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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:

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WCC – Presidential Decisions

Application for an extension of time - adequacy of reasons – Extension of time to appeal refused

Penrith Rugby League Club Limited v Morrissey [2020] NSWWCCPD 62 – Deputy President Wood – 15/10/2020

On 13/09/2016, the worker injured her left knee and right calf and ankle at work. The left knee was subsequently diagnosed as a medial meniscal tear and chondral tear of the medial compartment. The right calf and ankle were diagnosed as chronic scarring, tendinosis and tendonitis of the right Achilles tendon, a peroneus lungus tear with tendonitis and a cartilage fissure tear of the Talar dome. The worker underwent prolonged treatment for both injuries and managed to return to work, but began to suffer low back symptoms. She did not report those symptoms to any of her treating doctors until 22/11/2018.

On 3/04/2019, the worker claimed compensation under s 66 *WCA* for 18% WPI, which included an assessment of 7% WPI for the lumbar spine. However, the appellant disputed liability for the alleged lumbar spine injury.

Arbitrator Wynyard determined that the injuries on 13/09/2016 caused the worker to walk with an altered gait, which consequently caused her to suffer symptoms in her lumbar spine.

The appellant sought to appeal on 2 grounds: (1) The Arbitrator erred in fact by finding that the worker suffered an injury to her lumbar spine as a condition consequent upon her altered gait, and (2) The Arbitrator erred in law by failing to provide adequate reasons.

However, the appeal was lodged after 5 pm on the last of the 28-day appeal period and under Rule 8.1 (4) of the *Workers Compensation Commission Rules 2011* (*the 2011 Rules*) provides, it was received out of time. Therefore the appellant required an extension of time.

Deputy President Wood noted that the appellant's solicitor described the difficulties that he experienced because he was working from home on basic technology, which caused problems with collating and scanning the documents and affixing the signature. He said that he believed the appeal was lodged at 5 pm, but that he was subsequently advised by the Commission that the application was received on the Electronic Case Management System at 5.02 pm, which was out of time.

Rules 16.2 (5) and 16.2 (6) of *the 2011 Rules* provide:

> (5) The Commission constituted by a Presidential member may, if a party satisfies the Presidential member, ***in exceptional circumstances, that to lose the right to appeal would work demonstrable and substantial injustice***, by order extend the time for making an appeal [emphasis added].
>
> (6) A party who seeks an extension of time as referred to in sub-rule (5) must -
>
>> (a) as soon as practicable give notice to the other parties of the intention to seek the extension, and
>>
>> (b) lodge and serve with the application to appeal an application for the extension of time, including full details of the arguments to be put in favour of granting the extension.

The appellant relied on the decision of Campbell JA in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 *(Yacoub),* who stated (at [66] 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 rejected ground (1). She stated, relevantly:

> 128. …Applying the principles in *Whiteley Muir* (as summarised by Roche DP in *Raulston*), having found the primary facts, the Arbitrator is entitled to draw a particular inference from them and, in order to succeed on an appeal, the '*fact of the [Arbitrator's] decision must be displaced'*. That is, it must be shown that the Arbitrator was wrong. On the basis of the evidence before him, it was open to the Arbitrator to find that the lumbar symptoms were consequent upon the injury on 13 September 2016.

Wood DP also rejected ground (2). She noted that in *ADCO Constructions Pty Ltd v Ferguson* [2003] NSWWCCPD 21 (*Ferguson*), Fleming DP set out the approach to be taken in assessing the adequacy of reasons. The case involved an application to file a reply out of time. Fleming DP made the following observations (at [44]):

> The standard by which the '*adequacy*' of an Arbitrator's reasons will be determined is relative to the nature and context of both the decision made and the decision-maker. The decision to refuse to allow the filing of a Reply, in the context of the Commission's informal and expeditious process, does not require lengthy, detailed written reasons. The Commission is not a court (*Fuentes v Standard Knitting Mill Pty Limited & Anor* [2003] NSWCA 146) and is obliged to act according to equity and good conscience and the demands of the instant case. The purpose of giving reasons is to enable the parties to understand why the decision has been made.

