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MONTHLY
UPDATES
INFORMATION
TRENDS

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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

Compensation for permanent impairment not payable in addition to death benefits where death occurred shortly after injury

Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger - [2018] NSWCA 178 - Basten JA, Gleeson JA, Payne JA, Sackville AJA & Simpson AJA – 16 August 2018

Background

The worker suffered a severe crush injury to his upper body, which rendered him unconscious and he died a few minutes later. The employer accepted liability for payment of death benefits under ss 25 and 26 WCA. The Estate claimed compensation under s 66 WCA, which was disputed. The dispute was referred to an AMS, Dr Harvey-Sutton, who initially assessed 100% WPI. However, upon reconsideration she reduced the WPI assessment to 0%. The Estate appealed and a MAP revoked the reconsideration MAC and assessed 100% WPI. The employer applied for judicial review by the Supreme Court of NSW and Schmidt J granted SIRA leave to intervene.

Application for judicial review

Schmidt J noted that the MAP felt bound by the Court of Appeal's decision in *Ansett Australia v Dale* [2001] NSWCA 314 *(Dale),* which is authority for the proposition that: (1) the formulation from *Hillier* and *Bourke* that permanency is not established 'where death was inevitable within a very short time frame' is not determinative of permanency; and (2) establishing permanency will depend on the facts of each matter even where the period between the injury and death is very short. However, in her view to introduce a precondition of survival for a significant period would be to introduce a concept that was not contained in that legislative scheme and would be "inconsistent with the principle upon which the Act proceeds, namely, that the rights of a worker accrue on the happening of the injury".

Her Honour stated that a worker may suffer a 100% permanent impairment even if death follows not long after the injury, and it is only in the case where a worker is killed instantly that the statutory scheme does not provide for the worker to be compensated under s 66 WCA. She held:

84. What s 66 does not provide, is that there is to be no compensation payable in the event that death later results, within a particular time frame, as it easily could have, if that had been intended…

87. All of this supports the conclusion that the obligation to pay compensation for permanent impairment, even when death eventuates shortly after injury or when life does not endure, is simply a part of the balance which has been struck in this legislative scheme.

88. That under this statutory scheme, in the event of dispute, an approved medical specialist is to determine whether a worker has suffered a permanent impairment, applying the Guidelines issued under s 376 of the 1998 Act supports this conclusion, given that they are also not concerned with the consequences of impairment on a worker's lifespan.

Schmidt J held that the MAP did not commit jurisdictional error and she dismissed the Summons.

Appeal

The Insurer appealed and alleged that Schmidt J erred: (1) in concluding that "permanent impairment" encompasses an impairment so serious that death will inevitably follow within a short time frame; and (2) in failing to conclude that the MAP acted on a wrong construction of "permanent impairment" and thereby made a jurisdictional error, or error of law on the face of the record, in setting aside the decision of the AMS.

The Court of Appeal identified the issues as follows: (1) Whether "permanent impairment" as used in ss 65 and 66 WCA and s 322 (1) WIMA encompasses impairment so serious that death will inevitably follow within a short time frame; and (2) Whether Schmidt J should have concluded that the MAP erred in setting aside the "Reconsideration" MAC. It allowed the appeal, but the members provided different reasons for doing so, namely:

Basten JA held, relevantly:

> 7. For a person to suffer an impairment, his or her abilities or capabilities must be diminished. To say that a person's ability to work or to enjoy life in other ways is diminished is to describe an impairment. In ordinary speech, we do not describe death as a diminution of abilities or capabilities. Section 66 (1) envisages a continuing life with a compromised ability to work and a compromised capacity for the enjoyment of life. If a person's injuries are so severe that death is, in a practical sense, inevitable within a short period, the injury is described as fatal, not as resulting in an impairment. As explained by Payne JA at [95] below, "[t]here must be some continued and enduring experience of living in order for there to be 'permanent impairment'."
>
> 8. No doubt any impairment which results inevitably in death can be described as "permanent"; the necessary condition must be the existence of an impairment, simpliciter. The statement of Payne JA that impairment envisages a continuing life is expressed as operating in circumstances "where death follows shortly and inevitably after injury" and, in particular, where "death inevitably occurred within a few minutes." In this context inevitability describes the relationship between the injury and death. The brief period of survival, together with lack of consciousness, are important factors in the analysis for the purposes of the present case… and

> 14…The ordinary meaning of impairment does not properly apply to the circumstances of Mr Messenger in the brief period of unconsciousness between his fatal accident and his death.

Payne JA (Gleeson JA agreeing) held, relevantly:

> 95. It is sufficient for the purposes of this case to conclude that "permanent impairment" within the meaning of ss 65 and 66 of the Workers Compensation Act and in s 322(1) of the WIM Act does not encompass circumstances where death follows shortly and inevitably after the injury, and certainly not where, as here, death inevitably occurred within a few minutes. There must be some continued and enduring experience of living in order for there to be "permanent impairment".
>
> 96. The respondent's submission that the *Workers Compensation Act* and the *WIM Act* leave this question to medical professional opinion should be rejected. Whilst it may be accepted that whether impairment is "permanent" always involves a matter of fact and degree, the limitation in the meaning of the phrase "permanent impairment" to occasions in which impairment is "temporary" compared to where it is "permanent" is not warranted by the text, context and purpose of the *Workers Compensation Act*.
>
> 97. It is true that the conclusion in this case does not permit a bright line answer applicable in all circumstances to the determination of the question of whether an injury which results in death does or does not also give rise to "permanent impairment". Such a bright line answer is not possible. The bright line suggested by the primary judge, that permanent impairment does not arise where death is "instantaneous", is a chimera.

His Honour concluded that: (1) the "reconsideration" MAC contained the correct conclusion; (2) the MAP erred in law in setting it aside; and (3) Schmidt J should have so concluded. He proposed orders that: (1) allowed the appeal; (2) set aside the order made by Schmidt J on 22 November 2017 and in lieu thereof, ordered that the MAP's decision dated 27 February 2017 be set aside; and (3) dismissed the application to the MAP.

Sackville AJA agreed with the reasons and orders proposed by Payne JA, but made observations (with which Gleeson JA agreed) that included:

> 107. The expression "permanent impairment" consists of two words, one of which ("permanent") qualifies the other ("impairment"). The expression is not defined in the legislation. Although the expression is primarily associated with workers compensation entitlements, its use is by no means confined to that field. The expression in its ordinary usage connotes injuries or illnesses that have a significant debilitating effect on the person's physical capacities or quality of life for an indefinite period. In my opinion, in the absence of contextual indications to the contrary, the expression is not apt to describe the impact of an injury which is incompatible with the continuation of life and where the victim survives for a very short period, measured in seconds or a few minutes.
>
> 108. In my opinion the legislative context supports the conclusion that a fatal injury, where death ensues inevitably within a very short period, does not result in the victim having a "permanent impairment" within the meaning of s 66 (1) of the WC Act.

His Honour stated that several provisions governing compensation for permanent impairment are drafted on the assumption that permanent impairment is a long-term condition, including s 65 (1) WCA and s 324 WIMA. These clearly assume that a worker claiming compensation for permanent impairment will be alive at the time of the assessment and capable of being examined, although there will no doubt be cases where

a worker suffering permanent impairment within the meaning of s 66 (1) WCA dies before the assessment process is complete, perhaps from causes unrelated to the injury. If the legislation contemplated that fatal work-related accidents would routinely give rise to permanent impairment claims, it might have been expected that the statutory assessment process would have specifically accommodated such claims.

Simpson AJA agreed with the orders proposed by Payne JA, but for the following reasons:

> 114. The starting point is that the purpose of s 66 of the *Workers Compensation Act 1987* (NSW) is to compensate an injured worker for the loss of quality of life caused by the workplace injury that will continue for the duration of the worker's life. Although the terminology of the legislation is not explicit in this respect, it is not a sensible or reasonable application of the provision to award compensation to an injured worker the duration of whose life is so circumscribed as to allow no meaningful benefit of the award of compensation to him or her and who (as in this case) had no awareness or consciousness of the loss of quality of life.
>
> 115. It is obvious that this approach may, and very likely will, give rise to cases in which disputes will arise as to when, and in what circumstances, compensation will be awarded to a worker the duration of whose life has been curtailed by the workplace injury. There will be other cases (thanks to medical science) where an injured worker's life may be prolonged, but where the worker has no awareness or consciousness of the impairment. Those cases will have to be decided on a case by case basis. It is not possible, in the circumstances of the present case, to define the boundaries of the compensation available under s 66…
>
> 17. In my opinion, the concept of inevitability adds nothing to the issues to be determined in the present case; the issue is not the inevitability of Mr Messenger's death, but its occurrence within a period of time so limited that the injury could not be thought to have any bearing on his quality of life; nor could compensation afford him any meaningful benefit.
>
> 118. Moreover, it is possible to conceive of circumstances in which a work injury is such that death is not inevitable, but occurs in a short time by reason (to take one potential example) of the unavailability of medical services.

