WIRO
Workers Compensation independent review office

HOME ... ABOUT US ... CONTACT

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 85

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. Livers v Legal Services Commissioner [2020] NSWCA 317
2. Secretary, Department of Communities and Justice v Galea [2021] NSWWCCPD 1
3. Ratewave Pty Ltd t/as Manly Pacific Hotel Sydney v Radek [2021] NSWWCCMA 6
4. Callus v Binettes Pty Ltd [2020] NSWWCC 421
5. Appleby v Security Specialists Australia Pty Ltd [2020] NSWWCC 424
6. Watson v Murrays Australia Pty Ltd [2021] NSWWCC 9
7. Aslam v Ramesh Tanwar & others [2021] NSWWCC 13

Court of Appeal Decisions

Livers v Legal Services Commissioner [2020] NSWCA 317 – Ward CJ in Eq, White JA & McCallum JA – 10/12/2020

On 10/12/2020, the Court of Appeal published its decision in this matter.

The Court set aside the decision of the Civil and Administrative Tribunal dated 27/11/2019 and dismissed the Legal Services Commissioner's application for disciplinary findings and protective orders against the appellant.

WCC – Presidential Decisions

Injury arising out of employment – application of Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited [2009] NSWCA 324 – ss 9A (2) and 9B) WCA – Application of Renew God's Program Pty Ltd v Kim [2019] NSWWCCPD 45

Secretary, Department of Communities and Justice v Galea [2021] NSWWCCPD 1 – Deputy President Snell – 13/01/2021

The worker was employed by the appellant as a part-time disability care worker.

In early 2013, the worker made a pudding and placed it in the staff refrigerator. A co-worker took a saliva sample from a disabled boy and spread it over the pudding, which the worker later consumed. On 21/06/2013, another co-worker asked the worker if she had hepatitis yet and told her about the incident involving the pudding. The worker became upset, reported the matter, saw her GP and had a blood test – she was "*very stressed and worried*".

On 23/06/2013, while the worker was driving a work bus, she noticed that a teenaged boy in the back of the bus had removed his seat belt. She stopped the bus and went to assist the boy, who assaulted her. She could not use her remote control to open the back door of the bus and was trapped with him for about an hour. She was "very afraid*" and used tape to make the word "help*" on the window. Eventually, another departmental vehicle pulled over and freed her.

There was antipathy between the worker and the co-worker who told her about the pudding incident. He accused her of "*dobbing*" and said he did not wish to work with her and the worker said that, "*she felt very threatened and abused*" by him. She developed psychological symptoms and the appellant accepted liability. She commenced a return to work program in November 2013, but in June 2014 she suffered a significant stroke and has not worked since.

On or about 24/12/2015, the worker was at a shopping centre and saw the co-worker who was involved in the pudding incident. She was "*very shocked and surprised, became distressed, found breathing difficult and her chest tightened*". She suffered chest pain and was diagnosed with Takotsubo Cardiomyopathy (TCM).

The worker claimed compensation under s 66 *WCA* for a psychological injury (deemed date: 26/07/2013) and injury to the cardiovascular system on/about 24/12/2015. Alternatively, she alleged that TCM is a consequential condition to the psychological injury.

The appellant disputed that the stroke in 2015 was an injury or a consequential condition to the psychological injury and that TCM was an injury for the purposes of s 4 (b) *WCA,* which resulted from the psychological injury. It disputed that the incident on 24/12/2015 was in the course of the worker's employment or connected to the employment in any way and that ss 9A and 9B *WCA* are satisfied. It also disputed that the psychological impairment was at least 15% WPI.

On 27/07/2020, ***Arbitrator Burge*** issued a COD, which determined that the worker suffered both psychological and cardiovascular injuries and that these were separate injuries for the purposes of s 4 *WCA.* This meant that s 65A (4) *WCA* did not apply. He awarded the worker compensation under s 66 *WCA* for 20% WPI (cardiovascular system) and remitted the dispute regarding the psychological injury to the Registrar for referral to an AMS. His reasons are summarised below.

