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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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Supreme Court of New South Wales – Judicial Review Decisions

Error of law on the face of the record – whether AMS failed to properly explain path of reasoning – whether MAP erred in finding no error in the AMS' application of the Guidelines

Nguyen v Pasarela Pty Ltd [2020] NSWSC 1730 – Adamson J – 3/12/2020

On 7/10/2015, the plaintiff suffered injuries at work. He claimed compensation for injuries to his right shoulder, low back and left wrist. The insurer accepted the injury to the left wrist but disputed the other alleged injuries.

The Plaintiff claimed compensation under s 66 *WCA* for combined 35% WPI, comprising 11% for the right upper extremity, 4% WPI for the right wrist, 9% WPI for the left shoulder and 10% WPI for the left wrist. The insurer qualified Dr Pillemer, who assessed 0% WPI.

On 16/05/2018, ***Arbitrator Wynyard*** gave ex-tempore reasons and found that was not satisfied that the injuries to the right wrist, both shoulders and lumbar spine were connected to the accepted left wrist injury and he entered an award for the respondent. On 21/05/2018, the Commission issued a COD to that effect.

On 29/10/2018, Dr Endrey-Walder assessed 25% WPI, comprising 11% WPI for the left wrist and 16% WPI for the right shoulder and the plaintiff's solicitors claimed compensation under s 66 *WCA.* However, the employer issued a notice under s 74 of the Act in which it accepted the injury to the left wrist but denied the claim in respect of the right shoulder. It relied on the COD and argued that this operated to estop the plaintiff from claiming in respect of injuries other than the injury to his left wrist.

On 18/04/2019, the insurer argued that previous COD estops the plaintiff from any entitlement to compensation in respect of any alleged injury to the lumbar spine.

On 11/09/2019, ***Arbitrator Burge*** issued a COD, which determined that the plaintiff injured his left wrist on 7/10/2015 and that the right shoulder injury as a consequence of that injury. He remitted those disputes to the Registrar for referral to an AMS.

On 4/11/2019, Dr Burrow issued a MAC, which assessed 6% WPI for the left upper extremity and 4% WPI for the right upper extremity. He noted signs of abnormal illness behaviour.

On 2/12/2019, the plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The insurer opposed the appeal.

The MAP (Arbitrator Douglas, Dr D Dixon & Dr T Mastroianni) confirmed the MAC. The MAP noted that neither party challenged the AMS' method of assessment (loss of range of movement of the left wrist and right shoulder). Clause 2.20 of *the Guidelines* provide:

> When calculating impairment for loss of range of movement, it is most important to always compare measurements of the relevant joint(s) in both extremities If a contralateral 'normal/uninjured' joint has less than average mobility, the impairment value(s) corresponding to the uninvolved joint serves as a baseline and is subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the assessor's report (see AMA5 Section 16.4c, p 543).

The MAP held that while the AMS did not explain his rationale for deducting the impairment he assessed the appellant to have in the contralateral uninjured joints from the impairment he assessed in the joints that were referred to assessment, beyond noting that *the Guidelines* required that to be done, does not mean that the MAC contains an error. Neither party challenged the AMS' clinical findings and the MAP held that the impairment values based upon those findings are correct.

Based on the history that the AMS obtained and his clinical examination, he found that the appellant did not suffer injury to his left shoulder or right wrist in the incident of 7/10/2015 or beforehand. The Arbitrator made a finding in the prior proceedings between the parties that the appellant did not suffer an injury to his right wrist and left shoulder in the incident of 7/10/2015 and the parties are estopped from asserting to the contrary in the present proceedings.

The plaintiff applied to the Supreme Court for judicial review of the decisions of the AMS and MAP. He argued that: (1) The AMS misconstrued and misapplied clause 2.20 of *the Guidelines* in respect of the calculation of impairment by reference to the contralateral joint. His path of reasoning shows that he treated the application of cl 2.20 as being required, without more, and he therefore failed to perform his statutory task; (2) The AMS' path of reasoning does not address, as required, the '*rationale*' for the application of cl 2.20, and does not show the path of reasoning as to facts found, or other rationale, justifying the application that clause; and (3) The MAP erred in failing to appreciate and understand the AMS' errors outlined in [(1) and (2)] above and in its beneficial reading of the AMS' reasons by filling the gaps in his reasoning with steps of reasoning, or a path of reasoning, not present in the AMS' reasons and not justified by the correct application of a beneficial reading. In so doing, the MAP failed to perform its statutory task and did not correctly apply ss 327 and 328 *WIMA*.

