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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. AAI Limited (t/a AAMI) v Boga [2020] NSWSC 1903
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Supreme Court of NSW – Judicial Review Decisions

Jurisdictional error – Error of law on the face of the record – Alleged failure to give reasons – "Nguyen principle" -

AAI Limited (t/a AAMI) v Boga [2020] NSWSC 1903 – Cavanagh J – 24/12/2020

The first defendant was injured in a MVA and the plaintiff CTP insurer admitted liability. The first defendant claimed damages for non-economic loss, but the plaintiff disputed that the degree of permanent impairment is greater than 10%.

After an assessment of 19% WPI by Dr Fearnside (the initial assessor), the plaintiff obtained reports from Dr Harvey (0% WPI) and Dr Menogue (4% WPI) and it applied for a further assessment. SIRA referred the matter to Dr Wilding, who assessed 12% WPI (0% cervical spine, 5% lumbar spine, 5% left shoulder and 2% right shoulder). The plaintiff sought a review of the MAC, but the Proper Officer of SIRA was not satisfied that there was reasonable cause to suspect that the medical assessment was incorrect in a material aspect. The plaintiff sought a review of that decision, but the Proper Officer declined that request.

The plaintiff then applied for judicial review by the Supreme Court of NSW on the grounds that the assessor erred in assessing impairment of the right shoulder and the Proper Officer should have referred the matter to a Review Panel.

Cavanagh J noted that the plaintiff argued that Dr Wilding failed to: (1) follow the guidelines; (2) provide adequate reasons for assessing the right shoulder impairment at 2% WPI; (3) deal with inconsistencies that must have been apparent from the earlier reports; and (4) consider causation. It argued that Dr Wilding failed to engage with the dispute and failed to explain the basis of the assessment other than referring to the *Nguyen principle.*

Her Honour held that the plaintiff's focus on Dr Wilding's reference to the *Nguyen principle* ignores the balance of his report and that this reference must be considered in the context of the whole report. Dr Wilding measured the active range of motion in the shoulder and found restriction, he referred to the treating doctor's medical records and he recorded a history in respect of the injury and the pre-existing surgery to the shoulder. Her Honour stated (citations excluded):

> 80. It is agreed that the *Nguyen principle*, as referred to by Dr Wilding, is a reference to the decision of Hall J of this Court in *Nguyen v Motor Accidents Authority of New South Wales & Anor.*
>
> 81. As the plaintiff submits, the outcome in *Nguyen* is not remarkable in the sense that his Honour said little more than that establishing direct physical injury to a body part is not necessary to give rise to an impairment in that part.
>
> 82. The degree of impairment of the injured person is not limited to a particular part of the body which was actually injured in the accident. This is not a novel proposition. Indeed, it follows from the text of s 58 (1) (d).
>
> 83. Indeed, in *Dominice v Allianz Australia Insurance Ltd*, Simpson JA referred to the statement of Hall J in *Nguyen* at [99] and observed:
>
> > [56] The characterisation of this paragraph as a statement of '*principle*' is, in my opinion, an overstatement; it is a statement of fact. It simply acknowledges what medical practitioners (and legal practitioners and judges who engage in the world of personal injury litigation) have come to know, that injury to one part of the body can cause pain to other parts of the body. It remains necessary, in any individual case, to determine whether, in the circumstances of the individual case under consideration, the secondary injury is caused by or related to the primary injury.
>
> 84. Dr Wilding's reference to the *Nguyen principle* is not a correct characterisation of the observations of Hall J in *Nguyen* (as it is not a principle), but I take the reference to be nothing more than a shorthand way of saying that there was impairment, even though there was no injury to the right shoulder. There is nothing novel about such a proposition and, if Dr Wilding had expressed "*the principle*" with reference to that simple explanation, there could have been no complaint.
>
> 85. The complaint could only be that the reference to "*the principle does not in itself explain how he came to the view that there was permanent impairment in the right shoulder*". This ties in with the plaintiff's submission relating to causation.

Her Honour stated that the medical assessor's task is to assess the degree of permanent impairment that results from the injury caused by the MVA and that "*results from*" connotes a less direct casual connection than "*caused by*". It was not necessary for the doctor to specify what he did not find or what he did not accept. Having regard to his findings on examination and opinion as to the relationship between the impairment in the shoulder and an injury sustained in the accident, he concluded that the first defendant suffered a level of impairment in the right shoulder and then considered whether it was permanent. That is a medical opinion and he provided reasons for that opinion. It is not the Court's function to form its own opinion regarding the correctness of that medical opinion.

