# Bulletin

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UPDATES
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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.*

**Stop Press**

***Pacific National Pty Limited v Baldacchino & SIRA***

*The insurer has lodged a Summons in the Court of Appeal, seeking leave to appeal against the decision of DP Snell in Pacific National Pty Ltd v Baldacchino [2018] NSWWCCPD 12, which determined that a total knee replacement was an 'artificial aid' for the purposes of s 59A (6) WCA*

## NSW Court of Appeal

*The Court dismissed appellants' adjournment application where their special leave application to the High Court against the Court's decision in King v Muriniti [2018] NSWCA 98 has not yet been determined*

**Muriniti; Newell v Lawcover Insurance Pty Ltd [2018] NSWCA 134 – Beazley P – 18 June 2018**

### Background

The appellants contended that in view of the Court's finding in *King v Muriniti* (see: Bulletin issue number 19) that a party cannot challenge, in costs proceedings, findings made in the substantive proceedings, they will be precluded from advancing one of their principal arguments on their appeal.

In the Land and Environment Court (LEC) proceedings, the appellants' client made many unsuccessful applications against Mr & Mrs King and others and on 27 March 2017, Sheahan J ordered them to pay, jointly and severally, on an indemnity basis, the costs of the Kings and 11 of the non-parties in respect of the various costs applications that had been brought in the proceedings (*Young v King (No 11)* [2017] NSWLEC 34).
In making that decision Sheahan J found, at [210]- [213], that the appellants were "*the impetus*" for the costs applications, and that they had:

> *… behaved incompetently, unprofessionally, inappropriately, and against the true interests of their client, who was entitled to expect competent and reasonable representation. They not only brought, on her behalf, a costs application which had no arguable basis …*
>
> *they, and especially [Mr Newell], were the real authors of the folly which it became, so compounding his mounting of a conspiracy case, without a factual basis, in the substantive proceedings.*
>
> *Having embarked on these futile courses, the lawyers continued to incur, on [Mrs Young's] behalf, unnecessary liability for her own costs and the costs of those she unreasonably pursued, and they must be held responsible.*

Lawcover, the professional liability insurer for L C Muriniti & Associates, had the conduct of the costs applications made against appellants. On 11 April 2017, it filed a notice of intention to appeal on behalf of the appellants, but subsequently decided not to appeal. On 26 June 2017, Mr Muriniti advised Lawcover's solicitors in writing that he would be commencing proceedings against Lawcover, and that he would also file an appeal against the decision of Sheahan J. Mr Newell had also filed a notice of appeal at that time.

On 28 June 2017, Lawcover filed a summons, seeking, inter alia, interlocutory and final orders restraining the appellants from taking any steps to conduct or prosecute any appeal against the orders made by Sheahan J. On 16 November 2017, Sackar J made an order restraining the appellants from taking any steps to prosecute their appeals (*Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557), based upon the terms of the professional indemnity insurance policy between Lawcover and L C Muriniti & Associates and, particularly, cls 21-23, which provided:

> *Deciding Whether to Appeal*
>
> *21. We will seek the insured's consent before deciding whether or not to pursue an appeal.*
>
> *22. If the insured do not consent to our decision as to whether or not to pursue an appeal, the insured have 14 days within which to notify us that they require an opinion from a lawyer under clause 33. However, in case of urgency, we may require the insured to notify us within a shorter period specified by us in writing.*

*23. If the insured do not notify us under clause 22 they will be deemed to have consented.*

Sackar J held that cl 21 did not contemplate the insured being 'consulted' or asked to give permission to embark upon a decision-making process and that the appellants must be deemed to have consented to Lawcover's decision not to appeal. He found that Lawcover sought their consent not to appeal by an email dated 11 April 2017, but as they did not give notice that they required an opinion from a lawyer under cl 33, cl 23 was engaged.

His Honour found that:

- there was no substance to the appellants' allegation of bad faith on the part of Lawcover;
- the relevant clauses of the insurance policy did not offend the *Insurance Contracts Act*; and
- it was not contrary to public policy to prevent the appellants from conducting an appeal as they were contractually prevented from doing so.

