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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.

NSW Court of Appeal

Worker's death due to pre-existing asthma condition that was not aggravated by work.

Miller v State of New South Wales [2018] NSWCA 152 – McColl JA, Meagher JA & Leeming JA – 12 July 2018.

Background

The appellant claimed compensation under s 25 WCA following the death of his wife, while at work, on 15 April 2011. The deceased was employed as a community transport driver and was required to undertake driving duties when other drivers were not available. While performing those duties she suffered a severe asthma attack and a subsequent fatal cardiac arrest. On 5 May 2014, the Coroner entered a verdict of death due to anoxia, in turn due to a severe asthma attack.

Decision at first instance

The Arbitrator found that the deceased began having breathing problems from the time her bus commenced a return journey and increased to the point that a passenger asked her to pull over to the side of the road, which she did. While were 2 nurses were travelling in the bus and the worker carried Ventolin with her, the Arbitrator held that there was only a limited window of opportunity of a few minutes before the severe asthma attack proved to be fatal (by preventing the supply of oxygen to the body (anoxia) and leading to cardiac arrest). However, held that the cause of the worker's injury was her pre-existing medical condition and that this was not aggravated by her employment. He entered an award for the respondent.

Appeal to presidential member

The appellant appealed against the Arbitrator's decision and alleged 17 errors of law. He also requested an oral hearing, leave to rely upon further medical evidence and leave to cross-examine a witness. However, ADP Parker SC decided that there was sufficient information upon which to determine the appeal 'on the papers'.

Appeal Decision

Section 352 (6) WIMA requires the WCC to be satisfied that either: (a) the evidence concerned was not available to the party and could not reasonably have been obtained by that party before the proceedings concerned; or (b) the failure to grant leave would cause substantial injustice in the case (see: *CHEP Australia Pty Limited v Strickland* [2013] NSWCA 351, per Barrett JA at [27]).

ADP Parker SC found that there was no information as to why the further medical evidence could not reasonably have been obtained before the arbitral proceedings and it amounted to the proposition that if the worker received appropriate medical care sooner her prospects of survival were enhanced. However, it did not address whether there was an aggravation, acceleration, exacerbation or deterioration of asthma that was contributed to by employment (s 4 (b) (ii)) or whether the "employment" was "a substantial contributing factor to the injury" (s 9A (1).

ADP Parker SC was not satisfied that refusing leave to rely upon the further medical evidence would cause substantial injustice and/or that a different conclusion would have been reached if it had been received by the Arbitrator, and he refused to grant an extension of time to appeal. He also held that the appellant had not demonstrated any error in fact, law or discretion by the Arbitrator. The appeal was dismissed.

Court of Appeal

The appellant relied upon 9 grounds of appeal but the Court found that none of the grounds raised a point of law upon which the appeal was necessarily based. The Court held:

> 28. The short answer to all grounds of appeal is as was said by the respondent:
>
> [Injury] wasn't ever put in a different fashion. It was never put, either to the Arbitrator or to the Deputy President, that there was an injury simpliciter in the form of a cardiac arrest or anoxia which was the injury which was to be determined by the Arbitrator.
>
> 29. That fairly describes the entirety of the proceeding before the ADP. There is ordinarily no error, still less any error of law, in failing to address a case which has not been put.

The appeal was dismissed.

Workers Compensation Commission - Presidential decisions

Extension of time to appeal refused - no exceptional circumstances established

Thompson v State of New South Wales [2018] NSWWCCPD 25 – Wood DP – 27 June 2018

Background

The appellant was employed as a Corrective Services Officer from 1985 until 12 January 2004. He alleged that he suffered a psychological injury due to numerous work-related events that occurred between 1990 and 2004, but a significant number of the events occurred before 1 January 2002 (when s65A WCA commenced) and he first sought psychological treatment in/about October 2000. He then worked permanent night shift until

November 2003, when the employer attempted to return him to full duties (and day shifts). He was referred for a medical assessment by Health Quest and was medically retired. He claimed lump sum compensation for permanent impairment due to the injury dated 12 January 2004 (deemed) and the dispute was referred to an AMS, who assessed 23% WPI for permanent psychological impairment.

However, cl 3 (2) of Part 18C of Schedule 6 WCA provides:

3 Lump sum compensation amendments

(2) There is to be a reduction in the compensation payable under Division 4 of Part 3 (as amended by the lump sum compensation amendments) for any proportion of the permanent impairment concerned that is a previously non-compensable impairment. This subclause does not limit the operation of section 323 of the 1998 Act or section 68B of the 1987 Act.

As a result, the Arbitrator had to determine the amount of the reduction in compensation payable for psychological impairment arising from injury suffered prior to 1 January 2002. On 7 February 2018, he determined the reduction as 90%.

Appeal

The appellant sought leave to appeal against the Arbitrator's decision and alleged that the Arbitrator erred: (1) by failing to properly apportion between the incidents causing injury; (2) by not properly considering the effect of the loss of rostered night shifts upon him; and (3) by apportioning 90% to pre-2002 injuries when the loss of night shifts escalated his psychiatric condition to an assessment of 22% WPI.

However, the appeal was lodged late and an extension of time was required under rule 16.2 (12) of the WCC Rules, which provides:

> The Commission constituted by a Presidential member may, if a party satisfies the Presidential member, in exceptional circumstances, that to lose the right to appeal would work demonstrable and substantial injustice, by order extend the time for making an appeal.

The appellant alleged that the delay was reasonable and that it was caused by his reliance on third parties (including delays in obtaining WIRO funding and advice from counsel on the appeal's prospects of success) and he argued that "losing the right to seek leave to appeal would cause him immense demonstrable and substantial injustice".

The respondent conceded that it would not be prejudiced if an extension of time was granted. However, it relied upon the decision of Snell DP in *Lotos Concretors Pty Ltd v Mitchell* [2018] NSWWCCPD 16, which discussed and applied the principles laid down in *Gallo v Dawson* [1990] HCA 30 and *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* [2014] NSWCA 34, and upon the decision of Snell DP in *Erskine v Cozwine Pty Ltd* [2018] NSWWCCPD 9, with respect to the consideration of r 16.2 (12) of the WCC Rules and 'exceptional circumstances'.

The respondent argued that no exceptional circumstances had been established and that the appeal had minimal prospects of success. However, the appellant argued that he was only required to establish 'a fairly arguable case' and that he had done so (see: Candy ADP in *Hrvat v Thiess Pty Ltd and Hachtief AG Australia* [2010] NSWWCCPD 69).

Wood DP held that the appellant's solicitor was aware of the 28-day time limit for lodging the appeal, but he had not explained his lack of pro-activity and he did not explain why he was reliant upon counsel for advice on the prospects of success as he had not briefed counsel for the arbitration and he had a first-hand knowledge of the case run before the Arbitrator. He also did not brief counsel to prepare the submissions on appeal. She held that no exceptional circumstances were established.

Wood DP also held that the appellant must also show that a demonstrable or substantial injustice would occur if an extension of time was not granted, which requires an assessment of the merits of the case, as follows:

> 31. Justice McHugh said in *Gallo* that in considering an extension of time:
>
> The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties. ... This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time. ... When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal. ... It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted. ... It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice.

Wood DP also referred to the decision of the Court of Appeal in *Shellharbour City Council v Rhiannon Rigby* [2006] NSWCA 308, in which Beazley JA (Ipp JA agreeing, and Basten JA agreeing in principle) said at [144]:

> Questions of the weight of evidence are peculiarly matters within the province of the trial judge, unless it can be said that a finding was so against the weight of evidence that some error must have been involved.

Wood DP noted that the only stressor after 1 January 2002 that the appellant alleged was he felt pressured to return to normal shifts, but referred to this stressor only briefly in his statement and he did not describe its effects upon his psyche. Also, his histories to the medical experts "largely focussed on the specific traumatic events that he encountered during the 1990's." She found that the loss of night shifts was not a significant factor in the assessment of the WPI and that the events that caused the psychological injury occurred in the 1990's. She also found that the Arbitrator did not overlook material facts or give undue or too little weight to the evidence before him. His reasons set out the relevant evidence in full and adequately explained why he arrived at his conclusions.