Her Honour observed that Dr Wilding could have expressed his opinion more directly or used other words, but that does not lead to the conclusion that he failed to give adequate reasons and that medical assessors should not be held to a counsel of perfection when expressing their views on medical matters. When read in context and in their entirety, the reasons are adequate and there is no evidence that Dr Wilding failed to follow and properly apply the guidelines.

Her Honour stated that the plaintiff referred to observations made by Basten JA and Simpson JA in *Dominice* and by Walton J in *Insurance Australia Group Limited t/as NRMA Insurance v Saraceni* [2020] NSWSC 1045, both cases can be distinguished and the observations in *Dominice* do not go as far as the plaintiff contends. Dr Wilding considered the reports of Dr Harvey and Dr Menogue and complied with the obligation to take account of earlier records. However, the absence of any reference to Dr Wilding bringing inconsistencies to the specific attention of the first defendant does not mean that he failed to follow that guideline or denied the plaintiff procedural fairness. In any event, the fairness point referred to in *Dominice* does not require an assessor to ask the injured person to explain why an earlier assessor or practitioner recorded different findings and observations that were not apparent to them. The guidelines must be given practical application and unless there is procedural unfairness in the assessor's approach, the Court should not intervene on matters of medical opinion and expertise. Her Honour stated:

> 131. There is a danger in allowing the medical assessment process to become an exercise in analysis of competing medico-legal reports obtained by the claimant and the insurer. It could not have been the purpose of the MAS system that medical assessors are required to explain or justify their assessments with reference to every competing medico-legal opinion.

With respect to the Proper Officer's decision, her Honour rejected the plaintiff's arguments and stated that there is an inconsistency in its argument. While the plaintiff asserted jurisdictional error because the proper officer did not engage with its argument, it also asserted error seemingly because the proper officer engaged with the argument too much – by determining the outcome. The argument that the proper officer misdirected herself as to the application of relevant legal principle and applied the wrong statutory test is contradicted by the express wording of the decision and the references to the correct test in the decision.

Accordingly, her Honour dismissed the summons.

WCC – Medical Appeal Panel Decisions

Psychiatric injury – Grounds of Appeal did not properly articulate how there was demonstrable error or application of incorrect criteria – Mere difference of opinion does not satisfy the concept of error – Appeal dismissed

Dooley's Lidcombe Catholic Club Limited v Lytwyn [2020] NSWWCCMA 177 – Arbitrator Harris, Dr J Parmegiani & Dr M Hong – 10/12/2020

The worker suffered a work-related psychological injury. He claimed compensation under s 66 *WCA* based upon an assessment from Dr Bertucen, but the appellant disputed the claim.

On 8/05/2020, an Arbitrator issued consent orders, which resolved the liability issues, and the s 66 dispute was remitted to the Registrar and was referred to Dr McClure for assessment. On 9/06/2020, Dr McClure issued a MAC which assessed 19% WPI.

On 7/07/2020, the appellant attempted to appeal against the MAC pursuant to ss 327 (3) (c) and (d) *WIMA*, but the appeal was filed out of time and an extension of time was required. On 14/08/2020, a delegate of the Registrar granted an extension of time based on special circumstances. The respondent opposed the appeal.

The MAP dismissed the appeal and its reasons are summarised below.

The MAP noted that in *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J emphasised the "pre-eminence of clinical observations" in approving the decision in *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 at [33]. In *Parker v Select Civil Pty Ltd* [2012] NSWSC 140, Harrison AsJ applied these observations when analysing whether an Appeal Panel lawfully allowed an appeal by substituting its finding of class 2 for a finding of class 3 made by the AMS for one of the PIRS categories. Her Honour stated:

> It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error.

The MAP upheld the AMS' assessment of class 3 for social and recreational activities. In *Ballas v Department of Education [2020] NSWCA 86*, the Court of Appeal noted that it was "*plainly arguable*" that social and recreational activities involved "*some degree of interaction with others*". The concept of active planning does not fall within this scale.

With respect to the assessment for concentration, persistence and pace, the appellant argued that the AMS should have assessed impairment under class 2 and not class 3. The MAP rejected that argument and held that the appellant's submissions were directed to a divergence of opinion upon which reasonable minds may differ and no error was established.

