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UPDATES
INFORMATION
TRENDS

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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

1 Meat Carter Pty Ltd v Melides [2020] NSWCA 307
2. Balde v AAI Ltd t/as GIO [2020] NSWSC 1623
3. Hutchison v Wyong Race Club Limited and Ors [2020] NSWSC 1592
4. Dunne v Surfside Buslines Pty Ltd [2020] NSWWCCMA 165
5. Thomson v Westpac Banking Corporation [2020] NSWWCCMA 167
6. Casper v Workforce Recruitment and Labour Services Pty Ltd [2020] NSWWCC 384
7. Hall v Mars Australia Pty Ltd [2020] NSWWCC 385

Court of Appeal Decisions

Section 38A WCA – Payment of the special rate is payable from the time the worker satisfies the definition of "worker with highest needs"

Meat Carter Pty Ltd v Melides [2020] NSWCA 307 – Macfarlan, Gleeson & White JJA – 26/11/2020

The Presidential decision was reported in Bulletin no. 42. However, by way of summary, the appellant contracted Q-Fever and a secondary psychological condition. On 14/12/2015, he was awarded weekly payments under the previous ss 36 and 37 WCA and reasonably necessary s 60 expenses, but an award for the respondent was entered with respect to the claim for weekly payments from 14/12/2015.

On 9/06/2017, an AMS issued a MAC which assessed 60% WPI. The employer appealed against the MAC, but a MAP ultimately confirmed the MAC. On 21/09/2017, a COD awarded the appellant compensation under s 66 WCA based upon the MAC.

On 8/07/2018, the insurer commenced payments to the appellant under s 38A WCA, but the appellant claimed payments from 14/08/2017 to 7/07/2017, with credit to the insurer for payments made, based upon the decision of Senior Arbitrator Capel in *White v Vostok Industries Pty Limited*. However, the insurer disputed that he was entitled to payments under s 38A before the date on which he was "*confirmed as a worker with highest needs*".

Arbitrator Scarcella rejected the appellant's argument that the entitlement under s 38A WCA vests when the injury occurs.

On appeal, the appellant asserted that the Arbitrator erred: (1) when he found that the entitlement pursuant to s 38A did not commence until the date of the issue of the MAC; (2) when he considered that the requirements of paragraph (a) of the definition of worker with highest needs was satisfied when there had been an assessment by an AMS on referral from the Commission; (3) when he declined to infer that the respondent had made an assessment of the worker's capacity in circumstances where it had continued to pay weekly compensation; and (4) when he failed to make an order for the payment of compensation.

Acting Deputy President Parker SC upheld ground (1). He noted that in *ADCO Constructions v Goudappel* the High Court said when construing a regulation that that the appropriate enquiry should be directed to the "*text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the construction that, according to the established rules of interpretation, best serves the statutory purpose.*" He opined that a similar approach to the construction of s 38A is appropriate.

In relation to the context of s 38A WCA, Parker ADP stated that s 38A *WCA* does not contain any explicit temporal element and its purpose is to provide that in the case of a worker with highest needs the rate of weekly benefit payable is adjusted so that it does not fall below the prescribed minimum. Section 38A is premised on the "*determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision*".

Parker ADP held that the worker's right to receive compensation and the employer's obligation to pay arise at the "*moment of happening of the 'jurisdictional fact' of injury. Quantification and precise calculation may take time. But the right is then 'accrued and vested'*".

Parker ADP stated that s 38A is different to s 39 *WCA* as it is not a disentitling provision and all it does for a worker with highest needs is adjust the rate so that the weekly benefit paid does not fall below the prescribed minimum. Accordingly, the construction contended for by the appellant is correct and it is not inconsistent with the conclusions expressed by the President in *Hochbaum*.

Accordingly, Parker ADP revoked COD and ordered the employer to pay weekly compensation under s 38A WCA from 14/08/2014 to 8/07/2017, with credit for payments made.

On appeal, the appellant argued that although the respondent is entitled to payment at the special rate, that entitlement only arose from 9/06/2017, when he satisfied the definition of "*worker with highest needs*" under s 32A *WCA.*

The Court of Appeal (Macfarlan, Gleeson & White JJA) allowed the appeal. White JA (Macfarlan JA and Gleeson JA agreeing at [1] and [2] respectively) found that the respondent's entitlement to compensation vested on the date of injury however the method for calculating the quantum of that compensation must be determined pursuant to the detailed regime set out in the Act: [18], [27], [44], [46]. The competing objectives of *the Act* require a construction which gives primacy to the text of the provisions: [56]. *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36; *Carr v Western Australia* (2007) 231 CLR 138; [2007] HCA 47: applied.