Therefore, the appeal had no prospects of success and the application for leave an extension of time was refused.

Meaning of "real and substantial connection" in s 10 (3A) WCA

State Super Financial Services Australia Limited v McCoy [2018] NSWWCCPD 26 – Keating P – 3 July 2018

Background

On 5 December 2013, the worker injured her right ankle because of a fall on uneven paving while she was walking from her hotel (where she was spending the night) to the venue where she was to attend a work Christmas party. She alleged that she fell because she was hurrying to get to the party on time and she was tired.

On 1 November 2015, the worker claimed compensation, but the insurer disputed the claim because: (a) it was not made within 6 months after the injury; (b) the worker had not suffered an injury arising out of or in the course of her employment; and (c) there was no real and substantial connection between the employment and the accident or incident out of which the injury arose.

On 17 August 2016, the worker claimed compensation under s 66 WCA for 31% WPI, but the insurer maintained its denial of liability. On 26 October 2017, the worker lodged an ARD that claimed weekly payments, medical and related treatment expenses and lump sum compensation.

Relevant legislation

Section 10 WCA provides, relevantly:

(1) A personal injury received by a worker on any journey to which this section applies is, for the purposes of this Act, an injury arising out of or in the course of employment, and compensation is payable accordingly…

(3) The journeys to which this section applies are as follows:

  (a) the daily or other periodic journeys between the worker's place of abode and place of employment, …

(3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose…

(6) In this section… 'place of abode' includes:

  (a) the place where the worker has spent the night preceding a journey and from which the worker is journeying, and

  (b) the place to which the worker is journeying with the intention of there spending the night following a journey.

Decision at first instance

Arbitrator Egan found that there was a real and substantial connection between the worker's employment and the incident out of which the personal injury arose. The mere fact that the worker was on her way to a work function was not sufficient to establish a real and substantial connection to her employment and "connection" in s 10 (3A) WCA may, but does not necessarily, convey the notion of a causal relationship. He referred to the decisions in *Bina v ISS Property Services Pty Ltd* [2013] NSWWCCPD 72 *(Bina)* and *Dewan Singh and Kim Singh t.as Krambach Service Station v Wickenden* [2014] NSWWCCPD 13 *(Wickenden)*. He also noted that in *Wickenden,* the fact that the worker was required to travel in darkness was sufficient to establish a real and substantial connection to employment, and in *Field v Department of Education and Communities* [2014] NSWWCCPD 16 (*Field)*, a real and substantial connection was established because the worker was rushing to commence work on time after receiving short notice to attend work.

Arbitrator Egan held that it was not necessary for the worker to establish that the employer demanded or required her to attend the party at 6pm for the relevant test to be satisfied. The employer had not persuasively challenged the worker's evidence (that she was tired after a full day's work and a busy year and that she was hurrying to get to the party or her pick-up point) and the authorities do not impose a test of reasonableness on the worker's motives.

Appeal

The employer appealed and alleged that the Arbitrator erred in law in finding that there was "a real and substantial connection" and made submissions that are summarised below:

- The Arbitrator drew an inference that could not be drawn as there was no evidence that there was a strict timeframe for the worker to attend the party and/or that she was fatigued;
- In *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31], the High Court stated:

  > It is for the tribunal of fact to assess the reliability of the evidence against the 'contemporary materials, objectively established facts and the apparent logic of events.

  It argued that there was no evidence that punctuality was important to the employer and while the worker may have been hurrying, *"taking an evaluative approach of impression and degree, the reasons for the hurrying were her own."* Therefore, the reliability of the evidence was not assessed against contemporary materials, objectively established facts and the apparent logic of events;
- The worker did not logically explain the basis for her alleged tiredness and it was not open to the Arbitrator to infer that she was tired without any logical or plausible reasons being given. It was also contradictory for the Arbitrator to find that common sense suggests that fatigue reduces awareness and reaction times; and
- The Arbitrator did not consider, or did not properly consider, its submissions during the Arbitration - particularly regarding the decision in *Field.*

Keating P held that that the appellant bears the onus of proving that the Arbitrator's findings were not open to him – i.e. they were not supported by the evidence or the evidence, properly evaluated, demonstrated a contrary view to that adopted by the Arbitrator. He cited the decision of DP Roche in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25 *(Roulston)*, which set out the principles that apply to challenges to factual findings on appeal, as follows:

> 19. First, as error now defines the appeal process under s 352, the following principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ *in Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140; 140 ALR 227) are relevant (I have substituted 'Arbitrator' for 'trial judge' where appropriate):
>
> (a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.
>
> (b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the 'fact of the [Arbitrator's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
>
> (c) It may be shown that an Arbitrator was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong.'

20. The decision of Allsop J (as his Honour then was) in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 (Drummond and Mansfield JJ agreeing) is also instructive in the context of the need to establish error. His Honour observed (at [28]):

> In that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge. (see: *Roulston [19]- [20]).*

Keating P held that the relevant test under s 10 (3A) is less demanding than the test under s 4 WCA, and it may but does not necessarily convey the notion of a causal connection. It requires an association or relationship between the employment and the accident or incident that may be provided by establishing that the employment caused the accident or incident, but employment does not have to be the only or even the main cause. He found that the Arbitrator correctly observed the factors that contributed to the worker's fall and stated that whether any of the factors were connected to the accident out of which the personal injury arose was a question of fact that required the drawing of an inference - *"an exercise of the ordinary powers of human reason in the light of human experience"* (see: *G v H* [1994] HCA 48; 181 CLR 387, 390 (*G v H*).

Keating P also stated that an error is unlikely to be established where all that is shown is that the arbitrator made a choice between competing inferences (see: *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* [1992] FCA 184; 35 FCR 359, 369). The Arbitrator accepted the worker's evidence, which was not *'inherently illogical or unreliable"* or defective in some other material way (see: *Hamod*, [338]; *Thompson*, [21]) and he did not err in doing so. He also did not err in drawing the inference that common sense suggested that fatigue reduces awareness and reaction time and therefore contributed to the fall.

The appeal was dismissed.

WCC lacks power to make an order under s 53 WCA after the end of the second entitlement period in the absence of an award of weekly payments.

Paterson v Paterson Panel Workz Pty Limited [2018] NSWWCCPD 27 – Keating P – 6 July 2018

Background

On 18 October 2013, the appellant injured his left ankle and foot and he suffered consequential injuries to his right knee and left hip. He claimed compensation and received voluntary payments of weekly compensation for more than 205 weeks in respect of his injuries. However, on 13 December 2017, he left Australia with the intention of residing permanently in the Philippines.

On 2 January 2018, the appellant lodged an ARD and claimed lump sum compensation and medical and related treatment expenses in respect of his injuries.

However, on 19 January 2018, the appellant's solicitor gave written notice to the respondent that the appellant 'would seek to remain on ongoing weekly compensation while he resides outside of Australia pursuant to s 53 of the 1987 Act'. On 1 February 2018, the respondent disputed that the appellant was entitled to further weekly payments as 'he had not obtained the requisite certificate or determination pursuant to s 53 of the 1987 Act, that his incapacity for work was likely to be of a permanent nature'.

On 9 February 2018, the ARD was amended to claim continuing weekly payments from 13 December 2017.

Relevant legislation

Section 53 WCA provides**:**

(1) If a worker receiving, or entitled to receive, a weekly payment of compensation under an award ceases to reside in Australia, the worker shall thereupon cease to be entitled to receive any weekly payment, unless an approved medical specialist certifies, or the Commission determines, that the incapacity for work resulting from the injury is likely to be of a permanent nature.

(2) If the incapacity is so certified or determined to be of a permanent nature, the worker is entitled to receive quarterly the amount of the weekly payments accruing due during the preceding quarter, so long as the worker establishes, in such manner and at such intervals as the insurer may require, the worker's identity and the continuance of the incapacity in respect of which the weekly payment is payable.

Clause 17 of Sch 8 to the *Workers Compensation Regulation 2016 (cl 17 of Sch 6 of the 2016 Regulation)* provides:

(1) On and from 1 September 2015, the weekly payments amendments apply to the compensation payable under Division 2 of Part 3 of the 1987 Act (in respect of any period of incapacity occurring on and after that date) to an existing recipient of weekly payments in respect of whom a work capacity assessment has not been conducted before that date.