With respect to the assessment for employability, the appellant argued that the AMS failed to provide detailed reasons for the class 4 assessment and that he was more appropriately assessed under class 3 (as per Dr Bertucen's assessment). The MAP stated (citations excluded):

> 67. The AMS has a statutory obligation to provide reasons pursuant to s 325 of *the 1998 Act*. These principles were discussed in *El Masri v Woolworths Ltd* (*El Masri*) a decision involving judicial review of a decision of an Appeal Panel, when Campbell J stated:
>
> > As I have said, and at the risk of repeating myself unduly, the process is one of expert evaluation. Often when judgment of any type is called for, there will be a gap between expression of reasons and articulation of decision which cannot itself be fully articulated. That gap constitutes what might be called judgment. Although, as Ms Allars reminded me, *Wingfoot* does not necessarily apply to this case because it was a case where there was a statutory obligation to give reasons, and in this case the obligation to give reasons is implied by the general law as explained in *Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372, what their Honours said at [55] of *Wingfoot* must be applicable. Basically, the statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. Applying that standard, it is clear what was decided and why, as is the reasoning process that led to the decision, especially if one has regard to what was said by the Panel at paragraph 18 which I will not further set out.
>
> 68. Campbell J expressed similar reasons in *State of New South Wales v Kaur*.
>
> 69. The reasons must be read as a whole. The AMS made a diagnosis of a chronic major depressive episode with associated anxious distress and also accepted that the symptoms complained of by the AMS were consistent with the diagnosis. A conclusion by an Approved Medical Specialist that a worker lacks or has diminished employability must, as a matter of common sense, be viewed in the context of the accepted symptoms. The symptoms in the present case included poor motivation, social withdrawal, poor concentration, recurrent anxiety, anger and sleep disturbance. All of these symptoms would greatly impact on the respondent's employability.

The MAP found that when the reasons are read as a whole, there is a sufficient path of reasoning to enable it to ascertain how the AMS reached his conclusion and whether this involved relevant error. It was satisfied that the evidence was consistent with a class 3 rating and that no error was established.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Jurisdiction of the Commission to refer worker for assessment of permanent impairment - Consent orders are not a determination of the Commission under Part 4 WCA – Worker not estopped by s 322 (1) WIMA as the purpose of the assessment was to determine whether he met the definition of "worker with highest needs" under s 32A WCA

Xenicas v ARB Corporation Limited [2020] NSWWCC 413 – Arbitrator Edwards – 15/12/2020

The worker filed an application for assessment by an AMS to assess whether the degree of permanent impairment with respect to injuries suffered on 15/06/2018 was more than 30% and satisfies the definition of "*worker with highest needs*" in s 32A *WCA.*

The worker previously claimed compensation under s 66 *WCA* and on 9/06/2020, the Commission issued Consent Orders under which he received compensation for 20% WPI for injuries to both upper extremities, both lower extremities and the lumbar spine.

In these proceedings, the worker also sought an assessment of permanent impairment of the cervical spine, but the respondent disputed liability for that alleged injury.

Arbitrator Edwards conducted a teleconference on 16/08/2020, during which the worker's solicitor conceded that the cervical spine should not be included in a referral to an AMS. The respondent disputed that the Commission has jurisdiction to refer the matter to an AMS due to the operation of s 322A *WIMA.*

The Arbitrator accepted the worker's submission that the Consent Orders are: (1) not an assessment made under s 322A (1A); (2) not an assessment and a MAC issued under Pt 7 *WIMA* (s 322A (3) (a)); and (3) not a determination of the Commission under Pt 4 *WCA* (s 322A (3) (b) *WIMA*), as the liability issue did not require determination by the Commission and no reasons were provided as to whether the assessment was made by applying ss 322 and 323 *WIMA* and the Guidelines. The Arbitrator stated:

> 35. I do not agree with the respondent's submission that the consent orders issued in Matter No. 2497/20 "*is an assessment of the degree of permanent impairment of the worker*" because the orders were made in accordance with the agreement of the parties and, in my view, the provision of s 322A (1A) cannot be given such a narrow interpretation in beneficial legislation to preclude a worker being assessed by an AMS as to whether the degree of permanent impairment is more than 30% to meet the definition of "*worker with highest needs*" prescribed by s 32A of *the 1987 Act…*
>
> 37. Issue estoppel would apply if Mr Xenikas made a further claim for compensation in respect of permanent impairment that results from the injury: s 66 (1A) of *the 1987 Act.*
>
> 38. Mr Xenikas is not making a further claim for lump sum compensation under s 66 of *the 1987 Act*; his application is for the Commission to refer him to an AMS for assessment as to whether the degree of permanent impairment is more than 30% for the purpose of meeting the definition of "*worker with highest needs*" prescribed by s 32A of *the 1987 Act.*

Accordingly, the Arbitrator remitted the matter to the Registrar for referral to an AMS to assess the degree of permanent impairment of the lumbar spine, both upper extremities and both lower extremities.

