Bulletin

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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.

Supreme Court of New South Wales – Judicial Review Decisions

Jurisdictional error on multiple grounds

Mercy Connect Limited v Kiely [2018] NSWSC 1421 – Harrison AsJ – 21 September 2018

Background

On 19 April 2011, the defendant suffered physical injuries and a psychological injury during her employment with the plaintiff.

On 19 November 2015, the defendant claimed for lump sum compensation for a primary psychological impairment under s 66 WCA, but on 13 January 2016, the plaintiff disputed the claim and asserted that the defendant had suffered a secondary psychological injury and was not entitled to lump sum compensation for permanent impairment.

On 20 July 2016, the defendant commenced proceedings in the WCC and on 24 October 2016, the dispute proceeded to determination before Arbitrator Snell. He remitted the matter was remitted to the Registrar for referral to an AMS for the assessment with respect to primary psychological injury only. The AMS was instructed to exclude any impairment arising from a secondary psychological injury from the WPI assessment.

On 29 November 2016, the AMS issued a MAC, which assessed 12% WPI because of a primary psychological injury. This did not satisfy the threshold under s 65A WCA.

First Medical Appeal

On 20 December 2016, the defendant lodged an application for appeal against the decision of the AMS and submissions in support of that application. The plaintiff opposed the appeal and filed submissions in support of the opposition. On 15 March 2017, the MAP revoked the MAC and issued its own MAC, which assessed 15% WPI, which satisfied the s 65A threshold.

First Application for Judicial Review

On 18 April 2017, the plaintiff applied to the Supreme Court for judicial review of the MAP's decision. On 18 August 2017, Wilson J heard the application and on 14 September 2017, she delivered judgment, which quashed the decision of the MAP and remitted the appeal to the WCC for determination by a differently constituted MAP.

Re-determination of Medical Appeal

On 20 October 2017, the MAP requested further submissions from the parties. On 27 February 2018, it MAP published its decision and statement of reasons, which set aside the MAC and published a MAC that assessed 19% WPI.

Second Application for Judicial Review

On 27 March 2018, the plaintiff filed a further summons seeking judicial review on the following grounds: (1) The MAP failed to properly determine the defendant's appeal; (2) The MAP made directions that the defendant should have a further examination before determining whether there was an error in the MAC; (3) The MAP mistook its own jurisdiction on appeal with the Supreme Court's jurisdiction on judicial review; (4) The MAP failed to consider the defendant's secondary psychological injury and/or make a finding as to the degree of permanent impairment for that injury and did not give sufficient reasons to enable a Court, on review, to understand whether it had considered and made a finding regarding the secondary psychological injury; (5) The MAP failed to consider making a deduction for pre-existing condition or abnormality under s 323 of the *WIM Act*; (6) The MAP failed to give reasons for its revision of the degree of WPI; and (7) The MAP's decision is legally unreasonable. In the alternative, she asserted that grounds 1 to 6 are errors on the face of the record under s 69 of the *Supreme Court Act 1970 (NSW).*

On 21 September 2018, Harrison AsJ delivered judgment. Her reasons are summarised below.

Ground 1

The MAP did not address the grounds of appeal and failed to exercise its statutory task and misconstrued its statutory duty. Her Honour stated, relevantly:

> 71. … These were the grounds upon which the original appeal was made and the Appeal Panel was obligated to determine them in accordance with s 328 (2) of the *WIM Act*.

Ground 2

Her Honour referred to the decisions in *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 (*Vegan*), which was upheld in *Pitsonis v Registrar of the Workers Compensation Commission* (2008) 73 NSWLR 366 at [48] – [49] (*Pitsonis*) and stated:

> 79. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales*, Davies J stated that it is necessary for an Appeal Panel to identify a demonstrable error in a MAC before it is permitted to order a re-examination. His Honour at [34] stated:
>
> > …if an assessment can be carried out in the course of an appeal that assessment cannot take place before the Appeal Panel has determined that there is an error in the certificate leading to the need for a further assessment. Such an assessment may be needed because the Panel, although in a position to revoke a certificate for error, is not in a position to issue a new one without such an assessment.

> 80. In summary, these authorities support the proposition that the Appeal Panel had a limited jurisdiction in conducting its appeal and was obliged to identify a demonstrable error in the MAC prior to directing any re-examination of Ms Kiely.

The Appeal Panel did not identify a demonstrable error arising from the MAC and it was not entitled to conduct the re-examination and it misconstrued its statutory duty.

Ground 3

Her Honour stated that because of her finding on ground 2 she did not have to determine this ground. However, if she was wrong regarding that issue, she would have decided that ground 3 was not made out. She held:

> 86. While the Appeal Panel did make some oblique statements at [19] and [22] of its reasons, these statements were made in the context of the Appeal Panel summarising the parties' submissions and the procedural history of the matter. Therefore, I would have found that to consider these statements as evidence of the Appeal Panel misconstruing its jurisdiction would involve this Court incorrectly adopting an overly zealous approach to language with an eye finely tuned for error: see *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) 185 CLR 259; [1996] HCA 6 at 291.

Grounds 4 and 5

Her Honour stated that these grounds raise similar issues. It was not necessary to determine them, but if she needed to express a view, it would be that the MAP misconstrued its statutory task on both grounds.

Ground 6

Her Honour felt that this ground was more akin to a merits review and if it was necessary for her to determine it, she would not have found that the MAP misconstrued its statutory duty by not considering the s 323 deduction.

Ground 7

Her Honour referred to the decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76] ("*Li*"), in which the High Court stated:

> In *Peko-Wallsend*, Mason J, having observed that there was considerable diversity in the application by the courts of the test of manifest unreasonableness, suggested that "guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion". *House v R* holds that it is not enough that an appellate court would have taken a different course. What must be evident is that some error has been made in exercising the discretion, such as where a judge acts on a wrong principle or takes irrelevant matters into consideration. The analogy with the approach taken in an administrative law context is apparent.
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> As to the inferences that may be drawn by an appellate court, it was said in *House v R* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust." …. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification

Her Honour held that as the decision did not satisfy this threshold, ground 7 failed. She therefore set aside the MAP's decision and remitted the matter to WCC for determination in accordance with law.

Jurisdictional error not established

Chalkias v State of New South Wales [2018] NSWSC 1561 – Adamson J – 17 October 2018

Background

On 20 December 2016, the plaintiff claimed lump sum compensation for permanent psychological impairment, with respect to an injury that allegedly occurred on 27 November 2012, based upon an assessment of 24% WPI from Dr Smith. However, the insurer disputed that the plaintiff suffered a primary psychological injury. It also arranged for him to be assessed by Dr Prior, who assessed 8% WPI, and it then disputed that the plaintiff was entitled to compensation under s 65A WCA.

On 11 May 2017, the plaintiff filed an ARD and the dispute was referred to an AMS, Dr Takyar. In August 2017, he issued a MAC that assessed 15% WPI.

Medical Appeal

On 4 September 2017, the insurer appealed against the decision of the AMS and asserted that the assessment was made on the basis of incorrect criteria (s 327 (3) (c) WIMA) and the MAC contained a demonstrable error (s 327 (3) (d) WIMA). The Registrar referred the appeal to a MAP.

On 2 February 2018, the MAP revoked the MAC and assessed 7% WPI, which did not entitle the plaintiff to lump sum compensation under s 66 WCA. The plaintiff then sought judicial review from the Supreme Court.

Judicial Review

Counsel for the plaintiff argued that the MAP had not determined whether there was a relevant error before proceeding to review the WPI assessment and that in the circumstances of this matter, it was not open to the MAP to find a demonstrable error or incorrect criteria in the AMS' assessment. He relied upon the decision of Campbell J in *Ferguson v State if New South Wales* [2017] NSWSC 887 (*Ferguson*), that the relevant test to be applied by the MAP was whether the assessment was "glaringly improbable" and that this threshold had not been reached. He also argued that this matter was indistinguishable from the circumstances addressed by Harrison AsJ in *Parker v Select Civil Pty Ltd* [2018] NSWSC 140, where Her Honour found that a difference of opinion about whether a worker should be categorised in class 2 or class 3 was not sufficient to amount to a demonstrable error or incorrect criteria for the purposes of s 327 (3) WIMA.

Adamson J rejected the submission that the MAP's review is confined to cases where the medical assessment, or some aspect of it, is 'glaringly improbable' as it is not supported by the wording of WMA, which only requires that an error be 'demonstrable' or that there be 'incorrect criteria'. These expressions are to be understood in accordance with their plain meaning. In *Ferguson,* the MAP used the expression "glaringly improbable" and it would be a misreading of Campbell J's reasons to conclude that he intended to suggest that the expression formed any part of the test for error in the context of ss 327 or 328 WIMA.

The MAP found that the AMS fell into error when his "findings' were compared to the descriptors in the Evaluation Guidelines. It was satisfied that he had made his assessment based upon incorrect criteria under s 327 (3) (c) WIMA, as he had not applied the Guidelines correctly, and that this was a demonstrable error under s 327 (3) (d) WIMA. Therefore, the MAP did not misapprehend its jurisdiction. Her Honour stated:

> 33. … A decision-maker in the position of the Panel is required to set out "the actual path of reasoning" by which it arrived at its assessment of WPI: *Wingfoot Australia*

> *Partners Pty Limited v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [48]; *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39. The reasons are to be understood as recording the steps that were actually taken to arrive at the result: *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816; [2005] HCA 57 at [130] per Hayne J. The Panel's reasons demonstrate that it correctly apprehended and exercised its jurisdiction.
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> 34. Further support for the proposition that the Panel correctly apprehended its jurisdiction can be found in its reasons for not reviewing the other two grounds of appeal, which concerned the categories with respect to "Travel" and "Concentration, Persistence and Pace". These reasons are extracted below…

Her Honour held that having been satisfied of the error, which fell within s 327 (4) WIMA, the MAP was both entitled and obliged to review the assessment with respect to that item. The fact that it came to a different assessment does not convert its initial finding of error into a difference of opinion. Its finding was open on the evidence and there was no error of law or jurisdictional error in its assessment. Therefore, the Summons was dismissed.

No jurisdictional error disclosed

Cincotta v Police Citizens Youth Clubs NSW Ltd & Ors [2018] NSWSC 1588 – Hoeben CJ at CL – 23 October 2018

Background

The plaintiff injured his back at work on 2 October 2015. On 8 December 2015, Dr M Giblin performed surgery on 8 December 2015, having previously operated on the plaintiff for an earlier injury in 2007. Some weeks later, he complained of weakness in his left leg, which Dr Giblin noted had also occurred after the 2007 surgery. However, the weakness increased over the following months, which the doctor found 'surprising' and he suspected that this was caused by a 'vascular event to the (L5) nerve root'. A later neurological report suggested that the cause was diabetic neuropathy, which Dr Giblin considered to be consistent with his initial diagnoses.

The plaintiff claimed lump sum compensation under s 66 WCA for 22% WPI, based upon an assessment from Dr Habib, who attributed the left leg symptoms to the 2015 surgery.

On 11 September 2017, the Insurer responded to the s 66 claim, confirming that in 2008, the plaintiff had been compensated for 24% WPI in relation to the lumbar spine. It disputed that his condition had deteriorated since the 2008 settlement and asserted that maximum medical improvement had not been reached with respect to the peripheral nerve injury and it also disputed that he had suffered more than 10% WPI because of that injury. It relied upon an opinion from Dr Miniter.

On 7 September 2017, the plaintiff filed an ARD seeking referral to an AMS, and on 29 September 2017, the Registrar referred the matter to Dr Assem, AMS.

On 25 October 2017, Dr Assem issued a MAC (MAC 1), which assessed 14% WPI with respect to the lumbar spine. The MAP reported that the Dr Assem made the following findings, relevantly:

> On 2 October 2015, he stumbled and fell forwards aggravating his back complaints. He developed severe pain across his lower back with left sided sciatica. There was an evolving left-sided foot drop that continued to worsen until he has no active motion present in his left foot and total sensory loss that is predominantly in a glove and stocking distribution. Electrophysiological studies suggested a proximal lesion but there were also clear features of a diabetic polyneuropathy…

> He suffers from peripheral neuropathy with complete motor and sensory loss in his left lower leg below the knee that increases more distally towards the foot. Although it is clearly a constitutional condition not related to his employment, there is radiological and possible electrophysiological evidence of a more proximal lesion that may be contributing to some of the neurological symptoms reported. I have therefore given him the benefit of the doubt and accepted that he has radiculopathy persisting after surgery 3 and awarded 3% Whole Person Impairment.
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> The total Whole Person Impairment is 15%.
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> I was also requested to provide an assessment of peripheral spinal nerve root impairment. I have included any possible contribution from the spinal nerve roots by accepting that he may have radiculopathy persisting after surgery. As far as the peripheral nerve roots are concerned, he has diabetic peripheral neuropathy which is a constitutional condition and not related to his employment.

On 30 October 2017, the insurer sought reconsideration of MAC 1 by Dr Assem. The plaintiff objected, but on 13 November 2017, the Registrar returned MAC 1 to Dr Assem for reconsideration.