His Honour also stated that s 38A does not provide for the substitution of amounts calculated pursuant to ss 36, 37 or 38 prior to the injured worker being a "*worker with highest needs*": [34]. The definition includes a temporal element which requires that a worker be at the relevant time a "*worker with highest needs*" in order to qualify for payment at the higher rate: [40]-[41].

When the definition of "*worker with highest needs*" is read into s 38A the temporal element of the definition requires that one of the conditions in the definition be met before the entitlement to payment at the special rate arises: [47]-[49]. Prior to 9 June 2017 there was no assessment. This meant that the respondent was not a "*worker with highest needs*" within the meaning of s 38A: [35]. The use of the defined term stands s 38A in contrast to s 39 considered by this court in *Hochbaum*.

Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW [2020] NSWCA 113: considered.

His Honour concluded that this construction does not require the reading in of words into s 38A to account for the temporal element rather it follows from the use of the defined term and the context and structure of subdivision 2: [49]-[52].

Supreme Court of New South Wales – Judicial Review Decisions

MACA 1999 (NSW) – Whether third defendant applied an incorrect test in determining causation and whether proposed treatment was reasonable and necessary

Balde v AAI Ltd t/as GIO [2020] NSWSC 1623 – Adamson J – 16/11/2020

On 5/03/2017, the plaintiff was injured in a MVA. He claimed compensation for permanent impairment, but on 6/09/2018, Dr Perla certified that he had suffered 0% WPI.

On 29/04/2019, Dr Darwish recommended cervical spine surgery and the plaintiff claimed the cost of this treatment from the insurer, but it rejected the claim based upon Dr Perla's MAC. SIRA referred the dispute to Dr Giblin, who certified that: (1) the proposed treatment did not relate to the injuries caused by the accident; and (2) the proposed treatment was not reasonable and necessary in the circumstances.

The plaintiff requested a review of Dr Giblin's assessments and argued that he misapprehended the legal test for causation and that the proposed treatment was reasonable and necessary because it would have a reasonable chance of alleviating symptoms when other modes of treatment had failed.

On 26/02/2020, the Proper Officer decided that she was not satisfied that there was a reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application and that the plaintiff merely disagreed with Dr Giblin's conclusion.

The plaintiff applied to the Supreme Court of New South Wales for judicial review of both decisions on the grounds that there was an error of law on the face of the record or jurisdictional error. However, the Summons was filed out of time and she required an extension of time from the Court.

Adamson J held that there is no prejudice to the insurer and granted an extension of time.

Her Honour rejected ground (1) and she stated that Dr Giblin had to determine whether the injuries sustained in the accident were related to the proposed surgery. In essence, he concluded that the radiological changes were not caused by the accident and that any soft tissue injuries would not be resolved by surgery. Of greater significance, he was not persuaded that there was any clinical presentation, which indicated any nerve root impingement at the site of the proposed surgery, and therefore the surgery was neither reasonable nor necessary.

Her Honour held that Dr Giblin's opinion was open to him as an expert and stated, relevantly:

> 46. Mr Romaniuk contended, and Mr Rewell accepted, that Dr Giblin's comment that the "*soft tissue nature of the clinical complaints is non-specific in nature and **not directly productive** of the radiological changes referred to in the MRI scan of 21 August 2018*" (emphasis added) was potentially problematic. However, I consider that Dr Giblin's

observations mean no more than that the impact of the accident caused symptoms (of a soft-tissue non-specific clinical nature) which arose at least in part from a pre-existing condition which was reflected in radiological changes which must have pre-dated the accident. I do not consider that this passage, when read in the context of the reasons as a whole, reveals any error in determining causation. This conclusion is supported by Dr Giblin's detailed consideration of the films which showed "a good deal of canal potency and CFS surrounding the cord" and "no clear evidence of compression or oedema [swelling] and there is a reasonable amount of epidural fat around the nerve roots in the exiting foramina.

47. It may be accepted that, as the claimant contended, his underlying degenerative condition became symptomatic following the accident. On this basis, the accident can be said to have been a cause of his symptoms, in that it materially contributed to them. However, it does not follow from these propositions that the injuries sustained in the accident relate to the proposed surgery. The conclusion of causation can only be drawn when the purpose of the surgery is identified and the part or parts to be treated with the proposed surgery can be said to have been affected by the accident… In the present case, Dr Giblin considered that, in the absence of radiological or clinical evidence of nerve root impingement, the proposed surgery, the purpose of which was to relieve such impingement, was not related to the injuries sustained in the accident.