Worker failed to discharge onus of proving that he was a worker or deemed worker

Thoms v Workers Compensation Nominal Insurer (iCare) & others [2020] NSWWCC 420 – Arbitrator Homan – 18/12/2020

On 4/12/2015, the claimant injured his right eye. He alleged that he was in the course of his employment when the injury occurred, but the alleged employer was uninsured. On 11/09/2018, the Nominal Insurer disputed the claim and it maintained its decision following reviews dated 27/11/2018 and 15/07/2019.

The claimant filed an ARD claiming continuing weekly payments from 4/09/2015 and lump sum compensation under s 66 *WCA*, but discontinued the weekly payments claim during conciliation.

Arbitrator Homan stated, relevantly:

> 100. The primary difficulty for the applicant in discharging the onus of establishing that he was a worker or deemed worker is the lack of corroborative evidence. Whilst corroborative evidence is not required in order for the applicant to discharge the relevant onus, it is a relevant consideration in weighing all the evidence.
>
> 101. In this case there is no written contract of employment. There is no documentary evidence of remuneration in the form of payslips or payment summaries, bank deposits, superannuation statements, tax returns or Centrelink declarations. There are no business records or written correspondence between the parties evidencing any employment agreement.
>
> 102. There is also no witness evidence from any person attesting to employment relationship between the applicant and the first respondent. Although the applicant has identified two persons, one of whom he described as a good friend, as having knowledge of his employment relationship with the first respondent, there is no evidence before the Commission from either person. There is also no evidence from any family member or other person who may have had knowledge of the alleged employment relationship.
>
> 103. The only documentary evidence relied on by the applicant in support of the alleged employment relationship are the Optus telephone records. I accept that the records show regular communications between the applicant's number and a number that has been identified in other documents as the mobile phone number of the first respondent, both before and after the alleged period of employment. It is unclear on the records, however, whether the records show contact made by the applicant to the first respondent or the reverse or both. The format of the records including the identification of the applicant's number as "*A_ Number" and a variety of other telephone numbers including that of the first respondent as "B_Number*", suggests that the document shows calls and SMS messages originating from the applicant's number only.
>
> 104. Whilst I accept that there appears to be a pattern of contact between the applicant and the first respondent shown on the records, in the context of the other evidence that the applicant and the first respondent were friends, I do not find the telephone records to be of assistance in determining whether there was an employment relationship between the applicant and the first respondent…
>
> 108. The absence of corroborative evidence has been explained in the applicant's own evidence to some degree, for example, by reference to the claim that there was an oral contract of employment, payment by cash in hand and a failure to pay taxes by both the applicant and the first respondent.
>
> 109. The applicant has not, however, explained why he was not able to procure any witness evidence or produce any SMS messages. The applicant has not explained whether he declared any income to Centrelink. The absence of reference to work or employment in the contemporaneous medical evidence is unexplained except for Mr Hanrahan's submission that it is not unreasonable or unusual that in the context of receiving treatment for his serious and traumatic injury the applicant may not have disclosed the nature of his contractual relationship with the first respondent…

The Arbitrator was not satisfied on the balance of probabilities that the claimant: (1) entered into or was working under a contract of service with the first respondent; and (2) was party to a contract with the first respondent to perform work for the purposes of cl 2 (1) of Sch 1 *WIMA.*

Accordingly, the Arbitrator entered an award in favour of the Nominal Insurer.

Claim under s 66 WCA – Worker relied on respondent's expert's assessment – Respondent does not accept its expert's assessment for reasons set out in the dispute notice – Held: A medical dispute exists under s 319 WIMA – matter remitted to Registrar for referral to an AMS

Austin v State of New South Wales (Sydney Children's Hospital) [2020] NSWWCC 421 – Arbitrator Homan – 21/12/2020

The worker alleged injuries to her hands and wrists as a result of the nature and conditions of employment. The respondent issued dispute notices dated 14/06/2016 and 23/12/2016.

On 27/07/2018, the worker claimed compensation for 48% WPI based upon an assessment from Dr Min Fee Lai. However, the respondent disputed the claim on 7/12/2018 and maintained its position following internal review.

On 25/11/2019, A/Prof Meares assessed 69% WPI in a medicolegal report addressed to the respondent. However, on 7/02/2020, the respondent issued a further dispute notice and raised issues regarding A/Prof Meares' history and examination. It stated:

> Following the examination, A/Prof Meares diagnoses you with bilateral Complex Regional Pain Syndrome. We say that the opinion and the examination and resultant assessment of your degree of permanent impairment, cannot be accepted given your presentation on the day.
>
> We are unable to accept the opinion of A/Prof Meares, for the reasons explained above. In addition to the above, we say that your degree of permanent impairment is not stable and therefore not ascertainable.