On 22 November 2017, Dr Assem issued MAC 2, which assessed 0% WPI with respect to peripheral nerves. He stated, relevantly:

> The distal cause of his symptoms is clearly due to a peripheral neuropathy as noted by a progressive glove and stocking sensory loss, complete absence of motor power and absence of reflexes. There are many causes for the development of peripheral neuropathy but they are all due to constitutional medical conditions that affect multiple nerves distally rather than a spinal injury or a discrete nerve root injury that may have occurred as a complication of the surgical procedure to his lumbar spine. The most likely cause of his peripheral neuropathy is diabetes mellitus. Although there is a temporal relationship between the surgical procedure on the lumbar spine and the gradual worsening of his peripheral neuropathy leading to legal finding of causation, from a medical perspective, the relationship is purely incidental and there is no other possible cause except for pre-existing constitutional conditions.
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> If the peripheral neuropathy is assessed, he would have total or 100% impairment in a glove and stocking distribution below the knee. The sensory changes were not confined to the L5 nerve root distribution as determined by Dr Habib. The degree of sensory loss is multiplied by the area of the leg involved. I have referred to AMA 5, Table 17-32 and determined that 70% of his left leg below the knee is involved. This is combined with complete motor loss to all muscle groups below the knee AMA 5, Table 16-11, p 484. Since the impairment value cannot exceed an amputation, he will have an impairment equivalent to an amputation below the knee or 70% LEI which converts to 42% WPI. As his condition is partially due to pre-existing pathology involving his lumbar spine that has already been settled and predominately due to constitutional medical conditions, the entire impairment was deducted to give 0% WPI.
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> Total motor and partial sensory loss below the knee gives 70% LEI or 42% WPI. After deducting the entire amount, he has 0% WPI.

MAC 2 prevailed over MAC 1 by operation of s 329 (2) WIMA,

On 24 November 2017, the plaintiff filed an application for appeal against MAC 2, alleging that the assessment was made based upon incorrect criteria and that the MAC contained a demonstrable error. On 16 December 2017, the insurer opposed the appeal.

On 24 January 2018, a Delegate of the Registrar decided determined that, because there was a clear inconsistency between the two MACs, the later MAC prevails and only the appeal against MAC 2 was to be considered by the Appeal Panel.

On 8 March 2018, the MAP confirmed MAC 2 and on 1 May 2018, WCC issued a COD based upon MAC 2.

Judicial review

On 1 June 2018, the plaintiff filed a Summons in the Supreme Court seeking the following orders: (1) A declaration pursuant to s 69 of the *Supreme Court Act 1970* (NSW) that the decision and the statement of reasons for decision of the third defendant and issued by the second defendant on 8 March 2018 is void and of no effect; (2) An order setting aside the decision and the statement of reasons for the decision of the third defendant and issued by the second defendant on 8 March 2018; (3) An order pursuant to UCPR 59.10(2) extending time to apply to the Court for the commencement of judicial review proceedings in respect of the Medical Assessment Certificate Further Assessment or Reconsideration decision and statement of reasons for decision of the fourth defendant issued by the second defendant on 22 November 2017; (4) A declaration pursuant to s 69 of the *Supreme Court Act 1970* (NSW) that the Medical Assessment Certificate Further Assessment or Reconsideration decision and the statement of reasons for decision of the fourth defendant issued by the second defendant on 22 November 2017 is void and of no effect; (5) An order setting aside the Medical Assessment Certificate Further Assessment or Reconsideration decision and the statement of reasons for the decision of the fourth defendant and issued by the second defendant on 22 November 2017; (6) Such further order as this Honourable Court deems necessary to give effect to the plaintiff's claims in the nature of judicial review; and (7) The first defendant to pay the plaintiff's costs of the proceedings.

The summons was heard by Hoeben CJ at CL, who stated:

> 5. I have a preliminary difficulty with the form of the Summons in that I do not understand how, in the context of the *Workplace Injury Management Act 1998* (NSW) (the Act) and as a matter of principle, the plaintiff can or needs to challenge the Medical Assessment Certificate Further Assessment or Reconsideration dated 22 November 2017. (For ease of reference, I will refer to this Certificate as MAC 2.)
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> 6. It is clear from the Act that once the Medical Appeal Panel had issued its reasons that became the operative decision so far as these proceedings are concerned. That is the effect of the structure of the Act and in particular, ss 325A, 328(5) and 329(2). Section 328(5) effectively provides that a certificate issued by an Appeal Panel takes the place of any previous Medical Assessment Certificate (MAC). Significantly, if this Court were to find error in the Appeal Panel decision, the appropriate remedy (whether or not there was an error in the MAC 2) would be to remit the decision to the Appeal Panel. Alternatively, if the Court were to find an error in the MAC 2, but there was no error in the Appeal Panel decision, the effect of such a finding would be that the Appeal Panel decision had cured such an error.
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> 7. As a matter of principle, that is the approach normally followed in legislation which provides for an appeal process. In *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 248; 139 FCR 344 the Court (Finn, Mansfield and Gyles JJ) said:
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> > 32 It should therefore be concluded that the Tribunal did have power to review the delegate's decision. The Tribunal was, in consequence, able to "cure" the defect in the delegate's decision: see *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116. Because of our conclusion it is unnecessary to

> enter upon the question whether a direct challenge could have been made to the delegate's decision in judicial review proceedings in disregard of the procedure for Tribunal review: cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
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> Observations to similar effect were made in *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed and Anor* [2005] FCAFC 58; 143 FCR 314 (Hely, Gyles and Allsop JJ at [12]- [14], [37]- [43]).
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> 9. In any event, I decline as a matter of discretion to deal with the plaintiff's challenge to the MAC 2 and reasons on the basis that the Act provides an effective and convenient remedy if there is error in the certificate and reasons of an AMS by way of the Medical Appeal Panel as provided by s 327 of the Act. That was the first option for the plaintiff if he wished to challenge the MAC 2, rather than by way of bringing s 69 proceedings in this Court. Moreover, not only did the plaintiff have an avenue for appeal by way of the Medical Appeal Panel, but he exercised that right.

His Honour held that the scope of the AMS' and MAP's task was defined by two factors – the dispute referred to them/it and the relevant legislative provisions. The referral was made in the context of a dispute as to whether the left foot drop was relevantly related to, or caused by, the fall or the 2015 surgery. He referred to the decisions of the Court of Appeal in *Haroun v Rail Corporation New South Wales and Ors* [2008] NSWCA 192; *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264; and *Jaffarie v Quality Castings Pty Ltd* [2018] NSWCA 88 and stated:

> 47. As can be seen, the submissions of the plaintiff in these proceedings are similar to those put forward unsuccessfully by Mr Bindah and should fail for the same reasons. The degree of permanent impairment which the AMS and Appeal Panel were required to assess in this case was the degree of permanent impairment resulting from the injury in question, i.e. the fall and the 2015 surgery. Given paragraph (d) of the definition of "Medical Dispute" and the terms of the referral by the Registrar, the AMS and Appeal Panel were required to consider the degree of permanent impairment attributable to other causes and to differentiate between these and the degree of permanent impairment resulting from the fall and the 2015 surgery.
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> 48. Once this is accepted, it is apparent that the AMS and Appeal Panel were required to engage in such assessment of causation as was necessary to discharge their statutory task of determining the degree of permanent impairment resulting from the injury in question. That is not to say that the whole of the question of causation is a matter for an AMS/Appeal Panel to determine. For example, in this case had the first defendant disputed liability on the basis that the fall was not itself caused by any relevant act or conduct by it, that aspect of causation would have been a matter for the Commission itself applying the relevant principles of causation.
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> 49. It follows that the Appeal Panel did not commit jurisdictional error by misdirecting itself as to its statutory task, nor did it ask itself the wrong question. The Appeal Panel's statutory task was to consider whether the AMS had made the correct decision on the question referred to him. The question referred to the Appeal Panel was whether the MAC 2 assessment of the plaintiff's permanent impairment contained a demonstrable error. The only error identified by the plaintiff in that regard was the incorrect application of the relevant assessment table. That ground was abandoned at the hearing. The Appeal Panel's reasons must be understood in light of this process of referral.

> 50. As can be seen from the way in which the Appeal Panel's reasons were structured, it considered in detail the plaintiff's history and the findings made by the AMS. The Appeal Panel confirmed the decision of the AMS in the MAC 2 and the approach which the AMS followed. The Appeal Panel determined "we cannot see how the peripheral neuropathy could be associated with the lumbar spine and a spinal nerve root lesion …". This was confirmed by the Appeal Panel's reference to the results of the nerve conduction studies carried out by Dr Yiannakis. Doctor Yiannakis opined that the results he saw "would argue against a sciatic nerve lesion".

His Honour concluded that the question for the MAP was whether there was demonstrable error in the MAC 2? In determining this issue, the MAP asked itself the correct question and carried out its statutory task. Therefore, the summons was dismissed.

Workers Compensation Commission - Presidential Decisions

Causation, procedural fairness, adequacy of reasons and disturbing findings of fact on appeal

Andersen v J & M Predl Pty Limited [2018] NSWWCCPD 40 – President Keating – 20 September 2018

Background

The appellant was employed by the respondent as a tyre fitter and wheel aligner. On 13 July 2010, he injured his left shoulder when a car that he was working on rolled. He suffered a series of later shoulder dislocations and underwent surgery on 11 August 2016. The appellant alleged that after the surgery he became solely reliant upon the use of his right shoulder and he began to suffer dislocations of that shoulder. He underwent right shoulder surgery on 16 February 2017.

On 2 July 2017, the appellant fell when alighting from a car and he suffered a fractured right clavicle and other associated injuries. He alleged that the condition in his right shoulder and the injuries suffered in the fall in July 2017 were consequential to the left shoulder injury in 2010.

The insurer issued a series of dispute notices and disputed the alleged consequential injury to the right shoulder and liability for the fall in July 2017. On 19 February 2018, the worker filed an ARD and claimed compensation under s 60 WCA for the various injuries.

Decision at first instance

On 29 May 2018, Arbitrator Bamber issued a COD, which noted that the dispute regarding s 60 expenses for the left shoulder was resolved between the parties. She found for the worker with respect to the dispute regarding treatment for the right shoulder condition, but entered an award for the respondent with respect to the injuries suffered in July 2017, as they were not caused by or consequential to the injury to the left shoulder on 13 July 2010. She applied the principles discussed in *Kooragang* and concluded that the chain of causation was broken and that he fell because his show got caught. She held that the injuries to the clavicle, head and eustachian tube would have occurred if the worker had been in normal health and stated (at [130]):

> As stated in *Oakley* the damage sustained included no element of aggravation of the earlier injury to the shoulders and so the subsequent accident and the further injury should be causally regarded as independent of the first.

Appeal

The appellant alleged that the Arbitrator erred: (1) in taking into account irrelevant considerations and denied the appellant procedural fairness; (2) by failing to give adequate reasons for rejecting the appellant's argument as to causation; and (3) by failing to apply the correct test of causation.

Submissions

In relation to ground (1):

The appellant argued that the Arbitrator took into account irrelevant considerations, including that he would not have had sufficient time to put his hands up to brace his fall, and that the Arbitrator was asked to infer that he would not have sustained the injuries had be braced for the fall. The Arbitrator's findings are not consistent with the way that his case was argued and she failed to alert his counsel that she was going to decide the case on the basis that she did. She ought to have brought it specifically to the attention of the his counsel and, at the very least, invited submissions.

The respondent argued that there was an exchange between the Arbitrator and the appellant's counsel concerning whether the appellant had been injured before he had any opportunity to brace against the fall. The Arbitrator clearly reasoned on a common-sense view of the evidence that it was the appellant's foot being wedged that caused the fall and that is consistent with *Kooragang.*

In relation to the appellant's argument that the Arbitrator was asked to make an inference, the relevant consideration is that considered in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25 (*Raulston*), namely: (1) An Arbitrator may prefer one view of the facts over another, such a finding may only be disturbed on appeal if "other probabilities so outweigh that chosen… that it can be said that [the] conclusion was wrong." (2) it is not sufficient that a different inference would have been drawn by a Presidential member and the Arbitrator must be shown to have been wrong. (3) "The available inference in the opposite sense to that chosen… [must be] so preponderant in the opinion of the appellate court that the… decision is wrong". The respondent argued that the appellant has satisfied this test.

Consideration

Ground (1)

President Keating stated that the WCC has consistently applied the principles stated by Barwick CJ in *Whitely Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 (*Whiteley Muir*) in determining whether an Arbitrator has erred in a finding of fact. These were cited by DP Roche in *Raulston* and were approved by the Court of Appeal in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 and he applied them in this matter. He stated that application did not fail because of the extent of the injuries that may or may not have unfolded if the appellant braced against his fall, but because there was a *novus actus interveniens* (a new intervening act), namely his shoe was caught between the gutter and the car as he was attempting to alight from the vehicle. The Arbitrator found that this act broke the chain of causation. These findings were clearly open on the evidence and they disclose no error.

