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.

High Court of Australia Decisions

"Incapacity for work outside the police force" in s 10 (1A) (b) (ii) of the Police Regulation (Superannuation) Act 1906 (NSW) means "incapacity for work outside the police force from a specified infirmity of body or mind determined to have been caused by being hurt on duty when a member of the police force".

SAS Trustee Corporation v Miles [2018] HCA 55 Kiefel CJ, Bell, Gageler, Nettle & Edelman JJ - 14 November 2018

Background

On 28 August 2003, the respondent was certified (under s 10B (1) of the *Police Regulation (Superannuation) Act 1906 (NSW) (the Act)* as being incapable of discharging the duties of his office as a police officer because of (1) cervical spine, symptomatic degenerative changes; (2) lumbar spine, symptomatic degenerative changes; (3) left shoulder, recurrent dislocation; and (4) right knee, symptomatic chondromalacia. On 4 September 2003, a Delegate of the Commissioner of Police certified (under s 10B (3) (a) of *the Act*, that these infirmities were caused by the respondent being hurt on duty. He was medically discharged from the police force on 5 September 2003. Under s 10 (1A) (a) of *the Act,* he was entitled to and received superannuation equal to 72.75% of his attributed salary of office. In the following years, the he made several applications to increase his superannuation allowance and the District Court increased the allowance to 82.55%.

In 2009, the respondent applied to amend his s 10B (1) certificate to include "PTSD" and he argued that when the certificate was issued he did not know that he had a psychiatric condition. The appellant rejected the application and the respondent appealed unsuccessfully to both the Industrial Court and the Full Bench of that Court. Most-recently, he applied to increase his superannuation allowance to 85% (based upon his PTSD) on 12 November 2013, but the appellant rejected the application. He commenced proceedings in the District Court of NSW.

On 11 April 2016, Neilson J confirmed the appellant's decision and found that the proper construction of s 10 (1A) (b) (ii) of *the Act* was that the PTSD could not be considered as it was a supervening incapacity and did not arise from the 4 infirmities certified by the appellant.

The respondent appealed to the Court of Appeal and the majority allowed the appeal and determined that there was no reason to restrict s 10 (1A) (b) (ii) to incapacity for work outside the police force that was caused by the member having been hurt on duty when a member of the police force. The appellant then sought and was granted special leave to appeal to the High Court of Australia.

High Court Appeal

Kiefel CJ, Bell and Nettle JJ held that the preferable view of s 10 (1A) (b) (ii) is that, like s 10 (1A) (c), it contemplates only one kind of incapacity for work outside the police force, being incapacity that results from the specified infirmity of body or mind determined to have been caused by the member being hurt on duty when a member of the police force.

Their Honours noted that in the Court of Appeal, Sackville AJA invoked *Lembcke v SAS Trustee Corporation* (2003) 56 NSWLR 736 (*Lembcke)* as support for the idea that the respondent's proposed construction of s 10 (1A) should not be rejected simply because it produces anomalous results. In, *Lembcke,* the Court of Appeal rejected an argument that the "additional amount" payable under s 10 (1A) (b) (ii) was subject to an implicit limitation that a disabled member receiving a superannuation allowance under s 10 (1A) as well as earnings outside of the police force should not be better off than he or she would have been on his or her pre-disablement salary. Santow JA held that s 10 (1A) required no more than a consideration of what additional amount in the opinion of the appellant, is commensurate (in the sense of proportionate) with the member's incapacity for work outside the police force. Meagher JA observed that the section requires one question only, namely "what is the applicant's incapacity for work outside the police force?" Ipp JA held that it was plainly not compensatory and the idea of an implied limitation therefore fell away.

Their Honours held:

> 32. Apart from making clear, however, that s 10 (1A) is to be construed in accordance with its terms rather than according to preconceptions about underlying policy, *Lembcke* really takes the matter no further. Plainly enough, s 10 (1A) provides for benefits commensurate with the extent to which a member is incapacitated for work outside the police force. But the question remains whether, upon its proper construction, s 10 (1A) confines those benefits to incapacity for work outside the police force the result of an infirmity caused by injury sustained in the course of duty. And for the reasons given, it should be concluded that it does.

While their Honours noted that Sackville AJA cited an extract from the Second Reading Speech as supporting the contrary conclusion, they held that this statement *"is apt to refer to a situation where the infirmity is caused from being hurt on duty but does not manifest until a later point and it does not suggest that s 10 (1A) (b) (ii) should be construed other than as argued by the appellant"*.