- The parties agreed that TCM is a heart attack injury for the purposes of s 9B *WCA*, but disputed: (1) whether it was a work-related injury (s 4 *WCA*); (2) whether employment was a substantial contributing factor (s 9A WCA); (3) whether s 9B *WCA* was satisfied; and (4) if TCM was not an injury within the meaning of s 4 *WCA*, whether it was a consequential condition resulting from the psychological injury.
- The parties also agreed that if he found for the worker regarding the TCM injury, the degree of permanent impairment was 20% WPI.
- The medical evidence established that the TCM was "*brought on by emotional/psychological stressors ... There is no medical evidence which contradicts that opinion*." He found that this is a frank injury.
- To be an injury arising out of the employment, there must be a causal connection between the employment and the injury. He quoted from the passage in *Kooragang Cement Pty Ltd v Bates* in which Kirby P spoke of the requirement for a "*common-sense evaluation of the causal chain*".
- The evidence clearly established on the balance of probabilities that the cardiac injury arose out of the worker's employment and s 9A *WCA* was satisfied.
- The employment gave rise to a significantly greater risk of a heart attack injury. It put the worker in a position where she was assaulted and where she was exposed to the "*appalling conduct regarding the attempted hepatitis infection*". He stated:

> Had those aspects of her employment not happened, the [worker] in turn would not have sought to dissociate herself from her co-workers and the TCM would not have occurred. All of the relevant medical evidence supports a finding that were it not for the prior psychological stressors brought about at work, the [worker] would not have suffered from TCM. Such evidence is, in my opinion, strongly suggestive of a significantly increased risk of injury as a result of the employment than had the [worker] not worked for the [employer].

- The decisions of Snell DP in *De Silva v Secretary, Department of Finance, Services and Innovation* and *Renew God's Program Pty Ltd v Kim* establish that s 9B involves an evaluative task, comparing the risks to which the employment concerned gives rise, with the risks if the worker was not employed in employment of that nature. It is an assessment of comparative risk, not a test of true causation.
- The employment exposed the worker to psychological stressors which gave rise to the TCM injury. If she was not exposed to that heightened risk there would have been significantly less risk of the heart attack injury occurring. If she had not been exposed to the factors that caused her psychological injury, she would not have suffered her cardiac injury. Therefore, the requirements of s 9B were met.

On appeal, the appellant alleged that the Arbitrator erred in law in finding that: (1) the TCM injury arose out of the worker's employment, as he: (a) applied the wrong legal test; and (b) failed to take account of the fact that the worker was no longer employed by it; and (2) the worker's employment was a substantial contributing factor to that injury. He also erred in law and applied the wrong legal test in finding that the employment gave rise to a significantly greater risk of a heart attack injury.

Deputy President Snell noted that the appeal was lodged out of time and stated that it is necessary to consider its merits before granting an extension of time. He held that the appeal did not have reasonable prospects of success and as exceptional circumstances were not established, he refused to grant an extension of time. His reasons are summarised below.

Snell DP rejected ground (1). He noted that the appellant argued that *Kooragang* sets out the appropriate causation test for determining whether death or incapacity results from an injury that is already "*defined and created by s 4*" *WCA* and that the Arbitrator's reliance on involved him applying an incorrect test to the issue of whether the TCM injury was one arising out of the employment. However, the reasons must be read as a whole and it is plain that his reasoning did not proceed on the simple basis that *Kooragang* provided an appropriate test for determining whether injury arising out of the employment was established and he did not apply a wrong test.

The Arbitrator found that the psychological injury was the main contributing factor to the TCM injury and he approached the issue of whether the injury arose out of the employment in a fashion consistent with the relevant authorities.