Her Honour felt that whether a worker has suffered a permanent impairment for the purposes of s 66 is a question of fact. She concluded that an unequivocal statement by this Court would have significant implications and said that she preferred to refrain from expressing agreement until the question has been fully debated.

Court applies a discount of 25% applied to award of damages for future attendant care and for lawnmowing, gardening and handyman services and a 10% discount to damages for future medical treatment costs.

Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer [2018] NSWCA 146 – McColl JA, Payne JA, White JA – 27 July 2018

Background

The worker was employed by Professional Contracting Pty Limited. In 2006, he was injured at a work site operated by the Appellant, when two of the Appellant's employees were erecting a mast on a pile driving rig and an auxiliary cable on the mast snapped and he was struck by falling metal objects. He suffered injuries to his head, neck and chest. In 2009, he claimed damages from the Appellant and the Appellant filed a defence that claimed contributory negligence by the worker and relied upon s 151Z (1) (d) WCA (reduction in its liability due to alleged negligence of Professional Contracting Pty Limited).

The Nominal Insurer then claimed an indemnity against the Appellant under s151Z (1) (d) WCA and the Appellant again relied upon s151Z WCA.

Rothman J heard the matters together. In the negligence proceedings, he held that the appellant was negligent and awarded the worker damages exceeding $2.6M and found that the employer was not negligent and the worker was not guilty of contributory negligence. In the indemnity proceedings, he found for the Nominal Insurer in the sum of $919,225.23 and rejected the Appellant's defence of negligence by the employer.

Appeal

On appeal, the Court identified the issues as: (1) Whether the primary judge formulated the risk of harm for the purposes of the negligence of Professional Contracting Pty Ltd and the contributory negligence of the worker in a way that was impermissible; (2) Whether the primary judge erred in finding that Professional Contracting Pty Ltd was not negligent; (3) Whether the primary judge erred in not making a finding of contributory negligence by the worker; and (4) Whether the primary judge erred in his Honour's award of damages.

Consideration

The Court allowed the appeal in part. Payne JA (McColl JA and White JA agreeing) held:

In relation to issue 1

The Appellant bore the onus of proof, including identification of the correct risk of harm, to establish negligence by the employer and contributory negligence by the worker, but it failed to frame its pleadings regarding the risk of harm by specific reference to relevant provisions of the *Civil Liability Act 2005* (NSW) or to identify the correct risk of harm. The primary judge did not err in formulating the risk of harm and he identified the source and general causal mechanism of the injury.

In relation to issue 2

The primary judge correctly found that the employer was not negligent and the Appellant did not demonstrate that the employer knew, or had any reason to know, of the risk of harm or that the worker or his supervisor could appreciate the risk of harm.

In relation to issue 3

The primary judge was correct to find no contributory negligence by the worker and the Appellant did not prove that he knew or ought to have known of the risk of harm.

In relation to issue 4

The primary judge's award of damages should be varied in respect of some heads of damage and left undisturbed in respect of other heads. Save for certain agreed adjustments, the Appellant failed to show error in the award of damages for past economic loss, loss of future earning capacity and past gratuitous care, but the Primary Judge did not approach the assessment of damages for future attendant care, lawn mowing, gardening and handyman services, and future medical expenses in the manner required by section 13 of the *Civil Liability Act 2002* (NSW).

The Court applied a discount of 25% to the awards of damages for future attendant care, lawn mowing, gardening and handyman services pursuant to: *Uniform Civil Procedure Rules 2005 (NSW), r 51.53; Civil Liability Act 2002* (NSW), s 13; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20; *Van Gervan v Fenton* (1992) 175 CLR 327; [1992] HCA 54; *Australia and New Zealand Banking Group Ltd v Haq* [2016] NSWCA 93; and *White v Benjamin* [2015] NSWCA 75. It also applied a 10% discount to the award of damages for future treatment expenses: *Civil Liability Act 2002* (NSW), s 13; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20, applied.

Assessment of damages resulting from a breach of duty by a solicitor – what is the value of the chance lost by the appellant?

Gulic v Angelkovski – [2018] NSWCA 161 – Beazley P, McColl JA & Sackville AJA – 27 July 2018

Background

The appellant was injured in a motor vehicle accident in 2004. In 2013, he sued 2 Law Firms in the District Court of NSW against two Law Firms, alleging a breach of duty in failing to commence CTP proceedings against the driver at fault within the limitation period.

Gibb DCJ dismissed the claim against the first respondent. The second respondent accepted that it breached its duty of care to the appellant by failing to institute proceedings and the only issue was the value of the chance lost by the appellant. The appellant sought to establish a pre-accident earning capacity based upon a letter from Mr Djakovic, which purported to offer him employment as a driver. However, Her Honour found that this letter was 'a fabrication'.

Her Honour awarded damages of $25,000 for past economic loss (the respondent conceded that a trial judge in April 2009 might have awarded that amount) but declined to award damages for future economic loses under s126 of the *Motor Accidents Compensation Act 1999* (NSW) (*MAC Act).* She also declined to award damages for domestic assistance under s 128 of the *MAC Act* (she rejected the evidence of the appellant and his son regarding the level of domestic assistance that that was provided and found that the provided services were not needed *"in the sense contemplated by the MAC Act"*).

Appeal

Sackville AJA (Beazley P and McColl JA agreeing) noted that some of the 17 grounds of appeal sought to challenge the primary Judge's credibility-based findings. The appellant argued that the Primary Judge erred in not directing herself to apply the standard of proof laid down by s 140 of the *Evidence Act 1995* (NSW) for determining allegations of fraudulent or other serious misconduct. However, he stated that this does not elevate the standard of proof identified in s140 (1) beyond satisfaction on the balance of probabilities. His findings are summarised below:

- In deciding whether appellant was offered a job by Mr Djakovic and which version of the evidence that she accepted, the Primary Judge was not required to consider the 'gravity' of finding that one of these versions was untrue;
- The appellant is entitled to damages for any diminution in his earning capacity resulting from injuries sustained because of the defendant's negligence (*Vosebe Pty Ltd v Bakavgas* [2009] NSWCA 117 at [137] (*Vosebe*), but not damages for the degree of incapacity that arose from conditions that pre-dated the defendant's negligence (*Vosebe* at [137]; *Commonwealth v Elliott* [2004] NSWCA 369 at [79]).). It is therefore necessary to assess the appellant's earning capacity before and after the accident, which includes assessing his economic prospects at the relevant times (*Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [108] (*Seltsam*));
- The problem for the appellant was that the Primary judge found that the due to the appellant's pre-MVA injuries he had little or no earning capacity and was totally disabled as a brick cleaner. None of the grounds of appeal sought to challenge this finding. While it was open to him to adduce evidence to counter the respondent's evidence and/or that even if he had no residual earning capacity in February 2004,

his circumstances might have changed thereafter and his chances of gaining employment approved, he did not do so;

- The Primary Judge awarded the appellant a modest sum for damages for past economic loss, based upon a hypothetical situation that was not intended to accord with her actual findings, to indicate that her calculations produced a figure less than the respondent's possibly generous concession;
- In relation to future economic loss, the primary Judge correctly held that the appellant needed to satisfy s 126 (1) of the MAC Act. She rejected the appellant's submission to the effect that but for the injuries resulting from the MVA, he would have undertaken some form of light industrial work or as a truck driver or something similar, as there was no evidence that he ever held a commercial driving licence in Australia or that he was physically capable of working as a driver immediately before the MVA and/or that he would be likely to obtain a position having regard to his physical limitations and lack of command of English; and
- In relation to the claim for damages for gratuitous domestic assistance, no grounds were established for overturning her Honour's credibility-based findings and the appellant was unable to satisfy s 128 (3) of *the MAC Act*.

The Court dismissed the appeal and ordered the appellant to pay the respondent's costs.

Supreme Court of New South Wales – Judicial Review Decisions

Jurisdictional error - AMS determined causation and excluded certain body parts from an assessment where there was no liability dispute

Mirarchi v CPA Australia Limited – [2017] NSWSC – Adamson J – 31 August 2017

Background

On 3 November 2006, the plaintiff injured her right shoulder at work but she developed symptoms in both shoulders. The insurer paid medical treatment expenses (including surgery) for treatment of both upper limbs and it appeared that it accepted that the left shoulder symptoms were work-related. Prior to July 2010, the plaintiff claimed lump sum compensation under s 66 WCA for both upper extremities and the dispute was resolved by a complying agreement dated 16 July 2010. The plaintiff received $2,500 (right upper extremity) but the left upper extremity was not assessed.

On 15 September 2015, the plaintiff made a further claim under s 66 WCA, based upon Dr Kwong's diagnoses of *"right lateral epicondylitis, right radial tunnel syndrome and "complex regional pain syndrome with bilateral frozen shoulder following right elbow and right radial tunnel release surgery"* and his combined assessment of 27% WPI (17% for the right upper extremity and 12% for the left upper extremity).