**Appeal**

On 16 February 2018, the appellants filed a notice of appeal against the orders made by Sackar J, which raised the following issues:

1. Whether, on a proper construction of the insurance policy:
   a) The appellants had consented to Lawcover's decision not to appeal *Young v King (No 11)*;
   b) The appellants were disentitled from appealing *Young v King (No 11)* in person;
      i) If so, whether the appellants should be permitted to appeal on the basis of public policy considerations;
2. Whether Lawcover failed to act in utmost good faith:
   a) By failing, allegedly, to defend the proceedings in *Young v King (No 11)* properly;
   b) By deciding not to appeal *Young v King (No 11)*;
   c) By failing, allegedly, to give adequate reasons for its decision not to appeal *Young v King (No 11)*;
3. Whether Sackar J failed to give adequate reasons for his finding that Lawcover did not fail to act in utmost good faith;
4. If Lawcover did in fact fail to act in utmost good faith, whether:
   a) It should be found that the appellants had not consented to Lawcover's decision not to appeal *Young v King (No 11)*;
   b) Lawcover was entitled to rely upon those provisions of the insurance policy which entitled it to control and conduct an appeal of *Young v King (No 11)*;
5. Whether cls 21-23 of the insurance policy were unenforceable on the basis that they offended the *Insurance Contracts Act*, ss 13, 14 and 52;
6. Whether the appellants' apprehension about corruption of the independent lawyer process was supported by evidence or was well founded;

7. Whether Sackar J erred in finding that the appellants would have poor prospects of success on appeal;
8. Whether Sackar J's reasons support the existence of a reasonable apprehension of bias.

In determining the adjournment application, Beazley P noted that:

- The appellants' proposed argument on the appeal is that Lawcover's decision to not appeal from the orders made by Sheahan J was taken in breach of its obligation of utmost good faith;
- They appellants asserted that the findings of Sheahan J, that the various applications brought by Mrs Young (including the costs applications) were hopeless and that their conduct of those proceedings was unprofessional, incompetent and inappropriate, were wrong; and
- Mr Newell argued that the Court of Appeal's decision in *King v Young* regarding the operation of s 91 of the *Evidence Act 1995 (NSW)* meant that the appellants would not be able to challenge those findings and that the hearing of the appeal should abide the outcome of the special leave application.

Her Honour felt that there is a real question as to whether the findings in the LEC decisions would in fact be an issue in the manner that Mr Newell contended, as while Lawcover decided not to appeal based upon findings made in the LEC proceedings, what is in issue in the appeal is whether it breached its obligation of utmost good faith by relying upon those findings in making its decision not to appeal against the orders made by Sheahan J. She held, relevantly:

> *32. As with any appeal, it will be permissible for the appellants to challenge the findings of the primary judge including the primary judge's factual findings. Grounds 8 and 9 of the appeal raise the question of what evidence there was, if any, to support their claim that Lawcover had not properly defended Young v King (No 11). As I see it at this stage, the proper application of s 91, as determined in King v Muriniti, is not an impediment to that argument being raised. Should any other issue arise, that can be dealt with on the hearing of the appeal.*
>
> *33. In the circumstances, I have concluded that the appeal should proceed and that the adjournment application be refused. The appellants will, as is the usual case, have every opportunity to develop their argument in accordance with their grounds of appeal.*

The appellants were ordered to pay the respondent's costs of the notice of motion.

*Principles applying to an application for an extension of time to make a claim for work injury damages under s 151D WCA considered – Leave not granted.*

**Gower v State of New South Wales [2018] NSWCA 132 – Basten JA, White JA, Simpson AJA – 19 June 2018**

## Background

On 12 September 2003, the appellant was employed as a high school teacher and he was struck by a soccer ball that was thrown by a student. He suffered a psychological injury as a result. He underwent various assessments of his psychological condition, but it was only in May 2012 that he was assessed as having reached the 15% WPI threshold that would entitle him to make a claim for work injury damages under s151H WCA.

On 13 May 2014 (more than 10 years after the injury), the appellant received a medical assessment certificate that found his degree of permanent impairment was at least 15%. On 23 March 2016, he commenced proceedings in the District Court, but he required leave of the Court under s 151D WCA to make the claim out of time and he filed a Notice of Motion seeking leave.

## Decision at first instance

Gibson DCJ rejected the Notice of Motion and struck out and dismissed the proceedings on 4 grounds, namely:

a) The appellant was advised of the limitation period by his solicitor and deliberately allowed it to expire;
b) The appellant has not provided a full or satisfactory explanation of his reasons for delay and the explanation of his solicitor is insufficient and unpersuasive;
c) The apparent weakness of the plaintiff's case is a factor which militates against an extension of time; and
d) There is substantial evidence of actual prejudice in relation to all aspects of the cause of action in the form of missing witnesses and documents.

The appellant appealed to the Court of Appeal and argued that her Honour erred in reaching the conclusions above and that the discretion to extend time should be exercised.