Adamson J noted that while the Summons was filed within time with respect to the MAP's decision, an extension of time was required with respect to the application concerning the AMS' decision. The employer opposed the granting of leave and argued there was no dispute about whether the AMS applied the correct test and the only issue was whether he set out his rationale sufficiently to comply with *the Guidelines.* If the plaintiff succeeded in setting aside the MAP's decision, the matter could be remitted to another MAP for determination and no relief ought be granted in respect of the AMS' decision. However, her Honour held that it is appropriate to extend the time to file the summons to challenge the AMS' decision.

Her Honour rejected ground (1) and held that the reasons of a decision maker must be given a fair and beneficial reading: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ); [1996] HCA 6. Applying this principle, it is clear from the AMS' reasons that his rationale for using the deduction method set out in cl 2.20 was: (1) there had been no injury to the contralateral joints of the left shoulder and the right wrist (because Arbitrator Wynyard had found that the contralateral joints had not suffered injuries within the meaning of s 4 *WCA)*; (2) notwithstanding (1), there was a loss of active range of motion in the contralateral joints of the left shoulder and the right wrist which manifested itself, either partly or wholly, in abnormal illness behaviour; (3) as a consequence of (1) and (2), the average range of motion set out in the impairment tables and the pie charts was inapplicable to the assessment of the claimant's permanent impairment; and (4) for this reason, the deduction method set out in cl 2.20 of *the Guidelines* (described by the AMS as "*instructions from SIRA*") was at least suitable, if not required, in the present case to calculate impairment for loss of range of movement in the involved joint (the left wrist and the right shoulder).

Her Honour found that the rationale for using the deduction method was adequately explained and no "*gap-filling*" is required to discern the path of reasoning since the reasons are sufficient to show how and why the AMS applied cl 2.20 of *the Guidelines* as part of his assessment of the % WPI. She made similar findings with respect to the assessment for the right shoulder.

Her Honour rejected the plaintiff's argument that it was not open to the MAP to confirm the MAC as the MAP had that power under s 328 (5) *WIMA*. It is plain from the MAP's reasons that it considered the matter for itself and endorsed the AMS' approach because it was considered correct and it was not required to do more than this. She stated:

> 67. The Appeal Panel appears to have considered that the AMS used the deduction method because it was "*the best method*" since the uninjured contralateral joint represented the "*baseline*" of what the worker's range of motion in his injured joint would have been before the injury. I am not persuaded that there is any inadequacy in the Appeal Panel's reason for so finding. Its view, as expressed in its reasons, was the product of its own expertise. Indeed, given that the contralateral joint in each case exhibited a restricted range of motion, the average figures in the pie charts and tables were plainly inapposite. This left, as the only alternative method expressly contemplated by cl 2.20 and the relevant portion of AMA5 for assessing impairment in the joint, the comparison between the injured and non-injured joints. The obvious applicability and suitability of the deduction method meant that the reasons of the AMS, and in turn, the Appeal Panel needed only to be brief to be sufficient. Thus, it did not follow from the Appeal Panel's conclusion that the AMS did not explain the rationale for using the deduction "*beyond noting that the Guidelines required that it be done*" that more was required since the AMS's reasons were sufficient to explain why cl 2.20 applied and why the deduction method was appropriate.

Accordingly, her Honour dismissed the amended Summons and ordered the plaintiff to pay the first defendant's costs.

WCC – Presidential Decisions

Alleged failure to admit late evidence & alleged errors of fact – COD confirmed

Black v Inghams Enterprises Pty Ltd [2020] NSWWCCPD 69 – Deputy President Wood – 30/11/2020

The appellant alleged that he injured his lumbar spine in an incident that occurred during the night shift on 25/03/2019 and 26/03/2019. He ceased work and claimed compensation, but the respondent disputed the claim. He had suffered a previous non-work related injury to his lumbar spine in 2002.

The appellant filed an ARD, which alleged that on 26/03/2019, and as a result of the heavy nature of his work, he suffered an aggravation etc. of his pre-existing condition. The respondent maintained the liability dispute.

Arbitrator Douglas conducted an arbitration on 2/07/2020, during which the appellant sought to tender a supplementary statement of evidence from himself. The respondent opposed the application and the Arbitrator declined to admit the statement. On 16/07/2020, the Arbitrator issued a COD, which determined that the appellant had suffered an aggravation of his pre-existing lumbar disease as a result of his heavy duties, but he was not satisfied that his employment was the main contributing factor to it.

The appellant sought leave to appeal against the interlocutory refusal to admit the statement and the final determination of liability. He alleged that the Arbitrator erred as follows: (1) in fact and law in inferring that he suffered a fall in February 2018 by relying on the histories in clinical records and denying him procedural fairness by refusing his application to rely on a statement addressing the issue; (2) in fact in having found that he suffered a fall in February 2018, by determining that he suffered thoracic and lumbar symptoms as a result of that fall, and (3) in law by determining that he required expert opinion in order to determine the extent that any non-work factors contributed to the aggravation of the lumbar spine.