The insurer rejected the claim based upon the decision in *Cram Fluid Power Pty Ltd v Green*, but in 2016, the plaintiff sought a review of that decision and the insurer arranged a medical examination with Professor Cumming. He assessed 1% WPI for scarring, but expressed the view that the frozen shoulder was not work-related and found no evidence of carpal tunnel syndrome.

On 29 March 2016, the insurer issued a dispute notice, relying upon s 66 (1) WCA and s 323 WIMA, based upon Professor Cumming's report.

The plaintiff lodged an ARD and the dispute was referred to an AMS (Dr Faithfull). The Registrar's referral stated the date of injury as "3 November 2006" and instructed the AMS to assess the degree of WPI in the "left upper extremity (shoulder) and right upper extremity (shoulder, wrist and elbow)". However, the AMS issued a MAC that assessed 1% WPI (right tennis elbow), but indicated that he did not assess the left shoulder, right shoulder or

right wrist as there was a full range of movement in the left upper extremity and that the bilateral carpal tunnel syndrome was not work-related.

Medical Appeal

The plaintiff appealed against the decision of the AMS and the matter was referred to a Medical Appeal Panel (MAP), but the MAP also determined that the left shoulder condition was not work-related and it confirmed the MAC.

Judicial Review

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision.

On 24 August 2017, the summons was listed for hearing before Adamson J. the parties advised the Court that they agreed that there was jurisdictional error by the MAP that warranted the making of orders sought in the amended summons. Her Honour stated that she had to be satisfied that it is appropriate to make the orders sought and to give reasons and she held, relevantly:

> 24. I am satisfied, in light of the joint submissions of the parties that the second defendant misapprehended the ambit of the dispute which was the subject of the s 74 Notice, which was intended to be confined to the degree of permanent impairment of the left upper limb. This led the second defendant to refer the medical dispute to the third defendant in terms which did not make clear that the parties' dispute was confined to the degree of permanent impairment and did not require resolution of any issue concerning causation since this was *not* a matter in dispute. The fourth defendant dealt with the appeal on the basis that the certificate and reasons of the third defendant were within jurisdiction and were valid.
>
> 25. I note that the initial misapprehension which appears to have led the third and fourth defendants to misconstrue the ambit of the dispute, arose from the s 74 Notice sent by QBE which summarised Professor Cumming's opinion as to causation. His opinion as to causation was irrelevant to the 'dispute' between the parties, since there was no issue as to causation between them. The circumstances of this case highlight the care which must be taken when defining a dispute in such a notice, since the s 74 Notice will inform the exercise of the Registrar's power to refer the dispute for medical assessment. The medical practitioners who are in the position of the third or fourth defendants can hardly be expected to refrain from expressing their opinions on causation when they are led to believe it arises, unless they appreciate that their opinions are not sought on that question.

Adamson J set aside the original MAC, the MAP's decision and the WCC's determination "so that the process could begin again on a valid footing".

Court declines declaratory relief under s 69 of the Supreme Court Act 1970 (NSW)

Alam v Allianz Australia Insurance Limited – [2018] NSWSC 1214 – Adamson J – 6 August 2018

Background

The plaintiff was involved in a motor vehicle accident on 3 February 2016 and claimed damages under the *Motor Accidents Compensation Act 1999 (NSW) (the MACA).* A medical assessor issued a Certificate that assessed 24% WPI. The insurer instructed its solicitor to apply for a review under s 63 of the *MACA* but the insurer's solicitor failed to lodge the application within time.

On 5 October 2017, the insurer's solicitor sought an extension of time from the Proper Officer and she then sent the insurer's solicitor's letter to the plaintiff's solicitor by email.

The plaintiff's solicitor was away and he had not set up an 'out of office' response to emails or otherwise arranged for them to be monitored in his absence. As a result, he did not see either the letter or the email until he returned from leave and the Proper Officer was unaware of his absence. She mistakenly believed that he had not responded because he did not oppose an extension of time.

On 16 October 2017, the Proper Officer wrote to the parties by email, noting that she had not received a response from the plaintiff's solicitor and stating:

> Given the circumstances as described by [the insurer's solicitor], I am prepared to accept on this occasion that exceptional circumstances exist in that their oversight should not preclude the insurer from lodging a review application. Any such review application must be received by MAS by 23 October 2017.

The insurer's solicitor filed an application for review and on 20 October 2017, the Proper Officer advised the parties that the application had been received. She directed the plaintiff to file a reply by 17 November 2017. However, on 24 October 2017, the plaintiff's solicitor sent written submissions to the Proper Officer objecting to an extension of time. He argued that a solicitor's oversight could not be 'exceptional circumstances' within the meaning of the Guidelines and that this was "an excuse, and an exceptionally weak one, akin to 'the dog ate my homework'". He also took exception to the Authority corresponding with him by email as he had indicated that this was not his preferred form of communication.

On 16 November 2017, the Proper Officer sent a response to the plaintiff's solicitor by email. She said that she accepted the insurer's solicitor's request for an extension of time essentially so that the insurer was not disadvantaged by an oversight by its solicitor and that as there was no response by the due date, she approved the request. She stated:

> …While you may not agree with my reasoning for the extension of time, I have often given extensions to claimant's representatives who have missed review application deadlines, so as not to disadvantage the claimant. The same consideration has here been given to the insurer.

The Proper Officer stated that she did not consider her decision of 16 October 2017 as being unreasonable and she declined to quash it under the *Bhardwaj* principle. She stated:

> … Since there has been a delay on my behalf in advising you of my decision regarding the *Bhardwaj* request, I will extend the time for you to provide the MAS 5R in response by 20 days from today to 14 December 2017. The Proper Officer's decision on whether to refer the matter to a Medical Review Officer will now be due on 11 January 2018…

Judicial review

The Plaintiff sought judicial review on grounds that the Proper Officer: (a) erred in finding that 'exceptional circumstances' existed; (b) failed to state reasons as to the test applied by her in the determination of whether 'exceptional circumstances' existed; (c) failed to accord the plaintiff procedural fairness because she did not take into account the plaintiff's submissions in the application for an extension of time under clause 16.5.3; she communicated by email with the plaintiff's solicitor, who was on leave, and treated the absence of a response as evidence of 'no opposition' in circumstances where the plaintiff's solicitor had informed the Proper Officer that he would not accept email communication; (d) took into account an irrelevant consideration, in treating the absence of a response from the plaintiff's solicitor as evidence of 'no opposition'; (e) made the decision on 16 December 2017 to extend time under clause 16.5.3 only on the basis of her treating the absence of a response from the plaintiff's solicitor as evidence of 'no opposition' and she did not consider whether 'exceptional circumstances' existed. She only considered the question of whether

'exceptional circumstances' existed after 16 October 2017 and when providing the reasons dated 16 November 2017; and (f) made a finding of 'exceptional circumstances' that was legally unreasonable.

Adamson J noted the defendant's concession that the Proper Officer failed to accord procedural fairness to the plaintiff in making her decision on 16 October 2017 and that the power under clause 16.5.3 was not fully exercised at that time. However, the Proper Officer was entitled to correct this error by considering the matter afresh once she had received the Plaintiff's Solicitor's response: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. The relevant issue was whether the error was corrected on 16 November 2017.

Her Honour dismissed the summons and provided reasons that are summarised below:

In relation to grounds (c) and (d)

Procedural fairness was accorded before the extension of time was granted on 16 November 2017, as by then the Proper Officer understood the plaintiff's solicitor's explanation.

In relation to grounds (a) and (f)

Her Honour stated:

> 22. It is plain from the wording of the Guidelines that the question whether circumstances are exceptional is one for the Proper Officer. I note that clause 16.5.3 does not envisage a balancing exercise. Whether an oversight of a time limit is, or could be in any given case, exceptional is, accordingly, a matter from the Proper Officer, who was obliged, having regard to cl 1.14.2 of the Guidelines, to construe the Guidelines 'fairly and according to the substantial merits of the application with as little formality and technicality as practicable and minimising cost to the parties'. The focus on the 'substantial merits' of the application indicates that 'exceptional circumstances' ought not be construed too narrowly. Too narrow a view of what is 'exceptional' would tend to shut out a party from being entitled to have its application considered by the Proper Officer, as gate-keeper, under s 63 (3).

Her Honour was not persuaded that the decision was legally unreasonable. The only applicable 'test' is whether the Proper Officer 'is satisfied that exceptional circumstances exist that justify the lodgement of a late application, having regard to the submissions of the parties' and the Guidelines requires the Proper Officer to make an evaluative judgment on this matter.

In relation to ground (e)

This ground suggested that the Proper Officer only considered the question of 'exceptional circumstances' on 16 November 2017, but the letter dated 16 October 2017 indicates that she considered that issue and that she maintained her view on 16 November 2017.

In relation to ground (b)

Her Honour stated:

> 25. There is no general rule of common law or principle of natural justice that requires reasons to be given for administrative decisions: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656… I do not consider that cl 16.5 can be construed as applying beyond its terms. In some cases, an obligation to give reasons can be implied from the statutory context and the nature of the functions imposed on a decision-maker: see the discussion in *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; [2006] NSWCA 284.