Her Honour rejected ground (2) and stated that Dr Giblin used the term "*radiculopathy*" to connote any impingement on the nerve from the cervical spine. While the *PI Guidelines* purport to define this in a particular way, they do not have a monopoly on the use of the term. Dr Giblin was obliged "*to form and give his own opinion on the medical question referred to it by applying [his] own medical experience and [his] own medical expertise*": *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 (*Wingfoot*) at [47] (French CJ, Crennan, Bell, Gageler and Keane JJ). Her Honour was not persuaded that he adopted the definition of radiculopathy in the *PI Guidelines*, which was the definition which Dr Perla applied in his assessment of WPI. While he had regard to Dr Perla's reasons, this was primarily for the purpose of ascertaining whether Dr Perla had detected any indications of nerve root impingement in his examination of the claimant for the purposes of that assessment. His opinion was open to him as an expert and his reasons set out his actual path of reasoning. As a result, no error was established.

Her Honour noted that the parties agreed that no error was established in Dr Giblin's assessment, the Proper Officer's decision is not amenable to relief under s 69. She affirmed the Proper Officer's decision. Accordingly, she dismissed the summons with costs.

Judicial review – no denial of procedural fairness – no legal unreasonableness found – summons dismissed

Hutchison v Wyong Race Club Limited and Ors [2020] NSWSC 1592 – Johnson J – 18/11/2020

On 8/06/2011, the Plaintiff was crushed against a barrier gate by a horse and he ultimately claimed compensation under s 66 *WCA.* That the dispute was referred to an AMS and on 8/01/2020, Dr Truskett issued a MAC, which assessed reported 0% WPI with respect to each of the cervical spine, the lumbar spine, the right shoulder and the digestive tract.

The Plaintiff appealed against the MAC and on 15/04/2020, the MAP confirmed the MAC. He applied to the Supreme Court of NSW for judicial review of the decisions of the AMS and MAP, on grounds of procedural unfairness, error of law on the face of the record, legal unreasonableness and jurisdictional error such that the decisions were ultra vires. He also sought orders setting aside the MACs and the COD dated 20/05/2020.

Johnson J dismissed the summons and his reasons are summarised below.

The Plaintiff argued that:

- Both the AMS and MAP were required to afford him procedural fairness and to ensure that decisions were made according to law and based on relevant and logically probative information: see the AMS Code of Conduct (24/11/2009) and the Registrar's Guideline (February 2011). This resulted in practical injustice to the Plaintiff, applying the principles in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40 at [30]; *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39 at [31]-[39] and *Boyce v Allianz Australia Insurance Ltd* (2018) 96 NSWLR 356; [2018] NSWCA 22 at [112]-[121].
- A statutory decision maker is required to act reasonably and not illogically or irrationally and that the final conclusion of the decision maker should not be "*unreasonable in a legal sense*": *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [72].
- The AMS acted in a procedurally unfair manner with respect to his right shoulder, in that a finding had been made of the existence of a subsequent injury to the right shoulder after 2013 which was said to explain the problem that he was experiencing. Dr Truskett was obliged, as a matter of procedural fairness, to raise that issue with the him during the medical examination before making an effective finding of a subsequent injury to the right shoulder and that he did not do so thereby constituting a denial of procedural fairness.
- Dr Truskett misread Dr Kemp's report of 18/03/2013, which had not stated that the right shoulder had recovered. That error was carried through into other findings made in the MAC so as to constitute a finding that was unreasonable in the legal sense as well as a denial of procedural fairness.
- With respect to the MAP's decision, he submitted that the denial of procedural fairness and process of unreasonable decision making had carried through from the MAC as a result of the MAP effectively adopting and confirming the reasoning contained in the MAC.
- It was essential in this case that he be further re-examined for the purpose of the appeal to the MAP and this was not done without the expression of any reasons for that position. He relied upon the decision in *Ah-Dar v State Transit Authority of NSW* (2007) 69 NSWLR 468; [2007] NSWSC 260 at [63]-[69]; *Sydney Night Patrol & Inc Co v Absolom* [2015] NSWSC 60 at [34]-[40] and *Cobar Shire Council v Harpley-Oeser* [2018] NSWSC 964 at [91].
- Contrary to the MAP's finding that there was ample evidence to permit the AMS to make his assessment of WPI, there was no evidence to support this conclusion. While the MAP noted the AMS raised inconsistencies with him for comment, it erred in accepting the AMS' approach to the right shoulder.
- The MAP erred (at paragraphs 43-44 of the Decision) in stating that there was no requirement for an AMS to seek an explanation from the worker concerning matters that are the subject of the physical examination and assessment. This is inconsistent with the requirement placed on AMSs to abide by the principles of procedural fairness and to ensure that decisions are made according to law and based on relevant and logically probative information.
- As the MAC and MAP's MAC are affected by jurisdictional error, each should be quashed and the matter should be remitted for redetermination of the appeal by a fresh MAP.