Deputy President Wood determined the appeal on the papers.

Wood DP granted the appellant leave to appeal the interlocutory decision. She stated that a factor that weighs in favour of the granting of leave to appeal is that the substantive matter has been finally determined, so that the appellant would have no other opportunity to challenge the interlocutory decision. The Arbitrator's final determinations that the appellant did not injure the lumbar spine on 26/03/2019 and that he was not satisfied that the heavy nature of the employment was the main contributing factor to the aggravation are also the subject of this appeal. The parties are involved in an appeal from those final determinations in any event.

Wood DP declined to admit the appellant's supplementary statement into evidence. The appellant made no submission about why it should be admitted in the appeal and she found that with due diligence it could clearly have reasonably been obtained before the arbitration. The only way in which it can be determined whether the appellant would suffer a "*substantial injustice*", as required by s 352 (6) *WIMA* is to assess whether the Arbitrator erred in the exercise of his discretion by refusing to admit the document. This requires consideration of ground (1).

Wood DP held that the Arbitrator's failure to admit the evidence does not amount to an error in the exercise of his discretion and a refusal to admit it in the appeal cannot result in a substantial injustice to the appellant.

Wood DP rejected ground (1). She held that three the treating doctors recorded a consistent medical history, that the appellant suffered a fall downstairs in February 2018, which caused lumbar symptoms on a background of prior lumbar complaints. This was evidence in the appellant's case and no evidence was adduced to challenge the correctness of the histories. The consistency of this evidence makes the evidence of the fall compelling, particularly in the light of the appellant's failure to deny that the event occurred.

Wood DP noted that the Arbitrator drew the appellant's attention to the relevance of the fall in February 2018, particularly in terms of whether there was a "*fair climate*" in which to accept Dr Bentivoglio's opinion, in the absence of that history being included in the history to the medical expert. In addition, the appellant made submissions about the relevance of the fall. Therefore, the Arbitrator did not deny the appellant procedural fairness in making the finding. The issue was squarely raised and the appellant was given the opportunity to make appropriate submissions.

As to the exercise of discretion by the Arbitrator, Wood DP noted that in *Micallef v ICI Australia Operations Pty Ltd*, Heydon JA (as his Honour then was) observed that it is necessary to bear in mind some submissions of the defendants to the effect that a discretionary judgment can only be overturned in limited circumstances. Any attack on decisions of that character must fail unless it can be demonstrated that the decision-maker: (a) made an error of legal principle; (b) made a material error of fact; (c) took into account some irrelevant matter; (d) failed to take into account, or gave insufficient weight to, some relevant matter; or (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning.

In *Hamod v State of New South Wales*, Beazley JA (as her Honour then was) observed (citations omitted):

> The court at first instance must be free to exercise its discretion in matters of practice and procedure as the court considers necessary, having regard to the circumstances of the case. However, the discretion so vested in the first instance court is subject at all times to the primary obligation of ensuring a fair trial to the parties to the litigation.
>
> The court's concern with a fair trial is not divorced from the other considerations that the court has in the administration of justice. In particular, the concept of a fair trial is one that has regard to the interests of all parties to the suit. Nor, in this State, is it divorced from the court's statutory obligation to ensure the just, quick and cheap resolution of the real issues in the dispute or proceedings.
>
> For these reasons, before an appellate court will interfere with a discretionary judgment in a matter of practice and procedure, the question whether injustice flowed from the order appealed from will be a relevant and necessary consideration.

In *Coles Myer Limited v Tabassum*, Byron DP set out the matters that an arbitrator is required to consider when deciding whether a document should be admitted, namely (a) whether there was an acceptable explanation for the delay; (b) whether or not a refusal to admit the evidence would cause substantial prejudice to the party seeking to tender the evidence; (c) the prejudice (if any) to the other party; (d) whether the delay was attributable to the legal representative and not the party personally; (e) the nature of the proceedings, and in this case the nature of the statutory scheme, and (f) general considerations of fairness and justice between the parties.

Wood DP found that the appellant had not identified any error by the Arbitrator by arriving at a result so unreasonable or unjust that it would suggest errors of the kind identified in *Micallef* occurred and there is no basis for disturbing the decision to not admit the statement.

Wood DP rejected ground (2) and stated that it was open to the Arbitrator, on the medical evidence that was before him, and in the absence of any evidence to the contrary, to arrive at his finding of fact. In determining whether he erred in respect of a finding of fact, the principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* have been consistently applied in the Commission. Adopting those principles, in order to disturb the Arbitrator's finding, the appellant must establish that: (a) other probabilities so outweigh that chosen by the Arbitrator that it can be said that his conclusion was wrong; (b) the fact upon which the inference drawn by the Arbitrator is based must be wrong, or (c) material facts were overlooked, or given undue or too little weight, or the available inference in the opposite sense was so preponderant that the Arbitrator's decision is wrong.