Wood DP stated that the extent and scope of a trial judge's duty to give reasons depends upon the circumstances of the individual case. An Arbitrator is not required to give lengthy reasons and when considering the adequacy of the reasons, the decision must be read as a whole, and not with an eye attuned to find error.

The appellant argued that the crux of its case was that there was no altered gait, so that there could be no connection between the lumbar symptoms and the leg injuries. The worker argued that there was ample evidence to support the Arbitrator's finding that there was an altered gait (summarised at [97]–[98] above) and the Arbitrator's reasoning process included a consideration of all of that evidence.

Wood DP held that it is clear from the Arbitrator's reasons that he rejected Dr Wallace's opinion because it was based on a premise that the worker did not suffer from an altered gait, which was contrary to the evidence from 3 treating physiotherapists and the worker's own credible evidence. He also reasoned that Dr Wallace: (a) did not address the issue of whether an altered gait could cause lumbar symptoms; (b) similarly, did not address the issue of whether an altered gait could cause an aggravation to the lumbar pathology, and (c) did not explain why it was likely that the worker would have experienced lumbar symptoms at about that time, regardless of her employment with the appellant. The reasons embraced the evidence and disclosed that he examined it and provided detailed reasons as to why the evidence was either accepted or rejected.

The Arbitrator took a common sense approach in the evaluation of the causal chain, consistent with the approach described by Kirby P in *Kooragang*. In accordance with Deputy President Fleming's observations in *Ferguson*, long and detailed reasons are not required and it is tolerably clear from the reasons as to why he came to his conclusions and his ultimate determination that the worker's lumbar symptoms resulted from the injury on 13/09/2016.

Accordingly, Wood DP declined to extend the time to appeal.

Weight of medical evidence in the Commission; expert evidence regarding 'stress' - issues of causation in the Commission - application of Kooragang Cement Pty Ltd v Bates (1994) 35 NSWLR 452 - the 'but for' test in causation

<u>C. Reagh Pty Ltd v Gaydon</u> [2020] NSWWCCPD 63 – Deputy President Snell – 20/10/2020

On 5/03/2012, Deanna Mooney (the deceased) injured her back at work. She claimed compensation, but the insurer disputed the claim. That dispute was the subject of WCC proceedings (No. 5077/12, 'the original proceedings').

On 7/11/2012, the original proceedings were listed for an arbitration hearing in Sydney and the deceased and her mother travelled from Dubbo to attend. The deceased gave evidence and was cross-examined and the Manager of the appellant gave evidence in its case. The Arbitrator reserved his decision. In the early evening, the deceased and her mother boarded a flight in Sydney to return to Dubbo. The flight was delayed. The deceased was observed to be anxious and after boarding, she was sweating and said she felt like vomiting. She then appeared to sleep, after which her breathing became shallow and she was unresponsive.

The worker stopped breathing and had an absent carotid pulse. Attempts to revive her were unsuccessful. The plane returned to Sydney and an ambulance crew boarded the plane. At 8.25 pm, attempts at cardiopulmonary resuscitation were discontinued. An autopsy report gave the cause of death as coronary artery thrombus.

On 21/02/2013, the Commission issued a COD. The deceased's claim succeeded and there was an award of weekly compensation from 5/03/2012 to 7/11/2012.

The first respondent, the deceased's de facto partner, claimed payment of death benefits under s 25 *WCA,* based upon an opinion from Dr Herman, cardiologist, dated 2/10/2018. Dr Herman was asked to assume that "*[d]uring cross examination, several stressful circumstances unfolded relating to adversarial evidence from a work colleague, questioning about domestic violence and realising surveillance footage had been obtained on her*". He identified a causal relationship between the arbitration and the deceased's death.

The insurer disputed that the death resulted from the accepted back injury and that the first respondent was dependent on the deceased.

The ARD alleges that the first respondent, the second respondent (the deceased's daughter) and the third respondent (the deceased's son) are dependants.