The first defendant argued that:

- The MAC did not contain error regarding the AMS' approach to the right shoulder and the AMS' conclusion does not involve a denial of procedural fairness or any unreasonable approach.
- Procedural fairness does not require a decision maker to disclose what they are minded to decide or to invite comment on their process of reasoning: *Woolworths Limited v Michelle Howarth* [2015] NSWSC 1624 at [32] (Hamill J). The AMS was entitled to draw upon his expertise and to reach conclusions without disclosing his reasoning to the Plaintiff or giving him an opportunity to comment: *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* [2006] NSWSC 235 at [62] (Studdert J).
- the MAP was entitled to draw upon the expertise of its members in exercising its function: *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* at [62].
- With respect to the Plaintiff's complaint that the MAP did not conduct a further medical examination, the decision of the Court of Appeal in *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175 at [34] is support for the proposition that the MAP's reasons indicated that it considered a further medical examination, decided that the matter could be dealt with on the papers without one.
- With respect to the Plaintiff's reliance upon authorities concerning the exercise of discretionary power, caution is required in relying upon them as the MAP was not exercising a discretionary power, but a statutory appellate function under the *WIMA*. In that respect, provided there is some logical basis for making the relevant decision, the Court will not interfere with it: see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [130] with respect to a challenge to an administrative decision upon the basis that it was illogical or irrational.
- The MAP acknowledged that part of the MAC could have been expressed more clearly, but it explained its understanding of the MAC, which did not reveal appealable error on the part of the AMS and this approach was open to the MAP.

His Honour accepted that the *AMS Code of Conduct* requires that an AMS, amongst other things, abide by principles of procedural fairness and ensure that decisions are made according to law and based on relevant and logically probative information. In *Phillips v JW Williamson and RW Williamson trading as Williamson Bros* [2016] NSWSC 1681, Schmidt J summarised helpfully the relevant principles concerning procedural fairness as they apply to AMSs and MAPs and the need to read the decision under challenge fully and fairly. Her Honour said at [36]-[37]:

> 36 The Appeal Panel's reasons must be considered in the way discussed in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6 at 291. They must thus be read as a whole, considered fairly and without 'combing through the words with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law'. …

In *Woolworths Limited v Michelle Howarth*, Hamill J considered the requirements of procedural fairness concerning an AMS and a MAP under the *WIMA* and stated at [30]-[32]:

30 It is established that an Appeal Panel reviewing a certificate issued by an AMS is required to afford the parties procedural fairness: see, for example, *Markovic v Rydges Hotels Ltd* [2009] NSWCA 181 at [34]-[35], *Hatch v Peel Valley Exporters Pty Ltd* [2010] NSWSC 23 at [39]-[41]. In those cases, the Appeal Panel introduced a new issue and procedural fairness required the party affected to be afforded an opportunity to be heard. In each case reference was made to the judgment of McColl JA in *Siddick v WorkCover Authority of NSW* [2008] NSWCA 116 at [104]:

> In my view, therefore, while it was open to the Appeal Panel to depart from the grounds of appeal the respondent had identified, it could only do so if it notified the parties and gave them an opportunity to be heard. It did not do so and, therefore misconceived its role, the nature of its jurisdiction and its duty…

32 Procedural fairness does not require a decision maker to disclose what they are minded to decide or to invite comment on their process of reasoning: see, for example, *Hoffmann-La Roche v Trade Secretary* [1975] AC 295 at 369, *Re Minister for Immigration and Multicultural Affairs and Anor; Ex Parte Miah* [2001] HCA 22; 206 CLR 57 at [31], *Sinnathamby v Minister for Immigration* (1986) 86 ALR 502 at 506, *Ansett v Minister* (1987) 72 ALR 469 at 499, *Asiamet (No 1) v Federal Commissioner of Taxation* [2003] FCA 35 196 ALR 692. In *Asiamet* Emmett J explained at [79]:

> A person who would be affected by the exercise of a statutory power is entitled to rebut or qualify further information, and comment by way of submission upon adverse material, from other sources that is before the decision-maker. A decision-maker is required to identify to the person affected any issue critical to the decision that is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion that has been arrived at, which would not obviously be open on known material. Subject to those qualifications, however, a decision-maker is not obliged to expose his or her mental processes or provisional views for comment before making the decision in question (*Commissioner for ACT Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576 at 591-592 (‘*Alphaone Case’*)). Nor is there any duty to disclose draft or preliminary views. Within the bounds of rationality, a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case. It is only if the decision-maker proposes to reach an adverse conclusion that is not an obvious and natural evaluation of the material supplied by the applicant, that the applicant is entitled to be told of the tentative conclusion (*Alphaone Case* at 591).