Wood DP held that the appellant has not established that any of those errors have occurred and that there is ample evidence to support the Arbitrator's finding as to causation. The Arbitrator was entitled to determine that issue based on the evidence before him and it was not necessary in this matter for a medical expert to provide an opinion on that issue. He gave detailed consideration to all of the available relevant evidence.

Wood DP also rejected ground (3). She noted that the appellant correctly cited *Tudor Capital* as authority for the proposition that an Arbitrator is required to base his or her conclusions on probative material to ensure that the conclusions reached are not capricious, arbitrary or without foundation. Further, when making a choice between competing expert evidence, the Arbitrator is required to use logic and common sense in determining which view is to be preferred. However, he did not explain how that authority applies to this appeal.

The Arbitrator gave sound reasons for rejecting Dr Bentivoglio's opinion and his conclusion was not capricious, arbitrary or without foundation. The appellant bears the onus of adducing sufficiently probative evidence to support the assertions made and the Arbitrator considered that his evidence did not reach the necessary bar and he was unable to determine which of the factors that contributed to the aggravation was the main contributing factor. He did not decline the undertake the task that he was required to determine.

WCC – Medical Appeal Panel Decisions

Difference between DRE Lumbar Categories II and III requirements in Guidelines for assessment of radiculopathy – Principles of assessment for scarring under the TEMSKI

Hetherington v Aldi Foods Pty Ltd [2020] NSWWCCMA 170 – Arbitrator McDonald, Dr D Dixon & Dr G McGroder – 14/11/2020

On 6/12/2016, the appellant struck her head and injured her back at work. She attempted to return to work on 9/01/2017, but felt dizzy, and while hanging out washing at home after work, she felt dizzy and fell over the edge of a retaining wall and injured her right foot. She underwent surgery on 2/01/2017 and 28/06/2017.

The AMS was instructed to assess WPI of the lumbar spine, right lower extremity and scarring (TEMSKI). On 24/08/202, Dr Anderson issued a MAC, which assessed 12% WPI, comprising 7% WPI (lumbar spine), 4% WPI (right lower extremity) and 1% WPI (TEMSKI).

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and argued that the AMS made a demonstrable error in assessing the lumbar spine because he did not assess that 2 of the criteria for radiculopathy were present. She argued that her symptoms are consistent with an anatomically localised spinal nerve root distribution and that scarring of her right foot was more appropriately 2% WPI (as assessed by New).

The MAP confirmed the MAC for reasons that are summarised below.

- The AMS explained his calculations for the lumbar spine and scarring and where he differed from the parties' independent medical examiners. He was unable to demonstrate definitive radiculopathy down the right leg and he concluded that 1% WPI was appropriate for scarring.
- The AMS was required to conduct an examination and review the medical reports to understand the treatment provided and briefly consider the opinions of other doctors to explain where he differed, but he was not required to accept them or choose between them. In *State of NSW v Kaur* [2016] NSWC 346 at [25]-[26], Campbell J stated:

> In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480, the High Court of Australia dealt with the nature of the jurisdiction exercised by a medical panel under cognate Victorian legislation. The legislation is not entirely the same but it is broadly similar in purpose. Allowing for some differences, the High Court said at page 498 [47]:
>
> > The material supplied to a medical panel may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on the medical opinion supplied to it in forming and giving its own

> opinion. It goes too far, however, to conceive of the functions of the panel as being either to decide a dispute or to make up its mind by reference to completing contentions or competing medical opinions. The function of a medical panel is neither arbitral or adjudicative: It is neither to choose between competing arguments nor to opine on the correctness of other opinions on that medical question. The function is in every case to perform and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.
>
> Not all of this, as I have said, is apposite in the context of the New South Wales legislation. In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in *Wingfoot Australia*. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise. It is sufficient, as their Honours pointed out at [55], that:
>
> > The statement of reasons… explain the actual path of reasoning in sufficient detail to enable the Court to see whether the opinion does or does not involve any error of law.

- The appellant's argument that Dr New's assessment of the lumbar spine should be preferred misunderstands the task that the AMS was required to perform. A review of the relevant paragraphs of *the Guidelines* shows that the AMS was correct not to assess radiculopathy, as Dr New's findings do not satisfy the criteria for such an assessment. The AMS set out his findings and explained his reasoning and there is no error in his assessment.
- Dr New did not explain why he assessed 2% under the TEMSKI. The AMS said that the scar was not causing the appellant any concern and that it had healed well. The scar on the left hip always caused concern.
- The Table is used "*in accordance with the principle of best fit*." The assessor is not required to make an assessment merely because the criteria in Table 14.1 are fulfilled. There is no error in the AMS' assessment, as it was open to him in the exercise of his clinical judgment.