On 6/05/2020, ***Arbitrator Young*** issued a COD, which found that "*the deceased suffered her fatal myocardial infarction as a result of the stress occasioned by the hearing*". He noted there was an "*in principle agreement*" that the lump sum should be apportioned equally between the first, second and third respondents, which he considered "*appropriate".*

The appellant appealed on the following grounds:

> (1) The Arbitrator erred in fact and law when he failed to properly evaluate the evidence to determine whether the stress of the arbitration was causative of the heart attack which occurred at least six hours after the arbitration hearing concluded;
>
> (2) The Arbitrator erred in law when he applied the wrong test to determine whether the heart attack causing death resulted from the accepted back injury; and
>
> (3) The Arbitrator erred in fact and law when he found that the death resulted from the accepted back condition.

Deputy President Snell rejected ground (1). His reasons are summarised below:

- The appellant argued that only a psychiatrist is a medical expert adequately qualified to express an opinion on the existence and cause of psychological stress and anxiety in the deceased. However, it did not cite any authority for the proposition that a cardiologist lacks the expertise to express an opinion on this issue.
- The Commission is not bound by the rules of evidence (s 354 (4) *WIMA*) and it is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 354 (3) *WIMA*). Also, R 15.2 of the *Workers Compensation Commission Rules 2011* provides that when informing itself on any matter, the Commission is to bear in mind the following principles: (1) evidence should be logical and probative, (2) evidence should be relevant to the facts in issue and the issues in dispute, (3) evidence based on speculation or unsubstantiated assumptions is unacceptable, (4) unqualified opinions are unacceptable.
- In *South Western Sydney Area Health Service v Edmonds* McColl JA said:

  > … the fact that cross-examination of an expert witness may be permitted indicates the desirability of expert reports conforming as far as possible to common law standards of admissibility designed to ensure they have probative value. Even if that is too stringent an approach in the face of s 354, as the rules recognise, evidence must be 'logical and probative' and 'unqualified opinions are unacceptable'.

- In *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 (Sutton), Allsop P said:

> Rule 15.2 represents a sound approach for the reliable disposition of important cases for individuals. It is not a reintroduction of the rules of evidence. Were the rule to be such a reintroduction, it would confront the inconsistency of the statute (in s 354). Thus, when one is considering the probative value of an expert report, for instance, the question is not whether it is admissible, but whether it provides material upon which the Commission was entitled to act.

  Basten JA said:

> Once it is accepted that certain material may be considered by the Commission, the weight to be given to the material is a matter for the Commission itself. Indeed, once inadmissible evidence is before a court without objection being taken, the question for the court is merely one of weight: *Makita* at [86], last sentence.

- In *CHEP Australia Limited v Strickland* Barrett JA said:

> 53. Because the rules of evidence do not apply, medical opinions tendered in proceedings in the Commission do not fall to be assessed according to any direct application of provisions in Part 3.3 of the *Evidence Act 1995* or the '*the basis rule*' by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence. In addition and as Bryson JA observed in *Aluminium Louvres & Ceilings Pty Ltd v Zheng* [2006] NSWCA 34; (2006) 4 DDCR 358 at [25], assumptions upon which common law trials are conducted should not be readily carried over when testing contentions that proceedings in the Commission were not conducted in a fair way.
>
> 54. If the appellant is to succeed in its contention that the Presidential member erred in law by relying on Dr McKechnie's reports, it must show that such reliance entailed failure '*to act according to equity, good conscience and the substantial merits of the case*' as required by s 354 (3) *WIMA*. A failure of that kind might possibly be found if a central conclusion was based squarely on an expert opinion that was devoid of foundation and if, in addition, there was no other material before the tribunal capable of supporting the conclusion, so that, as a matter of law, the conclusion was simply unavailable: *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at [90]-[91].

- The parties relied on medico-legal opinions from a cardiologist on causation and none stated that expressing an opinion on the presence of stress, and its potential causal relationship to the fatal myocardial infarction, was beyond their expertise.
- Dr Smith, psychiatrist, made numerous references to the transcript, with page references and said that the cross-examination was "*highly likely to have been extremely stressful*", and that the cross-examination "*more likely than not placed [the deceased] under acute stress*". He said the deceased was placed at "*significantly greater risk of suffering chronic stress*", although her death on the date of the hearing intervened.
- Snell DP rejected the appellant's argument that a medical practitioner who does not have specialist qualifications in psychiatry does not have the expertise to employ the term "stress" in describing a patient's mental state. In *Ramsay v Watson* [1961] HCA 65; 108 CLR 642 at {[2]), the High Court said:

> A qualified medical practitioner may, as an expert, express his opinion as to the nature and cause, or probable cause, of an ailment. But it is for the jury to weigh and determine the probabilities. In doing so they may be assisted by the medical evidence.