While the appellant sought to distinguish this matter from *Badawi*, this does not assist it. He stated:

> 83. …The passage from *Badawi* quoted above sets out the relevant test, by reference to settled authority, in a way that is not specific to the factual position in *Badaw*i. The employer submits that nothing in the worker's employment caused her to attend the shopping centre in December 2015. The worker's case was never presented on such a basis. It was the worker's case that the necessary causal element was established, because a chain of causation existed between the worker's employment duties which caused the accepted psychological injury, and the TCM injury. The Arbitrator found the existence of that causal chain. It is not argued on this appeal that the chain was broken by a novus actus interveniens.

84. …In the Commission matters in a medical history may comprise evidence of the facts on which the Commission may act. The Arbitrator made a positive finding that the worker saw an "*ex-colleague*". It was open to the Arbitrator to make that finding on the evidence (see [13]–[16] above). The availability of the finding is not specifically challenged on this appeal. It is unclear what the employer seeks to draw from the reference to "*someone she thought she knew*", it does not assist the employer's position.

Snell DP rejected ground (2). He stated, relevantly:

> 106. It is specifically noted in *Badawi* that there will be circumstances where the causal relationship, which supports a conclusion that there was injury arising from employment, will also be sufficient to satisfy s 9A. Given the strong causal relationship between the worker's relevant employment duties and the TCM injury, this in my view is such a case. It follows that the basis on which the Arbitrator concluded that s 9A was satisfied, in the particular factual circumstances, did not involve error. If the Arbitrator had engaged in a consideration of "*the time and place of the injury*" in accordance with cl (a) of s 9A (2) this would not have changed the result.

Snell DP rejected ground (3). He stated, relevantly:

> 116. The assessment of comparative risks, called for by the section, involves comparing the risk in the employment that caused the heart attack injury, with the risk if the worker was not employed in that employment. Although it is not a true test of causation, it does require assessment of the risk in the actual employment in which injury was suffered. This is then compared with the risk if the worker was not so employed. It is necessary that the first of these risks be 'significantly greater' than the second. On the medical evidence, the significantly greater risk of the heart attack injury (Takotsubo Cardiomyopathy) given rise to by the actual employment, was associated with the risk of psychological injury in the actual employment. On the evidence this included both bullying and harassment by fellow workers and the risk of being assaulted. A comparison between those levels of risk was what the section required. The risk associated with the actual employment was significantly greater than if the worker was not so employed. This was because only the first of the scenarios (the actual employment) carried the risk of psychological injury, which had been causative of the heart attack injury which the worker suffered.

WCC – Medical Appeal Panel Decisions

Demonstrable error – AMS is required to make an independent assessment having due regard to other evidence before them and not relying solely on a worker's self-report

Ratewave Pty Ltd t/as Manly Pacific Hotel Sydney v Radek [2021] NSWWCCMA 6 – Arbitrator Peacock, Prof. N Glozier & Dr P Morris – 8/01/2021

On 20/04/2019 (deemed), the worker suffered a work-related psychological injury.

On 11/05/2020, Dr Takyar issued a MAC which assessed 19% WPI. However, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and argued that the worker's evidence to the AMS was inconsistent with the evidence in the file, particularly regarding his reported functioning under the PIRS categories, and that the AMS failed to appropriately consider the entirety of the evidence before him. The worker opposed the appeal.

The appellant sought to rely upon report from a treating doctor (Dr Cotiga) as fresh evidence in the appeal. The MAP admitted this evidence in the appeal as it was not available at the time of the initial examination.

The MAP found that the AMS had little to no regard to the evidence that was before him about the activities that the worker was able to undertake. It stated that an AMS is mandated not to rely upon a self-report alone and should have due regard to the other evidence before him and take a proper history. However, this was not done and it was therefore necessary for the worker to undergo a further medical examination.

Prof. Glozier re-examined the worker on behalf of the MAP. While he agreed with the AMS' diagnosis, he assessed class 2 impairments for all PIRS categories except Concentration, Persistence and Pace for which he found that the class 3 impairment was open to the AMS). He found that there was a median class 2, which equated to 8% WPI.