## Decision on Appeal

The Court (Basten JA and White JA, Simpson AJA dissenting) dismissed the appeal and held:

1. Error had been established (per White JA and Simpson AJA, Basten J contra)

   In relation to a) and b) (per White JA and Simpson AJA):

   > The primary judge acted on a wrong principle in determining the case on the basis that Mr Gower had been advised of the limitation period and had not provided a satisfactory explanation for his reasons of delay. It was not unreasonable for the appellant to wait until he had reached the 15 per cent threshold: [96]- [104], [231]- [238], [247].

   In relation to c):

   > Per White JA, whilst the claim is a weak claim, it raises a real issue of fact to be determined and could not be summarily dismissed on that basis: [149]. Per Simpson AJA, it has not been shown that the primary judge erred in taking into account the weakness of the case. The weakness of the case is not, however, sufficient of itself to justify refusing the application: [251].
   >
   > *Dey v Victorian Railways Commissioners* (1949) 78 CLR 52; *Spencer v The Commonwealth* (2010) 241 CLR 118; *Strasburger Enterprises Pty Ltd t/a Quix Food Stores v Serna* [2008] NSWCA 354 applied.

   In relation to d):

   > Per White JA, actual prejudice was only established in respect of one witness: [162]. The respondent's evidence concerning the lack of availability of witnesses and documents does not otherwise establish prejudice: [170]. Per Simpson AJA, no actual prejudice existed, the impediments in the way of the respondent making an adequate defence to the claim are relatively insignificant: [252]- [243].
   >
   > *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; *Itek Graphix Pty Limited v Elliott* (2002) 54 NSWLR 207; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Holt v Wynter* (2000) 49 NSWLR 128; *South Western Sydney Area Health Service v Gabriel* [2001] NSWCA 477; *Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347; *Strasburger Enterprises Pty Ltd t/a Quix Food Stores v Serna* [2008] NSWCA 354 considered.

*Basten JA contra:*

No error could be established. A correct understanding of the statutory scheme supported the reasons of Gibson DCJ as the appellant could have brought his claim within time. If the appellant had made a claim for lump sum compensation, it would have resulted in time being suspended for work injury damages whilst the degree of permanent impairment was not fully ascertainable: [5], [23].

2. *The discretion to grant leave should not be exercised (per White JA, Simpson AJA dissenting)*

The apparent weakness of the appellant's case (which is highly material to the discretion), the prejudice to the respondent arising from the delay, and the absence of any earlier notice of an intention to make a work injury claim justified refusing the discretion. The presumption of prejudice arising from the passage of 14 years and the respondent's being able to deal with the evidence is strong: [150], [190]- [191]. *Commonwealth of Australia v Shaw* (2006) 66 NSWLR 325 applied.

## Supreme Court of NSW – Common Law decision

*Court orders a foreign state to indemnify the Nominal Insurer with respect to workers compensation payments made under the U.L.I.S to a worker employed at its Sydney Consulate*

**Workers Compensation Nominal Insurer v Republic of Lebanon [2018] NSWSC 857 – Fagan J – 4 June 2018**

### Background

On 10 March 2017, the Plaintiff filed a statement of claim, which claimed $45,576.15 plus interest up to judgment against the defendant, arising out of the employment of a worker by the defendant at its Sydney Consulate. The worker alleged a workplace injury and sought to recover compensation under Part 3 WCA. However, the defendant was uninsured, contrary to s 155 WCA, and the worker claimed against the Plaintiff under s 140 WCA.

On 14 May 2014, WCC decided that the defendant should pay compensation to the worker and that it should reimburse the amounts paid out from the Workers Compensation Insurance Fund totalling $45,576.15.

As the defendant is a foreign state, proceedings against it are governed by the Foreign States Immunities Act 1985 (Cth) (FSIA). Section 12 of FSIA provides, relevantly:

> *(1) A foreign state, as employer, is not immune in a proceeding insofar as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia;*

*(2) A reference in subsection (1) to a proceeding includes a reference to a proceeding concerning:*

*(a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee, or*

*(b) a payment entitlement which arises under a contract of employment.*

*…*

*(3) Subsection (1) does not apply in relation to the employment of*

*(a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5)(a) [being the Vienna Convention on Diplomatic Relations]; or*

*(b) a consular employee as defined by the Convention referred to in paragraph 5(b) [being the Vienna Convention on Consular Relations]*

*unless the member or employee was at the time when the contract of employment was made a permanent resident of Australia.*

The Plaintiff alleged that the worker was a permanent resident of Australia when she was engaged by the defendant and that s 12 (1) applies such that the defendant is not immune from the claim.