(2) For the purposes of the application under this clause of the weekly payments amendments to an existing recipient of weekly payments who is in receipt of weekly payments of compensation immediately before 1 September 2015, the worker is taken (until a work capacity assessment is conducted in respect of the worker) to have been assessed by the insurer as having no current work capacity.

Decision at first instance.

On 5 March 2018, Senior Arbitrator McDonald conducted a conciliation/arbitration hearing. There was no dispute between the parties regarding the level of the appellant's incapacity or that this was 'permanent'.

However, on 25 March 2018, the Senior Arbitrator issued a Certificate of Determination, which declined to make a declaration under s 53 WCA as the appellant was not a worker 'receiving or entitled to receive a weekly payment of compensation under an award'. She held that the WCC has no jurisdiction to enter an award in the appellant's favour and that s 53 WCA did not apply. She stated at [20]:

Because Mr Paterson is not in receipt of payments under an award, s 53 does not apply and there is no jurisdiction to make a determination as to the permanence of his injury or to refer the question to an Approved Medical Specialist. Any entitlement to payments depends on the insurer's management of the claim.

Appeal

The worker appealed and alleged that the Senior Arbitrator erred:

(a) in determining that a favourable determination in respect of weekly payments, whether by operation of law or decision of an insurer, could not constitute an award within the meaning of s 53 WCA;

(b) in the alternative, in failing to consider whether a favourable determination in respect of weekly payments, whether by operation of law or decision of an insurer, could constitute an award within the meaning of s 53 WCA;

(c) in the alternative, in finding that the insurer had not raised a dispute about the appellant's entitlements to weekly compensation, and

(d) in the alternative, in finding that the Commission had no jurisdiction to resolve a dispute about weekly compensation.

Keating P stated that the issue for determination was whether the making of an "award" of compensation is within the exclusive domain of the WCC or extends to an insurer? That is, whether the making of payments after the second entitlement period could constitute an award as contemplated by s 53 WCA and therefore enliven the WCC's jurisdiction or the power of an AMS to issue a determination or certification under s 53 WCA.

Keating P rejected the appellant's submission that "award" includes a "positive decision (actual or deemed)" regarding the payment of weekly compensation by an insurer, for reasons including:

> 108…Third, whilst I accept that a "decision" of the Commission and an "award" of the Commission may mean the same thing in some circumstances, in reference to work capacity decisions, the language used is specific to "decisions by insurers". A decision by an insurer cannot be conflated with a decision or award of the Commission for the purpose of satisfying a jurisdictional fact necessary to invoke the Commission's jurisdiction under s 53 of the 1987 Act. As the legislative history demonstrates, s 53 of the 1987 Act introduced the requirement that for an order under s 53 to be made by the Commission, the worker must be receiving or entitled to receive weekly payments of compensation "under an award." …
>
> 110. The text of the legislation is plain. It restricts the application of s 53 of the 1987 Act, to workers who cease to reside in Australia where the worker is receiving or entitled to receive a weekly payment of compensation under an award. Unlike previous iterations of s 53 of the 1987 Act, the text does not refer to a worker receiving weekly payments whether it be pursuant to an award or otherwise. It is specific to workers who receive a weekly payment pursuant to an award. There is no dispute in this case that Mr Paterson was not receiving or entitled to receive compensation pursuant to an award of the Commission. He was receiving voluntary payments of weekly benefits until they were suspended by the insurer due to a purported failure to comply with s 53 of the 1987 Act.
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> 111. Further, it is an accepted canon of statutory construction that all words of a provision must have work to do. In *Project Blue Sky* (1998] MCA 28; 194 CLR 355) the High Court by majority held:
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> > … [a] court construing a statutory provision must strive to give meaning to every word of the provision. In *the Commonwealth v Baume* [1905] HAC 11; 2 CLR 405, Griffith CJ cited *R v Berchet* [(1688) [1794] EngR 1806; 1 Show KB 106; 98 ER 480] to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent' (at [71]).''

> 112. The use of the words in s 53 of the 1987 Act "under an award" must have meaning and must be given work to do. For the reasons above, "an award" under the 1987 Act or the 1998 Act invariably refers to the power of the Commission to make orders in respect of compensation benefits. It follows that the preferred construction of the words "under an award" in s 53 of the 1987 Act refers to the Commission's power to make orders or "awards" with respect to compensation benefits. Contrary to Mr Paterson's submission it does not extend to a decision of an insurer.

Keating P held that the appellant's circumstances identify a gap or lacuna in the legislation regarding the making of orders for the payment of compensation overseas, as it only permits the making of such orders by the WCC in circumstances where it has entered an award in respect of the worker's entitlements. It does not provide a remedy to enforce the payment of compensation overseas when they are being made voluntarily or under the deeming provision in *cl 17 of Sch 8 of the 2016 Regulation*. He also stated:

> 128. In *Lee*, I held that the Commission has very broad powers to hear and determine all matters arising under both the 1987 and 1998 Acts. However, the "exclusive jurisdiction" granted to the Commission, pursuant to s 105 (1) of the 1998 Act, is qualified by the express prohibitions in ss 43 (3) and 44 (5) of the 1987 Act. Those provisions removed the Commission's jurisdiction to determine any dispute about a work capacity decision of an insurer and prevent the Commission from making a decision in respect of a dispute before it that is inconsistent with a work capacity decision of an insurer (s 43 (3) of the 1987 Act). I further held that it was clear from the unambiguous terms of s 38 of the 1987 Act that an entitlement to compensation under that section must be assessed by an insurer, not by the Commission. For these reasons, I reject Mr Paterson's submission that the Commission is endowed with the requisite jurisdiction pursuant to s 105 of the 1998 Act, to make the orders sought.

Keating P noted that the decision in *Lee* was recently approved by the Court of Appeal in *Jaffarie v Quality Castings Pty Ltd* [2018] NSWCA 88. He rejected the appellant's submission that the WCC has jurisdiction to make an award for weekly compensation under s 38 WCA by operation of *cl 17 of Sch 8 of the 2016 Regulation* and that a determination under s 38 WCA "could not violate the prohibition contained in s 43 (3) of the 1987 Act." He held that this is a transitional provision relating to the effect on existing recipients of weekly payments of compensation where no work capacity assessment had been undertaken, which provides that *"a worker is taken (until a work capacity assessment is conducted in respect of the worker) to have been assessed by the insurer as having no current work capacity."* However, there is no entitlement to further weekly payments after the expiration of the second entitlement period unless the worker is assessed by the insurer as having no current work capacity *and is likely to continue indefinitely to have no current work capacity* (see s 38 (2)). In any event, the benefit of a deemed assessment under cl 17 is of limited duration and only applies until the insurer undertakes a work capacity assessment.

This is not the same as satisfying the precondition to the assessment of an entitlement under s 38 (2) WCA and it does not enliven the WCC's jurisdiction to enter an award under s 38 WCA. In turn, it does not satisfy the jurisdictional fact required for it to exercise power under s 53 WCA.

Keating P concluded:

> 139. In *Lee* I held that it was clear from the unambiguous terms of s 38 of the 1987 Act that an entitlement to compensation under the section must be assessed by the insurer, not by the Commission. In *Jaffarie,* Leeming JA (White and Macfarlan JJA agreeing) held that that statement was "entirely correct" (at [29]).
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> 140. It follows that while there may be a factual distinction between the present matter and *Lee*, the outcome is the same, namely that the Commission is precluded from making an award because the preconditions to entering an award pursuant to s 38(2) of the 1987 Act have not been satisfied. That is because the insurer has not made a work capacity assessment that deals with both limbs of s 38(2), and therefore the Commission has no jurisdiction to enter an award until the insurer assesses Mr Paterson's ongoing entitlements.

The Certificate of Determination was confirmed.

Comment:

*"Existing Recipient of Weekly Payments" is defined in Sch 6 Pt 19H Cl 1 WCA as "*an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments."

However, the decision indicates that the appellant was injured on 18 October 2013, after the commencement of the 2012 amendments to WCA. Therefore, he does not satisfy the definition of an 'existing recipient of weekly payments' and it appears that Sch 8 cl 17 of the 2016 Regulation does not apply.