Her Honour concluded that as none of the grounds had been made out it was not necessary to decide whether the decision to extend time would be amenable to judicial review based upon the principles set out by the High Court in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159-160… and it was not necessary to resolve the question of the juridical status of the Guidelines, which Leeming J raised, obiter, in *Ali v AAI Ltd* [2016] NSWCA 110.

Court must be satisfied of the grounds for, and the appropriateness of, proposed orders

Ingham Enterprises Pty Ltd v Belkoski & Ors – [2018] NSWSC 1233 – Davies J – 10 August 2018

Background

The first defendant was employed by the plaintiff. He injured his neck at work on 25 March 2009 and underwent a spinal fusion at the C4/5 and C5/6 levels and a fusion at the C3/4 fusion on 4 April 2014. He claimed lump sum compensation for permanent impairment and the dispute was referred to an AMS. On 28 June 2017, the AMS issued a MAC that assessed 28% WPI.

Medical Appeal

The plaintiff appealed against the MAC under ss 327 (3) (c) and (d) WIMA. It requested that a member of the MAP re-examine the first defendant and an oral hearing. The first defendant filed an Opposition and made submissions including that the appeal could be determined on the papers. On 13 September 2017, a delegate of the Registrar referred the appeal to a MAP and their decision indicates that the plaintiff requested an oral hearing, which was opposed by the first defendant, and that the MAP might require the first defendant to be re-examined.

On 10 November 2017, the MAP confirmed the MAC and its reasons indicated that the plaintiff "***did not request*** *that the worker be re-examined by an AMS-member of the Panel"* (emphasis added). It found that AMS failed to engage with the evidence and to explain why a deduction of 1/10 was made, and this was a demonstrable error, but that based upon an independent consideration of the evidence it was not satisfied that the assessment should be altered.

Judicial review

The plaintiff applied to the Supreme Court for judicial review of the MAP's decision, but before the hearing counsel for the plaintiff (with consent of counsel for the first defendant) sent an email to Davies J's Associate, advising that the parties had agreed on appropriate orders, namely:

> 1. Orders (sic) in the nature of certiorari quashing the decision made on 10 November 2017 by the Third Defendant, the Appeal Panel constituted under s 4328 (sic) of the Workplace Injury Management and Workers Compensation Act 1998 (NSW).
>
> 2. Remit the matter to the Second Defendant, the Registrar of the Workers Compensation Commission, for the purpose of constituting an Appeal Panel to determine the matter according to law.
>
> 3. No order as to costs.

Davies J stated that it is inappropriate for the Court simply to 'rubber stamp' proposed orders where certiorari is sought, but the parties argued that it was sufficient for the Court to be satisfied that the Appeal Panel had committed an error of law: *Kovalev v Minister of Immigration and Multicultural Affairs* [1999] FCA 557 (*Kovalev*), per French J.

In *Kovalev* the parties submitted a a proposed consent order that set aside a decision of the Refugee Review Tribunal and remitted the matter to the Tribunal for determination according to law, but it did not specify the basis for the remitter. French J was not prepared to make an order in the terms sought unless/until: (1) The error of law grounding the decision to set aside the Refugee Review Tribunal's decision and which it was required address by order of the Court was specified in the proposed order; and (2) The Court was satisfied that there was a proper basis for setting aside the decision and remitting the matter to the Refugee Review Tribunal.

Davies J held that an order disposing of proceedings by consent must be self-explanatory, as if the matter is remitted to a tribunal to be decided according to law it is necessary for it to be informed of the nature of the error conceded by the parties. The consent order might then need to be drafted in such a way that the Tribunal understood how it was to go about its task in the circumstances of the instant case. He also stated:

> 20. Finally, French J made two further points relevant to the present matter. His Honour said:
>
> > [14] This approach to the making of consent orders does not require exacting inquiry into the basis for every such order that is sought. There are many consent orders both of an interlocutory and a final nature which are perfectly regular and within power on their face and which reflect a considered resolution by parties of legal capacity to make the agreements reflected by those orders. One example of a "routine order" of this kind is a consent order dismissing the application. There are other orders which have public interest elements and require closer examination before the Court accedes to them…
> >
> > [19] I do not think it necessary that a Judge in making consent orders of this kind should ordinarily elaborate reasons for being satisfied that they are within power and appropriate. I do not propose to do so in this case. I think it sufficient that the Judge be satisfied of the matters which I have referred to earlier and that the terms of the consent order themselves reflect the basis upon which the matter is being remitted to the Tribunal. It may be that the parties submitting a consent order in such cases as well as formulating it with the requisite specificity could submit a brief joint memorandum identifying from the record those parts of the decision-maker's decision or process which disclose the conceded error.

His Honour noted that in *Inghams Enterprises Pty Limited v Vojnokovich* [2014] NSWSC 1519 (*Vojnokovich*), the parties asked the Court to make consent orders that quashed a MAP's decision and remitted the matter to the Registrar for referral to a further MAP to be decided according to law, although the defendant did not concede that there was an error of law. The plaintiff argued that the Court could make proposed consent order if it was satisfied that the interests of justice so demanded even if it was not satisfied that an error had been established. However, Schmidt J rejected that argument and held that while the Court has supervisory jurisdiction under the *Supreme Court Act 1970* its exercise is not at large (see *Victims Compensation Fund Corp v GM* [2004] NSWCA 185 (2004) 60 NSWLR 310 at [31]). She stated:

> [25] The exercise of that jurisdiction depends on relevant error being established, as discussed in *Kirk v Industrial Relations Commission (NSW); Kirk Group Holdings Pty Ltd v WorkCover Authority of (NSW) (Inspector Childs)* [2010] HCA 1; (2010) 239 CLR 531. There, the difficulty in determining in a particular case whether, if error has occurred, it is a jurisdictional error because the decision maker has made a decision outside the limits of the functions and powers conferred upon it, or does something which it lacks power to do, or whether the error is an error within jurisdiction, involving a decision

which the decision maker is authorised to decide, was discussed (see at [66] - [70]).

Davies J held that the MAP's failure to consider the plaintiff's requests for re-examination of the first defendant and an oral hearing was an error of law. In making the proposed orders by consent, he cited the decision of Bell J in *Dar v State Transit Authority of NSW* [2007] NSWSC 260, as follows:

> [67] It may be accepted that it was open to the Appeal Panel to determine that the appeal would proceed without an assessment hearing. However, there is force to the complaint that the Appeal Panel's discretion to decide whether to hold an assessment hearing was not properly exercised. It seems to me that it was not exercised at all because the Appeal Panel, wrongly, understood that each of the parties to this medical dispute wanted the appeal to be determined on the papers.

MAP failed to perform its statutory task by revoking a MAC conducting its own review in circumstances where there was a demonstrable error

Broadspectrum (Australia) Pty LTD v Wills & Others – [2018] NSWSC 1320 – Harrison AsJ – 31 August 2018

Background

From March 2014 to July 2014 the first defendant (worker) was employed by the plaintiff as a full time social worker/case manager at the Offshore Processing Centre on Manus Island. She alleged that on 3 May 2014, she was sexually assaulted by a client at the facility and developed a psychiatric and/or psychological injury over time. She claimed compensation for permanent psychological and/or psychiatric impairment under s 65A WCA.

The insurer disputed the claim and on 11 October 2016, Arbitrator Edwards determined that the first defendant had suffered an injury in the course of her employment and the dispute under s 65A WCA was remitted to the Registrar for referral to an AMS.

On 2 February 2017, the AMS issued a MAC that assessed 19% WPI under PIRS (19% WPI + "treatment effect of impairment" of 2% WPI), but applied only a 1/10 deduction under s 323 WIMA. In relation to this issue, Harrison AsJ noted that the AMS took a prior history of significant mental illness from the first defendant, which included being sexually abused as a 10-year old child by her grandmother's neighbour, when she was aged 10. She returned to New Zealand in 1989 and tried to take legal action against the perpetrator, but was against it as he was old, unwell, and a known paedophile and she received extended counselling over a six-month period. In 2000, she began taking antidepressants for PMT and took these for 2 years. In 2012, she saw Dr Guha for treatment with respect to a sexual assault that occurred in 2007. She was also the victim of domestic violence from her then partner, who was misusing cannabis, and resumed taking anti-depressants and saw a psychologist. There was also a family history of mental illness, with conditions such as PTSD, Depression, and Alcohol Misuse.

The AMS diagnosed an aggravation of Major Depressive Disorder, PTSD and "Alcohol Misuse Disorder" and said that while there were some inconsistencies in the first defendant's presentation, there was evidence of a 'moderately severe psychiatric disorder'. In relation to the deductible proportion (if any) under s 323 WIMA, the AMS answered 'not applicable', but he nevertheless applied a deductible of 1/10 in the MAC.