*S 13 of FSIA provides:*

*A foreign state is not immune in a proceeding insofar as the proceeding concerns:*

*(a) the death of, or personal injury to a person; or*

*(b) loss of or damage to tangible property;*

*caused by an act or omission done or omitted to be done in Australia.*

The Court was satisfied that s 13 of FSIA applied to the matter and that the claim had been duly served upon the defendant as required by FSIA. However, the Court dismissed the proceedings pursuant to rule 12.8 of the UCPR. The plaintiff filed a Notice of Motion seeking an order that the dismissal order be set aside.

Fagan J stated that the principal question concerning the exercise of the power is whether there may be detriment to the defendant in doing so and whether notice ought to be given to the defendant before determining the application. He noted that the defendant had not responded to the service of the statement of claim upon it, or to the plaintiff's service of the certificate and demand under s 145 91) WCA, although both were properly served under FSIA. There was no detriment to the defendant if the proceedings were reinstated. He held, relevantly:

*19. So far as the defendant has been aware, as appears from the evidence before the Court, it would have understood that the statement of claim was valid and effective and that it required response if the claim were to be defended. In that understanding the defendant has done nothing about the proceedings. The time limit for the entry of appearance, which would be twenty-eight*

*days from 5 November 2017, has well and truly passed. Accordingly, I consider that it is in order to grant the relief that the plaintiff seeks.*

*20. It has been drawn to my attention that Ms Kassis herself brought proceedings against the defendant in the Federal Circuit Court of Australia for unpaid wages and entitlements and for compensation for discrimination on the grounds of her marital status and for wrongful dismissal. The Republic of Lebanon did not appear, although the originating process had been served in accordance with the Foreign States Immunities Act. Ms Kassis' claims were upheld: Kassis v Republic of Lebanon [2014] FCCA 155. It is a matter of concern, within the responsibility of the Commonwealth Department of Foreign Affairs and Trade, that the Republic of Lebanon appears to disregard proceedings in courts of appropriate jurisdiction concerning liabilities of the Republic liabilities arising from it having employed in this State an Australian citizen.*

Fagan J directed that the Judgment and a copy of the orders be taken out from the Registry under seal and served on the defendant in accordance with s 28 of the Foreign States Immunities Act 1985 (Cth).

## Supreme Court of NSW – Judicial review decisions

*Jurisdictional error by Medical Appeal Panel in respect of apportionment*

**Nicol v Macquarie University [2018] NSWSC 530 – Harrison AsJ – 27 April 2018**

### Summary

The Court quashed a MAC issued by a Medical Appeal Panel (MAP) comprising John Wynyard (Arbitrator), Dr Robert Gertler (AMS) and Dr Brian Parsonage (AMS on grounds of jurisdictional error. The Court determined that MAP misapplied the Guidelines for the Evaluation of Permanent Impairment in respect of apportionment. However, it remitted the matter to WCC for determination by a differently constituted MAP "according to law" rather than making a final determination.

### Background

The worker was employed by Macquarie University (Macquarie) as a Return to Work Coordinator from January 2005 until October 2006. He suffered a psychological injury and was certified unfit for work from 11 May 2006 to 13 October 2006. On 23 October 2006, he commenced work as a Claims Assessor with Cambridge Insurance (Cambridge). He claimed compensation from Macquarie and on 19 December 2006, WCC issued a COD, which awarded weekly payments for a closed period until 23 October 2006.

Thereafter, the was certified unfit for work from 11 April 2007 to 11 June 2007, due to a recurrence of “treatment resistant major depression with anxious features” and a from 4 October 2007 to 30 November 2007, although he was certified fit for suitable duties for 2 days from 27 September 2007. An episode then occurred at Cambridge, following the death of a work colleague, which led to the worker complaining about the manner that the employer treated that death. His employment was then terminated.

**Decision at first instance**

On 26 May 2016, the worker lodged an ARD alleging a psychological injury due to the nature and conditions of employment with Macquarie from January 2005 to October 2006. There was a dispute regarding the degree of WPI and this was remitted to the Registrar for referral to an AMS. The Registrar appointed Dr Takyar as the AMS.

On 19 October 2016, the AMS issued a MAC that assessed 50% WPI with respect to the psychological injury in October 2006 (deemed). However, he made no apportionment in respect of either pre-existing or subsequent impairment and did not apply a deductible under s323 WIMA.

**Appeal against the decision of the AMS**

Macquarie appealed against the decision of the AMS under s 327 (3) (c) WIMA (incorrect assessment criteria) and s 327 (3) (d) WIMA (demonstrable error). The Registrar decided that at least one ground of appeal had been made out and referred the matter to the MAP.