The evaluative judgment of reasonableness in the context of s 11A (1) WCA

Mascaro v Inner West Council – [2018] NSWWCCPD 29 – Acting President Snell – 12 July 2018

Background

The appellant commenced employment with the respondent as a child care worker on 7 August 1989. From about 1991, she was a director of child care centres operated by the respondent. On 12 September 2014, an incident occurred in which a supervisor, who was subordinate to the appellant, spoke to her in a way that she found aggressive and she reported this to the respondent. The supervisor also made a complaint about the appellant. The respondent investigated, during which it interviewed staff at the child care centre, and they raised concerns about the appellant's leadership. On 24 October 2014, the appellant was transferred to another child care centre at her own request.

On 12 November 2014, the respondent dismissed the complaints made by the appellant and the supervisor. However, on 13 November 2014, it issued a Formal Counselling Report to the appellant, which concluded that allegations against her had been substantiated – namely: she told staff to have children keep their voices down; she did not adhere to staff/children rations; and she was rude to staff. It notified her that these behaviours were not acceptable and that a formal counselling plan would be issued and that she would be provided with a development plan to assist her to develop her leadership skills.

On 12 January 2015, the appellant commenced a 'Professional Development and Mentoring Program'. On 16 March 2015, the appellant attended a meeting with representatives of the respondent and a support person, during which she was advised that following a period of pre-arranged extended leave she would be required to undertake further mentoring. She was upset by this decision and consulted her GP on 17 March 2015. She obtained a medical certificate that indicated that she had no current work capacity. She lodged a claim form dated 24 March 2015 and on 2 July 2015, the insurer disputed the claim on grounds that included reliance upon s 11A (1) WCA.

An ARD was registered on 22 March 2017 and the matter was listed for conciliation and Arbitration on 7 June 2017. It was listed for further hearings on 21 June 2017 and 28 July 2017 and written submissions were then filed.

Decision at First Instance

On 8 January 2018, the Arbitrator issued a Certificate of Determination and Statement of Reasons for Decision. He accepted that the worker had developed a Major Depressive Disorder or Episode by late 2016 and held that the incident on 12 September 2014 and the requirement for mentoring contributed were the main contributing factors to the contraction of a psychological injury. However, he held that the employer's actions were the predominant cause of the psychological injury as they were more numerous than the incident on 12 September 2014 and more proximate to the appellant's taking of sick leave on 17 & 18 March 2015.

The Arbitrator referred to *Northern NSW Local Health Network v Heggie* [2018] NSWWCC 3 and quoted from the summation of principle set out at [59] of that decision. He concluded that the respondent's investigation of the allegations against the appellant and the outcomes of that investigation, which included communication of the adverse findings, the administration of the mentoring program and the communication on 16 March 2015, were properly characterised as actions with respect to 'discipline'. He held that the reasonableness of those actions was "to be determined objectively weighing all the relevant factors" and referred to the decision of Geraghty CCJ in *Irwin v Director- General of School Education* (unreported - 18 June 1998). He held that the respondent's actions with respect to discipline were 'reasonable' and that the s 11A defence was made out. He entered an award for the respondent.

Appeal

The appellant lodged an application to appeal on 6 February 2018, but this was rejected as it was lodged late. The application was re-lodged on 19 February 2018, with submissions in support of an application for extension of time. It set out the following grounds of appeal:

1. The Arbitrator did not identify the correct test of causation in considering the defence pursuant to s 11A (1) of the 1987 Act;
2. The Arbitrator did not apply the correct test of causation in considering the defence pursuant to s 11A (1) of the 1987 Act;
3. The Arbitrator failed to consider the opinion of Dr Allnutt, that the worker's deteriorating psychological state, after 12 September 2014, compromised her capacity to perform adequately in a mentoring program;
4. In considering the test of causation when assessing the defence pursuant to s 11A (1) of the 1987 Act, the Arbitrator took account of the causal contribution of workplace events other than those he had found to constitute 'injury' within the meaning of s 4 of the 1987 Act;

5. The Arbitrator erred in determining that the requirement that the worker participate in a mentoring program constituted action in respect of 'discipline' for the purposes of s 11A of the 1987 Act; and

6. The Arbitrator erred in finding that the actions of the Council in respect of discipline were 'reasonable'.

Application for extension of time

The appellant submitted that the delay in lodgement was due to several factors, including an administrative error by counsel, and that her rights potentially involve a substantial entitlement that she would be unable to exert if time was not extended. She also submitted that the delay was not due to any personal delinquency and the interests of justice favour granting an extension of time.

The respondent opposed the application and argued that exceptional circumstances were not established and that as the appeal cannot succeed on its merits, the application should be refused.

Snell AP cited the decision of DP Roche in *Allen v Roads and Maritime Services* [2015] NSWWCCPD 39, which summarised the principles set out in *Gallo v Dawson* [1990] HCA 30 and set out the matters to be considered, namely: (a) the history of the proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences for the parties of the grant or refusal of the application for the extension of time; (e) the prospects of the applicant succeeding in the appeal, and (f) upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for extension of time is granted.

He also cited the decision of the Court of Appeal in *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* [2014] NSWCA 34, per Basten JA (Beazley P and Leeming JA agreeing), which held that the primary considerations on an application for leave to extend time are: (a) the extent of the delay and reasons therefor; (b) the prejudice to the applicant if the application were to be refused; (c) the prejudice to the defendant from the delay if the application were to be granted; and (d) the prospects of success on the proposed appeal.

He also cited the decision of Campbell JA in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290, and stated that in deciding whether 'exceptional circumstances' were present, it was necessary to bear in mind 'System objectives' and 'Procedure before the Commission' (*Vaughan v Secretary, Department of Education* [2018] NSWWCCPD 1, [23]).

Snell AP noted that the appellant's submissions did not specifically address 'exceptional circumstances' and that the appeal was lodged late because counsel diarised an incorrect date for lodgement of the appeal. Based upon the decision of *O'Carroll Constructions Pty Ltd v Burgess* [2007] NSWWCCPD 224, [22], in which DP Roche held that *"inadvertence or administrative errors by a legal practitioner do not amount to exceptional circumstances",* he held that exceptional circumstances were not established.

Merits of the Appeal

In relation to the merits of the appeal, Snell AP held that grounds 1 to 4 could not succeed. He noted that in *Ponan v George Weston Foods Ltd*, Handley ADP held that 'predominant' in s 11A (1) WCA meant "mainly or principally caused" and that this was applied by Roche DP in *Temelkov v Kemblawarra Portuguese Sports & Social Club Ltd*. In that matter, Roche DP also dealt with the s 11A (1) causation issue, on the basis that *Kooragang Cement Pty Ltd v Bates* applied and that *"causation is a question of fact to be determined on the evidence in each case".* He stated:

> 91. It would have been desirable for the Arbitrator to more fully describe the test on causation which he applied. However, it was not essential, providing he actually applied an appropriate test. The balance of these grounds essentially hinge on whether there was error in application of an appropriate test…
>
> 105…On a fair reading of the Arbitrator's reasons, it is clear that he found the matters described at both [88] and [92] of his reasons to be causative of the psychological injury. It follows that he did not commit the error alleged in ground no 4, of applying the causation test in s 11A (1) to matters which were not part of a relevant cause of injury. Ground no 4 cannot succeed.
>
> 106. Ground no 2 challenges the Arbitrator's approach in comparing the relative contributions of the incident on 12 September 2014, with the other workplace stressors which he identified as causative. In the absence of the incident on 12 September 2014, the other stressors found to be causative were all workplace stressors, which were found to constitute actions of the Council in respect of 'discipline'. There were no other competing causes of the psychological injury. In these circumstances, ground no 2 cannot succeed…

Snell AP also cited the decision of Sackville AJA (Ward JA agreeing) in *Heggie,* that 'discipline' in s 11A (1) WCA is *"capable of extending to the entire process involved in disciplinary action, including the course of an investigation (at [59]).*" He stated:

> 135…The parties' submissions do not deal with this broader issue in any detail, but direct themselves to whether the factual situation at hand can be appropriately characterised as 'discipline'. Applying the clear meaning of the text, in my view the Arbitrator did not err, in his conclusion at [95]– [96] of his reasons, that the Council's relevant actions were "with respect to discipline". This outcome does not depend on the term 'discipline' being given a broad meaning consistent with the decision in *Kushwaha*. The Arbitrator's approach was also consistent with that in *Sinclair*, of considering the entirety of the conduct. Ground no 5 cannot succeed.