His Honour rejected the appellant's submission that he was denied procedural fairness. He noted that the appellant's counsel referred to the decision in *Caswell v Powell Duffryn Associated Collieries Limited* (1940) AC 152, in which Lord Powell stated in relation to the drawing of inferences:

> …Inference must be carefully distinguished from conjecture or speculation, and there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability, but if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

His Honour held that the drawing of an inference requires an assessment of the available evidence to determine proved facts from which the inference could be drawn as distinct from mere speculation or conjecture. He stated that the Arbitrator's factual findings were available on the evidence and disclose no error and she implicitly found that the available evidence did not enable her to draw the inference that the appellant sought. The findings were not based upon irrelevant considerations. The Arbitrator needed to deal with them as they responded to the appellant's submissions and were ancillary to the primary finding regarding the cause of the injuries and there was no error of the kind discussed in *Whiteley Muir w*as established.

Ground (2)

His Honour held that the Arbitrator clearly articulated the path of reasoning that led to her conclusion regarding causation and that the injuries would have occurred irrespective of the previous injury or condition. He was satisfied that the Arbitrator discharged the statutory obligation to provide reasons.

Ground (3)

His Honour held that the Arbitrator's finding regarding causation was open on the evidence and revealed no error. He rejected the proposition that she focussed upon the cause of the fall rather than the injuries and held that the appellant's concept of causation is misconceived. He stated, relevantly:

> 87. …In a consequential condition claim, causation is established if the alleged consequential condition results from the accepted compensable injury/condition. In this case the consequential condition did not result from the injury to the left shoulder and/or the consequential condition in the right shoulder, it resulted from Mr Andersen's foot being caught while he was attempting to get out of the car.

His Honour noted that the appellant's case was not run on the basis that his injuries resulted from more than one cause, but rather than there was one cause – namely the appellant's failure to brace against impact after getting his foot wedged because of his pre-existing injury/consequential condition. He held that the Arbitrator could not have erred in failing to deal with a submission that was not made: *Brambles Industries Ltd v Bell* [2010] NSWCA 162. Further, the Arbitrator found that his failure to brace was not the cause of the injuries sustained or even a contributing factor. That was open on the evidence and did not reveal any error.

Accordingly, His Honour confirmed the COD.

Distinction between final and interlocutory decisions – indexation of benefits and calculation of PIAWE after the first 52 weeks

State of New South Wales v Abdul - [2018] NSWWCCPD 41 – Deputy President Wood – 20 September 2018

Background

The worker alleged injuries to his neck and back at work on 1 September 2016. The insurer accepted liability and made voluntary payments of weekly compensation and s 60 expenses until 19 January 2017, but on 4 January 2017, it disputed the claim under ss 4 (a) and 9A WCA. The worker then filed an ARD that alleged injuries to his neck, back, right shoulder, as well as concussion and a secondary psychological injury.

Decision at first instance

On 12 January 2018, Arbitrator Dalley issued a COD. He found for the worker regarding the injuries to the neck and back and a secondary psychological injury, but entered an award for the respondent regarding alleged injuries to the right shoulder and concussion.

The Arbitrator found that the worker suffered an aggravation of pre-existing degenerative changes in his cervical and lumbar spines to which employment was the main contributing factor. He found that the worker had no current work capacity and determined the amounts of PIAWE and ordinary weekly earnings, but he did not determine the entitlement to weekly payments as he required submissions from the parties regarding indexation under s 82A WCA. He ordered the appellant to pay the worker's s 60 expenses.

On 21 March 2018, the Arbitrator issued a further COD, which determined the indexation of weekly payments and amended the previous COD: (1) to correct the name of the employer; (2) to remove the claim for specific treatment expenses and to claim a general order under s 60 WCA; and (3) to claim weekly payments from 1 September 2016 under ss 36 and 37 WCA. He formally awarded the worker weekly payments under ss 36 and 37 WCA with credit to the insurer for payments made.

On 5 April 2018, the appellant sought reconsideration of the COD dated 21 March 2018, regarding the calculation of weekly payments. On 18 April 2018, it appealed against both decisions, but the appeals were stayed pending the decision regarding reconsideration.

On 14 May 2018, the Arbitrator issued a further COD. He declined to reconsider the decision dated 21 March 2018, but by consent amended paragraphs 10 and 21 of his previous statement of reasons.

Appeal

Time to appeal

The worker argued that the appeal was lodged out of time as the Arbitrator finally determined liability and all issues other than the amount of weekly payments on 12 January 2018. He objected to time being extended as the appellant had not commenced weekly payments and thus breached s 362 (5A) WIMA. He also argued that the appeal had low prospects of success and that the appellant sought to run a different case to that put to the Arbitrator.

The appellant argued that time the Arbitrator did not finally and conclusively determine the application until the COD was issued on 21 March 2018. It relied upon the decisions of the High Court in *Licul v Corney* [1976] HCA 6; 180 CLR 213 and of the WCC in *Unilever Australia Pty Ltd v Petrevska* [2013] NSWWCCPD 3, and argued that its final ground of appeal arises from the Arbitrator's findings regarding the calculation of the CPI indexation of weekly payments (which was the subject of the COD dated 21 March 2018).

DP Wood found that the appellant sought to appeal both decisions and observed that if the appellant had unsuccessfully appealed the earlier decision within the 28-day period, the ultimate determination would have been delayed and the parties would have been faced with the costs of a second appeal. In the interests of justice, she extended the time to appeal the first decision.

Grounds of Appeal

The appellant alleged that Arbitrator erred in law as follows: (1) By finding that the worker suffered a disease injury (consequential psychological condition) under s 4 (b) (ii) WCA, having failed to consider, apply or satisfy the conditions set out in that provision; (2) By finding that the worker suffered a disease injury under s 4 (b) (ii) WCA, being a consequential psychological injury, where the medical opinion relied upon did not support such a finding and there was no other evidence to support such a finding; (3) By finding that the worker suffered a disease injury under s 4 (b) (ii) WCA in respect of the neck and low back on 1 September 2016 and thereafter suffered the onset of a consequential psychological condition and failed to consider, apply or satisfy s 9A WCA; and (4) By retrospectively applying from 1 October 2017, the CPI increases under s 82A WCA to PIAWE for the period from 1 October 2016 to 1 April 2017.

Consideration

DP Wood held that grounds (1), (2) and (3) "disclose a complete misunderstanding of the distinction between an injury and a consequential condition". The worker alleged that he suffered a consequential psychological condition and not a s 4 injury and the Arbitrator did not find that he suffered a psychological injury or a disease under s 4. A long list of authorities establish that a worker need not prove that a consequential condition satisfies the definition of a s 4 injury and that s 9A does not apply. Rather, the relevant test is one of causation and if it is established that the condition results from the injury and that there is an unbroken chain of causation between the injury and the development of the condition, the condition is compensable. The Arbitrator's finding was supported by expert evidence.

DP Wood stated that the worker's injuries could fall within the definition of s 4 (b) (ii) WCA and that ss 4 (a) and 4 (b) WCA are not mutually exclusive. She discussed the Court of Appeal's decision in *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* [1996] NSWCC 51 (*Mecha*), which was applied in *Dimovski,* and found that the injury should properly be considered a personal injury under s 4 (a) WCA. She re-determined this issue under s 352 (7) WIMA and found that the worker had suffered injury under s 4 (a) WCA and that the test in s 9A WCA was satisfied as the test of "main contributing factor", which is more stringent, was satisfied.

In relation to ground (4), DP Wood held:

> 248. The ordinary earnings cannot be varied except on the review dates where there is evidence that had the worker remained in the employment position, the ordinary earnings would have changed. In Mr Abdul's case, the ordinary earnings became the basis of the amount used for his pre-injury earnings after the first 52 weeks of weekly payments.

249. The Arbitrator (correctly) determined the pre-injury average weekly earnings for the period 1 September 2017 to 30 September 2017 to be $884.69. There is no challenge to that calculation on this appeal. By operation of s 82A (1), that figure could not change until the next review date on 1 October 2017.

250. Prior to 1 October 2017, Mr Abdul's pre-injury average weekly earnings had (correctly) not been varied, so that "A" in the formula could only be a number that had not been indexed.

251. The Arbitrator erred in retrospectively indexing the figure of $884.69. The indexation of the figure $884.69 on 1 October 2016 and 1 April 2017 is precluded by s 82A (3) because those amounts would have exceeded Mr Abdul's ordinary earnings ($884.69), which for the purposes of s 82A did not increase until after those two review dates. The ordinary weekly earnings did not increase to $906.81 until 1 July 2017.

252. The Arbitrator was also in error in determining that the figure $884.69 could be varied on 1 October 2017 by the indexation numbers applicable to a review on 1 October 2016 and 1 April 2017 because of the operation of s 82A (1). Section 82A (1) only allows a variation of "A" in the formula. "A" is either a figure which has not been previously varied, or the figure "as last varied". The figure that was to be reviewed on 1 October 2017 was Mr Abdul's average weekly earnings of $884.69, which had not been previously varied.

DP Wood determined that indexed PIAWE (as at 1 October 2017) was $891.06 per week ($884.69 x 1.0072), which was less than agreed ordinary earnings, and that the worker is entitled to weekly payments under s 37(1) WCA from 1 October 2017, at the rate of $712.45 per week (80% x $891.06) (as adjusted from time to time). She amended the COD dated 12 January 2018 (as corrected on 21 March 2018) to delete the finding of disease and to substitute findings of injury under s 4 (a) WCA and s 9A WCA and she further amended para 7 (d) of the COD dated 21 March 2018, to delete the figure "$725.45" and replace it with "$712.85".

Death claim – dependency under s 25 (1) WCA

Jamal v Nonabel Concrete Pty Ltd [2018] NSWWCCPD 42 – DP Wood – 4 October 2018

Background

The deceased, Souhayb Jamal, died on 28 March 2017 because of injury received in the course of his employment with the respondent on 27 March 2017. He commenced employment about one week before his death and had not previously worked in Australia.

On 2 May 2017, the employer filed an application in respect of the death of a worker, seeking the apportionment of the lump sum benefit payable under s 25 (1) WCA. The appellant, Ms Mayssoun Ali Kanj, Mrs Fatme Obeid and Ms Sari Jamal, alleged that they were at least partially dependent upon the deceased at the date of his death. The appellant is the deceased's father and the ex-husband of Mrs Obeid (the deceased's mother), while Ms Ali Kanj and Ms Jamal are the deceased's sisters. Ms Ali Kanj resides in Australia, while the appellant, Mrs Obeid and Ms Jamal reside in Lebanon. The deceased resided with Ms Ali Kanj after he arrived in Australia.

The matter proceeded to arbitration before Arbitrator Batchelor on 30 April 2018. He determined that the appellant was not dependent upon the deceased at the date of his death and he apportioned the lump sum benefit between Ms Ali Kanj (30%), Mrs Obeid (60%) and Ms Jamal (10%). In making that determination, he noted that the other alleged dependants submitted that the appellant should not be entitled to any of the lump sum benefit. He considered it relevant that both Mrs Obeid and Ms Jamal challenged the appellant's statement that when the deceased was in Dubai "he earned a relatively high income", and their evidence was to the effect that during the three years that he was in "the Emirates", he did not work because he lacked qualifications.

The Arbitrator preferred the evidence of Mrs Obeid and Ms Jamal over that of the appellant as he did not provide any details of the work that the deceased allegedly performed in Dubai and there was no evidence to support his allegations. He was also satisfied that the appellant had not supported his family. However, he found that Mrs Obeid, Ms Ali Kanj and Ms Jamal each had a reasonable expectation of support from the deceased at the date of his death, but the appellant did not.

Appeal

The appellant alleged that the Arbitrator erred in law by determining the matter contrary to the evidence and, inter alia, he raised the following matters: (a) Mrs Obeid is still married to him, lives in a property that he owns and pays no rent; (b) the Arbitrator failed to take into account the family register and the sworn evidence that Mr El Samad brought him money from the deceased; (c) the financial assistance received from the deceased was sufficient to cover all of his expenses; (d) there was no evidence to refute that the deceased was supporting him financially; and (e) the Arbitrator failed to make a fair decision and the decision to exclude him was unreasonable.

DP Wood stated that whether the appellant and Mrs Obeid were still married is irrelevant in circumstances where Mrs Obeid had received no financial support from the appellant for over 20 years and it is relevant to the issue of dependency. The Arbitrator carefully weighed the evidence of each of the alleged dependants, including the document signed by the Mayor of Bakhoun, but he found that this had no probative value and gave sound reasons for that finding. The appellant's evidence was uncorroborated and his assertions that the deceased supported him financially and would have continued to do so is inconsistent with the evidence of Mrs Obeid, Ms Ali Kanj and Ms Jamal. It was open to the Arbitrator to reject the appellant's evidence and to consider it unlikely that the deceased would feel an obligation to assist his father.