Macquarie alleged that the AMS failed to take a correct history of the worker’s later employment with Cambridge; that he failed to make a deduction for the ongoing effects of an injury sustained while the worker was employed by Cambridge; and that he erred in assessing certain categories of impairment under PIRS. It asked the MAP to re-examine the worker.

The MAP found that there was a demonstrable error as the AMS found that there was no subsequent injury and had not addressed that issue in his reasons. Dr Gertler re-examined the worker and he opined that before the episode at Cambridge, his WPI was significantly less than at the time of his assessment. The MAP adopted that opinion and stated:

> *89. Chapter 11 of the Guides provides for the classification of six categories in which the assessor is required to assess the behavioural consequences of the psychiatric disorder. Whilst an AMS is required to assess the WPI of a claimant as he/she presents for assessment in accordance with Part 1.6(a), an exception is made in Chapter 11 regarding pre-existing impairment at Chapter 11.10. It is appropriate to assess the claimant's relevant WPI by using the method set out in that subparagraph, which provides:*
>
> > *To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of*

*WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level. The assessing psychiatrist uses all available information to rate the injured worker's pre-injury level of functioning in each of the areas of function. The percentage impairment is calculated using the aggregate score and median class score using the conversion table below. The injured worker's current level of WPI% is then assessed, and the pre-existing WPI% is subtracted from their current level, to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI.*

*90. This method is appropriate also to assess a claimant's WPI where there has been a subsequent injury, as in this case, by adopting the pre-existing impairment assessment as the applicable assessment. The evidence is available herein upon which to recalculate the PIRS. Although the appellant employer confined its appeal to only four categories of the PIRS, the Panel in obliged to correct all errors it finds in revoking the original MAC. We have accordingly reassessed each category.*

The MAP assessed each category of PIRS and concluded that the result entitled the worker to an assessment of 6% WPI, but it allowed an additional 2% WPI as there had not been a total elimination of permanent impairment due to treatment. On 26 May 2017, it revoked the MAC and issued a new MAC that assessed 8% WPI.

**Judicial Review**

The worker applied to the Supreme Court of NSW for judicial review of the MAP's decision on 3 grounds:

1. Denial of procedural fairness – he was not given the opportunity to address the issue of apportionment during the clinical assessment by Dr Gertler;

2. The MAP misapplied its statutory task in respect of causation and constructively failed to exercise its jurisdiction and it erred as it assumed that there had been a later injury that resulted in a degree of permanent impairment; and

3. The MAP applied an incorrect methodology to the evaluation of permanent impairment in respect of the apportionment and misconstrued its task. It therefore failed to exercise jurisdiction and erred in its approach to apportionment by treating it as "causally severed when there was no probative, factual or legal basis to do so".

Her Honour Harrison AsJ determined:

***In relation to 1 - The MAP afforded the worker procedural fairness for the following reasons*.**

Based upon the decision in *Crean v Burrangong Pet Food Pty Limited [2007] NSWSC 839*, procedural fairness does not require a disclosure by the Appeal Panel of the intention to increase or decrease a WPI finding if the finding regarding WPI is different from that of the AMS. There is also no requirement for an Appeal Panel to disclose in advance for comment its evaluation of the proportion for deduction that is appropriate in respect of subsequent injury.

The test set out in *Frost v Kourouche [2014] NSWCA 39*, is framed in terms of the "avoidance of practical injustice" and stipulates that procedural fairness requires the decision maker "to take any and all necessary steps to ensure a fair hearing".

In this matter, both parties addressed the worker's injury or injuries with Macquarie and Cambridge in their submissions to the MAP and the worker was re-examined by a member of the MAP. If he wished to obtain a further medical legal report on causation to put before the MAP he could have requested an opportunity to obtain one, but he did not do so.