In relation to ground 6, he stated:

> 142. For ground no 6 to succeed, it is necessary that Ms Mascaro identify "error in making the evaluative judgment as to reasonableness … factual error of the kind described by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* [(1966) 39 ALJR 505 at 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140; 140 ALR 227)" …The factual finding on this issue involved elements of fact, degree, opinion or judgment. It would not be appealable error if I was of the view that a different outcome was preferable. I accept the submission of the Council, that the Arbitrator's findings of fact relevant to 'reasonableness' were available on the evidence. Ground no 6 cannot succeed.

The application for an extension of time under r 16.2 (12) of the WCC Rules was refused.

Parking Patrol Officer is not a Police Officer within the meaning of Sch 6, Pt 19H, cl 25 WCA

Mahal v The State of New South Wales (No 3) - [2018] NSWWCCPD 30 – Acting President Snell – 20 July 2018

Background

The issue upon appeal was whether the appellant, who was employed by the NSW Police Force as a Parking Patrol Officer was a 'Police Officer' within the meaning of Sch 6, Pt 19H, cl 25 WCA, such that she was not subject to the 2012 amendments and s 39 WCA.

The appellant was employed by the respondent from 13 January 1997 to 4 December 2001. She suffered work-related injuries to her neck, back, both arms and both legs and received compensation and in 2003, she received lump sum compensation under s 66 WCA (Table of Maims) and under for pain and suffering under s 67 WCA.

In 2016, the appellant lodged an ARD that claimed lump sum compensation, weekly payments and medical treatment expenses, but ultimately the only matters that proceeded were a claim for further lump sum compensation and a threshold dispute. The AMS assessed 7% WPI and this assessment was upheld despite a series of unsuccessful medical and Presidential appeals and applications for reconsideration by the appellant.

On 17 August 2017, the Insurer notified the appellant that as the AMS assessed less than 21% WPI, she would not be entitled to receive weekly payments beyond 260 weeks. However, on 24 August 2017, the appellant responded that s 39 WCA did not apply to her because she was 'a Police Officer'. On 13 September 2017, the insurer issued a notice under s 39 WCA and advised the appellant that her last date of entitlement to weekly payments would be 1 January 2018. The appellant then filed an ARD claiming continuing weekly payments from 1 January 2018.

Decision at first instance

The appellant was legally represented in the proceedings before the Arbitrator. On 19 December 2017, Arbitrator Dalley directed the parties to file and serve written submissions dealing with the issue of whether the appellant was, at the relevant time, a Police Officer and therefore exempted from the operation of the 2012 amendments. The issue was then to be determined on the papers.

The appellant filed lengthy written submissions, accompanied by 79 pages of material and short submissions from her counsel. These referred to decisions in *State of New South Wales v Stockwell* [2017] NSWCA 30 and *State of New South Wales v Chapman- Davis* [2016] NSWCA 237, and submitted that she was 'an exempt worker being a Police Officer' and she cited aspects of her employment that she alleged were consistent with being 'a Police Officer.' She also argued that 'Police Officer' was not defined in the WCA and that only the dictionary meaning could be read into it. She described the application of the definition of 'police officer' in the *Interpretation Act 1987* as *'a figment by the respondent to avoid the ordinary dictionary meaning'* and that the respondent's argument was *'far-fetched and preposterous.'* and that

The respondent referred to various relevant statutory provisions and relied upon decisions in *Muscat v Parramatta City Council* [2014] NSWWCC 406 and *D'Angelo v NSW Police Force* [2016] NSWWCC 54. It submitted that management of the appellant's claim was consistent with her not being an exempt worker and that she was subject to the 2012 amendments.

On 8 March 2018, the Arbitrator issued a Certificate of Determination and Statement of Reasons. After setting out the legislative provisions, the Arbitrator noted that the definition of 'Police Officer' in the *interpretation Act* applied, in the absence of contrary intention in the *Interpretation Act, or the Act,* or instrument concerned. He rejected the proposition that the beneficial nature of the legislation, or sections 3 and 254 *WIMA* demonstrated a contrary intention – to displace the meaning established by the *Interpretation Act* and stated that where there was conflict between the beneficial nature of the legislation and the 2012 amending Act, it was necessary to identify the leading and subordinate provisions. He concluded that the more specific definition in the *interpretation Act* must override a more general provision in other legislation.

The Arbitrator rejected the appellant's submission that the respondent 'acquiesced' to an allegation that she was a 'Police Officer' in earlier claims, as her status was not at issue in the earlier claims. He also distinguished *Stockwell* and *Chapman-Davis, as being decisions involving the term 'Paramedic',* which was not defined in either the workers compensation legislation or the *Interpretation Act.* He accepted that the decision in *Muscat* applied. Therefore, the appellant did not fall within the statutory definition of 'Police Officer' and she was not an exempt worker and the WCC had no power to order the payment of weekly compensation after 1 January 2018.

Appeal

The appellant appealed on the following grounds:

1. The Arbitrator erred in applying the definition of 'police officer' in the *Interpretation Act*, rather than a meaning of that term that includes the appellant and flows from the terms of the 1998 Act itself to the *Police Regulation (Superannuation) Act 1906*.
2. The respondent is estopped, by its failure to dispute the appellant's status as a 'police officer' in the original proceedings in which the appellant was awarded benefits over a decade ago, from now asserting she is not a 'police officer' for the purposes of the 2012 Amending Act.
3. The Arbitrator erred in not following "the essence of the arguments" in *Stockwell* and *Chapman-Davis*, cases decided by the President of the Commission, in relation to the exemption of ambulance officers.
4. The Arbitrator erred in applying the reasoning in *Muscat*. Some of the arguments made in the current matter were not present in *Muscat*. The appellant was not given an opportunity to address the application of *Muscat*, including whether it was correctly decided.
5. The decision of the Arbitrator is illogical based upon *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 decision of the High Court, since the reasoning is adopted in a workers compensation matter by the Court of Appeal in a comment of Sackville AJA in *Jaffarie v Quality Castings Pty Ltd* [2015] NSWCA 335 at [63].
6. The appellant was denied procedural fairness, in that the Arbitrator denied her the opportunity to be heard when such a request was made.
7. The Arbitrator erred, in that he accepted the respondent's arguments going to whether the appellant was an exempt worker in his decision on 20 February 2018, before his decision on 8 March 2018.

Relevant Legislation

Schedule 6, Part 19H, clause 25 of the 1987 Act provides:

> **25 Police officers, paramedics and firefighters**
>
> The amendments made by the 2012 amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.

Section 21 of the *Interpretation Act* relevantly provides:

> **21 Meanings of commonly used words and expressions**
>
> (1) In any Act or instrument:
>
> …***police officer*** means a member of the NSW Police Force who is a police officer within the meaning of the Police Act 1990.

Section 3 of the *Interpretation Act* provides:

> **3 Definitions**
>
> (1) In this Act:
>
> *instrument* means an instrument (including a statutory rule or an environmental planning instrument) made under an Act, and includes an instrument made under any such instrument.
>
> (2) In this Act:
>
> (a) a reference to a function includes a reference to a power, authority and duty, and
>
> (b) a reference to the exercise of a function includes, in relation to a duty, a reference to the performance of the duty.

Section 5 of the *Interpretation Act* provides:

> **5 Application of Act**
>
> (1) This Act applies to all Acts and instruments (including this Act) whether enacted or made before or after the commencement of this Act.
>
> (2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.
>
> (3) Wherever appropriate, this Act applies to a portion of an Act or instrument in the same way as it applies to the whole of an Act or instrument.
>
> (4) Nothing in this Act excludes the application to an Act or instrument of a rule of construction applicable to it and not inconsistent with this Act.
>
> (5) This section does not authorise a statutory rule to exclude or modify the operation of Part 6 (statutory rules and certain other instruments).
>
> (6) The provisions of sections 24, 28, 29, 30, 30B, 33, 42, 43, 69A, 75 and 80 that apply to a statutory rule also apply to an environmental planning instrument.