On 6/05/2020, the worker claimed weekly payments and compensation under s 66 *WCA* based upon A/Prof Meares' report, but the respondent disputed those claims and stated that the degree of permanent impairment is not fully ascertainable.

Arbitrator Homan conducted a teleconference on 23/11/2020, during which the respondent conceded liability and an agreement was reached regarding the weekly payments claim. The respondent offered to pay compensation under s 66 *WCA* for 48% WPI, but the worker rejected that offer. The respondent sought an order referring a medical dispute to an AMS, but the worker argued that there is no medical dispute and in the absence of a competing assessment, the Arbitrator should determine the dispute based on *Kato v City of Sydney* [2019] NSWWCC 288. The Arbitrator directed the parties to file and serve submissions as to whether there is a medical dispute for the purposes of s 319 *WIMA* and determined the matter on the papers.

On 21/12/2020, the Arbitrator issued a COD which determined that there is a medical dispute within the meaning of s 319 *WIMA* and she remitted the matter to the Registrar for referral to an AMS. The Arbitrator's reasons are summarised below.

The worker argued that: (1) a referral to an AMS would amount to a denial of procedural fairness; (2) the respondent had no basis for cavilling with the WPI assessment from its qualified IME; and (3) the common law routinely recognised that an examination without consent constitutes a physical assault and she did not consent to a further examination. She referred to 6 matters where arbitrators determined the degree of permanent impairment and argued that she should be assessed as having 69% WPI or in the alternative the matter should be referred for conciliation and arbitration.

The respondent argued that given the complexity of the matter, including but not limited to the issues as to diagnosis, the nature of the injury, the differences in the medical opinions and assessments of permanent impairment, the time which had elapsed since Dr Lai's assessment and the worker's presentation on the day of the assessment with A/Prof Meares, it is not appropriate for the claim to be determined by an arbitrator.

The Arbitrator noted that the worker's submissions do not address the dispute notices dated 7/02/2020 and 6/05/2020, which provided its reasons for not accepting the assessment of its IME, which clearly raised disputes within ss 319 (c) and (g) *WIMA.* She stated:

> 37. In *Sharman v Chemtools* ([2020] NSWWCC 237) the arbitrator found that a similar submission required words to be read into s 319 to limit the concept of a '*dispute*'. Referring to the test articulated in *Taylor v The Owners Strata Plan No 115646* as applied in the contexts of *the 1987 Act* and the *1998 Act* in *State of NSW v Chapman-Davis* ([2016] NSWCA 237 at [1] and [49]) and *Cram Fluid Power Pty Ltd v Green* ([2015] NSWCA 250 at [1], [12], [88] and [131]), the arbitrator found no basis to read in the words required to give s 319 the meaning advocated by the applicant…
>
> 41. Within this framework, whilst it is necessary, in order for an applicant to be entitled to compensation under s 66 of *the 1987 Act* to have an assessment of permanent impairment made in accordance with the Guidelines, I can find nothing in the statutory framework to support the conclusion that it is not open for an employer or their insurer to "*dispute*" an assessment of the degree of permanent impairment in the absence of a competing assessment.
>
> 41. The respondent has in this case articulated a number of reasons why the assessment of A/Prof Meares was not accepted. In the circumstances of this case, where the assessment involved consideration of whether the applicant had signs and symptoms of Complex Regional Pain Syndrome (CRPS), changes in skin temperature and sweating due to applicant's acute abdominal issues on the day of assessment had the potential to interfere with A/Prof Meares' examination and assessment. A/Prof Meares had suggested that the examination should be terminated to enable the applicant to go to the Emergency Department but the applicant was reluctant to do this and wished to proceed as she had travelled a long distance in order to be examined. Without expressing any opinion on whether the assessment was compromised by the applicant's other medical issues, I do accept that there was proper basis on which to dispute the assessment of the degree of permanent impairment of A/Prof Meares on which the applicant now relies.

The Arbitrator held that the decision in *Kato v City of Sydney* [2019] NSWWCC 288 can be distinguished on its facts, as in that matter there was no competing WPI assessment, no dispute notice and no submissions from the respondent that disputed the degree of impairment. She decided to exercise her discretion to determine the matter and remitted the matter to the Registrar for referral to an AMS because the respondent's concerns raised questions as to whether it is appropriate for the assessment to proceed and whether the assessment may have been compromised by the worker's non-work-related symptoms. A/Prof Meares stated that the worker's condition made his examination difficult.