DP Wood held that based upon *Singh v Ginelle Pty Ltd* [2010] NSWCA 310, [45], [47] and [50] The appellant bears the onus of establishing that there are sufficient grounds to overturn the Arbitrator's decision and he must show that the Arbitrator either: (1) ignored material facts; (2) made a critical finding of fact which has no basis in the evidence; (3) showed a demonstrable misunderstanding of relevant evidence, or (4) demonstrably failed to consider relevant evidence (*Henderson v Foxworth Investments Ltd* [2014] UKSC 41.

The Arbitrator's finding on dependency is a factual one that was made based upon an inference drawn from the evidence. Questions of the acceptance of evidence and the weight it is given are peculiarly matters within the province of the trial judge, unless it can be said that a finding was so against the weight of the evidence that some error must have been involved: see *Shellharbour City Council v Rigby* [2006] NSWCA 308, [144].

The appellant had not put forward a cogent reason why his uncorroborated evidence should be afforded greater weight than the competing evidence and he failed to establish to the Arbitrator's satisfaction that he was dependent on the deceased. The mere fact that he is disgruntled by the decision is not sufficient to set it aside. The Arbitrator did not ignore material facts and there was no relevant evidence that he failed to consider or that he misunderstood. His findings were based on the evidence that was available to him and disclose no error of law or fact.

Accordingly, DP Wood confirmed the COD.

Death claim – appeals against apportionment dismissed - applications to admit fresh evidence on appeal refused

Ali Kanj v Nonabel Concrete Pty Ltd [2018] NSWWCCPD 43 – Deputy President Wood – 4 October 2018

Background

This appeal arises from the same factual circumstances as those considered in Jamal v Nonabel Concrete Pty Ltd (above).

The Arbitrator determined that the appellant was partially dependent upon the deceased for support, but that their relationship was more one of co-dependency, and he awarded her a 30% portion of the lump sum death benefit under s 25 (1) WCA. However, the appellant appealed against that decision on the following grounds:

(1) The Arbitrator erred in fact in determining that the relationship between the deceased and Ms Ali Kanj was one of co-dependency as opposed to her being dependent on the deceased;

(2) The Arbitrator erred in fact in determining that Mrs Obeid was dependent on the deceased for financial support where there was no evidence to support that determination;

(3) The Arbitrator erred in fact in determining that Ms Jamal received support from the deceased and had an expectation of support where there was no evidence to support that determination, and

(4) The Arbitrator erred in the exercise of his discretion in calculating the apportionment by having regard to the reasonable expectation of support held by Mrs Obeid, Ms Jamal and herself.

Application to admit further evidence

The appellant sought to adduce further evidence in the appeal, namely: (1) a statement from Mr Amin Jama (Amin)l, the deceased's older brother, which was written in Arabic; and (2) a certified translation of the document. Amin stated that he resides in Dubai and he stated that the deceased lived with him for three years, during which he did not work at all and he was supported by Amin and their uncle. He said that the deceased did not spend any money on his farther, mother or sister and that before moving to Dubai the deceased did not reside with Mrs Obeid because he was unemployed and could not contribute to her expenses.

DP Wood stated that s 352 (6) WIMA empowers a Presidential member with a discretion to admit evidence on the appeal only if satisfied that the evidence was not available, and could not have been reasonably obtained, prior to the Arbitral proceedings or that failure to admit the document would cause substantial injustice in the case.

The appellant argued that the further evidence addresses allegations made by the deceased's father. However, DP Wood stated that she had not described any difficulty in obtaining Mr Amin's evidence and it could not be said that it could not have been reasonably obtained at the arbitral stage, and it is necessary to consider whether a failure to admit it causes a substantial injustice in the case.

In *D'Orta-Ekenaike v Victoria Legal Aid [*2005] HCA 12; 223 CLR 1 (*D'Orta-Ekenaike*), the majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) held:

> A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few narrowly defined, circumstances. ...
>
> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule') are all rules based on the need for finality. As was said in the joint reasons in *Coulton v Holcombe*: '[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial.'

DP Wood declined to admit the further evidence because it was not 'compelling' evidence that, if admitted, would be likely to affect the outcome of the case. In the absence of the documents that Mr Jamal sought to adduce in this appeal and in the absence of any fresh issues raised in this appeal, the failure to admit this evidence would not create a "substantial injustice". On the contrary, its admission would cause substantial prejudice to Mr Jamal, Ms Jamal and Mrs Obeid and each would have to be given the opportunity to address Amin's evidence by testing the evidence and potentially adducing evidence in response. That would amount to a re-hearing in contravention of s 352 (5) of the 1998 Act. As its probative value and whether its admission would likely result in a different outcome cannot be assessed without affording the other parties the opportunity to respond to it, the evidence was excluded.

The deceased's father (the appellant in Jamal v Nonabel Concrete Pty Ltd) sought to rely upon further evidence in response to this appeal, namely: (1) a statement from Fadi Foz El Samad, who asserted that while he was in Dubai, the deceased would give him 6,000 Arab Emirates dirhams to give to Mr Jamal; and (2) a statement from Mr Abdulmajid Obeid (the deceased's brother-in-law), who stated that he witnessed Mr El Samad bring him money that was sent by the deceased.

DP Wood noted that this evidence was obtained in July 2018, after the Arbitrator's determination, but Mr Jamal had not offered any reason why he could not have obtained them at the arbitral stage. She was satisfied that the evidence could have been obtained with reasonable diligence and she declined to admit them for the same reasons.

Consideration

Ground 1

DP Wood stated that to establish error by the Arbitrator regarding his factual findings, the appellant need to show that the Arbitrator either: (a) ignored material facts; (b) made a critical finding of fact that has no basis in the evidence; (c) showed a demonstrable misunderstanding of relevant evidence, or (d) demonstrably failed to consider relevant evidence (*Henderson v Foxworth Investments Ltd* [2014] UKSC 41; SLT 775; 1 WLR 2600, [67].) She stated:

135. As described by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505, to demonstrate error on the part of the Arbitrator, what is required is to establish that other probabilities so outweigh the Arbitrator's conclusion that it can be said his conclusion was wrong.

DP Wood held that there was no material error of fact on the part of the Arbitrator in finding that the appellant was dependent upon the deceased. He considered the co-dependent nature of the appellant's relationship with the deceased in determining the apportionment, which is an exercise of discretion, involving an evaluative judgment involving an individual choice to which there may be differences of opinion. That finding will not be lightly reviewed and the appellate tribunal must exercise restraint in an appeal from a discretionary decision (*Tarabay v Leite* [2008] NSWCA 256, [29] (per Basten JA).)

DP Wood stated:

138. In *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274 (*Micallef),* Heydon JA (as His Honour then was) observed (at [45]):

> It is necessary to bear in mind some submissions of the defendants to the effect that a discretionary judgment can only be overturned in limited circumstances …
>
> Any attack on decisions of that character must fail unless it can be demonstrated that the decision-maker:
>
> (a) made an error of legal principle;
>
> (b) made a material error of fact;
>
> (c) took into account some irrelevant matter,
>
> (d) failed to take into account, or gave insufficient weight to, some relevant matter, or
>
> (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning.

DP Wood concluded that the appellant had not established any error of legal principle, material error of fact or that the Arbitrator considered an irrelevant matter or failed to consider or give sufficient weight to a relevant matter and the decision was not unreasonable or unjust. Therefore, ground 1 failed.

Ground 2

DP Wood found that the Arbitrator considered the lack of documentary evidence to corroborate Mrs Obeid's evidence that the deceased sent her money after he commenced work with the respondent. He accepted that the deceased had sent Mrs Obeid money when he was able to and found that Mrs Obeid had a reasonable expectation of future support and that her evidence was corroborated by Ms Jamal. That finding was open to the Arbitrator and discloses no error. She also noted that none of the parties produced any documentary evidence of money transfers to support their claims and based upon the vague nature of the evidence, the Arbitrator considered what reasonable expectation of future support each alleged dependent would have, to apportion the lump sum benefit. The approach was consistent with that in *Halloris* and was based on the available evidence. Therefore, ground 2 failed.

Ground 3

In view of her finding in relation to ground 2, DP Wood held that Mrs Obeid's evidence corroborated that of Ms Jamal with respect to dependency. The Arbitrator's finding was available based on the evidence and no error was identified. Therefore, ground 3 failed.

Ground 4

DP Wood held that as the Arbitrator's finding on apportionment is a discretionary exercise, she must be satisfied of the type of error identified in *Micallef* before the finding can be disturbed. However, the appellant has not alleged an error of legal principle and she complaints that he considered irrelevant matters, placed too much weight on the circumstances following the breakdown of Mr and Mrs Obeid's marriage and failed to consider that the deceased did not provide financial support to Mrs Obeid during the three years that he was in Dubai.

There was a sound basis for the Arbitrator's determinations regarding dependency and apportionment of the lump sum benefit and even if she preferred a different conclusion (and she did not), that would not be a basis for overturning the decision. Therefore, ground 4 failed.

Accordingly, she confirmed the Certificate of Determination dated 22 May 2018.

Workers Compensation Commission - Medical Appeal Panel Decisions

MAC confirmed by second MAP following remitter from Supreme Court of NSW

Cobar Shire Council v Gemma Harpley-Oeser [2018] NSWWCCMA 94 – Arbitrator Grahame Edwards, Dr David Crocker & Dr Brian Noll – 7 September 2018

Background

On 12 January 2012, the worker injured her left upper extremity and cervical spine at work. On 16 August 2014, she suffered an exacerbation of her symptoms while at work. She was subsequently diagnosed with Chronic Regional Pain Syndrome (CRPS). Thereafter, she performed part-time administrative work until her employment was terminated on 5 November 2015.

On 13 May 2016, the worker claimed lump sum compensation under s 66 WCA. The appellant denied liability for the claim and on 25 November 2016, the worker filed an ARD. Following a teleconference with an Arbitrator, the matter was remitted to the Registrar for referral to an AMS to assess whole person impairment of the cervical spine and left upper extremity.

On 17 February 2017, the AMS issued a MAC that assessed combined 26% WPI for the 2012 injuries (7% WPI of the cervical spine and 20% WPI of the left upper extremity) and 0% WPI for the 2014 injuries.

On 17 March 2017, the appellant appealed against the decision of the AMS. A Delegate of the Registrar determined that a ground of appeal had been made out and a MAP was appointed. The Map determined that the assessment was made based on correct criteria and that the MAC did not contain a demonstrable error.

The appellant applied to the Supreme Court of NSW for judicial review of the MAP's decision. On 27 June 2018, the Supreme Court of NSW issued a judgment that quashed the decision of a previous MAP and remitted the matter to the WCC for determination according to law.

On 10 July 2018, the Registrar constituted this MAP to determine the appeal.

Current appeal

The appellant argued that the MAC was made based on incorrect assessment criteria and that it contains a demonstrable error, as follows: (1) Failure to apply, or incorrectly applied, the criteria in para 2.5 of Ch 2 and para 1.36 of Ch 1 of the Guidelines by applying the range of motion methodology when there was inconsistency on presentation; (2) Failure to apply, or incorrectly applied Ch 17 of the Guidelines; (3) Failure to measure or comment on whether there was any muscle wasting in the left upper extremity; (4) Incorrect criteria applied in assessing a loading for interference with activities of daily living in respect of the permanent impairment assessment of the cervical spine; and (5) Failed to apply a deductible proportion in respect of the assessment of the cervical spine as a required by s 323 of the 1998 Act.

Ground (1)

This ground failed as the MAP was satisfied that the AMS carried out a thorough and careful examination of the appellant and recorded his findings on examination regarding range of motion of the left upper extremity after demonstrating that there were no neurological features and that the fingers had a normal range of movement. It held:

> 85. Assessing permanent impairment involves clinical assessment of the claimant as he or she presents on the day of assessment. Assessment of the upper extremity mainly involves clinical evaluation. In other words, the clinical judgment of the AMS is to be exercised based upon medical knowledge and in accordance with the Guidelines and AMA5. …
>
> 87. While the AMS did not specifically state that Ms Harpley-Oeser was consistent in her presentation, the assessment was made on the basis of ROM in accordance with Chapter 2 of the Guidelines. On the presumption of regularity, the AMS would have referred to paragraph 1.36 of the Guidelines if he had found inconsistency on presentation. Significantly, there is no reference within the MAC or the AMS's findings which indicates that there was any form of inconsistency in presentation in terms of the restricted ROM of the left shoulder, elbow and wrist joint.
>
> 88. Range of Motion to assess permanent impairment in accordance with paragraph 2.5 of the Guidelines is the correct approach when consistency of presentation is found on examination by an AMS. The fact that the AMS assessed permanent impairment of the left upper extremity on the basis of ROM in accordance with paragraph 2.5 indicates there was no inconsistency on presentation as submitted by the appellant. Paragraph 1.36 is only to be applied in circumstances where there is presence of inconsistent presentation. As such, where no inconsistent presentation is evident, then the ROM criteria should be used as a "valid parameter of impairment evaluation" in line with paragraph 2.5, which the AMS did.