Section 3 of the *Police Act 1990* (the *Police Act*) provides:

3 Definitions

(1) In this Act: …

police officer means a member of the NSW Police Force holding a position which is designated under this Act as a position to be held by a police officer.

Section 12 of the *Police Act* provides:

12 Ranks and grades of police officers

(1) The ranks of police officers within the NSW Police Force are (in descending order) as follows:

(a) Commissioner.

(b) NSW Police Force senior executive.

(c) Superintendent.

(d) Inspector.

(e) Sergeant.

(f) Constable.

(2) The Commissioner, with the approval of the Minister, may specify different ranks for police officers who are NSW Police Force senior executives.

(3) The regulations may specify grades within the ranks of superintendent, inspector, sergeant and constable.

Section 13 of the *Police Act* provides:

13 Oath to be taken by persons exercising police functions

(1) Before a person exercises any of the functions of a police officer, the person must take the oath or make the affirmation of office as a police officer in accordance with the regulations.

(2) A police officer is not required to take a further oath or make a further affirmation after a change in the officer's position in the NSW Police Force, so long as the officer remains in the NSW Police Force.

(3) An oath or affirmation under this section is to be administered by or made before the Commissioner or any other person authorised to administer an official oath under the Oaths Act 1900.

The definition of 'worker' in s 4 of the 1998 Act relevantly reads:

worker means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing). However, it does not include:

(a) a member of the NSW Police Force who is a contributor to the Police Superannuation Fund under the *Police Regulation (Superannuation) Act 1906*...

Section 39 WCA (inserted by the 2012 Amending Act) provides:

39 Cessation of weekly payments after 5 years

(1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.

(2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

Note. For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

(3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4).

In relation to grounds 1 to 3, Acting President Snell found:

- The appellant's submissions, in so far as they relied upon the *Police Regulation (Superannuation) Act* and her assertion that she was a contributor pursuant to that Act (and therefore a Police Officer) could not succeed. The definition of worker in *s 4 WIMA* is not derived from that Act and exempts from the application of WCA and WIMA, certain people whose rights to compensation derive from that Act. He stated that the very fact that the appellant was seeking to establish that she was a 'police officer', and therefore quarantined from the effect of the *2012 Amending Act*, is illustrative of the fact that her rights are pursuant to the *WCA* and *WIMA*.
- *Chapman-Davis* and *Stockwell* do not support the proposition that whether a worker falls within one of the exempt categories of worker in *Sch 6, Pt 19H, cl 25 WCA* depends on an analysis of the worker's duties from time to time. *Chapman-Davis* involved a worker who was classified as a 'paramedic', but who was injured when working on a 12-month secondment as a health adviser. It was common ground that the duties of a health adviser were different to those of a paramedic. Gleeson JA (McColl JA agreeing) said at [74]:

  > If, as should be accepted, the language of the exemption is not to be construed as containing the adjectival limitation of 'operational', it may also be doubted that a functional limitation or qualification of the type suggested by the appellants was intended, there being no particular duties which the nominated classes of worker are required to perform to engage the exemption. The language used in the exemption, '... in respect of an injury received by a ... paramedic', is broad and unqualified. The better view is that whether a worker answers the statutory description in the exemption is determined by their designation or holding the status as a 'police officer, paramedic or firefighter' at the time of receipt of an injury, not by reference to the duties they are *required* to perform.

- The effect of the Court of Appeal decision in *Chapman-Davis* was summarised by McColl JA in *Stockwell* at [55]:

  > In brief, the court held that the focus of the cl 25 exemption was a designation or status of the worker, rather than certain characteristics or functional aspects of a person's work at the time the relevant injury was suffered.

- In *Stockwell* McColl JA described the task at hand in considering the application of cl 25:

> The SNSW's core contention turns on the construction of the 2006 Award. The term 'paramedic' had a particular meaning for the purposes of cl 25. That meaning was determined in *Chapman-Davis* as turning on whether a person employed by the Ambulance Service held the designation or status of 'paramedic' at the date of his or her injury. To resolve that issue in the present case, it was necessary for the arbitrator and, if appropriate within the confines of s 352 of the WIM Act, the President, to engage in a process of fact-finding *concerning the respondent's status within the Ambulance Service* and, too, to construe the 2006 Award and cl 25. (excluding citations) (emphasis added)

- The evidence does not suggest that the appellant was ever classified as, or held the status of, a 'police officer'. The ranks of police officers set out in s 12 of the *Police Act* does not include *'Parking Patrol Officer'.* A person carrying out the functions of a 'police officer' is required to take an oath or affirmation in compliance with s 13 of the *Police Act'.* However, there was no evidence that the appellant did so.
- The Arbitrator did not err in failing to consider the 'indicia' identified by the appellant, but these were not determinative of the issue of whether she was a 'police officer' within the meaning of cl 25.
- In any event, the Court of Appeal's decisions in *Chapman-Davis* and *Stockwell* direct attention to the classification or status of a worker. For the reasons set out above, those decisions do not assist the appellant.
- In relation to the appellant's submission regarding the beneficial nature of the legislation, the application of the principle stated by the High Court in *Bird v The Commonwealth* (1988) 165 CLR 1, is dependent upon the existence of 2 possible interpretations of the legislation being construed. However, the Arbitrator identified a single properly available interpretation, which was consistent with the decisions in *Muscat* and *D'Angelo*. This involved applying the definition found in the *Interpretation Act*. Therefore, the beneficial nature of the legislation does not assist the appellant.
- The evidence does not suggest any estoppel that would prevent the respondent from disputing whether the appellant was a 'police officer'.

Acting President Snell also rejected grounds 4 and 5. In relation to ground 6, which alleged an 'error of discretion' in denying the appellant an 'opportunity of arbitration or oral hearing', he stated:

> 100. The appellant raised two specific arguments, based on an alleged failure to afford her procedural fairness, relating to the opportunity to address the decision in *Muscat*, and whether she should have been informed that her submissions on s 5(2) of the *Interpretation Act* may not be accepted. These submissions are rejected for reasons given above. The appellant additionally raises a more general argument, that she was denied procedural fairness because, in her submissions in reply, she requested an oral hearing. Her submissions do not indicate what further submissions she sought to put, or why they were not put in her primary submissions to the Arbitrator, and her submissions in reply. I note that the appellant was legally represented at that time. Section 354(6) of the 1998 Act clearly entitled the Arbitrator, in the exercise of his discretion, to deal with the matter in the way that he did. He afforded the appellant the opportunity to make submissions. The appellant has not identified any basis on which the Arbitrator failed to afford her procedural fairness, in determining the issue before him without an oral hearing. She has not identified any basis on which the Arbitrator erred, applying the principles in *House v*

The King. I note the Arbitrator's reasons are not raised as an issue. Ground No 6 is rejected.

In relation to ground 7, Acting President Snell noted that the appellant appeared to raise the issue of bias based on pre-judgment, but whether actual bias or apprehended bias is not specified. At the least, the Arbitrator expressed an a priori view that was inconsistent with the appellant's argument regarding the relevant definition in the *Interpretation Act.* He stated:

> 110. How the appellant would have sought to articulate the basis of any allegation of bias is unknown, as no application was made before the Arbitrator. The appellant has not made submissions on this appeal dealing with such matters, other than the bare stating of the ground. The appellant was legally represented during the proceedings before the Arbitrator. The Direction, containing the passage to which this ground refers, was dated 20 February 2018. The Arbitrator's decision was issued on 8 March 2018, a little more than two weeks later. There is no suggestion that any application was made to the Arbitrator before his decision was issued, raising bias in either of its forms.
>
> 111. In *Vakauta v Kelly* [1989] HCA 44; 167 CLR 568, [5] Brennan, Deane and Gaudron JJ stated:
>
> > Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious.
> >
> > In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.
>
> 112. The above passage was applied in *Smits v Roach* [2006] HCA 36; 227 CLR 423 and in the New South Wales Court of Appeal in *Brown Brothers v Pittwater Council* [2015] NSWCA 215. Consistent with the approach taken in those cases, the appellant should be taken to have waived any right she may have had, to object to the Arbitrator determining the matter, on the basis of either actual or apprehended bias (*Smits* [44] – [49], *Brown Brothers* [43]).
>
> 113. If I am wrong on this point, any ground based on actual or apprehended bias could not succeed in any event, due to the lack of articulation of the basis of any objection to the Arbitrator continuing to deal with the matter.