**In relation to 2 – The MAP's reasoning on causation discloses that it misapplied its statutory task and constructively failed to exercise its jurisdiction and its decision is vitiated by jurisdiction error.**

The AMS and MAP were required to assess the WPI caused by the worker's psychological injury that occurred in October 2006 (deemed), which required not only the consideration of causation, but also whether employment was a substantial contributing factor to the injury. Once causation is established, there is a causal connection between the injuries, symptoms and disabilities, including any deterioration, except where the causative chain is broken. Her Honour held:

> *[145] The characterisation of the new injury as causing symptoms to recur suggests that the new injury and prior injury are linked. Based upon the decision of Aboushadi (which I have set out above), the present circumstances appear to fall into the second category. In other words, the further injury which resulted at Cambridge would have occurred even if Mr Nicol had been in normal health, but the damage sustained was greater because it was an aggravation of the earlier injury from Macquarie University. It is this additional damage resulting from the aggravated injury that remains causally linked to the first injury at Macquarie University. While Macquarie University submitted that the aggravation of an earlier injury does fall within the scope of the statutory definition of "injury" under s 4 of the Workers Compensation Act, it does not follow that the aggravation alone results in a new injury unless the causal chain has been broken.*

### In relation to 3

It was not necessary to this ground as if the MAP had not erred in relation to causation and the employment with Cambridge caused a new injury, its assessment of WPI using PIRS would have been correct and the deductions would have been made in accordance with its determination.

## Workers Compensation Commission - Presidential decision

*WCC re-states the principles relevant to an application for reconsideration under s 350 WIMA*

**Kathia v The Frank Whiddon Masonic Homes t/as Whiddon Group [2018] NSWWCCPD 22 – President Keating – 29 May 2018**

### Background

The worker was employed as a registered nurse until 6/07/2012. She alleged that on 9 April 2010 she suffered multiple injuries when she bent over to pick up a phone from the floor. The insurer accepted the claims for injury to the lumbar spine and a consequential gastrointestinal injury, but the worker also alleged injuries to her neck, right shoulder and right arm. On 3 July 2013, the insurer disputed the neck injury.

A complying agreement dated 20 June 2012, provided for settlement of 7% WPI under s 66 WCA (lumbar spine).

On 14 February 2014, the worker made a further claim under s66 WCA for 29% WPI (a further 5% WPI (lumbar spine), 14% WPI (cervical spine) and 5% WPI (Gastrointestinal)).

A further complying agreement dated December 2014, provided for 11% WPI (lumbar spine) with credit for the previous settlement.

### Decision at first instance

On 26 September 2014, the worker lodged an ARD seeking compensation under s 66 WCA and medical expenses for injuries to the lower back, neck and both upper and lower gastrointestinal tracts.

The dispute regarding liability for the alleged neck injury was determined by Arbitrator Beilby following an Arbitration hearing and on 25 February 2015, she delivered an extempore decision. She entered an award for the respondent in relation to the neck injury, but remitted the claim under s66 WCA for gastrointestinal injuries to the Registrar for referral to an AMS.

On 30 March 2015, the AMS issued a MAC that assessed 2% WPI (upper digestive system) but 0% WPI (lower digestive system). The worker appealed against the decision of the AMS and on 2 June 2016, a Medical Appeal Panel confirmed the MAC. On 7 July 2016, the Commission issued a COD that certified 13% WPI.

**Application for reconsideration by the Arbitrator**

On 9 June 2017, the worker applied for reconsideration of the Arbitrator's decision dated 25 February 2015, under s 350 WIMA. She sought to rely upon fresh evidence in support of that application, namely a report from the GP dated 5 June 2014 and a report of Dr Habib dated 2 June 2017. However, the Arbitrator declined to admit the "fresh evidence". On 22 November 2017, she issued a Certificate of Determination and declined the reconsideration application. The worker then appealed against this decision of the Arbitrator.

**Appeal**

The worker was self-represented in the appeal before President Keating. Keating P listed 11 grounds of appeal, most of which sought to re-ventilate the matters that were litigated at first instance, but he considered the grounds that alleged an error by the Arbitrator in refusing to admit the worker's "fresh evidence" on the reconsideration application.

Keating P held that the Arbitrator correctly set out the summary of principles governing the reconsideration power in s 350 (3) WIMA, which DP Roche listed in *Samuel v Sebel Furniture Ltd (Samuel) [2006] NSWWCC PD 141,* as follows:

1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*[Hardaker v Wright & Bruce Pty Ltd* [1962] SR (NSW) 244]);

2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;

3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ([*Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413]);

4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('[*Hilliger v Hilliger* (1952) 52 SR (NSW) 105 (*Hilliger*)]);

5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('[*Maksoudian v J Robins & Sons Pty Ltd* [1993] NSWCC 36; (1993) 9 NSWCCR 642]');

6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('[*Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] WCR 29]), and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act).]