Ground (2)

This ground failed because the MAP noted that the AMS specifically excluded CRPS as a diagnosis, as his clinical findings did not meet the diagnostic criteria required by Table 17.1 of Ch 17 of the Guidelines. It agreed with the AMS' conclusions regarding this issue.

The appellant argued that the AMS "actually diagnosed a chronic pain condition", which appeared to be based upon a comment that "her condition has unfortunately developed to become a chronic pain condition", but the MAP was satisfied that the AMS did not actually diagnose a "chronic pain condition", but was referring to the diagnosis of CRPS that was made by Dr Thong. Therefore, the assessment of permanent impairment was not made based on chronic pain.

Ground (3)

This ground failed because the MAP noted, in the exercise of its scientific and medical knowledge, that restriction in the range of motion does not necessarily result in muscle wasting. It was satisfied that the AMS' examination was thorough and comprehensive and he did not err by applying incorrect assessment criteria.

Ground (4)

This ground failed because the MAP held that paras 1.24, 1.25, 4.33, 4.34 and 4.35 of the Guidelines, in conjunction with the AMA tables referred to therein, are to be applied by assessors when assessing the ADL's because of injury. The Tables require the assessor to consider the impact of the injury on the ADL's in determining the precise impairment value. The AMS provided his reasons for the assessment of permanent impairment of the cervical spine and the impact of the cervical injury on the ADL's and the MAP was satisfied that he properly assessed this and explained why he assessed 2% WPI for the ADL's. It stated:

> 132. It is evident to the Appeal Panel that the AMS was aware of the impact of the injury to the left upper extremity when he acknowledged it was a realistic issue however, significantly in the Appeal Panel's view, he gave reasons why he assessed a further 2% WPI for the impact of the injury to the cervical spine on the ADL's. The AMS's assessment of a further 2% WPI for the impact of the injury to the cervical spine on the ADL's was open to him to make in the exercise of his judgment and medical knowledge based upon his clinical findings, the special investigations and other medical reports.

Ground (5)

This ground failed because the MAP noted that the AMS took a history of no previous injury and he therefore did not apply a deductible regarding the cervical spine under s 323 WIMA. However, the worker gave a history to Dr Hawke that she suffered a whiplash injury to her neck because of a MVA 30 years ago and that she suffered had intermitted exacerbations of neck pain since then. It stated:

> 149. The authorities make it clear that what must be determined on the evidence is whether any proportion of the permanent impairment present after the work injury was due to the previous injury or due to the pre-existing condition or abnormality. What has to be considered on the evidence is whether or not the earlier injury contributed to the degree of permanent impairment resulting from the injury. Section 323 does not permit the assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will also irrespective of the outcome, contribute to the impairment flowing from any subsequent injury. In other words, a conclusion is required, on the evidence that the previous injury, or pre-existing condition or abnormality contributed to the degree of permanent impairment resulting from the injury.

There was no evidence before the AMS upon which he could reach a conclusion that the previous injury to the neck some 30 odd years ago, with reported intermittent pain, contributed to the degree of permanent impairment resulting from the injury. In its view, the appellant's argument that a deduction should be made for the injury is based upon an assumption or hypothesis without evidence of the actual consequences of the earlier injury. While the AMS did not take a history of the previous neck injury, there is no evidence upon which a conclusion that it contributed to the degree of permanent impairment resulting from the injury could be made.

Accordingly, the MAC dated 17 February 2017 was confirmed.

AMS committed a demonstrable error by determining causation

Bandel v J M Harris, P J Harris & PJ & MJ Harris Pty Ltd [2018] NSWWCCMA 99 – Arbitrator John Harris, Dr David Crocker & Dr James Bodel – 20 September 2018

Background

The appellant injured his right ankle at work on 23 April 2008. He subsequently developed pain in the thoracic and lumbar spines. On 4 February 2018, he claimed lump sum compensation for combined 33% WPI, based upon a report from Dr Patrick. He diagnosed CRPS Type 1 and provided an assessment for the right lower extremity on that basis, as well as assessments of 6% WPI for the thoracic spine, 5% WPI for the lumbar spine and 1% WPI for scarring.

The Insurer relied upon a report from Dr Machart dated 2 May 2017. He assessed 4% WPI for the right lower extremity on the basis that the worker had suffered a chronic pain syndrome, but not CRPS Type 1, and provided assessments of 0% WPI for the thoracic and lumbar spines.

On 21 September 2017, the insurer issued a notice to the appellant that his entitlement to weekly payments would cease on 25 December 2017 by operation of s 39 WCA.

The appellant filed an ARD on 31 May 2018, alleging injury to his right ankle, thoracic and lumbar spines as a result of a fall at work on 23 April 2008, but it did not describe the latter injuries as being consequential to the right ankle injury. The respondent filed a reply, in which it conceded that it failed to determine the claim and it did not indicate any matters in dispute. As a result, the dispute under s 66 WCA was referred directly to an AMS for assessment.

On 25 June 2018, the Registrar referred the dispute to Dr Ryan, AMS, with instructions to assess the degree of WPI with respect to the thoracic spine, the lumbar spine and the right lower extremity.

On 18 July 2018, the AMS issued a MAC, which assessed a combined 15% WPI, comprising 14% WPI for the right lower extremity and 1% WPI for scarring, but he did not provide assessments for the thoracic and lumbar spines. In relation to this issue, he stated:

> … I therefore consider his spinal complaints are probably secondary to his ankle injury and therefore compensable.
>
> I cannot include an assessment of Thoracic Spine or Lumbar Spine, as his spinal symptoms were not directly due to the subject work injury. These are due to further injury.

Appeal

On 17 August 2018, the appellant filed an application to appeal against the decision of the AMS, relying upon ss 327 (3) (c) and (d) WIMA). He sought a re-examination by a member of the MAP, but the respondent argued that the appeal could be determined on the papers.

The Registrar referred the matter to a MAP, which conducted a preliminary review on 18 September 2018, and determined that a ground of appeal had been made out and that it was appropriate to determine the appeal without re-examining the appellant.

The MAP held that in accordance with s 321 (4) WIMA, issues of liability are a matter for a WCC Arbitrator and not an AMS. It referred to decisions of the Court of Appeal, including *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213 (*Hine*) and *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd* [2014] NSWCA 264 (*Bindah*), which discussed the respective roles of the Commission and an AMS. It stated, relevantly:

39. In *Inghams Enterprises Pty Ltd v Belokoski* [2017] NSWWCCPD 15, Deputy President Snell referred to the reasoning of Roche DP in *Jaffarie v Quality Castings Pty Ltd* (*Jaffarie No 1*) [2014] NSWWCCPD 79 at [259] – [261] and stated that "the Commission (in the bifurcated system) has jurisdiction to determine whether a worker suffered injury, and the nature of the injury: at [222].

40. More recently in *Jaffarie v Quality Castings Pty Ltd (No. 2)* [2018] NSWCA 88 *(Jaffarie No 2)* White J stated (Macfarlan and Leeming AJA agreeing on this point:

> What was said by Emmett JA at [109], quoted above at [70], must be understood in the context of the issues before the court in *Bindah*. I do not understand his Honour to mean that anything which falls within the definition of 'medical dispute' in s 319 will necessarily be outside the jurisdiction of an arbitrator.
>
> Under s 105(1) of the WIM Act the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under the WIM Act and the *Workers Compensation Act*. This is subject to specific exclusions contained in both the WIM Act and the *Workers Compensation Act*. The specific exclusion in s 65(3) of the *Workers Compensation Act* does not extend to any medical dispute within the meaning of s 319 of the WIM Act, but only to a subset of such disputes, being a dispute about the degree of permanent impairment of an injured worker. Even a medical dispute concerning permanent impairment of an injured worker cannot be referred for assessment under Pt 7 of Ch 7, except by the Registrar and then where liability is not in issue, or, if in issue, liability has been determined by the Commission (ss 293(3)(a) and 321(4)(a)). The medical assessment is conclusive only in respect of the matters referred to in s 326 which are not as extensive as the matters falling within the definition of medical dispute in s 319…

42. This reasoning is otherwise consistent with the approach taken by the Court of Appeal in *State of New South Wales v Bishop* [2014] NSWCA 354 (*Bishop*) where it was held that the determination of a consequential condition was a matter for a Commission Arbitrator.

The MAP observed that liability for the thoracic and lumbar spines was not disputed and was not a matter for the AMS to determine. This was a demonstrable error by the AMS and it revoked the MAC. It decided to determine the degree of permanent impairment of the thoracic and lumbar spines and it issued a further MAC, which assessed a combined 24% WPI, comprising 6% WPI for the lumbar spine (DRE category II = 5% + 2% WPI for ADL's = 7% WPI less 1/10 under s 323 WIMA and rounded) and 5% WPI for the thoracic spine (DRE category II less 1/10/ deductible and rounded).

Psychological injury – PIRS class descriptors are "examples only" and AMS must consider the circumstances of each case and exercise own clinical judgment

Oberon Council v Barton [2018] NSWWCCMA 100 – Arbitrator Gerard Egan, Dr Lana Kossoff & Dr Julian Parmegiani – 26 September 2018

Background

The worker suffered a psychological injury because of interactions with 2 General Managers. She claimed weekly payments, medical treatment expenses and lump sum compensation and replied upon a report from Dr Robertson. He diagnosed PTSD and depression due to the work injury and assessed 15% WPI under PIRS.

The appellant disputed the claim based upon opinions from Dr George (x 2).

The worker filed an ARD and on 25 May 2018, Consent Orders were entered under which the appellant agreed to pay weekly payments and medical treatment expenses to the worker and the dispute under s 66 WCA was remitted to the Registrar for referral to an AMS.

On 10 July 2018, the AMS (Dr Mason) issued a MAC

Appeal

On 30 July 2018, the appellant lodged an application to appeal against the decision of the AMS and alleged that the assessment was made on the basis of incorrect criteria (s 327 (3) (c) WIMA) and the MAC contains a demonstrable error (s 327 (3) (d) WIMA).

The appellant did not make any specific submissions regarding s 327 (3) (c) WIMA, but it relied upon various clinical findings, historical matters in earlier medical histories and the conclusions that the AMS reached in assessing the various classes under 4 separate PIRS categories. Those categories are: Table 11.1 – Self Care and Personal Hygiene; Table 11.3 – Travel; Table 11.4 – Social Functioning; and Table 11.6 – Employability.

The Registrar decided that a ground of appeal had been made out and referred the matter to the MAP.

The MAP conducted a preliminary review and determined that it was not necessary for the worker to be re-examined by an AMS member of the Panel and that it was appropriate to determine the appeal on the papers.

THE MAP noted that c. 11.12 of the Guidelines makes it clear that the PIRS class descriptors in the Tables "are examples of activities" and "are examples only" and that the AMS should consider the person's cultural background and consider activities that are usual for the person's age, sex and cultural norms.

Ground 1 – Table 11.1 – Self-care and personal hygiene

The MAP held that this ground failed as the AMS took a history of decompensation of sorts in mid-2017 and the AMS is required to take the worker as she presents on the day and to apply his own clinical judgment. None of the descriptions taken by the AMS have been undermined and they comfortably satisfy a classification of Class 2.

Ground 2 – Table 11.3 – Travel

The MAP held that this ground failed as it accepted the worker's submissions and noted that the AMS recorded that she is unable to travel to Bathurst.

Ground 3 – Table 11.4 – Social Functioning

The MAP held that this ground failed as the history taken by the AMS justified the rating of Class 2.

Ground 4 – Table 11.6 – Employability

The MAP held that this ground failed as, based on the evidence and the findings in the MAC, the assessment of class 4 was open to the AMS.

Accordingly, the MAC was confirmed.

Workers Compensation Commission – Arbitrator Decisions

WCC confirms that payment of Long Service leave entitlements under a Deed of Release is not "damages" for the purposes of s 151A WCA

Kluvetasch v DK Thompson – [2018] NSWWCC 158 – Arbitrator John Harris – 14 June 2018

Background

The worker was employed by the respondent from 2 October 2009 until 16 March 2017, when his employment was terminated. On 23 February 2017, he complained to his GP of anxiety due to workplace bullying and his GP issued a Certificate of Capacity and referred him to a psychologist.

On 14 March 2017, the worker signed a claim form alleging a psychological injury due to bullying by senior management about WH&S issues that he had raised and that he notified the respondent of this injury on 27 February 2017 and gave it the Certificate of Capacity. However, on 16 March 2017, the respondent summarily dismissed him and issued a letter that cited at least 4 allegations of serious and wilful misconduct as grounds for dismissal.

On 5 April 2017, the worker commenced proceedings in the Fair Work Commission. The matter was listed for hearing on 13 and 14 July 2017. However, the dispute was resolved on 19 July 2017, after which the worker signed a Deed of Release that evidenced that the respondent agreed to pay him $9,477 by way of accrued Long Service Leave. This was reflected in the Employment Separation Certificate dated 19 August 2017.

On 27 March 2017, the insurer issued a s 74 Notice, in which it disputed liability, but on 15 June 2017, it withdrew that dispute. However, on 15 May 2018, after the WCC registered an ARD, the insurer issued a further dispute notice that raised s 151A WCA as a defence.