The MAP adopted Prof. Glozier's findings and report and issued a MAC which assessed 8% WPI. This does not entitle the worker to compensation under s 66 *WCA.*

WCC – Arbitrator Decisions

Proposed surgery in the nature of sleeve gastrectomy and loop bipartition gastric bypass is reasonably necessary as a result of an injury to the left shoulder

Callus v Binettes Pty Ltd [2020] NSWWCC 421 – Arbitrator Jacqueline Snell – 23/12/2020

The worker was employed as a delivery driver. On 24/10/2017, she injured her left shoulder at work and on 7/03/2018, she underwent surgery. As a result of the surgery, she suffered a consequential injury to her right thigh (meralgia paresthetica).

The worker claimed s 60 expenses with respect to weight loss surgery, but the respondent disputed the claim. While it did not dispute liability for the shoulder injury and consequential injury to the right thigh, it disputed that the worker's morbid obesity resulted from the shoulder injury and asserted that the proposed surgery was not reasonably necessary as a result of that injury. Upon internal review, it also disputed that the left shoulder injury materially contributed to the need for the proposed surgery.

Arbitrator Snell conducted an arbitration. On 23/12/2020, she issued a COD which determined, relevantly, that the worker required medial and resulted treatment as a result of the left shoulder injury and that the proposed weight loss surgery is reasonably necessary treatment as a result of that injury. The Arbitrator's reasons are summarised below.

The Arbitrator noted that there is no dispute that the worker has had longstanding issues with her weight and suffered morbid obesity before the left shoulder injury occurred, but she had not been advised that she would benefit from weight loss surgery. During her recovery from the surgery, the right knee became symptomatic and she developed meralgia paresthetica in her right thigh. The worker was advised that she would benefit from a total knee replacement, but that her morbid obesity carries risk and she would benefit from weight loss before that surgery.

Accordingly, the Arbitrator found that the left shoulder injury and subsequent surgery materially contributed to the need for the proposed weight loss surgery and that the proposed surgery was reasonably necessary as a result of the left shoulder injury.

Exacerbation and acceleration of a disease under s 4 (b) (ii) WCA – the absence of positive medical evidence on the issue does not preclude a finding that the employment was both a material contributing factor and the main contributing factor to the exacerbation and acceleration

Appleby v Security Specialists Australia Pty Ltd [2020] NSWWCC 424 – Arbitrator Sweeney – 24/12/2020

The worker was employed as a security guard. There was no dispute that his work involved lifting and carrying backpacks containing cash and coin. In late 2014, he developed symptoms of cervical myelopathy with spinal cord compression and he underwent surgery in October 2015. He made a reasonable, but incomplete recovery and did not return to work.

The issue in dispute was whether the nature of employment materially contributed to the disease and, if so, whether it was the main contributing factor for the purposes of s 4 (b) (ii) *WCA.*

Arbitrator Sweeney issued an amended COD on 24/12/2020, which determined that the worker suffered the exacerbation and acceleration of a pre-existing disease in his cervical spine and that employment was the main contributing factor (notional date: 30/12/2016).

The Arbitrator found that the worker had no current earning capacity from 30/12/2016 to 28/06/2019, and he awarded weekly compensation under ss 36 and 37 *WCA.* He ordered the parties to advise the Commission within 21 days whether the issue of permanent impairment should be determined by the Commission or referred to an AMS. His reasons are summarised below.

The respondent argued that there was no reference to work or trauma as a cause of the disease in any clinical records or histories obtained by the treating doctors and their evidence that was relied upon was ambiguous regarding the issue of causation. The evidence of Dr Bentivoglio (qualified by the worker) was insufficient to prove causation as he noted that there was no workplace injury and he was unable to state that employment was the main contributing factor to the aggravation of the spinal disease. However, Dr Cochrane (qualified by the respondent) opined that employment was not the main contributing factor to the development of the disease. With respect to the issue of work capacity, Dr Bentivoglio's opinion is tantamount to an acceptance that the worker could perform work that did not involve lifting and bending and the worker had not established that he had no current work capacity.