- The term "*stress*" should not necessarily be viewed as akin to a psychiatric diagnosis. It may well be a thing that could be established as being within "*the realm of common knowledge and experience*". This depends on the circumstances in which it is used. In this matter, Dr Herman, Dr Brender and Dr Haber associated "*stress*" with the presence of specific effects on the cardiovascular system. This may well call for a more considered use of the term than its common lay meaning and, assuming that to be so, they had appropriate expertise to express opinions regarding whether the deceased suffered from stress in association with her attendance and cross-examination at the original arbitration hearing and surrounding events. A cardiologist would appear to be well qualified to comment on the presence of stress, viewed in that context.
- It is a matter for the Arbitrator to assess the weight to be given to such evidence.
- The appellant argued that the correct question was "*whether the deceased was suffering from stress due to the arbitration hearing some hours later when her heart attack occurred*" and there was no evidence to discharge the respondents' onus of proof. However, Snell DP held that the probative weight of the opinions from Dr Herman, Dr Brender and Dr Haber is not restricted in the way that the appellant argued. The time lapse between the conclusion of the arbitration and the onset of cardiac symptoms is not clear on the evidence, but it was less than 6 hours. While the appellant argued that the "*delay*" was not addressed by the evidence, there was evidence from Dr Brender, based on the transcript and the deceased's responses when giving evidence, that he would have expected the deceased to be extremely stressed and depressed by the time she left the arbitration. He thought the stress levels would have been increased by the flight delay, which would have prevented the deceased from relaxing. There was uncontroverted evidence the deceased was afraid of flying.
- Dr Smith's report generally supported Dr Brender's conclusions. There was lay evidence consistent with stress continuing beyond the conclusion of the arbitration (the deceased's fear of flying and the flight delay) and medical evidence that stress levels would have been extended over time due to these factors. The cardiologists did not approach the causation issue on the basis that it was necessary that the deceased be suffering from significant stress from the arbitration hearing at the time of the infarct. Dr Herman described the rupture of plaque in the right coronary artery (which led to myocardial infarction, arrhythmia and death) as being provoked by emotional stress earlier in the day. Dr Brender described the events of the day as the "*antecedent cause for her fatal infarct*" and considered the stress the deceased was exposed to "*by the time she left the hearing*" certainly could have been *a precipitating factor in her development of a myocardial infarction which proved fatal* (emphasis added).
- The appellant did not indicate how any further analysis of Dr Smith's report would have assisted its position, much less have changed the result. However, this is not necessarily relevant to whether causation is established applying the common-sense test of causation in *Kooragang*.

Snell DP upheld ground (2). He noted that the Arbitrator drew an analogy between the deceased's attendance at the arbitration and an injured worker attending for medical treatment and that the appellant argued that this is not a correct statement of the law. This involved error and he stated:

> 94. A journey between a worker's place of abode or place of employment, and another place, for the purpose of receiving medical, surgical or hospital advice, attention or treatment, for an injury for which compensation is payable, is a journey that is covered by the provisions of s 10(3)(c) of the 1987 Act. I accept the appellant's submission that there would be many events at a medical appointment that would not have "*sufficient connection*" to employment to be covered by the legislation. One such incident would be that suggested by the appellant, if a worker was assaulted while attending a doctor's surgery, for reasons unconnected to the injury.

Snell DP considered whether the "*but for*" test was applied. This was described by Windeyer J in *Faulkner v Keffalinos* [1971] 45 ALJR 80, 86 as follows:

> The consequences that flow from the second accident cannot, I think be regarded as caused, in any relevant sense, by the defendant's tort. I realise that philosophers and casuists may see these as indirect consequences. But for the first accident the respondent might still have been employed by the appellants, and therefore not where he was when the second accident happened. But lawyers must eschew this kind of 'but for' or sine qua non reasoning about cause and consequence.