His Honour was not satisfied that there was a denial of procedural fairness or unreasonableness in the conclusions reached in the MAC. Although, as the MAP noted, there may have been some looseness in the language used in this respect, this aspect was understood and explained sufficiently by the MAP in its decision (see paragraphs 29-37). The AMS’ reasons are to be read fully and fairly in this respect.

It was open to the MAP to determine that a further medical examination of the Plaintiff was not necessary: *Bojko v ICM Property Service Pty Ltd* at [34]. It is noteworthy that the plaintiff did not argue to the MAP that a further medical examination was an essential feature of the appeal. He had no automatic right to a further medical examination merely because he ticked the box on the form asking that it occur and it was a matter for the MAP to determine whether that step should be taken. The MAP determined that this was not necessary and that conclusion was open to it: see *Inghams Enterprises Pty Ltd v Lakovska* [2014] NSWCA 194 at [48]. The MAP’s approach on this issue does not disclose any basis upon which the Plaintiff is entitled to relief.

Contrary to the Plaintiff's arguments, no error is demonstrated in paragraphs 30-33 of the MAP's decision. The MAP considered closely the reasons provided by the AMS in the MAC and it is apparent that, having undertaken that task, it brought its own independent scrutiny to bear in observing that greater clarity may have been appropriate in some features of the MAC.

This is not a case where the MAP simply rubber stamped, without further consideration or scrutiny, the reasoning of the AMS in the MAC. Rather, it clearly gave careful attention to the reasoning in the MAC in light of the submissions that the parties made to the MAP and its reasoning serves to explain what the AMS had actually found, while noting that the finding was open to him as an AMS. Fairly read, the extent of the finding made by the AMS, and confirmed by the MAP, was that the right shoulder was not impaired as a result of any injury sustained in the workplace incident on 8/06/2011.

His Honour stated that the AMS' decision does not rise above a limited level of untidy reasoning, which falls well short of the requirement for demonstrating unreasonableness in judicial review proceedings. It was open to the MAP to reach the conclusion which it did. The Plaintiff has not demonstrated illogicality or irrationality of the type which is required to found relief by way of judicial review.

Accordingly, his Honour ordered the Plaintiff to pay the First Defendant's costs.

WCC – Medical Appeal Panel Decisions

Psychological injury - Mere disagreement with the MAC is not a proper basis for appeal

Dunne v Surfside Buslines Pty Ltd [2020] NSWWCCMA 165 – Arbitrator Moore, Prof. N Glozier & Dr P Morris – 5/11/2020

The appellant suffered a psychological injury (PTSD) as a result of the nature and conditions of his employment with the respondent as a bus driver (deemed date: 10/03/2019). He ultimately claimed compensation under s 66 *WCA* for 19% WPI based upon an assessment from Dr Takyar. appealed against the MAC under s 327 (3) (d) *WIMA.* However, the respondent disputed that the s 65A threshold was satisfied, based upon an assessment of 11% WPI from Dr Miller.

On 14/09/2020, Dr Hong issued a MAC, which assessed 7% WPI. However, the appellant appealed against the MAC under s 327 (3) (d) *WIMA.*

The MAP conducted a preliminary review and decided to determine the appeal on the papers and that it was not necessary for the appellant to be re-examined. It noted that essentially, the appellant alleged that the AMS erred because he did not adopt Dr Takyar's assessments under the PIRS categories.

The MAP held that the Guidelines are clear in that assessing permanent impairment "*involves clinical assessment…on the day of assessment, taking into account the claimant's relevant medical history and all available relevant information…*" The MAP's task on appeal is as stated in *Ferguson v State of New South Wales* [2017] NSWSC 887, where Campbell J stated:

> [23] By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS: '... *the pre-eminence of the clinical observations cannot be underrated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face'*.

> [24] The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
>
> [25] The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides '*the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment*'…

The MAP held that Dr Hong's recorded history is consistent with his assessment of class 2 for self-care and personal hygiene and there was no error in his assessment and the appellant's symptoms and presentation are not consistent with a class 3 rating (or moderate impairment). Further, the AMS' assessment with regard to social functioning was consistent with the evidence. The MAP stated that the appellant sought to cavil at matters of clinical judgment made by the AMS and to "*cherry-pick*" the evidence to suit his claim, but did not identify any error.

The MAP expressed similar views regarding the assessment for concentration, persistence and pace. It held that the evidence supports a class 2 rating and that reduced ability to concentrate does not of itself mean there is an automatic limited ability to follow complex instructions. In any event, the degree of activities undertaken by the appellant as noted by the AMS were indicative of mild impairment of function.