Relevant legislation

Section 151A WCA provides, relevantly:

> (1) If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then (except to the extent that subsection (2), (3) or (4) covers the case):
>
> > (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
> >
> > (b) the amount of any weekly payments of compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and ….

Arbitration

On 14 June 2018, Arbitrator Harris issued a Certificate of Determination which found in the worker's favour. His reasons for decision are summarised below.

The s 151A defence was raised after the ARD was registered and leave was required for the respondent to raise it. The worker opposed the granting of leave. The Arbitrator considered that the proposed defence had little merit, but to avoid a future dispute on this issue, he granted the respondent leave to raise it the defence - so it could be rejected. He referred to the decision of the Court of Appeal in *Adams v Fletcher International Exports Pty Ltd* [2008] NSWCA 238 (*Adams*), in which Handley AJA (the other Justices agreeing) stated:

17 The deed by itself could not have affected the worker's rights to compensation because s 234 of the 1998 Act provides that the two Acts apply 'despite any contract to the contrary'. The worker's difficulties flow not from the deed as such, but from his acceptance of the payment of $2500. …

21 It is clear therefore that the worker recovered the sum of $2500 and the only question under s 151A(1)(a) is whether this amount was 'damages in respect of an injury'. Damages for this purpose is defined in s 149 of the 1987 Act as follows:

> Damages includes:
>
> (a) any form of monetary compensation, and
>
> (b) without limiting (a), any amount paid under a compromise or settlement of a claim for damages (whether or not legal proceedings have been instituted), but does not include:
>
> (c) compensation under this Act ...

22 It cannot be denied that the $2500 was monetary compensation within para (a) of this definition. It is not clear that the worker had made 'a claim for damages' which would bring the deed within para (b) although the recitals suggest that this may have happened. It is not necessary to decide this question because para (b) does not limit para (a). …

24 The remaining question is whether the payment of $2500 damages, as defined, was 'in respect of an injury' so that s 151A (1) (a) applied and the worker ceased to be entitled to 'any further compensation under this Act in respect of the injury concerned.' The character of the payment is governed by the deed and the letter of 17 January 2005 which accompanied the cheque. ….

27 The amount of $2500 was also paid in respect of other claims, but this cannot matter. The deed and the letter, construed on their face, or in the light of the surrounding circumstances, establish that the payment was made 'in respect of' the injury to the worker's left hand and wrist. Accordingly, he ceased to be entitled to compensation 'in respect of the injury concerned', that is the injury to his left hand and wrist.

The principles regarding the construction of agreements (including consent orders and deeds) have been considered in many other decisions of the WCC. In *Barn v Department of Justice* [2015] NSWWCCPD 6 at [46] to [47], Acting President Roche (as he then was) held that the parties' subjective beliefs are irrelevant and that document under consideration is construed on an objective basis. He referred to numerous decisions of the High Court, including *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24 (*Codelfa*) and stated:

> The High Court has further explained, on more than one occasion, that it is 'the principle objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations; ***(****Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52 (*Alphapharm*). This 'objective approach' was recently reaffirmed by French CJ, Hayne, Crennan and Kiefel JJ in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7.

Most-recently, in *Heidtmann v Rail Corporation of New South Wales* [2018] NSWWCCPD 23, Keating P noted that the issue on appeal "turned on the construction of the Deed" and that the principles concerning the construction of contracts were discussed by the Court of Appeal in *Mainteck Services Pty Limited v Stein Heurley SA* [2014] NSWCA 184 (*Mainteck*).

In *Mainteck*, Leeming JA accepted the employer's submission that *Electricity Generation Corporation Ltd v Woodside Energy Ltd* [2014] HCA 7 (*Woodside*) endorsed and required a contextual approach to the construction of commercial contracts (at [86]):

> The approach to construction of written commercial contracts reflected in Woodside at [35] accords with what had been said in familiar passages in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at [22] (construction 'requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction'); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40] ('The meaning of the terms ... normally requires consideration not only of the text but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction'); and the endorsement in *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; 221 CLR 522 at [15] of the proposition that 'Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure'.

The Arbitrator held that the s 151A defence was misconceived and the respondent eventually conceded that the payment was for long service leave, to which the worker was entitled to under statute, and that no portion of it was "in respect of an injury". The respondent's argument that the reference to "compensation" in the deed was to "workers compensation" or "compensation in respect of an injury" was fallacious.

While the respondent argued that the subject matter of the claim for unfair dismissal encompassed the incidents that caused the psychological injury, the Arbitrator did not accept that the particularised allegations of serious and wilful misconduct pleaded in the Fair Work Commission proceedings were as wide as the incidents that caused the injury. In any event, *Adams* is concerned with "pathology" and not the events. He held:

> 66. In *Rail Corporation of NSW v Hunt* (*Hunt*) [2009] NSWWCCPD 114, Roche DP stated that the employer "must establish that the injury for which Ms Hunt recovered damages is the same injury for which she seeks compensation. It has failed to do so and cannot succeed with its section 151A defence.
>
> 67. As I noted, this analysis is artificial because of the finding that the respondent did not pay any damages in respect of injury. However, having submitted that it supposedly paid damages in respect of injury, the respondent was "forced" to make the submission that the matters pleaded by it as a defence to the unfair dismissal claim coincided with the width of the incidents said to be causative of injury. I do not accept thus submission, the medical evidence and the pleadings are wider than the allegations of serious and wilful misconduct. This is a further reason why the defence raised pursuant to s 151A of the 1987 Act fails.

The Arbitrator remitted the dispute under s 66 WCA to the Registrar for referral to an AMS to assess the degree of whole person impairment resulting from the psychological injury suffered on 23 February 2017 (deemed).

Psychological injury and perception – Decision in Attorney-General's Department v K followed

McHughes v Brewarrina Local Aboriginal Land Council – [2018] NSWWCC 209 – Senior Arbitrator Capel – 6 September 2018

Background

The worker was employed by the respondent initially as a co-ordinator on 23 July 2003, but at some later stage he became the acting CEO. He ceased work in May 2010, but was re-employed as either CEO or a cultural advisor on 23 February 2013. His position was made redundant on 13 October 2014.

On 18 June 2010, the worker completed a claim form in which he alleged that he suffered depression and anxiety as a result of being unpaid for three months' work and being unable to continue to work because he was mentally unstable. He identified the date of injury as 28 May 2010. On 6 August 2010, the insurer advised the worker that it intended to make provisional payments, but it identified the date of injury as 28 April 2010. It made voluntary payments based upon total incapacity from 4 July 2010 to 10 July 2011.

On 15 June 2016, the worker's solicitor gave notice of a claim for lump sum compensation for permanent impairment with respect to a psychological injury due to the nature and conditions of employment "on and prior to" 21 February 2011. On 14 November 2016, the insurer issued a s 74 notice, disputing the allegation of injury up to 21 February 2011 and that employment was the main contributing factor and/or a substantial contributing factor to the condition. It relied upon ss 4, 4 (b), 9A, 33, 60 and 66 WCA.

Arbitration

The ARD was registered on 22 March 2018 and the matter was heard by Senior Arbitrator Capel on 22 May 2018 and 25 July 2018. At the arbitration, the ARD was amended to claim compensation with respect to a psychological injury suffered on 28 April 2010 (deemed) due to bullying and undue pressure "resulting in an aggravation of a pre-existing psychological condition".

The Senior Arbitrator identified the following issues: (1) whether the worker suffered a psychological injury on 28 April 2010 (deemed) – s 4 (b) (i) WCA; (2) whether the worker's employment was a substantial contributing factor to the injury – s 9A WCA; and (3) quantification of the worker's entitlement to compensation under s 66 WCA.

The worker argued that the payment of compensation by the insurer in 2010 represents an admission by the respondent that he suffered an injury in the course of employment. However, the Arbitrator rejected that argument based on the decision of DP Roche in *Begnell v Super Start Batteries Pty Ltd* [2009] NSWWCCPD 19 (*Begnell*) and stated:

> The central principle of the doctrine of estoppel by conduct is that the law will not permit an unconscionable departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some course of conduct which would operate to that other party's detriment if the assumption were not adhered to for the purpose of the litigation (Deane J in *Verwayen* at 444). His Honour also observed (at 444) that:
>
> > Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.

The Senior Arbitrator found that the worker had ample opportunity to address the injury dispute and he had access to and relied upon medical and lay evidence. He was not satisfied that the worker had established an estoppel by representation or by the conduct of the respondent. As to whether the worker had been exposed to bullying etc. at work, the Senior Arbitrator stated:

> 140. In *Attorney General's Department v K* [2010] NSWWCCPD 76, Deputy President Roche summarised relevant authorities in relation to a worker's perception of real events at work:
>
> > (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 (*Chemler*) at [40]);
> >
> > (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
> >
> > (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
> >
> > (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Leigh Sheridan v Q-Comp* [2009] QIC 12);
> >
> > (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [31]), and
> >
> > (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered.

The Senior Arbitrator was satisfied that the alleged events occurred and were not imaginary and that the worker was placed under undue pressure regarding the proposed appointment of an administrator, the cessation of funding and the resulting impact this had on his dealings with the local Aboriginal community. He stated:

> 171. In *Stewart v NSW Police Service* [1998] NSWCCR 57, Neilson CCJ referring to his earlier decision of *Kirby v Trustees of the Society of St Vincent de Paul (NSW)* NSWCC No. 20708/94, 11 April 1997, unreported, stated:
>
> > To succeed in this Court, the applicant must prove that the conduct complained of constituted 'injury' within the meaning of the Act. Where, as here, a psychiatric injury is alleged the applicant must prove either:
> >
> > > (i) that the nervous system was so affected that a physiological effect was induced, not a mere emotional impulse: *Yates v South Kirkby Collieries Ltd* [1910] 2KB 538; *Austin v Director-General of Education* (1994) 10 NSWCCR 373; *Thazine-Aye v WorkCover Authority (NSW)* (1995) 12 NSWCCR 304; *Zinc Corporation Ltd v Scarce* (1995) 12 NSWCCR 566, or
> > >
> > > (ii) the aggravation, acceleration, exacerbation or deterioration of a pre-existing psychiatric condition: *Austin's* case.

> Frustration and emotional upset do not constitute injury: *Thazine-Aye's* case; nor, semble, where a mere 'anxiety state': the *Zinc Corporation* case per Meagher JA at 575B. A 'straight litigation neurosis' is not compensable: *Karathanos v Industrial Welding Co Ltd* [1973] 47 WCR (NSW) 79 at 80. A misperception of actual events, due to the irrational thinking of the worker leading to a psychiatric illness is not compensable: *Townsend v Commissioner of Police* (1992) 25 NSWCCR 9.
>
> It follows that subsequent rationalisation of earlier innocuous events, which rationalisation leads to psychiatric illness is also not compensable. Furthermore, once the applicant has established 'injury' she must prove that an incapacity for work resulted therefrom.

172. Further, in *Commonwealth of Australia v Smith* [2005] NSWCA 478, Handley JA stated:

> Thus, the law does not recognise that emotional and mental problems constitute an injury unless they constitute a psychiatric illness that has been recognised as such by 'professional medical opinion'.

173. Deputy President Roche cited *Stewart* with approval in *Bowditch,* noting the additional requirements set out in s 9A of the 1987 Act. He also observed the principles discussed in *Bhatia v State Rail Authority of NSW* [1997] NSWCC 25, *Tame v New South Wales* (2002) 211 CLR 317 and *Smith*. On review of these authorities, The Deputy President concluded:

> The authorities of *Tame* and *Smith* are consistent with section 11A (3) of the 1987 Act where 'psychological injury' is defined as 'an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.' In light of the above authorities it should now be accepted that a worker has suffered a psychological injury under section 4 of the 1987 Act if he or she has sustained a psychological or psychiatric disorder in the course of or arising out of employment and employment has been a substantial contributing factor to the injury, and section 11A does not apply to prevent the recovery of compensation. Such a disorder will, almost invariably, result in a physiological effect (as it has in the present case) thus also satisfying the test propounded by Judge Neilson in *Stewart*. Compensation is not recoverable for an emotional impulse or mere anxiety state.

The Senior Arbitrator held "having regard to the totality of the evidence and the common-sense evaluation test in *Kooragang",* the worker suffered a psychological injury arising out of or in the course of his employment on 28 April 2010 (deemed) and employment was a substantial contributing factor. He remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment.

Provision of an assistance dog and costs of maintaining the dog in the future are reasonably necessary medical and related treatment expenses under s 60 WCA

Parsons v Corrective Services NSW [2018] NSWWCC 227 – Arbitrator Philip Young – 20 September 2018

Background

The worker was employed by the respondent as an emergency response officer and he was repetitively exposed to traumatic and violent situations at work. He suffered a severe psychological injury (PTSD, anxiety and a panic disorder) as a result. The insurer accepted liability and the worker was assessed as suffering 24% WPI because of the injury.