Medical appeal

The plaintiff appealed against the MAC and a delegate of the Registrar referred the matter to a MAP on the basis that the MAC contained a demonstrable error. Harrison AsJ's judgment records the following submissions from the parties:

> *Appellant's submissions*
>
> 28. The appellant submits that the AMS erred in failing to apply a deduction of greater than 1/10. The AMS states that a deduction was "not applicable", when the worker was still receiving treatment at the time of the injury. The deduction was inadequate based on the nature of injury found by the Arbitrator, and on the evidence.
>
> 29. The AMS erred in making reference to 2 per cent deduction for pre-existing condition without explanation in the "PIRS Schedule".
>
> 30. The AMS made findings as to injury, against the findings of the Arbitrator. The AMS ignored the findings of the Arbitrator and substituted his own diagnosis in relation to the injury.
>
> 31. The AMS failed to provide a basis for the deduction made. The deduction made was inconsistent with his own diagnosis of the aggravation of PTSD and Major Depressive Disorder in addition to other diagnoses.
>
> 32. Given the Arbitrator accepted the diagnosis of Dr Lotz, a significant deduction should be made similar to the deduction made by him.
>
> *Respondent's submissions*
>
> 33. The respondent submits that the appellant's submissions are without merit and the MAC should be confirmed. There is no basis for the appellant's submissions that the assessment is based on incorrect criteria. The AMS has used the Psychiatric Impairment Rating Scale and properly completed Table 11.8 PIRS Rating Form under the Guidelines, and has complied with section 319 of the 1998 Act.
>
> 34. The referral to the AMS was for the assessment of "psychological injury". The terms of the referral are sufficiently broad for the diagnosis made by the AMS, The AMS is not constrained by the Arbitrator's determination as to the specific type of diagnosis, but has the jurisdiction to make a diagnosis under sections 322 and 326 of the 1998 Act. The AMS is able to make the diagnosis and assessment of impairment arising from the injury. This is consistent with *Haroun v Railcorp New South Wales* [2008] NSWCA 192 (*Haroun*).
>
> 35. The appellant is estopped from arguing that there are grounds for appeal in the working of the referral to the AMS, because issue should have been taken at the time of the referral.
>
> 36. The submissions of the appellant on the pre-existing condition are misconceived and not supported by the evidence which was fully considered by both the Arbitrator and the AMS.

The MAP confirmed the MAC and described the inconsistency between the AMS' comments and the deduction under s 323 WIMA as "a slip". It held, relevantly:

> 44. The appellant submits that the AMS has failed to explain the 1/10 deduction made under section 323, or to take account of the history of the pre-existing condition. The Panel notes that under "present symptoms" the AMS reports on his enquiries as to the source of the symptoms experienced relative to the pre-existing issues,
>
> > Ms Wills reports the presence of re-experiencing symptoms and flashbacks about the Manus Island incident. She denies flashbacks about the other assault.

She experiences anxiety symptoms, including panic attacks where she pants with her breath and feels sick. She identified low mood and can often get tearful. She continues to be in fear of being attacked again, particularly when she sees a Middle Eastern person…She has lost interest and concentration in reading and undertaking research. She states that certain things she reads triggers flashbacks of the sexual assault at Manus Island.

45. It is clear from the above excerpt and the history taken that the AMS was well aware of the pre-existing condition. The Panel notes that the deduction of 1/10 is consistent with the evidence that Ms Wills' previous condition had improved considerably in the period prior to the injury. She was on some medication, but in a report of 28 April 2013 Dr Nicholas Jetnikoff reports, "As regards current illness there is limited evidence of any current active psychological problems at all at the time of relevance."

46. Additionally, the health screening report for the employer dated 24 September 2013 states, "Suitable for proposed placement and assignment. Minor medical issues identified are considered stable and would not preclude successful assignment."

47. A letter from Dr Saibal Guha, treating consultant psychiatrist, dated 28 December 2013, signifies the end of treatment after a period of six months without a consultation, and says, "... we have discharged your care back to your GP, Dr Dore, as we envisage you are currently travelling well."

48. The clinical note of the GP, Dr Dore, on 16 April 2014, notes the circumstances of the employment on Manus Island and the involvement of Ms Wills in stressful situations in her work there. Dr Dore notes, "Need to keep an eye on this, monitor for PTSD." This suggests some vulnerability, but it is also consistent with the above medical evidence of the condition prior to injury.

49. All of this indicates that Ms Wills was functioning quite well in the period leading up to the injury. This evidence does not support the final opinion of Dr Trevor Lotz as to the pre-existing component. The evidence is consistent with the deduction applied by the AMS of 1/10, as it is difficult to quantify the deductible proportion, and 1/10 is not at odds with the evidence.

50. While the AMS could have expanded on the reasons for his conclusion on section 323, this has led to no error in the assessment. The Panel does not accept the submission of the appellant that the assessment is based on incorrect criteria. The AMS has used the PIRS assessment, as apparent at Table 11.8. The AMS has also considered and applied section 323 of the 1998 Act.

Judicial review

The plaintiff sought judicial review on the grounds that the MAP's decision was void by reason of jurisdictional error, as follows:

(a) The MAP failed to find demonstrable error in the MAC and statement of reasons of the AMS dated 2 February 2017 in respect of the s 323 WIMA deduction applied by the AMS, despite acknowledging that the AMS' reasons were inadequate or absent and that it failed to perform its statutory task under s 328 WIMA;

(b) Under s 328 (5) WIMA, the MAP only has power to either confirm or revoke a MAC, but despite acknowledging a failure to provide reasons for the applied deduction, which was a demonstrable error and should have triggered a revocation, it failed to revoke the MAC and then failed to conduct a review as required by the legislation and determine for itself the deductible under s 323 WIMA; and

(c) The MAP failed to perform its statutory task by not conducting its own review in circumstances where there was a clear demonstrable error in that it failed to explain or expose the reasoning and provide reasons for the deduction applied by the AMS and instead engaged in an exercising of justifying the final assessment of the AMS and provided an explanation that it assumed formed the basis of the AMS' assessment.

Plaintiff's submissions

The plaintiff relied upon the decisions in *Pereira v Siemens Ltd* [2015] NSWSC 1133 ("*Pereira*"); *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 ("*Cole*"); *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq)* [2013] NSWSC 365 ("*Elcheikh*") and *Sadsad v NRMA Insurance Limited* [2014] NSWSC 1216 ("*Sadsad"*). Its submissions are summarised below:

- While the AMS' reasons are entitled to a beneficial construction, this does not extend so far as to fill in the gaps in the reasons of administrative tribunals. Therefore, although the AMS deducted 1/10 for a pre-existing condition, it cannot be said that he did so under s 323 WIMA;
- This is not the exemplar case for the operation of s 323 (2), where it "will be difficult or costly to determine (because for example, of the absence of medical evidence)", leading to the application of an arbitrary 10% reduction for the impairment due to pre-existing condition. On the contrary, there as a substantial body of evidence available for assessing the degree of impairment that is due to a pre-existing condition or previous injury;
- Even if it could be said that the AMS did apply s 323 WIMA, he did not turn his mind "so far as one can tell from his reasons" to the jurisdictional fact or necessary precondition that grounds the engagement of s 323 (2); and
- Therefore, the matter has not been properly engaged with at either level of the decision-making process.

First Defendant's submissions

The First defendant's submissions are summarised below:

- For there to be a deduction for a pre-existing condition, it must have the impact that because of the pre-existing condition the degree of WPI is greater;
- The MAP correctly identified the AMS made a deduction of 2% WPI in respect of the pre-existing condition and the AMS was therefore aware of that condition when he made the assessment. This can be a matter of clinical assessment and not one where expansive reasons are required;
- It was not incumbent upon the AMS to state reasons beyond the figure reached for the 1/10th deduction as it clear from the context in which the AMS was operating that this default position was adopted. In circumstances where detailed contentions are not put forward as to what should happen the minimum legal standard applies: *Vegan* at [121] and [122]. These requirements are not even engaged in this case due to the way in which the material was put to the AMS;
- *Vitaz* and *Hill* are authority for the proposition that the AMS is required to make an intuitive or evaluative judgment and in doing so, they rely upon and apply their own medical skill and expertise to the task: *Wingfoot* at [47];

- The MAP correctly identified that the AMS was aware of her pre-existing condition and its impact in terms of the injuries sustained at work and the MAP also properly identified that she was effectively clear of ongo8ing symptomology when she commenced employment with the plaintiff; and
- Even if there was an error in respect of the obligation to state reasons by the AMS, the MAP's reasoning complies with that obligation.

Consideration

In relation to ground (a)

Her Honour stated that the decisions of the AMS and MAP must be read as a whole and "…not with an eye finely tuned for error": *McGinn v Ashfield Council* [2012] NSWCA 238 per McColl JA at [17] (Sackville AJA and Gzell J agreeing); *Walsh v Parramatta City Council* (2007) 161 LGERA 118; [2007] NSWLEC 255 at [67] per Preston CJ citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 (*Wu Shan Liang)* at 291. She also held that: "…The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law…" (*Wingfoot* at [55]).