While the appellant also argued the AMS erred in failing to make an adjustment for the effects of treatment, the MAP accepted that the appellant is maintaining a regular treatment regime, but held that it is clear that this has not resulted in "*substantial or total elimination of the claimant's permanent impairment*." As the AMS noted, the appellant, despite his treatment, still displayed numerous symptoms and some impairment. The contemporaneous notes do not identify a period of such major impairment that the currently rated 7% WPI would constitute a "*substantial elimination*." It was therefore open to the AMS to decline to increase the percentage of impairment for the effects of treatment. It concluded that mere disagreement with the MAC is not a proper basis for appeal and that the appellant's submissions reflect no more than that.

Accordingly, the MAP confirmed the MAC.

AMS failed to record and set out findings with respect to all criteria in part 4.27 of the Guidelines - MAC revoked

Thomson v Westpac Banking Corporation [2020] NSWWCCMA 167 – Arbitrator Douglas, Dr M Burns & Dr F Machart – 6/11/2020

On 27/07/2001, the injured her back and both knees. She ultimately claimed compensation under s 66 *WCA* , but the insurer disputed the claim. She filed an ARD seeking assessments under the Table of Disabilities and an assessment of WPI for threshold dispute purposes (whether she was a worker with high needs as defined by s 32A *WCA*).

On 25/09/2019, an AMS issued a MAC, which applied a deduction of 10% under s 68A WCA and assessed 18% permanent impairment of the back and 18% permanent loss of efficient use of the right leg at or above the knee, but 0% permanent loss of efficient use of the left leg at or above the knee. The AMS stated:

> Mrs Thomson demonstrates dysfunction of her lower back, although there is no radiculopathy. The radiological picture demonstrates degenerative changes, mostly around the L4/5 level. At L5/S1, there is a small posterior protrusion deviated towards the left. An impairment of 20% is appropriate.
>
> No significant features were demonstrated with the left knee. Therefore, there is 0% loss of use of function of the left leg at or above the knee. (Nevertheless, it is understood that a previous award has been made and it is respectfully suggested that this should stand.)
>
> There was significant dysfunction of the right knee with a fixed flexion deformity and slight restriction in flexion. She also has pain and some swelling around the right knee. 20% loss of useful function of the right leg at and above the knee is therefore appropriate.

The AMS assessed combined 17% WPI, comprising 8% WPI of the lumbar spine and 8% WPI of the right lower extremity, less a 10% deductible under s 323 *WIMA.* He noted that Dr Patrick assessed 72% WPI on the basis that the appellant was totally and permanently wheelchair bound, and he stated:

> With the greatest of respect, I am not persuaded that this is an accurate or appropriate assessment. Although caution should be paid to any surveillance material, there is evidence of Mrs Thomson being able to walk (albeit to a limited degree) but apparently relatively painlessly in July 2019. This strongly suggests that she is not totally wheelchair bound, as would be expected for example, in somebody with paraplegia.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* She argued that the AMS did not adequately examine her for signs of radiculopathy and that he erred by having regard to a surveillance report and finding that this was evidence that she could walk. She argued that he ought to have examined her with the video footage upon which the report on the surveillance was based and assessed her impairment with respect to her lower extremities based upon gait derangement, as she is "*almost totally and permanently wheelchair bound*".

The respondent argued that the AMS conducted his examination correctly with respect to the presence of absence of radiculopathy and that "*there is no evidence that the AMS did not conduct appropriate tests for radiculopathy and he specifically noted in the MAC that he had conducted pin prick testing*". It argued that the AMS treated the report on the surveillance footage with caution and "*a very conservative conclusion was taken by the AMS on it*".

The MAP held that the MAC contained a demonstrable error, because his reported findings regarding radiculopathy did not address all criteria in part 4.27 of *the Guidelines*. Specifically, he did not indicate whether he examined the appellant for "*muscle weakness that is anatomically localised to an appropriate spinal nerve distribution*", and this failure is consistent with his having overlooked it. It decided that the worker should be re-examined by Dr Burns.

Based upon Dr Burns' report, the MAP held that the appellant does not have radiculopathy and it assessed 19% WPI, comprising 8% WPI for the lumbar spine (DRE Lumbar category II + 3% ADLs) and 12% WPI of the right lower extremity and 0% WPI of the left lower extremity, but it did not apply a deductible under s 323 *WIMA.* It agreed with the AMS' assessments under the Table of Disabilities, but it did not apply a deduction for pre-existing impairment.

Accordingly, the MAP issued 2 MACs, one assessing 19% WPI for threshold purposes and the other assessing 20% permanent impairment of the back and 20% permanent loss of efficient use of the right leg at or above the knee.