The appeal failed.

Workers Compensation Commission - Medical Appeal Panel Decisions

Apportionment of permanent impairment for effects of later injury

Nicol v Macquarie University – MI-2738/16 – Arbitrator Egan, Professor Glozier & Dr Parmegiani – 11 July 2018

Background

This matter was previously discussed in WIRO Bulletin no. 2 in relation to the Judicial Review of a decision by a previous Medical Appeal Panel (MAP) decision by the Supreme Court of NSW. Harrison AsJ held that the decision of the previous MAP was vitiated by jurisdictional error and she revoked the MAP's MAC and remitted the matter to the WCC for determination by a differently constituted MAP according to law.

Decision of MAP upon remitter

The MAP determined, relevantly:

> 115. However, the extent of any impairment causally related to the subject injury remains a matter for determination within accordance with Chapter 7 Part 7 of the 1998 Act which in this case is remitted to this Panel.
>
> 116. Her Honour specifically notes that even though the Cambridge aggravation of the subject injury may also fall within the statutory definition of "injury" under s 4(b) of the 1987 Act (if it were relevant in a claim against Cambridge), it does not follow that the aggravation alone results in a new injury unless the causal chain has been broken. The crux of the jurisdictional error therefore was that the Panel applied cl 11.10, which implicitly assumes that none of the developments (the incident and the medical deterioration) after the respondent joined Cambridge were causally linked to the subject injury. That, is the original Panel mistakenly approached the matter as if impairment resulting from the subject injury was frozen to the state it was manifest at the time of the Cambridge employment.

The appellant sought that the worker be re-examined by a member of the MAP, but the MAP determined that the evidence before it was sufficient and that a further examination was not required. It identified 2 issues for determination, namely: (1) causation and (2) PIRS issues.

In relation to causation, the MAP relied upon the test set out in In *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; (1994) 10 NSWCCR 796 (*Kooragang*), in which Kirby P said:

> The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common-sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. (at 810)

The MAP held:

> 142. In *Aboushadi*, the Court of Appeal considered the relevant principles where a second accident caused greater damage due to the result of an earlier accident. Mason P (with whom Meagher JA and Barr J agreed) stated:

22. His Honour correctly applied *Fishlock v Plumber*, a case which (Others cited) was cited by Malcolm CJ in *State Insurance Commission v Oakley* (1990) Aus Tort Reports 81-003 at 67 to be authority for the first two of the following propositions:

(1) where the further injury results from a subsequent accident, which would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by that negligence;

(2) where the further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the defendant's negligence; and

(3) where the further injury results from a subsequent accident which would have occurred had the plaintiff been in normal health and the damage sustained include no element of aggravation of the earlier injury, the subsequent accident and further injury should be regarded as casually independent of the first.

The MAP determined that a portion of the assessed WPI should have been apportioned to the later injury, but that in assessing the effects of a later injury the Panel does not have the luxury of the 'default deduction' of one-tenth under s 323 WIMA. It held:

149. There is no scientific or strictly medical methodology for the Panel to adopt in isolating the ongoing effects of the subject injury on impairment. Doing the best we can, however, and on the basis that we consider the effects of the Cambridge injury to be more than minimal, but much less than the majority, we conclude that one-fifth of the presenting impairment is due to the Cambridge injury and not due to the subject injury.

The Panel considered the PIRS issues that were raised by the appellant, but dismissed these grounds of appeal. It revoked the MAC (which assessed 50% WPI due to the subject injury) and issued its own MAC, which assessed 40% WPI because of the subject injury (i.e. 80% x 50%).

Workers Compensation Commission – Arbitrator Decisions

Statutory interpretation of s 38A (1) WCA – Weekly payments to a worker with highest needs may exceed the entitlement that is calculated against PIAWE

White v Vostek Industries Pty Limited [2018] NSWWCC 161 – Arbitrator Capel – 19 June 2018

NB: This decision is currently the subject of an Appeal

Background

The worker injured his right wrist on 20 July 2005 and he ceased work in February 2009. The Insurer accepted liability and continued to make voluntary weekly payments of compensation to the worker. On 23 August 2010, an AMS assessed 32% WPI due to the injury. The worker then obtained alternative employment with MMP from 19 August 2011 to 13 January 2017, and with Countrybuilt from 1 May 2017 until November 2017.

On 12 May 2016, the worker's solicitor asked the insurer to increase the rate of weekly payments to the minimum rate prescribed under s 38A (1) WCA.

However, the insurer disputed that entitlement and asserted that the correct rate was $315.50 per week, which represented the difference between 80% of PIAWE ($1,300 per week) and the worker's current earnings ($948.50 per week). It also decided that if the prescribed rate of $793 was used to calculate the worker's entitlement he would not be entitled to weekly compensation.

The worker's solicitor maintained that the worker was entitled to $788.32 per week based upon a proper reading of s 38A WCA, but the insurer maintained the dispute and an ARD was registered on 20 October 2017. This was amended during the teleconference to claim weekly payments under s 38A WCA from 17 September 2012 to 13 January 2017 and from 1 May 2017 to 20 November 2017. The dispute proceeded to arbitration and the decision was deferred pending publication of an appeal decision in *Hee v State Transit Authority of NSW* [2018] NSWWCCPD 6 *(Hee No 2).*

On 19 June 2018, the Arbitrator issued a Certificate of Determination, in which he determined that the worker was entitled to payments of weekly compensation under s 38A WCA and he ordered the respondent to make payments at the rate of $788.32 per week, as adjusted, during the periods claimed with credit to the respondent for payments made. He noted that the worker was an existing recipient of weekly payments under s 40 WCA from 17 September 2012 to 3 October 2017; he was apparently transitioned onto the current scheme in October 2017; the insurer paid him weekly compensation at varying rates during the third entitlement period; and there was no dispute that he was a worker with highest needs.

Relevant legislation

Section 38A WCA provides:

38A Special provision for workers with highest needs

(1) If the determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision results in an amount that is less than $788.32, the amount is to be treated as $788.32.

(2) If the amount specified in subsection (1) is varied by operation of Division 6A, a weekly payment of compensation payable to a worker with highest needs before the date on which the variation takes effect is, for any period of incapacity occurring on and after that date, to be determined by reference to that amount as so varied.

The *Workers Compensation Benefits Guide October 2017 (the Benefits Guide)* issued by SIRA provides some guidance in respect of the payment of weekly benefits to workers with highest needs as follows:

> **Weekly payments**
>
> Workers with more than 30 per cent permanent impairment now have access to a minimum weekly amount of $788.32 per week. If the worker's income (made up of weekly payments and any earnings) falls below $788.32, the insurer will increase the weekly payments to this amount. The change applies to all weekly payments on or after 17 September 2012. This amount will be indexed in April and October each year. The first indexed adjustment review date is 1 April 2016…" (at page 13), and
>
> **Special provision for workers with highest needs**
>
> Workers with highest needs (more than 30 per cent permanent impairment) have access to a minimum weekly payment of compensation of $788.32 per week. If the worker's determined weekly payment of compensation that the worker is entitled to receive is below $788.32, the insurer will increase the weekly payments to this amount. This amount will be indexed in April and October each year. The first indexed adjustment review date is 1 April 2016" (at page 20).