Her Honour noted that the AMS failed to provide any reasons as to why he applied the 1/10th deduction under s 323(2) of the WIM Act and stated that if the deduction under s 323 was going to be too difficult or costly to determine (because for example there was an absence of medical evidence) then the AMS needed to say so. She held:

> 78. …It is unclear why s 323(2) was applied in circumstances where the AMS had recorded the existence of two previous sexual assaults that involved counselling and medication. The AMS should have provided some brief reasons to explain the path of reasoning which lead him to apply a 1/10th deduction for pre-existing WPI set out in s 323(2).

In relation to grounds (b) and (c)

Her Honour noted that the MAP approached its statutory task by "filling in the gaps that were omitted by the AMS", but this approach does not accord with what was said by Hamill J in *Sadsad* at [47]. She held:

> 79. …It is one thing to give a beneficial construction to the reasons of an administrative decision maker. It is another to fill in the gaps in the path of reasoning by a reference to an assumption that the decision was made according to the relevant law. This is what the Appeal Panel did at [45] to [49]. The Appeal Panel should have found a demonstrable error. In doing so, the Appeal Panel misconstrued its statutory task.

Her Honour declared the decisions of the AMS and MAP void by reason of jurisdictional error and remitted the matter to the WCC to be dealt with according to law.

Workers Compensation Commission - Presidential Decisions

Threshold dispute – No right of appeal unless the monetary threshold under s352 (3) WIMA is satisfied

Anderson v Secretary, Department of Education - [2018] NSWWCCPD 32 – Wood DP – 7 August 2018

Background

The appellant alleged that she injured her right knee on 30 May 2010, which caused her to overuse her left knee and caused an aggravation of her right knee injury and back pain. She also alleged a frank injury to the left knee on 26 October 2012. In 2016, she claimed compensation under s 66 WCA for her knee injuries and the dispute was referred to an AMS. On 9 June 2016, the AMS (Dr Assem) issued a MAC that assessed 14% WPI (right lower extremity) and 12% WPI (left lower extremity). The Certificate of Determination dated 12 May 2016, indicates that the claims under s 66 WCA were discontinued with respect to injuries to the lumbar spine and injury suffered "as a result of the nature and conditions of employment".

On 12 December 2017, the appellant lodged an Application for Assessment by an AMS with the WCC, to determine whether she satisfied the thresholds under s 60AA WCA and s 39 (2) WCA. The respondent opposed the referral to an AMS as it disputed the alleged injury to the lumbar spine and that the impairments could be aggregated to satisfy the thresholds. On 27 February 2018, Arbitrator Wynyard entered an award for the respondent.

Appeal

The appellant applied to appeal against the Arbitrator's decision, but the respondent disputed that the monetary threshold prescribed in s 352 (3) WIMA was satisfied. This provides that there is no appeal unless the amount of compensation at issue on the appeal is both (a) at least $5,000 (or such other amount as may be prescribed by the regulations), and (b) at least 20% of the amount awarded in the decision appealed against.

Wood DP directed the parties to file and serve submissions regarding the threshold issue and directed their attention to the decision of Snell DP in *Abu-Ali v Martin-Brower Australia Pty Ltd* [2017] NSWWCCPD 25. After discussing their submissions, she held that s 352 (3) WIMA provides that there is no right of appeal unless the amount of compensation at issue on the appeal exceeds $5,000.

In construing s 352 WIMA, Wood DP cited the majority's decision in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27, [47] and held that the general purpose and policy of the provision is to require that there is "an amount in issue". She then discussed the relevant authorities:

> 66. …Where no compensation was awarded, an appeal against a decision of an Arbitrator can still be brought, provided it satisfies subs (3) (a), that is, the amount of compensation at issue is at least $5,000: *Mawson v Fletchers International Exports Pty Ltd* [2002] NSWWCCPD 5, [22].
>
> 67. The amount of compensation at issue on the appeal must be determined by reference to the amount at issue in the proceedings at first instance: *Kate Louise Sheridan v Coles Supermarkets Australia Pty Limited* [2003] NSWWCCPD 3, [16] The appeal must have a *real* capacity to put the amount in issue in the appeal: *Fletchers International Exports Pty Ltd v Regan* [2004] NSWWCCPD 7 (*Regan*), [27].

> 68. In *Colefax*, Keating P considered whether the monetary threshold to appeal had been met. The appeal arose out of a decision of the Senior Arbitrator that the respondent was to provide suitable duties to the worker. The appellant argued that the threshold had been met because as suitable duties had not been provided, the worker had been prevented from earning her pre-injury weekly income which in total exceeded $5,000. Applying the relevant authorities, Keating P found there was no amount of compensation claimed in the Application before the Senior Arbitrator, so there was no amount of compensation at issue on the appeal and the s 352(3) threshold had not been met…
>
> 70. In *O'Callaghan v Energy World Corporation Ltd*, [2016] NSWWCCPD 1 (*O'Callaghan)* the worker sought to bring an appeal against a refusal by an Arbitrator to set aside consent orders. If the orders were set aside, it would enable her to bring a medical appeal pursuant to s 327(3) of the 1998 Act, with a view to bringing a work injury damages claim. Deputy President Roche said that the "claim is not one for compensation but one that relates to the threshold for a potential work injury damages claim. As a result, the monetary threshold cannot be met. (I note, in passing, that 'damages' does not include 'compensation' under the 1987 Act (s 149 (1) of the 1987 Act). (*O'Callaghan*, [50]) …
>
> 72. With respect to domestic assistance, Deputy President Roche determined in *Hawke v Stanyer & ors t/as Stanyer Partnership* [2007] NSWWCCPD 208 that a claim for domestic assistance expenses was not a claim for compensation because there was no evidence by a medical practitioner to support the claim and the Commission had no power to determine future (not yet incurred) treatment expenses, following *Widdup v Hamilton* [2006] NSWWCCPD 258. Since that decision, the 1987 Act has been amended to include s 60 (5), which extended the Commission's jurisdiction to the determination of disputes concerning future treatment expenses.

Wood DP held that this matter was "on all fours" with Snell DP's decision in *Abu-Ali.* She held:

> 78. The Deputy President considered a long line of presidential authorities on point. He concluded that:
>
> > The orders sought by the appellant on the appeal are revocation of the Certificate of Determination dated 5 December 2016, and referral to an AMS 'to assess WPI attributable to his secondary psychological condition for the purposes of s 32A'. If that assessment exceeded 20 per cent or 30 per cent, this would potentially increase the appellant's entitlement to benefits under the Workers Compensation Acts, if he was otherwise entitled. There was no amount of compensation claimed before the Arbitrator, and there is no amount of compensation directly at issue on the appeal. If the appeal were to succeed, there would be no orders for the payment of compensation. In my view, the threshold is not met. In the circumstances, no appeal lies pursuant to s 352, due to the application of s 352 (3) of the 1998 Act (*Abu-Ali*, [22]).

She concluded that as no amount of compensation was claimed before the Arbitrator and no amount of compensation is directly at issue on this appeal, the monetary threshold under s 352 (3) (a) WIMA was not satisfied and the appeal could not be brought.

No further entitlement to compensation under s 66 WCA without an increase in the degree of permanent impairment

Ilic v 2/11 Leonard Ave Pty Ltd (in liquidation) [2018] NSWWCCPD 34 – President Keating - 20 August 2018

Background

On 12 August 2009, the appellant injured his lumbar spine. On 30 May 2012, the parties entered into a complying agreement under which the appellant received compensation under s 66 WCA for 6% WPI. In 2017, the appellant made a further claim under s 66 WCA for 16% WPI, comprising a further 5% WPI for the lumbar spine, 4% WPI for the right upper extremity and 6% WPI for the right lower extremity and he alleged that he had suffered consequential injuries to the right shoulder, right hip and right knee.

On 5 February 2018, the insurer declined the claim based upon an assessment of 7% WPI from Dr Breit (5% for the lumbar spine + 2% for impaired activities of daily living).

On 15 January 2018, the appellant lodged an ARD claiming further compensation under s 66 WCA and resolution of a "threshold dispute". The dispute was referred to an AMS. On 5 March 2018, the AMS (Dr McGrath) issued a MAC, which assessed 6% WPI, comprising 2% for the lumbar spine (impaired activities of daily living), 4% for the right lower extremity and 0% for the right upper extremity.

On 3 April 2018, the appellant's solicitor wrote to the WCC, referring to the MAC and relying upon the decision in *Cram Fluid Power v Green ("Cram Fluid").* He submitted that *Cram Fluid "…held that a complying agreement is analogous to a Medical Assessment Certificate for the purposes of determining [Mr Ilic's] impairment"* and that the appellant was *"…entitled to make a further claim for 4% WPI in relation to [Mr Ilic's] injury to the Right Lower Extremity".* He requested a teleconference before an Arbitrator.