WCC – Arbitrator Decisions

Causation of consequential condition

Casper v Workforce Recruitment and Labour Services Pty Ltd [2020] NSWWCC 384 - Arbitrator Sweeney – 9/11/2020

On 29/03/2016, the worker injured his right shoulder at work. He later developed symptoms in his left shoulder, neck and back and alleged that these were due to overcompensation for altered mechanics as a result of the right shoulder injury. He claimed compensation under s 66 *WCA*, but the respondent disputed liability for the alleged consequential injuries.

The worker alleged that his back condition resulted from performing light duties following right shoulder surgery in August 2018. He said that it took him 3 hours to get to work on public transport because he was unable to drive and that he had to sit for long periods and in late-2017, he developed symptoms in his left shoulder, which required surgery in December 2018 and July 2019. He was advised to have a cervical fusion, but had declined this.

9/11/2020, ***Arbitrator Sweeney*** issued a COD, which determined that the worker injured his right shoulder at work on 29/03/2016 and suffered consequential medical conditions of his left shoulder and cervical spine, in the nature of an exacerbation of underlying degenerative disease caused by the altered mechanics of use of his arms. However, he was not satisfied on the balance of probabilities that the low back condition resulted from the work injury. He stated that the treating doctors' clinical notes did not offer much assistance regarding the causation of the back pain. He stated, relevantly:

> 69. While the medical practitioners at the Worker's Doctors refer to back pain due to "*overcompensation*", I am unable to envisage the physical mechanism by which pain and restriction of shoulder movement can lead to low back pain. There is no attempt to explain the mechanism in the medical evidence…
>
> 72. That leaves the contest on consequential medical conditions/injuries to the back as essentially one between the opinions of the two qualified medical practitioners, Dr Endrey-Walder for the applicant, and Dr Rimmer for the respondent. I have approached the resolution of issue on the basis that it is only necessary for the applicant to establish the occurrence of a consequential medical condition in the cervical or lumbar spine to permit that body part to be referred to an approved medical specialist: see *Taree City Council v Moore* [2010] NSWWCCPD 49 (May 2010). It was not suggested otherwise at the arbitration hearing. In a permanent impairment case, the issues of whether the effects of the consequential medical condition/injury were transient or permanent is solely within the prerogative of an approved medical specialist…
>
> 75. A more difficult question is why the applicant's back pain has persisted and worsened after he commenced part time work in Mona Vale and then ceased performing selected duties work. If sitting in an uncomfortable, unfamiliar position caused symptoms in the applicant's low back, it is difficult to explain their persistence after the withdrawal of that work in May 2017 on the basis of injury. One might assume that there was another cause. However, that is not a matter which I had to decide…
>
> 78. I am far from convinced, however, that the development of back pain while performing sedentary office work, and while seated on public transport can be characterised as resulting from the right shoulder injury. In *Bennett*, which I raised with the parties at the arbitration hearing, Deputy President Snell said this at paragraph 55:
>
> > "If the simple fact that the left shoulder injury caused the appellant to be placed on selected duties, in which the incident involving the lumbar spine occurred, does not establish a causal relationship between the injury on 16 May 2015 and the events of 9 June 2016. In *Faulkner v Keffalinos* Windeyer J said:

> 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.

79. In *Warwar v Speedy Couriers Pty Ltd* [2010] NSWWCCPD 92 (25 August 2010), Deputy President Roche, after reviewing the authorities on causation, said this:

> The limited utility of the "*but for*" test is best illustrated with an example. Say a factory worker suffers a serious hand injury whilst working with one employer. The seriousness of the injury prevents the employer from providing any suitable employment and the worker obtains light supervisory work in a warehouse with a different employer and, whilst working there, a heavy box falls from a shelf and strikes the worker on the head causing head and neck injuries. But for the hand injury, the worker would not have been working with the second employer and would not have been struck in the head by the falling box. However, it is fallacious to say that the initial hand injury caused the head and neck injury [see Windeyer J in *Faulkner v Keffalinos*]".

80. While the factual circumstances in both *Warwar* and *Bennett* were different to those in this case, the principle enunciated is quite clear. Proof that an event or condition would not have occurred "*but for*" an injury is not always sufficient to establish causation.

The Arbitrator held that if a worker with a back injury develops an overuse condition of his arms from unaccustomed use of a keyboard, or a worker with a knee injury develops back pain due to unaccustomed sitting while performing suitable duties, those conditions do not result from the original injury unless it can be established that the injury played an active role in its onset. To paraphrase the language of Burke CCJ, the provision of suitable duties merely "*sets the scene*" for the onset of these medical conditions: *Dorothy Joyce Stone v Mid-Western Area Health Service (Peak Hill Hospital)* NSWCC, 22 July 2002 (unreported). The injury does not play an "*active role*" in bringing about the medical conditions caused by the selected duties: see *Darren Bostok v Fairfield City Council* NSWCC, 9 April 1991 (unreported).