WCC – Arbitrator Decisions

Surgery not reasonably necessary as a result of workplace injury – treating surgeon's opinion lacked a fair climate because he did not discuss and explain to what extent the stump deteriorated due to the injury – Hancock v East Coast Timber Products Pty Ltd and Paric v John Holland (Constructions) Pty Ltd applied

Withers v Shellharbour City Council [2020] NSWWCC 402 – Arbitrator Harris – 23/11/2020

In 2000 the worker suffered an amputation of his left leg below the knee as a result of a MVA. On 5/07/2019, he fell to the ground at work, his residual stump impacted with the ground, a metal pin was projected and driven into the stump with force.

Before the workplace injury occurred, the worker researched a surgical procedure known as osteointegration, which involves implanting a titanium rod into the bone, from which the prosthesis protrudes. On 1/05/2020, he underwent osteointegration with muscle re-innervation and claimed the costs from the insurer, as well as continuing weekly payments from 1/05/2020 under s 37 *WCA.* However, the insurer disputed the claim.

Arbitrator Harris identified the issues as: (1) whether the surgery on 1/05/2020 was reasonably necessary; (2) whether the surgery was as a result of the injury; and (3) whether the worker had recovered from the effects of the injury.

After discussing the parties' lengthy submissions, the Arbitrator found that the medical evidence indicated that the worker was tentatively booked in for the surgery before the workplace injury occurred. It was not clear when the worker made that tentative booking, but he felt that it was far more likely that it was made before the injury occurred. He rejected the worker's argument that it was a red herring that he intended to have the surgery in any event and stated that it is logically relevant, though not determinative, in resolving the issue of whether the injury materially contributed to the need for the surgery, that he would have undergone the surgery irrespective of the work injury.

The Arbitrator noted that the requirements of compliance with regards to principles governing expert evidence were discussed by the Commission (as well as numerous other cases) in *STA of NSW v El-Achi* when Roche DP stated:

> All that is required for satisfactory compliance with the principles governing expert evidence is for the expert's report to set out 'the facts observed, the assumed facts including those garnered from other sources such as the history provided by the appellant, and information from x-rays and other tests' (*Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43 per Beazley JA (as her Honour then was) at [85] (Giles and Tobias JJA agreeing)).

The High Court discussed the fair climate in *Paric v John Holland (Constructions) Pty Ltd* and the Court of Appeal recently discussed them in *Booth v Fourmeninapub Pty Ltd* when Leeming JA stated:76

> Although a footnote cited the High Court's decision in *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58; 59 ALJR 844 for the reference to "*fair climate*", in fact that language, deriving from *Culver v Sekulich* 344 P 2d 146 (1959), a decision of the Supreme Court of Wyoming, was endorsed by this Court's ex tempore judgment in *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 509-510. The language concerns the degree of accuracy and specificity required when an expert is asked for an opinion on hypothetical facts. In *Culver*, two men died in a plane crash, and the passenger's widow sued the pilot's estate in negligence. Necessarily much of the expert evidence was hypothetical, and in an appeal based on error (rather than rehearing) it was urged that it was wrongly admitted. The passage endorsed by this Court in *Paric* was at 154:
>
> From our analysis of the record, it appears to us that there was some evidence to support every hypothetical question to which objection was made. Such evidence was not always complete, was sometimes hazy as to time, distance, and other vital points but in general furnished a fair climate for the consideration of the views of the expert witnesses.

The Arbitrator observed that it may be that the fair climate principle and the *Hancock* principle are not distinct and that they represent a single basis for rejecting an opinion or otherwise giving that opinion no weight. This is consistent with the observations made by McColl JA in *OneSteel Reinforcing Pty Ltd v Sutton* (*Sutton*), citing the decision in *Paric v John Holland Constructions Pty Ltd* (at 846) as follows:

> It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence (*Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642). *But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages from Wigmore on Evidence ... to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense.* (emphasis added)

The Arbitrator also considered that Allsop P's observations in *Sutton (at [2]) are* pertinent:

> Nevertheless, as the cases discussed by McColl JA (for example, *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43) show, the Commission is required to draw its conclusions from material that is satisfactory, in the probative sense, in order that it act lawfully and in order that conclusions reached by it are not seen to be capricious, arbitrary or without foundational material.