Snell DP stated:

> 100. I accept that the Arbitrator's reasoning at [33] and [36] of his reasons proceeded on the basis of the '*but for*' test. Paragraph [36] was the main dispositive paragraph that led to the finding that a causal link was established between the injury on 5 March 2012 and the fatal heart attack on 7 November 2012. The reasoning was dependent on the proposition that, but for the injury on 5 March 2012, the deceased "*would not have been at the hearing or been subject to cross-examination*"…

He noted that none of the parties argued that the application of the test of causation in *Kooragang* is wrong. The Arbitrator's dispositive finding was in a series of paragraphs which depended logically on a reliance on the '*but for*' test.

Snell DP considered it "*inappropriate*" to determine ground (3).

Snell DP revoked the COD and ordered that the matter be redetermined by a different Arbitrator. As the matter was dealt with on a basis that included consideration of the '*but for*' test, it remains to be considered whether the respondents succeed in the absence of the errors identified in dealing with Ground No. 2. He concluded:

> 106. The issue between the parties depends to an extent on the scope of the matters that should be considered as properly constituting the chain of causation. The decision in *Kooragang* suggests that matters beyond the purely medical may be relevant. The withdrawal of workers compensation liability by the employer was raised in *Kooragang* as potentially relevant. The matters to be considered will doubtlessly depend on the circumstances of each individual case. A matter that was not dealt with in the submissions before the Arbitrator is the question of whether the outcome in the original proceedings is relevant, in considering whether the chain of causation should properly include the original proceedings and arbitration hearing.

WCC – Medical Appeal Panel Decisions

Psychological injury – no demonstrable error or assessment on incorrect criteria

Mansfield v Secretary, Department of Education [2020] NSWWCCMA 153 – Arbitrator Peacock, Prof. N Glozier & Dr J Parmegiani – 21/10/2020

On 16/06/2020, Dr Bench issued a MAC, which assessed 8% WPI based upon diagnoses of Persistent Depressive Disorder with anxious distress and Alcohol Use Disorder.

The appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) *WIMA.* In particular, he complained about the AMS' assessments of mild impairment in 5 of the PIRS categories and he asserted that he should have received a "high rating". He sought to rely upon fresh evidence, namely his statement dated 10/07/2020 and a report from Mr Reed, psychologist, dated 24/06/2020.

The MAP determined the appeal on the papers and declined to re-examine the appellant on the basis that no error was found in the AMS' assessment.

The MAP admitted the fresh evidence in the appeal, but it stated, relevantly:

> 35. The panel after careful review including of the appellant's statement and the report of Mr Rolfe Reed (psychologist), can discern no error in the ratings ascribed by the AMS to each of the categories complained about on appeal. There was no application of incorrect criteria. Each of the ratings were open to the AMS in accordance with the correct application of the criteria in the Guides. The AMS has given reasons for each rating. He has given a clear and reasoned explanation, that is based on the application of his clinical expertise, for why his impairment ratings differ from that of Dr Teoh in the categories of Social and Recreational Activities, Concentration, Persistence and Pace and Employability (where he rates a higher impairment and which is not the subject of complaint on appeal). The ratings ascribed by the AMS in each of these categories accord with the criteria for each class. The Panel cannot interfere with these ratings absent error by the AMS.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Findings of fact

<u>Dwight v Sutherland Shire Council</u> [2020] NSWWCC 356 – Arbitrator Perry – 15/10/2020

The worker was employed by the respondent as a painter. On 5/04/2016, he alleged that he was climbing a ladder when the hinging brace gave way, causing it to tip, and that he noticed immediate pain down his left leg. He also alleged that this incident resulted in injuries to the thoracic and lumbar spines, left upper extremity (flanks) and left lower extremity (pelvic area, hips, buttocks, left leg, knee and ankle).

Following an investigation, the respondent accepted liability and made voluntary payments of compensation to the worker. The worker was certified unfit for work until 17/04/2016 and he then performed suitable duties until March 2017, when his employment was terminated on the grounds of retrenchment or redundancy.