Accordingly, the Arbitrator remitted the s 66 dispute to the Registrar for referral to an AMS to assess permanent impairment of the cervical spine and both upper extremities (shoulders).

Referral to an AMS for purposes of s 39 WCA – Prior WIDs claim dismissed because the statement of claim was materially different to the pre-filing statement – respondent sought a finding regarding causation of injury and argued there was an estoppel – Dispute referred to an AMS including a consequential condition of digestive system.

Hall v Mars Australia Pty Ltd [2020] NSWWCC 385 – Arbitrator McDonald – 10/11/2020

The decision of Davies J of the Supreme Court of New South Wales (*Hall v Ecoline Pty Ltd T/As Treetop Adventure Park* [2018] NSWSC 1732), which dismissed the worker's claim for WID's, was reported in Bulletin no. 25. However, the following summary is provided by way of background.

On 6/11/2009, the worker injured his back while participating in a team-building exercise operated by Ecoline Pty Ltd t/as Treetop Adventure Park ("Ecoline"), but there was an issue as to exactly how the injury occurred. There was no dispute that he was above ground, was moving from tree to tree and that the exercise involved a plank or planks of wood, but it was unclear whether these were being carried or stepped on. In July 2015, he recovered compensation under s 66 WCA for 20% WPI.

On 11/06/2016, the worker a statement of claim against both the respondent and Ecoline and each lodged a defence, but the statement of claim was filed out of time and he required leave under s 151D *WCA* and the cause of injury pleaded in it was inconsistent with that pleaded in the pre-filing statement. Section 318 (1) (a) *WIMA* provides that a claimant is not entitled to file a statement of claim that is materially different from the proposed statement of claim that formed part of the pre-filing statement … '*except with leave of the court*…' He sought leave to commence the WID proceedings out of time (s 151D *WCA*) and to rely upon the statement of claim.

Davies J held that the worker breached s 318 *WIMA* because his statement of claim was materially different to that in the pre-filing statement and the discretion under s 318 (2) *WIMA* was not enlivened. He dismissed the proceedings against Ecoline with costs.

On 25/03/2019, the worker's solicitors served an assessment of 27% WPI on the respondent and sought its concession that the degree of permanent impairment was greater than 20%. However, the respondent issued a dispute notice and denied liability for an alleged injury due to a fall in 2009 and all alleged consequential conditions. It disputed that the degree of permanent impairment was more than 20% and asserted that deductions are required due to pre-existing or subsequent conditions. It also raised issues regarding the worker's credibility.

On 15/04/2019, the worker made a further claim under s 66 *WCA* for 27% WPI (lumbar spine, upper digestive tract and anus/liver) but the respondent disputed these claims.

In these proceedings, the worker sought a referral to an AMS for an assessment that his degree of permanent impairment was more than 20% as a result of the injury to his lumbar spine and a consequential condition in his upper digestive tract and anus/liver dysfunction. However, he did not plead a claim under s 66 *WCA.*

The respondent argued that there is an estoppel as to the cause of the injury and denied that the worker suffered a consequential condition in his digestive system and that the Arbitrator should remit the matter for referral to an AMS with a specific finding that the lumbar spine injury did not result from a fall.

On 10/11/2020, ***Arbitrator McDonald*** issued a COD, which determined that the worker injured his lower back on 6/11/2009, after losing his footing, and that he suffered consequential injuries to his upper digestive tract and lower digestive tract (colon, rectum and anus). She remitted the matter to the Registrar for inclusion in the AMS pending list. Her reasons are summarised below.

The Arbitrator held that because the lumbar spine injury was accepted and compensation had been paid, there is no basis to decline to remit the application for referral to an AMS for an assessment for the purpose of s 39. She stated, relevantly:

> 101. The only application before the Commission is a request for referral to an AMS for an assessment for the purpose of s 39. Once the amendment was made to delete reference to a fall, there was no need to consider the effect of the complying agreement. The inferences which Mars sought that I draw about what it might have done are speculative and irrelevant.
>
> 102. A finding that there was no fall might be in Mars' interest for the purpose of a possible future claim in another jurisdiction but is of no relevance in these proceedings. Mars' action in pressing for a finding that there was no fall after the description of injury in the Application was amended has resulted in unnecessary time and costs being incurred.

The Arbitrator was satisfied that the worker suffered a consequential condition in his upper and lower digestive tracts as a result of taking pain-killing medication, but as AMA5 does not provide for assessment of the latter, the appropriate referral is in respect of the colon, rectum and anus. The assessment of impairment and the contribution of any pre-existing condition is a matter for an AMS.