The worker argued that the absence of medical evidence directly addressing the statutory language of "*main contributing factor*" was not fatal as in *State Transit Authority of NSW v El-Achi* [2015] NSWWCCPD 71, Roche DP stated that the question was "*main contributing factor*" was an evaluative process that must be determined by an arbitrator on the entirety of the evidence. It is open to an arbitrator to find a fact proven on the probabilities when the medical evidence clearly stated that it was possible in accordance with *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238 and there was no evidence of any other contributing factor to the acceleration etc. With respect to the issue of work capacity, he is unemployable.

The Arbitrator held that the absence of reference to the nature of the worker's duties in the treating doctors' medical records is only of slight importance in determining the issue of injury. The purpose of the worker's consultations was to identify and treat his symptoms and not to embark upon an enquiry regarding this relationship with his employment. He stated:

> 47. Generally, I take the view that clinical notes are important evidence, particularly when the circumstances allegedly giving rise to injury occurred many years ago. The brief notes of medical practitioners may often be more accurate than the recollection of witnesses as to complaint. Less compelling are clinical entries describing the physical circumstances of injury. Doctors are likely to briefly record an account injury or incident, but these are often condensed and of limited assistance. Understandably, medical practitioners are less likely to enquire into the nature of employment as a cause of a medical condition where the physical nature of the employment is not obviously traumatic and only capable of causing injury by a gradual process.
>
> 48. Equally, I doubt whether the opinions of general practitioners recorded in their clinical notes as to difficulties of proof are overly persuasive. Obviously, the general practitioners in this case have largely withdrawn from the field of forensic combat leaving the question of causation to specialist medical practitioners. Dr Greene, of course, expressed the guarded opinion that the applicant's employment might be causative of his spinal condition but deferred to the opinion of Dr Parkinson.
>
> 49. Of more concern, is the brevity of the applicant's evidence in respect of his employment. It is obvious that the applicant carried backpacks which weighed 20 or 25 kg in the course of his work. The applicant addresses this aspect of his employment thus:
>
> > I was often required to carry heavy items. I would often carry backpacks weighing in excess of 20kg on my back.

> 50. The applicant's evidence is so sparse that I have spent some time considering whether it is satisfactory evidence of work that might place hazardous strain on the applicant's neck. Neither the independent medical experts nor the treating doctors obtained a more extensive history of the physical aspects of the applicant's employment than the excerpt from his evidence above. The precise nature of applicant's work is of great importance to the issue of whether it could aggravate his spondylotic cervical myelopathy. Its importance can readily be seen from Dr Bentivoglio's reports where he opines that both the nature and duration of the strains placed upon the applicant's neck by his employment are important.

The Arbitrator found that the worker was required to lift and carry moderately heavy weights frequently in the course of his employment and that it is likely that his employment exacerbated, and probably accelerated a pre-existing degenerative condition in his cervical spine. He stated:

> 64. The injury in this case is the exacerbation and acceleration of a disease. It is not the disease process. This approach to a section 4 (b) (II) injury is consistent with the reasoning of the Court of Appeal in *Murray v Shillingsworth* [2006] NSWCA (20 December 2006), a case to which Ms Grotte referred in argument. In that case, Einstein J said this of section 9A at [63]:
>
> > These submissions are misconceived. They fail to recognise that in the circumstances concerning an integer dealt with by s4 (b) (ii) [such as an aggravation of a disease] the only compensation is for the effect of the aggravation and not for the effect of the original non-aggravated disease. …
>
> 68. Obviously, the absence of medical evidence that the applicant's employment is the main contributing factor to the exacerbation or acceleration of his spinal disease detracts from the applicant's case. More so when there is medical opinion which states that it was not. The absence of such evidence was considered by the presidential unit in *State Transit Authority of NSW v El-Achi* [2015] NSWWCCPD 71 (16 December 2015) (*El-Achi*). The facts in that case have some similarity to the instant case.
>
> 69. In *El-Achi*, Dr Bodel, an orthopaedic surgeon opined that the worker's employment as a bus driver was a substantial contributing factor to the condition of the vertebral canal stenosis. Dr Bodel expressed the opinion that the worker's condition was:
>
> > primarily a constitutional ailment. There are several factors contributing to this and that includes congenital short pedicles, degenerative changes in the facet joints, thickening of the ligamentum flavum and the bulging of the disc. He has a strong genetic, underlying predisposition to develop this condition but many decades of bus driving in my view have caused aggravation, acceleration, exacerbation and deterioration of that disease process leading to the need for surgery.
>
> 70. In dealing with the arbitral determination that the applicant's employment was the main contributing factor to the aggravation of his disease, President Roche said this:
>
> > Though it would have been helpful if Dr Bodel had expressed his opinion in the terms of the legislation, the fact that he did not mean that the Senior Arbitrator erred in accepting his evidence. That a doctor does not address the ultimate legal question to be decided is not fatal (*Guthrie v Spence* [2009] NSWCA 369; 78 NSWLR 225 at [194]-[199] and [203]. In the Commission, an Arbitrator must determine having regard to the whole of the evidence, the issue of injury and whether employment is the main contributing factor to the injury. That involves an evaluative process. The Senior Arbitrator properly engaged in that process and the conclusions he reached were open on the evidence.

71. It is evident that the approach of the courts to determining questions of causation is markedly different to that employed by medical practitioners. In *Seltsam Pty Ltd v McGuinness* [2000] NSW CA 29 at [42] Spigelman CJ observed that courts approach questions of causation in a "*distinctively different manner from that which may be appropriate in either philosophy or science*". While he was addressing the use of the common-sense test of causation in finding as a probability that there was a causal nexus between insult and injury, similar reasoning may be applied to proof of the test of "*main contributing factor*". That is because the legal determination of both issues involves a consideration of the factual evidence as well as the medical evidence.

72. Ultimately, it is necessary for the trier of fact to be persuaded on the evidence that the applicant's employment was the main contributing factor to the exacerbation et cetera of the workers disease. Plainly that involves identifying the contributing factors to the exacerbation et cetera and ascertaining whether the employment factor is of such importance that it can be identified as the main contributing factor.

The Arbitrator noted that there is no dispute that the worker has suffered 34% WPI and the only dispute was the appropriate deduction under s 323 *WIMA.* He granted leave to the parties to advise the Commission within 14 days whether the dispute can be resolved or is to be referred to an AMS or determined by the Commission.

Entitlement to weekly payments during the second entitlement period – A worker who returned to work for not less than 15 hours per week, but was later stood down due to COVID-19, did not satisfy s 37 (2) WCA and weekly payments are to be calculated under s 37 (3) WCA

Watson v Murrays Australia Pty Ltd [2021] NSWWCC 9 – Arbitrator Burge – 8/01/2021

On 30/07/2018, the worker injured his lower back and during rehabilitation, he suffered a consequential umbilical hernia. He suffered a partial incapacity and returned to work for not less than 15 hours per week. However, on 19/03/2020, the worker was stood down from work due to the impact of COVID-19 and he received the Job Keeper Payment, which forms part of his assessable earnings. From 19/06/2020, the worker's earnings averaged $705.09 per week and he claimed continuing weekly payments from that date and s 60 expenses.

Arbitrator Burge noted that the dispute related to the correct rate of payment under s 37 *WCA.* The worker argued that the starting point for the calculation should be 95% of PIAWE, as he had returned to work and was working not less than 15 hours per week (s 37 (2) (b) *WCA*) until the respondent's business closed owing to the impacts of the COVID-19 pandemic. However, the respondent argued that the starting point should be 80% of PIAWE under s 37 (3) *WCA* as the worker is not working more than 15 hours per week.

The Arbitrator determined that s 37 (3) *WCA* applied and stated, relevantly:

28. Whilst I have a great deal of sympathy for the applicant's situation, in that were it not for the pandemic he would likely have been working for more than 15 hours per week, the terms of section 37 in my view contain both a temporal element and a requirement that the injured worker is carrying out greater than 15 hours per week of paid work.