Keating P determined that the Arbitrator had not erred in exercising her discretion not to admit the "fresh evidence" from the GP and Dr Habib for reasons including:

- The GP's report was not fresh evidence as it had been in the possession of the worker's solicitors and there was no explanation as to why it was not tendered in the arbitration proceedings. It was also unlikely to lead to a different result for reasons that included:

    - The GP's 'independent recollection' of the alleged complaints of pain in the neck, right arm and shoulder some 2 days after the accepted date of injury was not credible in the absence of contemporaneous clinical records and WorkCover medical certificates issued prior to 6 December 2012. He did not accept that a busy GP could have an independent recollection of symptoms discussed in a specific consultation more than 4 years earlier without contemporaneous notes to refresh her recollection; and

    - The 'independent recollection' was also inconsistent with the GP's referral to Dr Habib dated 3 December 2012, which stated: "had back injury at work not getting better wants opinion and rx also c/o pain in neck and rigt (sic) arm **since long time but mentioned to me on 6/6/12 after coming back from Pakistan**" (emphasis in

original)". It was also inconsistent with the symptoms reported on 15 May 2014, which did not refer to symptoms in the neck, right shoulder or right arm.

- There was also no explanation as to why Dr Habib's report could not, with reasonable diligence, have been available at the time of Arbitration. And it was therefore not fresh evidence. Rather, it was simply more evidence and an attempt to rectify an obvious gap in the evidence presented at first instance; and

- Dr Habib expressed an opinion that was contrary to the Arbitrator's findings of fact, which were clearly available to her on the evidence and she did not err in finding that his report carried no weight.

Keating P held that the Arbitrator determined the reconsideration application in accordance with s 350 WIMA and the principles in *Samuel* and properly applied the principles regarding fresh evidence, delay and the public interest that litigation should not proceed indefinitely. No error had been demonstrated in the exercise of her discretion. The appeal was dismissed.

## Workers Compensation Commission - Medical Appeal Panel Decision

*AMS erred in applying a time-weighted apportionment under s 323 WIMA for noise-induced hearing loss arising from previous employment outside NSW*

**Smith v G James Extrusion Co Pty Ltd - [2018] NSWWCCMA 56 – (Arbitrator Paul Sweeney, Dr Henley Harrison & Dr Joseph Scoppa) Decision dated 29 May 2018**

*Background*

The worker was a machine operator who was exposed to industrial noise at work in NSW from 1985 to March 2009. However, he previously worked in noisy employment in Fiji for 20 years as a Marine Engineer. The worker claimed compensation under s 66 WCA for 17% WPI and the cost of hearing aids, based upon a report from Dr Fagan. The insurer qualified Dr Williams, who assessed 7% WPI after applying a s 323 deductible. The dispute regarding the degree of WPI was referred to an AMS. On 8 January 2018, Dr Howison issued a MAC, which assessed 6% WPI after applying a deductible of 50% under s 323 WIMA for noise exposure outside of NSW. The worker appealed against the MAC on the basis that the MAC contained a demonstrable error (s 327 (3) (c) WIMA)

*Appeal against Decision of the AMS.*

The MAP determined that the MAC contained a demonstrable error and Dr Harrison re-examined the worker. He elicited a further history of work-related noise exposure from the worker. Upon reviewing all the evidence, the MAP

determined that it was difficult to determine the appropriate deduction for a pre-exiting condition and that s 323(2) should apply. The MAP held, relevantly:

> *47. The absence of audiological evidence as to the nature and extent of the appellant's hearing loss at the time he came to NSW means that any assessment of his deafness at that time must be hypothetical. While the appellant obtained hearing aids shortly after commencing to reside in NSW, there is no clear evidence as to the nature or extent of his deafness at the time. It is by no means clear to the specialists on the panel that the need for hearing aids was entirely, or primarily, caused by industrial noise.*
>
> *48. The panel also noted that the appellant described his work in NSW as machine operator as noisier than his work in Fiji because he was closer to the source of noise. Thus, it is probable that the extent of his noise exposure in NSW was greater than his exposure in Fiji. It may have been considerably greater. Assessment of the extent of noise exposure on the basis of a history which extends over four decades is fraught with difficulty.*
>
> *49. It is true, as was contended, that from time to time the appellant wore hearing aids when employed by the respondent but not in other work in NSW. The medical specialists on the panel accept that this may be a relevant factor. In this case, however, they are of the opinion that it does not ultimately assist in identifying a reasonably accurate deduction to reflect the pre-existing hearing loss suffered by the appellant when he came to NSW. In these circumstances, the specialist medical practitioners on the panel concluded that to assign a percentage to the appellant's pre-existing condition is akin to guesswork.*

The MAP revoked the MAC and issued a new MAC, which applied a deductible of 10% under s 323 WIMA and assessed 11% WPI.