The Arbitrator held that determination of the issue of "*as a result of an injury*" involves resolution of both factual issues and medical opinions. He accepted that Dr Chester recorded obvious bruising to the stump following the injury and that the contemporaneous examination findings of Dr Tetworth record motion within normal limits, good strength, no instability in the left knee and a "*very satisfactory*" shape of the stump. He found that the worker did not attempt to explain the gross inconsistencies between what is recorded in the contemporaneous records and the history recorded by Dr Al Muderis and he did not argue that Dr Chester's contemporaneous clinical notes were inaccurate. He accepted the respondent's argument that Dr Al Muderis took an incorrect history and he found that Dr Al Muderis' opinion was made in the absence of a fair climate.

While Dr Al Muderis assumed that the worker suffered ongoing serious swelling, bruising and pain following the work injury, this was a gross over description of the symptoms and the doctor provided no proper reasons explaining variations to the stump due to changes that ordinarily occur over time and what proportion, if any, were caused by the work injury and he was not persuaded that the surgery was undertaken as a result of the work injury. It was not necessary for him to determine whether the surgery was reasonably necessary and, as the success of the weekly payments claim depended upon the outcome of the s 60 claim, he held that the worker is not entitled to weekly payments.

Application under s 245 (4) WCA – Whether the applicant is liable to reimburse the Nominal Insurer for compensation paid – Held: No actual persuasion that the injury occurred whilst the worker was working for the applicant – Applicant not required to reimburse the Nominal Insurer

Fit Concepts Pty Limited v Workers Compensation Nominal Insurer (iCare) [2020] NSWWCC 400 – Arbitrator McDonald – 23/11/2020

The applicant provides merchandising services to retail stores including Bunnings at Port Macquarie. In early 2019, it employed the worker, who also worked for other merchandising companies. Each of the worker's roles involved organising and replenishing stock at Bunnings stores. She alleged that she suffered an injury on 15/02/2019, while working for the applicant. However, she did not see her GP until May 2019 and she did not report the injury until August 2019.

The applicant did not hold workers compensation insurance in NSW and the worker made a claim against the Nominal Insurer. It accepted the claim and paid weekly compensation and s 60 expenses, including the cost of surgery to the right knee.

On 10/07/2020, the Nominal Insurer issued a notice under s 145 *WCA* seeking to recover the compensation that it paid to the worker. However, the applicant disputed that it is liable to repay that compensation and it sought a determination regarding its liability from the Commission.

Arbitrator McDonald identified the issues as being whether the worker: (1) was working for the applicant on the date of the alleged injury; (2) suffered an injury on 15/02/2019; (3) gave notice of injury in accordance with s 254 *WIMA*; and (d) claimed compensation in accordance with s 261 *WIMA.*

The applicant argued that it did not engage the worker on the date of the alleged injury because: (1) it did not receive an invoice for work done on that day; (2) it did not receive the report and photographs expected when work was completed for it; and (3) the worker says that she was

working with her daughter, Ms Paltram, and both say they were working for the same company. However, Ms Paltram did not work for it so and the only possible explanation for them working together is that they were working for one of the two other companies for whom the worker also worked at the time.

The applicant argued that there was insufficient evidence to find that the worker had suffered an injury that led to a pathological alteration in her knee and the lack of complaint to the GP in the period between February and May 2019 raised a serious question as to causation. The late notice of injury prevented it from undertaking a proper investigation and said it was surprising that the Nominal Insurer had not arranged an IME or considered whether the worker's employment with it was a substantial contributing factor to the injury before accepting the claim.

The applicant also argued that the amount of compensation sought to be recovered was not reasonable and that the worker had capacity to earn during the period for which compensation was paid. The worker ceased working because of the pandemic and not because of her injury and it is only appropriate that medical expenses of about $600 would be refunded.

The worker (who was joined as Second Respondent) argued that the application should be set aside and neither ss 254 nor 261 *WIMA* are an absolute bar to the recovery of compensation if there is a reasonable excuse. The pathology is clear and there is no basis for determining that employment was not a substantial contributing factor to the injury.

iCare argued that the recovery notice should be upheld.

The Arbitrator found the applicant not liable to reimburse iCare and stated (citations excluded):

> 75. The standard of proof which applies in the Commission was described by the Court of Appeal in *Nguyen v Cosmopolitan Homes*. McDougall J, with whom the other members of the Court agreed, said:
>
> > (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
> >
> > (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
> >
> > (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
> >
> > (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.

The Arbitrator found that the evidence provides a basis to conclude that the worker suffered an incident whilst working at Bunnings Port Macquarie on or about 15/02/2019 when stepping down from a ladder. However, she was not satisfied that the worker was working for the applicant on that day and therefore found that her employment with the applicant was not a substantial contributing factor to the injury. She noted that the applicant did not receive an injury report until after the worker had been placed on the public hospital wait list for knee surgery.