Gageler J agreed with the orders proposed by Kiefel CJ, Bell and Nettle JJ, but also held:

> 53. This elaborate structure has a coherent operation if, but only if: (1) the incapacity for work outside the police force which is captured by each of s 10 (1A (b) (ii) and s 10 (1A) (c) is the same incapacity; and (2) the incapacity is an incapacity attributable to the same specified infirmity of body or mind that has been determined by the Commissioner of Police under s 10B (3), or by the District Court on appeal under s 21 (4), to have been caused by the member being hurt on duty.
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> 54. When the incapacity for work outside the police force which is captured by each of s 10 (1A) (b) (ii) and s 10 (1A) (c) is so construed, the structure of the additional amount provided for by s 10 (1A) (b) and (c) is internally coherent. The focus throughout is on the specified infirmity of body or mind that has been determined by the Commissioner of Police under s 10B (3), or by the District Court on appeal under s 21 (4), to have been caused by the disabled member being hurt on duty. The inquiry throughout is as to the extent to which, in the opinion of STC, that specified infirmity has rendered the disabled member incapacitated for work outside the police force...
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> 56. The alternative construction of s 10 (1A) (b) (ii), of which the majority in the Court of Appeal was persuaded, is that the sub-paragraph refers to incapacity for work outside the police force irrespective of the source of that incapacity. Although that construction is textually available, it results in a distortion of the complementary operation of s 10 (1A) (b) and (c) in setting an additional amount which the disabled member is entitled to be paid.
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> 57. The relationship between s 10 (1A) (b) and (c) appears not to have been the subject of detailed submissions before the Court of Appeal. Taking that relationship into account, the conclusion of Schmidt J must be preferred to that of the majority.

In agreeing with the orders proposed by Kiefel CJ, Bell and Nettle JJ, Edelman J stated:

> 65. The reasons of Kiefel CJ, Bell and Nettle JJ demonstrate that the context and purpose of s 10 (1A) of the *Police Regulation (Superannuation) Act* supports the interpretation that an additional amount of the annual superannuation allowance under s 10 (1A) (b) is only available if the member's incapacity for work outside the police force is from the specified infirmity of body or mind determined to have been "caused by the member being hurt on duty" when he or she was a member of the police force. That context and purpose aligns with, and reinforces, the natural and ordinary meaning of the words of s 10(1A) when read together with its defined terms.

The Court allowed the appeal, set aside orders 1 and 2 of the Court of Appeal dated 4 May 2017, dismissed that appeal and ordered the appellant to pay the respondent’s costs.

Court of Appeal Decisions

"Only a superior court can pronounce authoritatively on the limits of its own jurisdiction"

In Attorney General for New South Wales v Gatsby (Gatsby), the Court of Appeal determined that a state tribunal (NCAT) is not a "court of a State" for the purposes of Ch III of the Constitution and s 39 of the Judiciary Act 1903 (Cth) and that it lacks jurisdiction to exercise judicial power in circumstances where power is not expressly conferred by statute and the dispute is between natural persons who are residents of different states.

Based upon the Court's reasons, the WCC is also not a court of a State for the purposes of Ch III of the Constitution and s 39 of the Judiciary Act 1903 (Cth). It is likely that declaratory relief will be available under s 69 of the Supreme Court Act 1970 (NSW) if it determined a dispute of that type.

However, the WCC retains jurisdiction to determine disputes where one of the parties to a dispute is: (a) a corporation; (b) a NSW government agency; (c) a resident of a territory; (d) a non-permanent resident of a different state; or (e) is located overseas.

Attorney General for New South Wales v Gatsby [2018] NSWCA 254 – Bathurst CJ, Beazley P, McColl JA, Basten JA & Leeming JA – 6 November 2018

Background

The NSW Civil and Administrative Tribunal (NCAT) determined 3 disputes under the *Residential Tenancies Act 2010 (NSW) (the RTA)* where a party to each dispute resided outside NSW: (*(1) Gatsby v Gatsby – RT 15/56639; (2) Dibbin v Johnson – RT 15/41349 & (3) Johnson v Dibbin – RT 15/44353*).

In matter (1), NCAT determined that there was a residential tenancy agreement for the purposes of s 13 of *the RTA;* that the termination notice was issued in accordance with s 87 and complied with ss 82 and 88 of *the RTA;* and that the Lessor was entitled to the orders sought. In matter (2), the Landlord applied for an order under s 175 of *the RTA*, for payment of the rental bond and compensation for the cost of cleaning and repairs (exceeding the rental bond). In matter (3), the Tenant sought an order for repayment of rent under s 45 of *the RTA*, alleging that the premises uninhabitable due to 'serious mould', compensation under s 187 (1) (d) of *the RTA* and a full bond refund under s 175 *RTA.* NCAT heard these matters together. It dismissed the Tenant's application and ordered her to pay the Landlord the sum of $4,400 and It ordered the Rental Bond Board to pay the entire bond to the Landlord.