However, on 15/06/2017, the insurer issued a dispute notice on the basis that the alleged incident in 2016 had not occurred and was fabricated by the worker and that the injuries occurred before he arrived at work on 5/04/2016. The worker filed an ARD claiming continuing weekly payments from 15/06/2017.

Arbitrator Perry issued a COD, which determined that the worker suffered an aggravation of asymptomatic degenerative changes in his lumbar spine in the course of his employment on 5/04/2016. However, he entered an award for the respondent with respect to the other alleged injuries. His reasons are summarised below:

- The worker developed symptoms in his lumbar spine on/about 5/04/2016.
- After an extensive discussion of the evidence, he stated that the worker was only 2 rungs up the ladder when the incident occurred and after being destabilised and twisting his spine on the ladder, somewhere between 2 and 3 rungs up, he stepped, or climbed, down in a fashion where he "landed" with some force on his left leg.

- He accepted the opinion of Dr Millons, who noted that the worker's problems initially were all in his back and left lower limb and found that the incident was the main contributing factor to the aggravation.
- The ARD also alleged injuries to the"… *thoracic spine, left upper extremity (flanks), left lower extremity (pelvic area… hips… buttocks… left leg… knee… ankle…)*". However, subject to accepting the worker's left leg symptoms, which flow or are referred from his lumbar spine, there is no medical evidence that supports a relationship between injury to any of those body parts and the incident – with the possible exception of the left shoulder.
- However, he preferred and accepted Dr Millons' opinion in respect of the left shoulder and found that "*the left shoulder problems were not specifically caused by the subject incident and relate to a relatively inactive lifestyle*".
- He also stated:

> In my opinion, it is appropriate in all the circumstances of this case to attach some small weight to an admission by the respondent of compensable injury. This is a case involving questions of fact as to whether there was an employment injury, as discussed by Spigelman CJ (with whom Hodgson and Bryson JJA agreed) in *Department of Education & Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206 (at [88-91]). This is one piece of evidence, albeit of small weight, I have weighed with all other evidence in my analysis.

Claim for psychiatric injury made more than 3 years out of time – worker statute-barred by operation of s 261 (4) WIMA

Burke v Suncorp Staff Pty Ltd [2020] NSWWCC 358 – Arbitrator Wynyard – 20/10/2020

The worker was employed by the respondent as a claims support officer. She claimed compensation under s 66 *WCA* for a psychological injury (deemed date: 5/02/2020), although the actual events that she relied upon occurred about 12 years ago. The insurer issued dispute notices dated 24/03/2015, 21/12/2016, 4/08/2017 and 19/05/2020, respectively.

Arbitrator Wynyard identified the issues as: (1) whether the worker was statute-barred by virtue of s 261 WIMA? and (2) if not, was the worker's employment a substantial contributing factor or the main contributing factor to the injury?

The worker alleged that she suffered a breakdown at the end of 2009 and she denied any prior psychological condition or illness. She said that in 2008 or 2009, she was required to move to the Sydney office. This involved increased train travel and caused her distress. She was also told to provide instruction and training to a new recruit who could not comprehend or understand her instructions and the new recruit made repeated mistakes and required intensive assistance. Conflict and tension arose between then, which resulted in regular and ongoing meetings with management. She was also allocated additional workload and no accommodation was made for her existing workload.

The worker said that she complained to management, but nothing was done. However, she her team leader assisted her in claiming under her income protection insurance after her breakdown.

The Arbitrator referred to s 261 *WIMA*. Based on the available evidence, he noted that the pressure of work did not overwhelm the worker until about mid-2009, at the earliest, and probably not until August and 7/09/2009. However, the worker had been treated for depression from 2008 at least. He stated:

> 132. I was puzzled by the state in which Dr Ciardi's clinical notes were tendered. Why they had been edited, who by and for what motive is impossible to know. However, both Dr Lovric and Dr Smith appear to have had more informative copies of the notes. There is no reason to doubt the observations by the specialists, and it follows that I may rely on that evidence. In doing so I bear in mind the danger that attends the reliance on clinical notes – or in this case, the absence of them – as determinative facts…
>
> 134. The entry mentioned by Dr Smith was part of one of the few entries in Dr Ciardi's notes before me that had a date, namely 12 November 2007. As indicated however, the notes tendered before me indicated only that Ms Burke's presentation on that day was for skin problems. Dr Smith's report indicated that a further part of that entry recorded Ms Burke's presentation for depression, which included the detail that a GP mental plan had been organised. That detail has probative weight as it demonstrates that Dr Smith probably had the full entry before him.