The Arbitrator stated that the worker's failure to give notice of the injury and the Nominal Insurer's failure to arrange an IME before accepting the claim support that decision. There was no evidence of any special circumstances set out in s 254 (3) *WIMA* and there was evidence that the applicant was prejudiced by being unable to investigate the circumstances of the injury. There is also no evidence that the worker's failure to make a claim in time was a result of ignorance, mistake, absence from the State or other reasonable cause.

The Arbitrator also stated that while the Nominal Insurer was entitled to determine whether to accept the claim or not, its failure to investigate the medical aspects of the claim when the circumstances were disputed supports the finding that the applicant should not be liable for the compensation paid.

Alleged injuries to cervical and lumbar spines – Work-related injury found with respect to the lumbar spine but not the cervical spine – Awards for weekly payments and s 60 expenses but s 66 dispute not referred to an AMS as s 66 (1) threshold was not satisfied

Hudson v Toll Holdings Limited [2020] NSWWCC 405 – Arbitrator Snell – 25/11/2020

On 16/08/2019, the worker was hit by freight on a forklift at work. He claimed continuing weekly payments from 30/08/2020, s 60 expenses and compensation for 13% WPI under s 66 *WCA* for alleged permanent impairment of the cervical and lumbar spines. However, the respondent disputed injury to the cervical spine and argued that the lumbar spine injury had resolved.

Arbitrator Snell conducted an arbitration, during which the parties agreed that PIAWE is $1,682.95 and that past s 60 expenses total $4,735. She noted that the issues in dispute were: (1) the alleged injury or consequential condition in the neck; (2) whether the effects of the low bac injury have ceased; (3) incapacity for work resulting from the low back and neck injuries; and (4) the requirement for medical or related treatment of the low back and neck injuries.

On 25/11/2020, the Arbitrator issued a COD, which determined that the worker injured his low-back, which had not resolved, but he did not injure his neck and she entered an award for the respondent for that alleged injury. She found that the worker has capacity to work 20 hours per week and awarded weekly payments under s 37 (3) (a) *WCA* at the rate of $931.76 per week and s 60 expenses with respect to the low back injury. She concluded that the worker was not entitled to have the s 66 dispute assessed by an AMS as the assessment for the lumbar spine did not satisfy the s 66 (1) threshold. Her reasons are summarised below.

- The worker bears the onus of proving that the low back injury is ongoing and that he sustained injury to his neck as a result of the same incident. This is a question of fact and consideration of his statements and the medical evidence is required: *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246, in which McDougall J stated (at [44]):

  > A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA; (1938) 60 CLR 336. His honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; 91940) 63 CLR 691 at 712

- As to the allegation that the neck injury may be a consequential condition, it is important to recognise that a workplace injury may set in train a series of events that, if unbroken, provides the relevant causative explanation of consequential injury. In *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 Deputy President Snell summarised a number of Presidential decisions concerning consequential injury (at [100]):

  > There have been a number of Presidential decisions dealing with the nature of claims in respect of consequential conditions. The principles are described in a number of decisions, for example *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 and *Kumar v Royal Comfort Bedding* [2012]. It is unnecessary for a worker alleging such a condition to establish that it is an '*injury*' (including '*injury*' based on the '*disease*' provisions) within section 4 of *the 1987 Act*.

- The worker did not injure his neck on 16/08/2019 or as a consequence of his low back injury because: (1) he said that his neck pain commenced a couple of months after the work injury occurred; (2) there is no complaint of neck pain in the clinical records; and (3) he told Dr Bentivoglio that his neck symptoms commenced 8 months after the work accident.
- Assessment of the worker's capacity for work since 30/08/2020 involves consideration of his capacity to undertake not only his pre-injury duties, but also suitable duties and suitable employment, irrespective of its availability. This was accepted by Roche DP in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55.
- The worker is currently 57 years of age, with his pre-injury duties with the respondent involving the supervision and co-ordination of staff. He has extensive experience in clerical work. While the worker's pre-injury duties reportedly require him to walk further than he was able to walk when reviewed by Dr Bentivoglio on 13/08/2020, since 30/08/2020, he has had capacity to work suitable duties of an administrative nature for 20 hours per week as a result of the low back injury.

WCC – Registrar's Delegate Decisions

Application to correct an alleged obvious error in a MAC under s 325 (3) WIMA refused

Radovanovic v Corporate Interfirm Pty Ltd [2020] NSWWCC 404 – Senior Arbitrator Bamber – 24/11/2020

On 4/08/2020, the worker filed an application seeking leave to correct an alleged obvious error in the MAC issued by Dr Truskett on 4/02/2020. He alleged that his injury occurred on 14/01/2017, but the MAC indicates that this occurred on 13/01/2017. The respondent disputes that the AMS made an obvious error.