On 18 April 2018, the WCC informed the parties that the complying agreement and MAC would be considered in determining the claim under s 66 WCA, but there would be no teleconference.

On 19 April 2018, Arbitrator Wright issued a Certificate of Determination, which indicated that the appellant had suffered 6% WPI due to the injury suffered on 12 August 2009, but he was not entitled to further lump sum compensation under s 66 WCA. His brief statement of reasons indicated that while compensation of $8,387.50 was payable for 6% WPI, the appellant had received compensation of $8,663 for 6% WPI under the 2012 Complying Agreement.

Appeal

On appeal, the appellant alleged that the Arbitrator erred by: (a) failing to consider the actual percentages awarded in the complying agreement as compared with those in the MAC, and (b) failing to give sufficient reasons for his decision.

In relation to ground 1

Keating P determined that the threshold under s 66 (1) WCA does not apply to this claim and s 66A (3) WCA empowers the WCC to award additional compensation to that payable under a complying agreement where there has been an increase in the degree of permanent impairment since the complying agreement was entered.

His Honour held that in determining the dispute regarding the quantification of permanent impairment, the Arbitrator was only required to consider the conclusive and binding MAC. He rejected the appellant's submission that the right lower extremity is "a further condition that warrants a separate assessment and award" as s 322 (2) WIMA provides that impairments that result from the same injury are to be assessed together. He stated:

> 63. Mr Ilic's further lump sum compensation claim is in respect of impairments that result from the same injury which had been the subject of the May 2012 complying agreement. There is only one injurious event, that is, the event that occurred on 12 August 2009. There is only one injury pleaded, that is, the accepted injury to the lumbar spine on 12 August 2009. The alleged impairments to the right upper and right lower limbs are not separate injuries, they are alleged consequential conditions arising from the accepted lumbar spine injury.
>
> 64. Contrary to Mr Ilic's submissions, it did not matter that the complying agreement was only in relation to the impairment of the lumbar spine. Nor did it matter that Dr McGrath's assessment concerned different body parts. Mr Ilic is not entitled to be awarded a further 4% whole person impairment for the right lower extremity, as he submits, merely because it is a separate impairment to the lumbar spine and was not the subject of the complying agreement. As I have said, the impairments concern the same injury and must be assessed together and not separately. That is why the subject of the referral to Dr McGrath was the degree of whole person impairment as a result of injury on 12 August 2009 to Mr Ilic's lumbar spine, right upper extremity and right lower extremity. That is, all impairments arising from the same injury.

As the appellant had not established an increase in the degree of WPI since the complying agreement was entered, he did not satisfy s 66A (3) (c) WCA and the Arbitrator did not err in finding that he is not entitled to further compensation under s 66 WCA.

In relation to ground 2

Keating P stated that the duty to provide reasons is governed by s 294 WCA and rule 15.6 of the 2011 Rules and he held:

> 71. The Arbitrator provided the reasoning process that led him to find that Mr Ilic had no entitlement to further lump sum compensation pursuant to s 66 of the 1987 Act. He stated that Mr Ilic was not entitled to further lump compensation because he was "previously paid [compensation] in respect of 6% permanent impairment resulting from injury on 12 August 2009 in accordance with the Complying Agreement dated 30 May 2012". That is, Mr Ilic was previously paid compensation for the permanent impairment which was claimed in the dispute before the Arbitrator. While the Arbitrator could have elaborated further on the reasons for making that finding, the reasons satisfied the statutory duty to provide "brief reasons": s 294 (2) WIMA.

His Honour therefore dismissed the appeal.

Workers Compensation Commission - Medical Appeal Panel Decisions

Demonstrable error in the calculation of a deductible under s 323 WIMA

PDF Food Services Pty Limited v Leslie McLennan – M1-003568/17 – Arbitrator William Dalley, Dr D Crocker and Dr B Noll – 17 July 2018

Background

The worker commenced employment as a storeman in 1989 and began work with the appellant in about 2000. He developed painful symptoms on both knees and in his low back and ultimately underwent bilateral total knee replacements. He claimed compensation under s 66 WCA and the WCC determined that the knee injuries were the result of a deterioration of a disease due to tasks performed at work. The dispute was referred to an AMS and the MAC assessed 16% WPI for the left lower extremity and 14% WPI for the right lower extremity, but applied a deductible of 90% under s 323 WIMA with respect to the left lower extremity.

First medical appeal

The worker appealed against the MAC and the Registrar referred the matter to a MAP. On 31 July 2013, the MAP issued a MAC that reduced the s 323 deductible for the left lower extremity to ¾ and applied a deductible of 1/10 for the the right lower extremity.

Further claim under s 66 WCA

On 27 February 2017, the worker claimed further compensation under s 66 WCA for injuries to the lumbar spine and both lower extremities.

This dispute was referred to an AMS and a MAC was issued on 6 April 2018, which assessed 15% WPI for the left lower extremity, 20% WPI for the right lower extremity, 6% WPI for the lumbar spine and 0% WPI for scarring. A deductible of 1/10 under s 323 WIMA was applied to each assessment.

Second medical appeal

The appellant appealed against the MAC and the Registrar referred the matter to a MAP.

The MAP held that the evidence before the AMS established both a pre-existing injury and a pre-existing condition that might reasonably have been thought to have contributed substantially to the level of impairment assessed by the AMS. However, the AMS provided no reasons for applying a 1/10 deductible other than noting that determination of the extent of the deduction would be difficult or costly. It held that s 323 (2) WIMA requires consideration of whether the 1/10 deduction is "at odds with the available evidence". It held that a deduction of less than ½ for the left lower extremity was at odds with the available evidence and was a demonstrable error. It applied a deductible of ¾ for the left lower extremity and 1/10 for both the right lower extremity and lumbar spine and assessed a combined 25% WPI.

"Before making any deduction pursuant to this provision (s 323 WIMA), an Approved Medical Specialist must first identify a previous injury to pre-existing condition or abnormality."

Raynam v Baxter Healthcare Pty Limited – M1-1004/18 – Arbitrator Mr R Perrignon, Dr P Harvey-Sutton and Dr B Stephenson – 20 July 2018

Background

The appellant injured his right hip on 14 June 2001. On 10 April 2018, an AMS (Dr Mastroianni) issued a MAC that assessed 40% permanent loss of efficient use of the right leg at or above the knee, but applied a deductible of ½ under s323 WIMA for "congenital osteoarthritis".

Appeal

The appellant appealed against the decision of the AMS and the Registrar referred the matter to a MAP. The appellant argued that no deduction should have been made because there was no evidence of osteoarthritis in the right hip prior to the injury. However, the respondent argued that the AMS was entitled to find that there was a pre-existing condition of the right hip and that it contributed to the current impairment.

The MAP held, relevantly:

> 17. Before making any deduction pursuant to this provision, an Approved Medical Specialist must first identify a previous injury to pre-existing condition or abnormality. In this case, no previous injury was identified. The Approved Medical Specialist reasoned that the degenerative changes in the right hip must have been constitutional, because there was osteoarthritis in the left hip. In our view, that might follow, it does not necessarily follow, particularly where, as here, there is a finding of injury to the right hip some 17 years earlier, and evidence of ongoing symptoms. To justify such a conclusion in this case, the Approved Medical Specialist was required to give at least some reasons, beyond the mere conclusion that the presence of left hip pathology justified such a finding. He did not do so. The failure to give adequate reasons constitutes error.
>
> 18. Having concluded that the right hip condition was 'constitutional', the Approved Medical Specialist made a deduction for the extent to which it contributed to the current impairment – namely, one-half. Unfortunately, he failed to make a necessary intermediate finding – that is, that the 'constitutional' condition existed prior to injury in 2001.

The MAP also held that even if the finding that the right hip condition was of constitutional origin had been justified by proper reasons, it would not compel a finding that it existed prior to injury in 2001 as there was no radiological or other evidence to establish the presence of right hip arthritis prior to injury and no history of symptoms prior to injury that could justify that conclusion. Therefore, s 323 WIMA did not authorise any deduction and the deduction was made without power.

The MAP revoked the MAC and issued a fresh MAC without a s 323 WIMA deduction.

Workers Compensation Commission – Arbitrator Decisions

Leave to amend an ARD declined in relation to a request for reconsideration of a MAC

Farrugia v TSY Transport Pty Ltd – 3090/17 – Senior Arbitrator McDonald – 27 November 2017

Background

On 28 June 2016, the applicant injured his lumbar spine and right leg at work. On 9 March 2017, he claimed compensation under s 66 WCA for 23% WPI, based upon Dr Habib's assessments (11% for lumbar spine and 14% for the right lower extremity). The dispute was referred to an AMS and on 10 August 2017, the AMS issued a MAC that assessed 9% WPI. He found evidence of scarring, he did not assess this under TEMSKI.