The issue that required determination was the extent to which the provision of a dog, variously described as an 'assistance dog' or a 'companion dog' or a 'therapy dog' constitutes reasonably necessary medical treatment under s 60 WCA. However, there was also a preliminary issue, namely whether the insurer's dispute notices outlined the issues in dispute with sufficient particularity.

Worker's submissions

The worker's counsel argued that the starting point is the consideration of the decision of DP Roche in *Diab v NRMA Limited* [2014] NSWWCCPD 72 (*Diab*), which accepts the approach of Burke J in *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32 (*Rose*). *Rose* identifies several relevant considerations regarding "reasonably necessary", including whether the treatment is appropriate, the alternatives to the treatment, its costs and effectiveness and acceptance by the medical profession. He also argued that the extent of the WPI assessment evidenced that the worker had suffered a very severe injury.

The evidence that the assistance dog was reasonably necessary is found in the medical report of Dr Rastogi, who opined that the dog would help provide the worker with companionship and with social anxiety. He also stated:

> …There have been studies to suggest that therapy dogs can help with soothing and relaxation during panic attacks and are very protective and can sense dangers that a person with PTSD cannot sense due to extreme arousal and vigilance. It will help Mr Parsons build confidence and set social goals and exposure given he is significantly impaired socially and highly avoidant due to PTSD. It will help him get out of bed and get some exercise given his poor motivation and drive.

The worker's counsel argued that this opinion satisfies the 'effectiveness' criteria in *Diab*, but this is also evidenced by opinions from Dr Pusic, that the worker had shown a good response to the assistance dog, which he had obtained a trained, over a period of 4 months. There was also qualified support from Dr Ng.

Respondent's submissions

The respondent argued that the only relevant paragraph of s 59 WCA is (b) – therapeutic treatment, but as Dr Pusic's report did not come into existence until months after the worker purchased the dog, even if the provision of the dog was therapeutic treatment, it was not directed by a medical practitioner. It also argued that it is unclear what Dr Pusic meant when he stated that the worker had achieved "a good response" to the service dog, as his reports in May and June 2018, indicated that the worker was having significant treatment following a deterioration in his mental state and he required hospitalisation in June 2018. He had the dog during this period, but his mental state still deteriorated and it is unclear how this was "a good response", which is relevant to the issue of the appropriateness of providing the dog. It also noted that the worker was discharged from the psychiatric hospital against medical advice, after he was violent with other patients and threatened to stab the NUM and Police were called and argued that his was not consistent with him receiving benefit from the dog. Therefore, the Commission should not be satisfied that the treatment was actually or potentially effective.

The respondent argued that provision of the dog was not 'treatment' and that the worker's doctors do not address the criteria or look at the literature regarding the efficacy of the provision of the dog as constituting treatment. Dr Pusic's report in July 2018 contains assertions that are not corroborated by his comments in reports issued in prior months or the documentation regarding the worker's admission and discharge from the psychiatric hospital.

Consideration

The Arbitrator held that Dr Pusic made a recommendation for the provision of the dog before 4 January 2018. Further, the dispute notice did not assert that the provision of the dog was not medical or related treatment within the meaning of s 59 WCA, but only that it was not 'reasonably necessary' under s 60 WCA.

The respondent did not seek leave to raise an issue under s 59 WCA during the arbitration, but if it had done so he would have declined to exercise his discretion to allow the issue to be raised in view of its lateness and the significant prejudice to the worker that would result. He stated:

> 26. I would add that I have had regard to the authorities mentioned and discussion by the President of the Commission in *Woolworths Limited v Meake* [2011] NSWWCCPD 13 *(Meake*) at [57] to [79]. That decision, to my mind, reinforces that preparation of dispute notices is a task which must be approached with thoroughness and particular care. There was no evidence that the respondent had alerted the applicant to this further central issue before the arbitration hearing. Borrowing part of the President's words in *Meake* (at [78]), the applicant was entitled to assume that matters pertaining to section 59 were not in issue in these proceedings. The parameters of the dispute in this particular matter are therefore limited, in my view, to section 60 of the 1987 Act.

The Arbitrator held that if he was wrong regarding the parameters of the dispute, both counsel accepted that the only relevant paragraph of s 59 WCA was para (b) – "therapeutic treatment given by direction of a medical practitioner". He felt it was clear from Dr Fong's medical certificate dated 4 January 2018, that there was a discussion between Dr Fong and the worker concerning Dr Pusic's verbal recommendation for the dog (contained in the Management Plan). Dr Pusic had treated the worker in September and October 2017 and the respondent was aware of the worker's request for the provision of a dog at that time. The dog in question was born on 25 December 2017, and while the date he collected the dog was unclear, the worker paid a deposit on 12 January 2018 and various amounts were paid for veterinary services between February and June 2018, which suggested that he collected it in or about February 2018.

The Arbitrator held that the recommendation for the dog was verbally instigated by Dr Pusic before 4 January 2018, and most probably before the dog was born and he was satisfied that the dog was provided by direction of a medical practitioner, namely Dr Pusic, and alternatively, Dr Fong, prior to 4 January 2018. In relation to whether the dog was 'therapeutic treatment', he referred to the decision of Handley JA in *Western Suburbs Leagues Club Illawarra Ltd v Everill* [2001] NSWCA 56 (*Everill*):

> Section 59 contains in terms an inclusive definition of medical or related treatment, but its settled interpretation and that of its predecessor s10 (2) of the 1926 Act is that the definition is exhaustive. See *Our Lady of Loreto Nursing Home v Olsen* [2000] NSWCA 12: (2000) 19 NSWCCR 464 CA, and the cases there cited. Moreover, authority in the Compensation Court establishes that the various paragraphs, including para (f), are themselves to be understood in the context of the phrase 'medical or related treatment' which is being defined.

The Arbitrator held that based upon *Everill,* "medical or related treatment" is treatment of a medical or related nature" and if the insurer had particularised a dispute under s 59 WCA, there may have been an outcome adverse to the worker. In relation to the dispute under s 60 WCA, he held that the worker's mental state gradually deteriorated in the 2 months up to 5 June 2018, did not necessarily mean that the dog was not and will not be reasonably necessary for the benefit of the worker. He held, relevantly:

> 36. …It may well be that without the dog the applicant's mental state could have been significantly worse during this period. That question was not specifically asked of Dr Pusic; however, I believe that it follows from his 9 July 2018 recommendation that he held that view. Were it otherwise, and directly knowing the applicant's mental state (as treating psychiatrist) and having seen him several times in the first half of 2018, it would be unlikely that Dr Pusic would make that supportive recommendation in July 2018 at all had be thought otherwise. There is no evidence that Dr Pusic is 'gilding the lily' to support the applicant. Dr Pusic's credibility is unchallenged by the evidence…
>
> 41. It is not the task of the Commission to be satisfied that scientific evidence warrants or dispels the need for provision of medical treatment, because scientific tests require significant statistical certainty and are not tests on the balance of probabilities. The task is to consider the individual applicant, in this case Mr Parsons, and the extent of his injuries and disabilities, and come to a view, comfortably and on the balance of probabilities, as to whether the provision and maintenance of the dog is "reasonably necessary". To the extent that both Ms Brownlee and Dr Ng rely on research literature (not all of which, incidentally, is unfavourable to the applicant) I read their opinions as having very much a scientific flavour and addressed to scientific analysis, which is not the test in this matter. The flavour is more apt to deal with an issue as to whether provision of a dog for the applicant is "absolutely necessary" and this is not the relevant test (see *Moorebank Recyclers Pty Limited v Tanlane Pty Limited* [2012] NSWCA 445 (*Moorebank*)).

Adopting the criteria in *Rose*, the Arbitrator was comfortably satisfied that the provision of a dog for the worker and said that this was potentially effective because if the dog brings him some happiness, his symptoms are on the balance of probabilities likely to be ameliorated to some beneficial extent. He concluded:

> 43. I would add, finally, that I have considered the decision of Deputy President Roche in *Ajay Fibreglass Industries Pty Limited t/as Duraplas Industries v Yee* [2012] NSWWCCPD 41 (*Yee*) which supports the view that the determination of "reasonably necessary" is "not solely a matter for statistical analysis, though that will often be relevant" and the decision of President Keating in *Sunrise T & D Pty Limited v Le* [2012] NSWWCCPD 47 (*Le*) where the President rejected the employer's submission that the Arbitrator had not given sufficient weight to the unusual nature of the treatment.

The Arbitrator determined that the provision of the dog was reasonably necessary within the meaning of s 60 WCA. He ordered the respondent to pay the applicant's costs incurred to date and also made a declaration under s 60 (5) WCA regarding future costs of maintaining the dog.

The degree of permanent impairment for a psychological injury suffered prior to 1 January 2002 can be assessed for the purposes of satisfying the s threshold under s 39 WCA

Datta v Universal Consultancy Services Pty Limited [2018] NSWWCC 223 – Arbitrator Paul Sweeney – 28 September 2018

Background

The worker suffered injury on 3 February 2001, as a result of being assaulted while he was travelling between premises at which the employer carried on business. He suffered significant facial injuries and underwent several surgeries. On 23 February 2018, the insurer arranged for the worker to be assessed by Professor David, maxillofacial surgeon, who assessed 17% WPI as a result of the physical injuries.

However, there was no dispute that the worker also suffered a primary psychological injury as a result of the assault. On 21 February 2018, the insurer arranged for him to be assessed by Dr Morris, psychiatrist, and he assessed 44% WPI. However, on 26 February 2018, he was also assessed by Dr Allan, psychiatrist, at the request of his solicitor and Dr Allan assessed 26% WPI.

By operation of the transitional provisions to the 2012 Amending Act, the period of 260 weeks of weekly compensation limited by s 39 WCA expired on 25 December 2017. The worker argued that he is entitled to receive continuing weekly payments either because of the exception in s 39 (2) WCA or by other provisions of the WCA. To crystallise his potential entitlement, he sought an assessment by an AMS of the degree of permanent impairment resulting from the psychological injury.

On 18 April 2018, the insurer issued a s 74 notice, advising the worker that he was not entitled to weekly payments for the following reasons:

> We consider you may only be entitled to continue to receive weekly payments after five years if your permanent impairment arose from an injury in respect of which you have had entitlement to lump sum compensation pursuant to section 65 and section 66 of the 1987 Act. You are not entitled to your lump sum compensation for your psychological injury and, therefore, we are unable to deem you as having greater than 20 per cent permanent impairment based upon your psychological injury.

Insurer's submissions

The insurer argued that the key question for determination was the meaning of the expression "the degree of permanent impairment" as it appears in ss 39 (2) and (3) WCA. Did this mean, in the context of the WCA, the degree of compensable permanent impairment or did it extend to permanent impairment for which a worker is not entitled to lump sum compensation under Division 4 of Part 3 WCA?

It argued that the words "for the purposes of Division 4" in s 39 (3) must be construed so that they are consistent with the language and purpose of all the provisions of the legislation, which means that the restrictions that apply to assessing entitlements to lump sum compensation also apply to assessing entitlements to ongoing weekly benefits. Further, the phrase "degree of permanent impairment" is a technical concept which only applies where the Workers Compensation Acts authorise the assessment of impairment. They do not do so for a psychological injury which occurred in 2001 and each of the worker's entitlements to weekly compensation ceased after 260 weeks under s 39 (1) WCA.

Worker's submissions

The worker argued that the statutory issue of whether he has a degree of permanent impairment resulting from the injury on 3 February 2001 that (is more than 20 per cent) is different to the issue of whether he may also have an entitlement to lump sum compensation. That is because there is nothing in s 39 (2) that clearly states that this is a requirement. If the legislator had intended it to be a requirement it could have clearly stated this.

Further, the words in s 39 (3) which directed that a worker be assessed as provided for by s 65(for an assessment for the purposes of Div. 4) was a clear direction by the legislature that the degree of permanent impairment be assessed in accordance with Div. 4 of Pt 3. Div. 4, Pt 3 has many purposes and one of them was simply to set out in detail the methodology by which whole person impairment was to be assessed. It did that by reference to the WIMA and that in turn imported the Guidelines and AMA5 as the method of assessment.

The construction contended for by the insurer would lead to draconian and discriminatory outcomes and a small group of quite seriously injured workers with psychological injuries or with physical injuries that were not compensable under the Table of Disabilities provisions of the WCA would have no right to weekly payments after 5 years and would have curtailed rights to medical and hospital treatment.

The relevant provisions should be interpreted to conclude that a worker who suffered a primary psychiatric injury before 1 January 2002 can attain the s 39 (2) threshold if the symptoms from that injury are assessed pursuant to the relevant guidelines as producing a degree of permanent impairment that is more than 20%.