The Arbitrator was satisfied that the psychological condition in December 2008 was not work-related. He noted that the worker rejected any suggestion that she was suffering from depression in 2006, but one of the difficulties in recalling facts accurately that occurred many years ago is that there is always a danger that there will be an inadvertent reconstruction of events as remembered many years later. He stated:

> 142. It follows that I find the evidence of Ms Burke to be unreliable. The general pattern of her work difficulties was described in similar terms in each of her statements, and whilst there may be some contemporaneous support for its being causative in the report of Dr Lovric, such corroboration relates to a later period, and in any event contrasts with the opinion of Dr Graham who, whilst discussing Ms Burke's duties at work, did not take any history of the difficulties described to Dr Lovric.

The Arbitrator drew an inference under the decision in *Jones v Dunkel* that the evidence of witnesses identified by the worker, but not called by the respondent, would not have assisted the respondent's case. He found that a prima facie case was made out that the worker suffered an aggravation of a pre-existing psychological condition while employed by the respondent.

The Arbitrator noted that the worker argued that she is entitled to compensation by operation of s 261 (4) *WIMA* because she was seriously and permanently disabled. He accepted that the worker is seriously and permanently disabled, but stated that the critical question is whether he should accept her claim of ignorance. He found the worker's explanation was inadequate and stated:

> 159. Whilst Ms Burke now maintains that she was ignorant of her entitlement to claim for psychological injuries, it may very well be that she did not consider her options at that time, not out of ignorance, but because she was receiving weekly payments under her income protection policy and, as she said, did not turn her mind to her rights at workers compensation. That is a different proposition from being ignorant of the existence of those rights.
>
> 160. Moreover, Ms Burke had been employed for over a year by the respondent, and her duties were as a claims officer. She had held a responsible job as a manager at David Jones just before starting her employment, so that it is difficult to accept that she would not have taken her duties with the respondent responsibly also. It is likely that she would have been aware of the existence of workers compensation for psychological injuries. She was certainly aware of the existence of the workers compensation scheme, as she had made a claim herself regarding a back injury. Whilst such a fine distinction was possible, I do not have a sense of persuasion that such was the case.

Accordingly, the Arbitrator found that the worker is not entitled to compensation and he entered an award for the respondent.

WCC – Registrar Decisions

Work capacity dispute – back injury resulted in significant physical restrictions – employment as a customer services officer and disability support officer are not suitable employment for the worker – IPD for weekly payments made

Carter v Parcel Post Logistics Pty Ltd [2020] NSWWCCR 11 – Delegate McAdam – 19/10/2020

On 5/03/2018, the worker injured his back, with resultant left sided radiculopathy, as a result of a frank incident at work. He underwent surgery and has not worked since.

On 16/06/2020, the insurer issued a WCD and decided that the worker has current capacity to work in suitable employment and that his weekly benefits would be reduced to $164.64 per week. The worker disputed that he is capable of working in that suitable employment.

Delegate McAdam noted that the issue in dispute is whether, and if so to what extent, the worker has capacity for suitable employment.

The insurer relied upon a vocational assessment report and the Delegate noted that when the assessment was conducted, the worker was certified fit for some type of employment for 20 hours per week, with a variety of restrictions including "*office duties*". The worker stated that he has no experience in the roles identified by the insurer and he has received no vocational retraining. He said that he would have difficulty performing the physical tasks involved unless he had an opportunity to take frequent breaks and walk around every 30 minutes.. He had applied for customer service roles, but had been unsuccessful either because the roles are full-time or required qualifications that he does not have.

The NTD approved employment as a customer service officer with the proviso that the worker should be provided with a standing desk so that he could stand up to do continuous data entry, but he stated that the role of "*disability support officer*" was the preferred option.