On 6 September 2017, the applicant asked the WCC to not issue a COD and he sought: the respondent's consent to the assessment of scarring or "to have the scarring issue determined by an arbitrator" (reconsideration); leave to obtain additional medical evidence with respect to scarring; reconsideration by the AMS of part of his assessment; and a stay pending the determination of these issues. He also lodged an appeal against the MAC, which was stayed pending the determination of the other matters.

The parties' filed written submissions, which are summarised below:

Applicant's submissions

The applicant argued that he was not aware of any potential entitlement to WPI for scarring until he received the MAC and that the fact that the AMS was unable to properly provide an assessment of scarring because this was not part of the Referral, resulted in the degree of permanent impairment not being fully ascertainable. The issues are therefore: (1) Whether he applicant suffered scarring; and (2) Whether he should be granted leave to amend the ARD to include "scarring/injury to the skin" in any referral to the AMS for reconsideration under s 329 WIMA and/or appeal on the AMC (sic) under s 327 WIMA.

Respondent's submissions

The respondent argued that reconsideration was not appropriate because the question of 'scarring' was not referred to the AMS. The applicant did not claim for scarring and he failed to object to the terms of the referral to the AMS. Further, the discretion to amend pleadings was not unfettered and should not be exercised after a MAC had been issued.

Consideration

The Senior Arbitrator held that the request for reconsideration of the MAC was not appropriate because the worker argued that the AMS' assessment is incorrect and this is properly the subject of a medical appeal. Therefore, the only issue is whether the ARD should be amended to include a claim for scarring. She stated:

35. In *Samuel* [2006] NSWWCCPD 141, Roche DP said at [55]:

> In considering the scope and operation of section 350(3) I think it is appropriate to keep in mind the words of Justice Mahoney in *Switzerland Insurance Workers' Compensation (NSW) Ltd v Burley*, Court of Appeal, No. 40408, 5 December 1996, unreported, at 18:

> Procedure in the Compensation Court is, in general, flexible and free from basic rigidities. This is as it should be: The Court is a specialist Court whose function is to deal with a large number of claims as expeditiously as may be. Its decisions are, in my opinion, to be given according to the law but with a regard to justice and merits appropriate to the nature of the social remedy which the legislation provides. Subject to observance of the specific statutory requirements, it should, in my opinion, exercise its jurisdiction in a beneficial manner and without undue emphasis upon technicalities.

36. In para 58, DP Roche set out the following principles applicable to reconsideration applications, which he distilled from the authorities:

> 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 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'*);
>
> 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'*);
>
> 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'*);
>
> 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'*), 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).

The Senior Arbitrator stated that to succeed, the worker needed to amend his claim for compensation and the ARD and the ability to amend a claim was considered in *Woolworths Limited v Stafford* [2015] NSWWCCPD 36 (*Stafford*), in which DP Roche said:

> The suggestion that a claim for permanent impairment compensation, whether valid or invalid, cannot be amended prior to its resolution or determination is clearly wrong and is rejected.

> It is true that neither the legislation nor the *Workers Compensation Commission Rules* 2011 (the Rules) deal with the amendment of the initial letter of "claim" for permanent impairment compensation or a permanent impairment claim form. That is hardly surprising. As explained earlier in this decision, when a claim is at that informal stage, the purpose of making a "claim" is merely to start the claims procedures in Ch
>
> 7. It is not a formal pleading. To suggest that, prior to the resolution or determination of the claim, by making a demand for permanent impairment compensation for a certain level of permanent impairment, the worker is permanently locked into that claim, and cannot amend it, is untenable and contrary to all principles of justice.

In *Stafford,* DP Roche stated that it is preferable that a claim should not be served until the worker's condition is stable, but there are some rare cases where there is a change in impairment between the date of the initial claim and the date of resolution or determination of the claim. He held at [94]:

> …In such cases, it is appropriate that the claim be amended to reflect the correct position. That is especially so where workers are now restricted to only "one claim" for permanent impairment compensation and where formal proceedings have not commenced in the Commission. It is clearly in the interests of justice that, subject to any prejudice to the appellant, and none has been suggested in the present case, particulars of the worker's claim properly reflect the claim that is being pursued.

The Senior Arbitrator referred to the decision in *Kurt Nixon v Kloman Industries Pty Limited* [2015] NSWWCC 293, in which Arbitrator Bamber considered an application to amend an ARD as a result of comments made by the AMS in a MAC, as follows:

> 50. Arbitrator Bamber acknowledged that Mr Nixon's impairment had not changed but noted that there had been no resolution or determination of his claim. She considered the factors leading to the conclusion that it was in the interests of justice to allow the amendment. One of the more significant factors in the exercise of her discretion was the fact that the AMS had found there was an additional impairment which should be assessed. Arbitrator Bamber also noted that the assessment of Mr Nixon's impairment was not straightforward. She considered that any prejudice to the respondent could be dealt with by allowing it to obtain medical; evidence though noted that the respondent had some medical evidence which dealt with Mr Nixon's gait. Arbitrator Bamber determined that it was in the interests of justice to permit the amendment. She remitted the matter to the Registrar to refer it to the AMS for reconsideration.

Further, the Senior Arbitrator noted that in *Robert Nixon v Lyndhurst Rural Services Pty Ltd* [2015] NSWWCC 276, Arbitrator Wynyard reached the same conclusion from different reasoning. In that matter, the AMS noted that the worker's presentation was consistent with damage to his vestibular system (central nervous system) but that the body system referred to her was the peripheral nervous system. Impairment to the vestibular system was not covered by AMA 5 or the *WorkCover Guides* and an assessment by analogy was required under paragraph 1.59 of the *Guides*. She stated:

> 52. Arbitrator Wynyard noted that the application was necessitated by new evidence which could not have been obtained by due diligence "as the evidence concerns a scientific and technical issue which has arisen from a relatively unusual injury" and "the intricacies of the Guides... could not reasonably be expected to be known by the medico-legal experts in the case: at [66] …

The Senior Arbitrator concluded that before an assessment by an AMS could take place, the worker must make a claim for permanent impairment compensation setting out the WPI suffered. In the absence of an assessment for scarring, she did not consider that the interests of justice permitted a late amendment to include a claim for scarring and she declined to grant leave to amend the ARD. She directed that the medical appeal should proceed.

Post-script

On 16 April 2018, a MAP revoked the MAC on the basis that the AMS had not made an allowance for impairment of activities of daily living (ADL's). It assessed 1% for ADL's and issued a MAC that assessed 10% WPI.

Adult child of deceased was partially dependent upon him due to a reasonable expectation of support from him at a future time

Sharney Kay Lees by her Tutor Diane Carol Wood v Caltex Australia Petroleum Pty Limited – 2623/18 – Arbitrator McDonald

Background

The worker died as a result of injuries that he suffered at work on 20 September 2017. There was no dispute that death benefits were properly payable to his dependants under s 25 WCA. His wife survived him, but died in April 2018. The deceased and his wife each had a child from prior relationships, namely Skye (the deceased's daughter) and Ben (his wife's son). They also had the had custody of the applicant grand-daughter since she was 11 months old.

Consideration

The Arbitrator referred to the decision of the Court of Appeal in *TNT Group 4 Ltd v Halloris* (1987) 3 NSWCCR 10 (*Halloris*), in which the Court held that an 18-year old student was dependent on the deceased, because the deceased had promised to support him when he turned 18 and commenced his tertiary education, even though he was not supporting him at the time of death.

In *Halloris,* McHugh JA (the other justices agreeing) held that dependency is concerned with, *"actual and not theoretical support. A person claiming dependency need not be in receipt of actual support at the date of death. It is enough that, as at that date, he or she had a reasonable expectation of support in the future, Dependency may exist at the date of death although actual support cannot or is unlikely to occur until a future time:* at p14E.

The Arbitrator stated:

> 43. His Honour referred to a number of authorities including *Lee v Munro* (1928) 21 BWCC 401 where Sankey LJ said that *'in deciding whether or not there is a dependency the factors to be considered are past events and future probabilities'.* McHugh JA noted that in each of the cases cited "the applicant had a general legal right to be supported either at the time of death or in the future" and said: "does it make any difference that the applicant had no legal right of future support at the date of death? I do not think that it does. It is enough that, as at the date of death, the applicant has a reasonable expectation that the deceased would support him then or in the future." (*Halloris at p15G to 16A).*

She also stated:

> 47. At the time of Mr Lees' death, Mrs Lees was very ill and undergoing treatment. The evidence of Skye, Ms Brophy and Ms Shimmin is that Mr Lees was concerned that the treatment would not be successful. While Skye was assisting Mr and Mrs Lees with practical matters, she was not, at the date of her father's death, taking care of Sharney. The event which lead to her undertaking that role was the worsening illness and subsequent death of Mrs Lees. The evidence shows that that event was in Mr Lees' contemplation at the time of his death. The trust created in Mr Lees' will dated 4 September 2017 reflects that.

The Arbitrator concluded that she was satisfied that Skye had a reasonable expectation of support when the deceased's wife became too ill to care for Sharney alone or died and she was therefore dependent upon the deceased.

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