## WIRO Procedural Review of a Work Capacity Decision - 14 of 2018

### Summary

*WIRO does not have jurisdiction to review a notice issued under s 39 WCA*

### Background

On 2 November 2017, the insurer contacted the worker by telephone and advised that due to the operation of s 39 (1) WCA, his weekly payments would cease in March 2108 after the effluxion of 260 weeks.

On 9 November 2017, the insurer sent a written confirmation to the worker, which stated that medical evidence indicated 6% WPI (although it had previously accepted and paid a claim for 10% WPI for the injury) and that, as there was no evidence of a WPI greater than 20%, the March 2018 deadline remained in force.

On 19 December 2017, the insurer sent the worker a further reminder of the impending cessation of payments and stated that the last day for receipt of payments would be 14 March 2018 and that this would cover the period from 22 March 2018 to 9 April 2018.

The insurer did not purport to make a work capacity decision. However, the worker applied for an internal review on/about 23 February 2018. The Insurer did not conduct an internal review.

### Merit Review

On 17 April 2018, the worker sought Merit Review from SIRA and SIRA purported to make a "finding" on 18 May 2018, that s 39 WCA applies to the worker and he has no entitlement to weekly payments of compensation. However, the Merit Reviewer also stated:

> *19.[…] I have considered the insurer's submissions however I am not persuaded that the decision to cease [the applicant's] weekly payments of compensation is not a work capacity decision under section 43 of the 1987 Act. I consider that is reviewable by the Authority in accordance with section 44BB(1)(b) of the 1987 Act.*

### Application for Procedural Review

WIRO determined that the Merit Reviewer erred in this finding as the only decision made by the insurer was that the worker's WPI did not exceed 20%. Once that decision was reached, the operation of the statute itself barred the insurer from making any further payments beyond 260 weeks. Further, s 43 (2) (b) WCA clearly provides that *"a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act"* is not a work capacity decision.

Section 319 WIMA appears in Part 7 of Chapter 7 and provides, relevantly:

> ***medical dispute*** *means* ***a dispute*** *between a claimant and the person on whom a claim is made about any of the following matters* ***or a question about*** *any of the following matters in connection with a claim:*
>
> *(c) the degree of permanent impairment of the worker as a result of an injury."*

As the insurer had not made a work capacity decision, neither SIRA nor WIRO has jurisdiction to conduct a review. The application for procedural review was dismissed.

## Workers Compensation (Indexation of Amounts) Amendment Order (no. 2) 2018

The above Order was Gazetted on 4 June 2018. Please note the following changes:

### Schedule 1 Amendment of Workers Compensation (Indexation of Amounts) Order 2013

**[1] Clause 5 Indexation of certain amounts—according to average weekly earnings:**
**section 82B**

Insert at the end of the Table to the clause:
2018–2019 $190

**[2] Clause 7 Indexation—compensation for permanent impairment: section 82F**

Omit the Table to the clause. Insert instead:

**Section 66 (2) (a)**

| **Impairment greater than 10% but not greater than 30%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $19,790 and $2,980, respectively |
| 2017–2018 | $20,260 and $3,050, respectively |
| 2018–2019 | $20,680 and $3,110, respectively |

**Section 66 (2) (b)**

| **Impairment greater than 30% but not greater than 50%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $79,220 and $4,900, respectively |
| 2017–2018 | $81,110 and $5,020, respectively |
| 2018–2019 | $82,790 and $5,120, respectively |

**Section 66 (2) (c)**

| **Impairment greater than 50% but not greater than 55%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $245,170 |
| 2017–2018 | $251,030 |
| 2018–2019 | $256,220 |

**Section 66 (2) (d)**

| **Impairment greater than 55% but not greater than 60%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $313,050 |
| 2017–2018 | $320,540 |
| 2018–2019 | $327,160 |

**Section 66 (2) (e)**

| **Impairment greater than 60% but not greater than 65%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $380,940 |
| 2017–2018 | $390,050 |
| 2018–2019 | $398,110 |

**Section 66 (2) (f)**

| **Impairment greater than 65% but not greater than 70%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $448,810 |
| 2017–2018 | $459,550 |
| 2018–2019 | $469,050 |

**Section 66 (2) (g)**

| **Impairment greater than 70% but not greater than 74%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $516,690 |
| 2017–2018 | $529,050 |
| 2018–2019 | $539,980 |

**Section 66 (2) (h)**

| **Impairment greater than 55% but not greater than 60%** | |
|---|---|
| **Column 1** | **Column 2** |
| 2016–2017 | $584,580 |
| 2017–2018 | $598,560 |
| 2018–2019 | $610,930 |