Statutory interpretation

Arbitrator Capel referred to the principles espoused by the High Court of Australia in *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 and to the decision of DP Roche in *Hesami v Hong Australia Pty Ltd* (2011) NSWWCCPD 14 at [43] – [44], which provided an 'excellent summary of the principles for statutory interpretation set out in *Wilson v State Rail Authority of New South Wales"* [2010] NSWCA 198, as follows:

> In interpreting this provision, I must apply the principles of statutory construction explained by Allsop P (Giles and Hodgson JJA agreeing) in *Wilson v State Rail Authority of New South Wales*. It is convenient to set out his Honour's statement in point form (excluding citations):
>
> (a) '[i]t is the language of Parliament that must be interpreted and construed';
>
> (b) 'in construing an Act, a court is permitted to have regard to the words used by Parliament in their legal and historical context';
>
> (c) '[c]ontext is to be considered in the first instance, not merely when some ambiguity is discerned';
>
> (d) '[c]ontext is to be understood in its widest sense to include such things as the existing state of the law and the mischief or object to which the statute was directed';
>
> (e) '[f]undamental to the task, of course, is the giving of close attention to the text and structure of the Act, as the words used by Parliament to effect its legislative purpose;'
>
> (f) 'general words, informed by an understanding of the context, and of the mischief to which the Act is directed, may be constrained in their effect.'

Further, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, the High Court discussed the importance of context in statutory interpretation, as follows (at [47]):This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

The Arbitrator also referred to the decision of Keating P in *Hee No 2* at [139] – [144]:

> Section 38A is a special provision which provides additional weekly compensation, in certain circumstances, to workers of highest needs. Namely, those workers who have an assessed whole person impairment of more than 30% or an Approved Medical Specialist has declined to make an assessment on the basis that the degree of permanent impairment is not fully ascertainable.
>
> The text of s 38A makes it clear that the additional special benefits are only payable if certain conditions are satisfied. Those conditions are as follows.
>
> First, there must be a 'determination' made of the amount of weekly payments of compensation payable in accordance with the subdivision (Subdiv 2). In the circumstances of this case and for the reasons discussed below, as Mr Hee is still within the second entitlement period that must mean a determination made in accordance with s 37 of the 1987 Act.

Second, s 38A provides that there must be an '*amount* of weekly payments of compensation *payable*' (emphasis added) following such a determination.

Third, the amount of compensation must be an amount that is less than $788.32. It seems plain that the general purpose of inserting s 38A into the legislation is to ensure that workers with highest needs receive additional weekly compensation payments compared to those workers with an impairment of 30% or less. That is not to say that all workers with highest needs receive the additional compensation. Such compensation is only available to those workers who meet the conditions set out above.

The Arbitrator stated that three criteria must be satisfied, namely:

(1) There must be a determination of weekly compensation payable in accordance with sub-div 2, namely in accordance with s 38 (7) of the 1987 Act;

(2) Amounts of compensation must be "payable"; and

(3) The amounts paid were less than the prescribed rate of $788.32 as adjusted.

As these criteria were satisfied, the worker was entitled to receive weekly payments under s 38A WCA at the rate of $788.32 per week, as adjusted, from 17 September 2012 to 13 January 2017 and from 1 May 2017 to 30 November 2017, less any payments already made.

Fixing the date of injury for a hearing loss claim where the worker is not employed in noisy employment when the claim is made

Van Poppel v Penrith Rugby League Club Limited [2018] NSWWCC 165 – Arbitrator Isasksen – 27 June 2018

Background

The worker was employed by the respondent as a bar attendant and was exposed to loud music between 1977 and 1982. After 1982 she continued to work for the respondent, but she was not exposed to any loud noise.

On 9 December 2016, she claimed lump sum compensation for hearing loss (13.7% BHI, which equates to 7% WPI) and hearing aids, and alleged that the injury occurred on 1 January 1982. This claim was duly made upon GIO (the insurer on risk in 1982), but it disputed the claim, mainly on the basis that the deemed date of injury was 9 December 2016 (the date of notification of the injury) and it was not on risk.

The worker then gave notice of the claim to CEM (the insurer on risk from 1 July 2012 to 30 June 2017), but it also disputed the claim, on the basis that the deemed date of injury was in 1982 and it was not on risk.

Relevant legislation

Section 17 WCA provides:

(1) If an injury is a loss, or further loss, of hearing which is of such a nature as to be caused by a gradual process, the following provisions have effect:

(a) for the purposes of this Act, the injury shall be deemed to have happened:

(i) where the worker was, at the time when he or she gave notice of the injury, employed in an employment to the nature of which the injury was due - at the time when the notice was given, or

(ii) where the worker was not so employed at the time when he or she gave notice of injury- on the last day on which the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice, …

(c) compensation is payable by:

(i) where the worker was employed by an employer in an employment to the nature of which the injury was due at the time he or she gave notice of the injury - that employer, or

(ii) where the worker was not so employed - the last employer by whom the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice…

(2) Without limiting the generality of subsection (1), the condition known as 'boilermaker's deafness' and any deafness of a similar origin shall, for the purposes of that subsection, be deemed to be losses of hearing which are of such a nature as to be caused by a gradual process.

Submissions

GIO submitted that s 17 (1) (a) (1) WCA applies and as the worker remained employed by the respondent after 1982, the injury is deemed to have occurred on 9 December 2016 (when notice of the injury was given). It relied upon the decision of Kirby A-CJ in *Blayney Shire Council v Lobley* [1995-1996] 12 NSWCCR 52 *(Lobley)* at [55]:

> It would have been easy for Parliament to have assigned responsibility for hearing loss to the last employer whose employment had actually caused some hearing loss. Instead, Parliament chose a different criterion, namely by assigning liability to the employer, at the time of the notice of injury, to the nature of whose employment the injury was due.
>
> There is an element of artificiality in section 17(1) of the Act. The injury, which is the result of a gradual process, is deemed to have happened at an arbitrary time, vis when the notice of injury is given. It is assigned to the employer at that time. But it is only assigned if that employer employed the worker in employment 'to the nature of which' the injury was due.

GIO argued that this interpretation is consistent with the decisions in *GIO Workers Compensation (NSW) Ltd v GIO General Ltd* [1995] 12 NSWCCR 197 *(GIO v GIO)* and *StateCover Mutual Ltd v Cameron* [2015] NSWCA 127 *(Cameron).*

However, CEM submitted that s 17 (1) (a) (ii) applies and as there is no evidence that the worker's employment from 1982 had "the tendencies, incidents or characteristics of employment that would give rise to a real risk of deafness", the deemed date of injury is 1 January 1982.

Findings

The Arbitrator stated that he had could not locate any decision that directly addresses the issue in dispute. However, the 'closest decision relevant to the facts in this dispute' appears to that in *McLean v Qantas Airways Limited* [2014] NSWWCC 421 *(McLean),* in which the worker was exposed to noise in a workshop from 1963 to 30 June 1997, and he then worked in a clerical position without noise exposure until 4 July 2005. On 18 December 2013, he claimed compensation under s66 WCA for industrial deafness and cited 30 June 1997 as the date of injury. Arbitrator Brown held that the deemed date of injury was 30 June 1997 and stated (at [31]):

> I am satisfied that during the period 1963 to 30 June 1997 the applicant was 'employed in employment to the nature of which the injury was due' and the last day of that employment was 30 June 1997. I am satisfied the applicant was not employed by the respondent in an employment to the nature of which the injury was due during the period 1 July 1997 to 4 July 2015.

The Arbitrator stated that while this matter is distinguishable on its facts from *McLean,* there was merit in Arbitrator Brown's conclusions. He also stated that the decision in *Lobley d*oes not entirely favour GIO's position, as Kirby A-CJ stated (at [59E]):

> It is essential that the Compensation Court should focus its attention upon the 'nature' of the employment at the time of the notice of injury. If that nature was of a kind which could cause hearing loss, the burden of carrying all past hearing loss falls upon that employer.

He also noted that the decisions of DP Roche and the Court of Appeal in *Cameron* concerned ss 15 and 18 WCA and that s 15 (5) WCA provides that s 15 does not apply to an injury under s 17 WCA. He stated:

> 35… The mere fact that the applicant was still employed under a contract of employment with the respondent on 9 December 2016 does not make that date the deemed date of injury because the applicant was not employed in that part of the respondent's premises where the nature of her employment could give rise to the risk of hearing loss. The last day that the applicant was employed in an employment to the nature of which the injury of hearing loss was due was a day in 1982 when the applicant worked as a bar attendant and was exposed to loud noise from disco music. Without a specific date for the last day of such exposure, the deemed date should be the earliest date in 1982, being 1 January 1982.

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office through editor@wiro.nsw.gov.au in the first instance.

Kim Garling