Senior Arbitrator Bamber, as a delegate of the Registrar, noted that the claim under s 66 *WCA* referred to the date of injury as 13/01/2017, as did the ARD and the COD dated 4/12/2019. Therefore, the Commission's referral to the AMS was in respect of an injury on 13/01/2017. She set out the documentary evidence regarding to the allegations of injury in some detail and noted that the worker's submissions refer to another matter, which appears to be a claim for WIDs, in which the defendant has objected to the pre-filing statement as being defective because the claim was made for an injury on 14/01/2017 and the MAC states the date of injury as 13/01/2017.

The Delegate noted that the worker argued that there was some confusion involving himself and his solicitors, which resulted in the documents referring to an injury on 13/01/2017. However, the respondent argued that the term "*obvious error*" was discussed in Practice Direction 4, issued by Keating P on 30/10/2018, and states that an "*obvious error*" referred to in, inter alia, s 325 (3) *WIMA* is an error that is apparent on the face of the document.

The respondent argued that an '*obvious error*' may include: (a) The incorrect description of a party to the proceedings; (b) The incorrect date in an award for compensation; (c) A clerical or typographical error in a decision or reason; (d) An error arising from an inadvertent slip or omission; (e) A defect in form; and (f) An inconsistency between the orders and the reasons for decision. The basis for the application of s325 (3) occurs when an error is apparent on the face of the MAC and is one that conflicts with actual assessment made by the AMS; *Newell v John Bruce t/as Tarawa Rural Partnership* [2006] NSW WCCPD 282.

The respondent argued that there is no error on the face of the MAC; and if there is an error on the face of the MAC (which is strongly disputed), that error does not conflict with the actual assessment made by the AMS and is not an '*obvious error*'. It also denied that any injury occurred on 14/01/2017.

At the hearing on 8/10/2020, counsel for the worker argued that in addition to seeking to correct the obvious error under s 325 (3) *WIMA*, the worker sought leave to amend the ARD to plead injury on 14/012017, and he alleged that the respondent was acting in mischief by trying to thwart the pending WIDs claim. In response, the respondent argued that because a COD was issued on 10/03/2020, the Commission is functus officio and cannot entertain the application to amend the ARD.

The Delegate noted that in *Jopa Pty Limited t/as Tricia's Clip-n-Snip v Edenden* [2004] NSWWCCPD 50, Fleming DP stated that the obvious error referred to in ss 294 (3) and 325 (3) *WIMA* means a factual error that is apparent on the face of the record. Roche ADP adopted that approach in *Newell.* Further, in *Milosavljevic v Medina Property Services Pty Ltd* [2008] NSWWCCPD 56, Roche DP referred to *Jopa* and stated:

> [48] As a MAC is conclusively presumed to be correct in respect of these matters, the Commission held in *Jopa Pty Ltd t/as Tricia's Clip-n-Snip v Edenden* [2004] NSWWCCPD 50 ('*Jopa'*) at [31] that '*it is reasonable to expect strict compliance with the requirements of section 325 (1) and (2)*'.
>
> [49] Whilst a MAC is '*conclusively presumed to be correct*' in respect of the matters in section 326 (1), it '*does not equate to a determine (sic) of the dispute by the Commission*' (*Jopa* at [27]) as an AMS is not part of the Commission (section 368 (1)) and all liability issues must be determined by a Commission Arbitrator (*North Sydney Leagues Club Ltd t/as Seagulls Club* [2005] NSWWCCPD 38; *Connor v Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2006] NSWWCCPD 124 and *Ooi v NEC Business Solutions Limited* [2006] NSWWCCPD 131).

The Delegate held that there is no error on the face of the MAC. The referral specified that the AMS was to assess permanent impairment in respect of an injury on 13/01/2017 and that is what he certified. Had the AMS issued a MAC in respect of an injury on 14/01/2017, he would have fallen into error.

The worker's application also faces a difficulty because since the MAC was issued, the Commission issued orders finalising the matter, being the COD dated 10/03/2020, and the worker did not ask for those orders to be rescinded. Further, the respondent has not been served with a lump sum claim in relation to the date of injury of 14/01/2017 and it has asserted in submissions that it would be prejudiced if the Commission was to make an order to change the date of injury, because it denies injury on that date occurred. This is a matter that would require a determination by an arbitrator of the Commission. A referral cannot be made to an AMS to assess permanent impairment if there is a liability dispute. A liability dispute needs to be determined by an Arbitrator and an AMS can only determine a medical dispute.

The Delegate ordered that the matter be listed for a further teleconference to enable the worker to advise whether he has any other applications to make.