The Delegate noted that Dr Davies, neurosurgeon, provided a medico-legal report and opined that the worker is permanently unfit for heavy manual handling duties, but is able to perform light sedentary duties, with restrictions on sitting, driving and lifting weights. He also assessed 15% WPI.

The Delegate found it unlikely that the worker would ever be able to return to his pre-injury employment, which was physical in nature and he noted that the worker was undertaking vocational retraining as a counsellor. He also noted that the worker is 49 years old and while engaging in a career change at that age is not unheard of, it represents a more significant challenge than if he were a younger man. He found that the worker has some relevant transferrable skills. However, he stated:

> 58. The applicant submitted that he had not been provided with any work trials or retraining by the rehab provider. In my view this is relevant and falls within the list of considerations outlined in section 32A of *the 1987 Act*. The respondent submitted that the insurer was not obliged to obtain a work trial for the applicant. That is technically true under the legislation, but the definition in section 32A makes the provision or lack thereof of rehabilitation services a relevant consideration.
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> 59. Pinnacle Rehab have been in regular contact with Mr Carter, including providing him with job seeking training and being involved in case conferences with his treating doctor throughout his claim. However, those services do not appear to have assisted Mr Carter in obtaining employment nor increased, in any tangible way, his skills relevant to the suitable employment options identified in the vocational assessment report.

60. Pinnacle Rehab has contacted a number of employers about Mr Carter, presumably discussing his skills and restrictions and in each case opining that he would be a suitable candidate for the role. However, at no stage does it appear that Mr Carter was actually put forward as a candidate or supported in making an application for the roles identified.

61. Further, as submitted by the applicant, I am of the view that it is relevant that Mr Carter has not been provided with a work trial by the rehabilitation provider. Mr Carter is expected to transition into an entirely new industry in which he has no previous experience. A work trial or other rehabilitation support would certainly have assisted in that regard.

The Delegate considered the decision in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55 and stated that the worker's current physical restrictions made consideration of the identified roles close to "a *totally theoretical or academic exercise*". He felt it relevant that the NTD was only given a brief summary of the roles' physical demands and duties and this gave less weight to his approval.

The Delegate stated that even if he regarded the identified roles as being within the worker's physical restrictions, they are not suitable employment having regard to his age, skills and work experience. He has never worked as either a customer service operator or as a disability service admin officer. He found it implausible that employers would value skills obtained as a delivery driver and security guard as relevant to a position as a welfare support officer working in the disability space. The reported conversations and feedback obtained from each employer are remarkably similar, which could simply be the author's manner of writing, it could indicate that the feedback was paraphrased, or it could indicate that there were a series of leading questions asked with simple responses designed to fulfill a predetermined narrative that the worker is suitable for these roles. He therefore placed little weight on that feedback.

In any event, the Delegate stated that there is no conclusive indication from any employer that either the worker would be a competitive applicant or that this role would constitute suitable employment. For example, both the vocational assessment report and labour market analysis repeat the conclusion that "*the employer reported that Mr Carter's restrictions would not hinder his ability to conduct the role of*…" Firstly this comment is addressed to his "*restrictions*" rather than his age, qualifications, skills and experience. Secondly, whether those relevant factors for consideration under section 32A would "*hinder*" a worker performing a role is not the relevant test. The question is rather whether he is suited for the role. In any event, I would think that having no experience or training in a role would hinder a person's ability to conduct that role. This is precisely where a work trial or vocational support is relevant and potentially could have been provided by the rehabilitation service provider.

The Delegate also rejected other aspects of the vocational assessment report, largely concerning the weight placed on the transferrable skills that the worker allegedly possesses and how they might be relevant for the suitable employment. Similarly, the amount and type of communication required as a delivery driver, cleaner, warehouse worker and security guard are different to that of a customer service officer. Whilst broadly these require communication with other people (as does simply existing in society) the level of expertise required is not high, compared with the direct interaction required of both suitable employment options identified and under consideration. It is questionable whether employers would treat those skills obtained as transferrable (in spite of the assertions in the vocational assessment report).

Accordingly, the Delegate was not satisfied that the worker has capacity to work in suitable employment as a customer service officer or a disabilities support officer and he issued an IPD for payment of weekly payments under s 37 *WCA* at the rate of $872 per week.