29. I accept the respondent's submission that the applicant's construction of section 37 (2) and 37 (3) is contrary to the intentions of Parliament. Division 2 of *the 1987 Act* contemplates weekly compensation being payable to an injured worker suffering incapacity for work as a result of a workplace injury. Section 33 clearly states the payment shall be made weekly during the incapacity. It is clear from the wording of sections 33, 36 and 37 of *the 1987 Act* that Parliament envisaged the payments for lost income being made on a weekly basis referable to the incapacity and circumstances of an injured worker at any given time…

31. As noted, the circumstances of the applicant ceasing post-injury employment were beyond his control, and I accept Ms Grotte's submission that were it not for the pandemic, he would have continued working and would have satisfied section 37(2). However, the unfortunate nature of the applicant's circumstances does not obviate the operation of the relevant statutory provisions.

The Arbitrator also made a general order for payment of s 60 expenses.

Taxi driver held to be a deemed worker under Sch 1 Cl 10 WIMA

Aslam v Ramesh Tanwar & others [2021] NSWWCC 13 – Arbitrator Rimmer – 11/01/2021

The applicant was a taxi driver. He alleged that he suffered physical and psychological injuries as a result of an assault that occurred on 21/10/2006. He claimed weekly payments and lump sum compensation under s 66 *WCA* against: (1) the first respondent – who owned the taxi; (2) the second respondent (the first respondent's company); and (3) the Nominal Insurer (as the first and second respondents were uninsured). The first and second respondents joined the fourth respondent, who was also uninsured, during the teleconference. The Nominal insurer disputed liability for injuries to the lumbar spine, right knee and right leg, or psychological injury (primary or secondary).

Arbitrator Rimmer identified the issues as: (1) Whether the first, second or fourth respondents bailed the taxi to the applicant from 20/10/2006 to 21/10/2006 (Sch 1, Cl 10 *WIMA*); (2) Did the applicant suffer injury to his lumbar spine, right leg (knee) or a psychological injury in the assault on 21/10/ 2006 (s 4 *WCA*)? (3) Was deemed employment under Sch 1 cl 10 *WIMA* with either the first, second or fourth respondents a substantial contributing factor to any injury to the lumbar spine, right leg, right knee or a psychological injury on 21/10/ 2006 (s 9A *WCA*)? (4) Whether the applicant has any incapacity as a result of injury suffered on 21/10/2006, and if so, the extent of such incapacity and his weekly entitlements; (5) Whether medical expenses were reasonably necessary; and (6) the degree of whole person impairment.

With respect to issue (1), the Arbitrator noted significant conflicts between the evidence of the applicant, the first and fourth respondents. While the applicant's evidence was that he bailed the taxi from the first respondent, the first respondent asserted that he had sub-leased the taxi to the fourth respondent and that the applicant bailed the taxi from him. The fourth respondent denied the bailment. The Arbitrator found that the second respondent bailed the taxi to the applicant, the first respondent paid the fourth respondent $650 per week in cash to assist him in managing his business; but that the fourth respondent was not involved as his agent in any bailment or sub-bailment to the applicant.

With respect to issue (2), the Arbitrator was not persuaded that the applicant injured his lumbar spine.

With respect to issue (3), the Arbitrator was satisfied that the applicant injured his right knee.

With respect to issue (4), the Arbitrator found that the applicant suffered PTSD following the assault.

With respect to issue (5), the Arbitrator held that both the physical and psychological injuries arose out of and in the course of the applicant's employment and that the employment was a substantial contributing factor to the injuries.

The Arbitrator remitted the matter to the Registrar for referral of the s 66 disputes to an AMS to determine: (1) permanent impairment of the cervical spine and right lower extremity; and (2) psychological impairment. She ordered that the claim for weekly payments and medical expenses be determined after the issue of the MACs.