Consideration

Arbitrator Sweeney stated that the relationship between s 39 (3) WCA and the definitions of worker with high needs or highest needs in s 32A WCA is not easy to understand. What is clear is that there are many provisions in the WCA that rely upon an assessment of the degree of whole person impairment before compensation or further compensation is payable. If there is a dispute between the parties about the degree of impairment, these provisions require an assessment by an AMS. The provisions are not limited to ss 32A or 39 (3), but also extend to s 151H for common law claims and s 87EA for commutation applications. He stated, relevantly:

> 32. …As I pointed out in the matter of *Robin-True v Stella Marist College*, matter number 00400/16, the language of each of the sections that require an assessment of permanent impairment in the form of whole person impairment is slightly different in each case. That undoubtedly leads to confusion and may, in part, have led to the dispute in this case.
>
> 33. In construing the workers compensation legislation, I have attempted to apply the principles of statutory construction set out in *Alcan(NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (30 September 2009), *Project Blue Sky v ABA* [1998] 194 CLR 355 and the other cases to which Dr Lucy has referred in her written submissions. The task of construction commences with a consideration of the text of the legislation. It is necessary, however, to consider the text in the legislative context including the purpose and policy of the Act. It is necessary to give the legislation a coherent and harmonious operation. That may necessitate, as the recent case law from the New South Wales Court of Appeal demonstrates, construing some provisions as dominant and other provisions as subservient.

Both parties referred to the reasoning of Deputy President Snell in *Abu-Ali v Martin-Brower Australia Pty Limited* [2017] NSWWCCPD 25 (*Abu-Ali*) in which the worker sought an order referring a consequential or secondary psychological injury to an AMS to determine whether he satisfied a threshold under s 32A WCA. The respondent quoted from part of that decision:

> In my view, the preferable construction of the relevant definitions in section 32A is that assessment 'for the purposes of Division 4' involves assessment consistent with the process of assessment of permanent impairment for the recovery of compensation for non-economic loss. Such a construction is consistent with the text - the purposes of Division 4 are consistent with assessment for the recovery of non-economic loss. The construction is consistent with the heading of Part 3, Division 4 'compensation for non-economic loss' which forms part of the text of the Act.

> I do not regard the language of the relevant definitions in section 32A and Part 3, Division 4 as being 'doubtful or ambiguous'. If it were, then such construction is consistent with the heading of Part 3, Division 4 (see the third of the 'rules' identified in *Ragless* at [64] above.

In *Abu-Ali* DP Snell concluded that the structure of the scheme, including the Acts and the guidelines, was inconsistent with the proposition that permanent impairment can be assessed in respect of a secondary psychological injury.

Arbitrator Sweeney stated that the claim that DP Snell was considering in *Abu-Ali* was for a secondary psychological injury for which there is no statutory apparatus or methodology to facilitate an assessment of permanent impairment. Section 65A (1) prohibits the payment of compensation for such an injury and the guidelines provide no basis for assessment of it. He stated, relevantly:

> 41. That same reasoning cannot apply to a primary psychological injury. A primary psychological injury is patently capable of assessment in accordance with Part 3, Division 4 of the 1987 Act and the statutory provisions and guidelines which are imported by the language of Division 4 to facilitate such an assessment. The Deputy President characterised the phrase "for the purposes of Division 4" as involving an assessment consistent with the process of assessment of permanent impairment for recovery of compensation for non-economic loss. I emphasise the words consistent with the process of assessment of permanent impairment. A primary psychological injury occurring before 1 January 2002 can be assessed "consistent with" the process of assessment of permanent impairment for the recovery of compensation for non-economic loss.
>
> 42. It is true that permanent impairment compensation cannot be recovered in respect of such an injury; however, in marked contra-distinction to a secondary psychological injury, it can readily be assessed in the same way as a primary psychological injury occurring after 1 January 2002.

Arbitrator Sweeney referred to the second reading speech to the 2012 Amendment Bill, noting that statements of Ministers are not always considered to be a reliable guide to the intention of Parliament, and stated, relevantly:

> 49. In my opinion, the language of subsections (2) and (3) of section 39 of the 1987 Act facilitates the assessment of permanent impairment in the manner set out in Division 4. For the reasons previously provided in *Robin-True v Stella Marist College*, an entitlement to make a claim for permanent impairment compensation is not a prerequisite for assessment of permanent impairment. Similarly, the subsections do not limit the class of workers who can be assessed for the purposes of section 39 to those who historically had a right to such compensation.
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> 50. The words of section 39 and the other sections of the Act, and the associated transitional provisions and regulations, do not explicitly state that an assessment pursuant to section 39 is limited to those who have a right to permanent impairment compensation. In my opinion, it is unnecessary that the workers have an entitlement to receive compensation for non-economic loss before there is a referral for a determination of the extent of permanent impairment under any or all of these sections.
>
> 51. While there may be some force in the argument presented by Dr Lucy that such a restriction can be implied by a reference to the Act, in my view this interpretation does not result in the harmonious operation of the Act taken as a whole. Division 4 of the 1987 Act is concerned with compensation for non-economic loss. As discussed in *Abu-Ali*, it also provides a scheme by which such compensation can be assessed.

> In section 32A, section 39, section 59, section 87E and section 151H, the legislature has sought to utilise the method of assessing permanent impairment to provide benchmarks or thresholds by which a worker's entitlement to weekly compensation or some other statutory benefit, an entitlement to a commutation or an entitlement to commence at common law or an entitlement to compensation for the cost of care, can be accessed.

Arbitrator Sweeney noted that the transition from the 1987 scheme, which provided for compensation by reference to a loss of a thing in the table and the present scheme of permanent impairment was analysed in the decisions of *BP Australia Limited v Greene* [2013] NSWWCCPD 60 and *Hogan v Mercy Health Care Centre* [2014] NSWWCC 349 (*Hogan*), and he adopted DP Snell's analysis in *Hogan* regarding the inter-relationship between the 2 schemes for lump sum compensation. He held:

> 56. From the analysis contained those decisions, it is evident that the 2001 amendments introduced the concept of permanent impairment compensation for the first time. The transitional provisions accompanying the amendments made provisions in Schedule 6, Part 18C, clause 4(1) for the assessment of claims for lump sum compensation in respect of injuries prior to 1 January 2002 by Approved Medical Specialist. The clause allows for the matter referred for assessment to be dealt with as if it were a medical dispute as defined by section 319 of the 1998 Act.
>
> 57. The 2001 amendments introduced for the first-time permanent impairment compensation in respect of psychiatric or psychological injury. By Schedule 6, Part 18C, clause 3 the transitional provisions provided that:
>
> > There is to be a reduction in the compensation payable under Division 4 of Part 3 as amended by the lump sum compensation amendments for any proportion of the permanent impairment concerned that is a previously non-compensable impairment.
> >
> > This subclause does not limit the operation of section 323 of the 1998 Act or section 68B of the 1987 Act.
>
> Clause 3 envisages that there can be permanent impairment as a result of an injury prior to 1 January 2002 in the form of a primary psychological injury. It provides, however, that proportion of the permanent impairment the Commission finds is attributable to the injury prior to 1 January 2002 is not compensable.

The Arbitrator held that the transitional provisions and regulations accompanying the 2012 Amending Act also address the issue of the assessment of injuries occurring prior to 1 January 2002. Sch 6, Pt 19H, cl 23 specifically provides that the degree of permanent impairment of an injured worker whose injury occurred before 1 January 2002 could be referred for assessment in accordance with Div 4 and the regulations published after those amendments facilitate the referral of seriously injured workers to a medical assessment to establish their degree of permanent impairment. Cl 13 (1) of Sch 8 of the *Workers Compensation Regulation 2016* states:

> The fact that a worker's injury was received before the commencement of the 2001 lump sum compensation amendments does not prevent the degree of permanent impairment of the injured worker from being assessed for the purposes of determining whether the worker is a seriously injured worker under Division 2 of Part 3 of the 1987 Act.

The Arbitrator concluded that the "words …. at the heart of the dispute" must mean that the permanent impairment can be assessed in accordance with, or consistently with, the provisions in Pt 3, Div 4 WCA as otherwise, the Act would not function effectively. There would be workers who would not be able to access certain of the compensation benefits that are available under the Act and seriously injured workers and workers with highest needs would not be able to avail themselves of an entitlement to compensation for more than 5 years. Ultimately, they would lose the right to reimbursement or indemnity in respect of their medical expenses, which does not seem be a harmonious outcome. The scheme of the Act is such that the weekly benefits that are available in Div 2, Pt 3 are to be measured by benchmarks or thresholds that are contained in Div 4.

Accordingly, the Arbitrator refused the insurer's application to strike out the application for assessment by an AMS and he remitted the matter to the Registrar for referral to an AMS to assess the degree if whole person impairment resulting from the primary psychiatric injury on 3 February 2001 for the purposes of s 39 WCA.

Workers Compensation Commission – Registrar Decisions

No ground of appeal under s 327 (3) WIMA made out

Razmovski v UGL Rail Services – M1-001615/18 –Belinda Gamble, Delegate of the Registrar – 2 August 2018

Background

An AMS issued a MAC dated 16 May 2018.

On 20 June 2018, the appellant lodged an Application to appeal against the decision of the AMS, relying solely upon s 327 (3 (b) WIMA, namely the availability of that additional relevant information (evidence that was not available to the appellant before the medical assessment appealed against and that could not reasonably have been obtained by the appellant before that medical assessment).

The further evidence comprised a report from Dr Ghabrial dated 4 June 2018, which enclosed an Activities of Daily Living assessment form, and a report from Dr Ghabrial dated 12 June 2018, which provided further information regarding the diagnosis of radiculopathy. Both reports were prepared after the MAC issued and responded to it.

In the MAC, the AMS commented:

> Dr Ghabrial, in his report dated 24 February 2016, allocates a loading of 3% whole person impairment for interference in activities of daily living. However Dr Ghabrial does not describe these limitations in his report. In his examination findings, he does not provide evidence qualifying Mr Razmovski for radiculopathy according to the WorkCover Guides – 4th Edition.

The appellant argued that he did not obtain these reports prior to the referral to the AMS as he felt entitled to assume that the AMS was aware of the matters that needed to be referred to in support of his assessment.

The respondent opposed the appeal.

Determination

The Registrar's Delegate stated that appellant provided submissions in relation to s 372 (sic) (5) WIMA, but as the sole ground relied upon was s 327 (3) (b) WMA, for which there was no time limitation, it was not necessary to consider those submissions.

The Delegate determined that she was not satisfied that a ground of appeal under s 327 (3) WIMA has been made out. She stated that the ground of appeal under s 327 (3) (b) WIMA is only made out where the additional information was not available to, and could not reasonably be obtained, by the appellant before the medical assessment.

Para 1.6 of the Guidelines provides:

> Assessing permanent assessment involves clinical assessment of the claimant as they present on the day of assessment taking account the claimant's relevant medical history and all available relevant medical information.

It was therefore open to the AMS to make the findings that he did, which were based on his clinical examination undertaken on the day of the assessment. Further, the assessment of permanent impairment is not determined by having regard to other doctors' assessments made at other times. Therefore, the fact that Dr Ghabrial may not have provided evidence to support his assessment is of no consequence to the AMS' determination of permanent impairment. It also does not follow that the outcome of the AMS' assessment would have been different if he had the additional medical reports from Dr Ghabrial, as an AMS is not obliged to accept any medical opinion, but is to use his clinical judgment on the day of the assessment.

The AMS did not address with Dr Ghabrial's assessment and stated that at the time of his clinical examination he did not find any objective evidence of radiculopathy or limitations in daily activities to warrant an assessment of 3% WPI.

The Delegate stated:

> 26. Section 327 (3) (b) of the 1998 is not an avenue for a party to re-submit their medical evidence in a different form in order to cavil with the findings made by the AMS on the day of assessment. In *Cortese v Cumberland Ford Pty Ltd & Ors* [2011] NSWSC 1260 Adamson J observed at [15]:
>
> > …it cannot be the case that evidence falls within s 327 (3) (b) if all it does is to restate evidence given before on the basis that if it had been put in a different way it would have been accepted.

The appellant's reliance on Dr Ghabrial's belated explanation of his assessment was simply an attempt to re-submit evidence, in a different form, which had already been provided to the AMS.

The Delegate also held:

> 29. There is another reason why the proposed appeal has no merit. Section 327 (3) (b) allows further evidence to be admitted "if it could not reasonably have been obtained by the appellant before that medical assessment". The appellant's explanation is that "he was entitled to assume that Professor Ghabrial was aware of the matters that needed to be referred to in support of his assessment." I do not accept that it can be assumed that the medico legal expert has properly addressed the issue. It is necessary for an expert to give proper and cogent reasons for his or her opinion.
>
> 30. Issues of weight need to be attached to a medical opinion admitted in proceedings before the Commission are to be based on settled principles. In *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43 at [82], Beazley JA said:

> Although not bound by the rules of evidence, there could be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert report will need to confirm in a sufficiently satisfactory way, with the usual requirements for expert evidence.
>
> 31. A simple reading of Dr Ghabrial's first report would indicate to any prudent solicitor that the doctor did not adequately explain his finding on radiculopathy. In those circumstances, the solicitor should have been on notice that the doctor did not explain his reasoning and a further report should and could have been obtained…
>
> 32. The appellant was clearly on notice of a dispute concerning the extent of the appellant's permanent impairment when he was served with the report of Associate Professor Miniter.

The Delegate decided that the appeal is not to proceed.

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