The unsuccessful parties appealed to NCAT's Appeal Panel. However, before these were heard, the Appeal Panel (comprising the President, a Deputy President and a Senior Member) queried its jurisdiction to determine proceedings "between residents of different states". The appeals were stood over pending the determination of other proceedings in the Court of Appeal to resolve jurisdiction issue. The Attorney General for NSW was joined as a party to the appeals.

The Appeal Panel ordered that the following questions regarding its jurisdiction be determined in each matter: 1. Did it at first instance have authority to hear and determine the application under *the RTA*? (a) because in doing so it was exercising administrative and not judicial power? (b) if the answer to question (a) is 'no', because it is a court of a State for the purposes of Chapter III of *the Constitution* and s 39 of the *Judiciary Act 1903 (Cth)*?

When NCAT made those orders, the Court of Appeal had determined that a State Tribunal, which is not a "court of a State", is unable to exercise judicial power to determine matters between residents of different states: *Burns v Corbett* [2018] HCA 15 (*Burns*). In *Burns*, the proceedings in both the High Court and the Court of Appeal were conducted on the assumption that the Tribunal (the Administrative Decisions Tribunal) was not a "court of a State" and that it had purported to exercise judicial power.

The Appeal Panel held that NCAT was exercising judicial power and it was a "court of a State" for the purposes of Chapter III of *the Constitution* and s 39 of the *Judiciary Act 1903 (Cth)*. It answered question 1(a) 'no' and question 1(b) 'yes'.

Court of Appeal

The Attorney General for NSW sought leave to appeal to the Court of Appeal and, alternatively, sought judicial review of the Appeal Panel's decision. The Attorney General for the Commonwealth intervened in the proceedings. The Attorney General for NSW argued that NCAT was not exercising judicial power and that it was not a 'court of the State'. However, in matters (2) and (3) he accepted that it was exercising judicial power and argued that it was not a 'court of a State'. The Attorney General for the Commonwealth argued that NCAT was exercising judicial power in all matters and that it was not a 'court of a State'. The Court also appointed 2 contradictors, who argued that the Appeal Panel answered both questions correctly.

Bathurst CJ

His Honour cited relevant provisions of the *Civil and Administrative Decisions Tribunal Act 2013 (No. 2) (NSW) (the NCAT Act)*, including, ss 28, 29, 54 and 83 and the *RTA* and held, relevantly:

> 95. I agree with the reasons expressed by Leeming JA on the issue of jurisdiction. As will be seen from my reasons below, I have concluded that the answer to each of the questions should be "No". However, it seems to me unsatisfactory merely to answer these questions without any consequential relief. In those circumstances, it is appropriate to make declaratory orders to give effect to these reasons.

His Honour cited the decision of Griffiths CJ in *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357, which described judicial power as follows:

> Apart from these considerations, I am of opinion that the words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

His Honour also referred to the comments made by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1971) 123 CLR 361 at 374-5* and held that NCAT exercised judicial power conferred on it by s 87 of *the RTA,* which involved it: (1) determining whether a residential tenancy agreement was in existence; (2) whether that agreement was breached; and (3) whether the breach was sufficient to justify the termination of the agreement, considering the maters referred to in s 87 (5). It therefore correctly answered question 1 (a).

He held that while NCAT has many features of a "court" and can, in a number of areas, exercise State judicial power, it is not a "court of a State" for the purposes of Ch III of *the Constitution* and s 39 of the *Judiciary Act 1903 (Cth),* due to a combination of the factors that he described in paras 182 – 186 (inclusive).

Beazley P and McColl JA concurred with t Bathurst CJ and Leeming JA and **McColl JA** also observed (citations excluded):

> 202. "For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality." These requirements "connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence". Those minimum requirements at least include being susceptible to removal only by the Governor on an address of both houses of parliament.
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> 203. In contrast, as Bathurst CJ has explained at [188], members of the NCAT do not have security of tenure comparable to that held by judges under the *Act of Settlement* and its statutory or constitutional equivalents. Rather, apart from the President, members of the NCAT are appointed by the Minister, their term of appointment is for a period not exceeding five years, and they are eligible for reappointment. In addition, members other than the President can be removed from office by the Governor for "incapacity, incompetence or misbehaviour", rather than, as I have said, in the case of members of the judiciary, by the Governor on an address of both houses of Parliament.

Leeming JA concurred with Bathurst CJ and stated, relevantly (emphasis added):

> 280. … But if the answer to the second question was that NCAT was not a "court of a State", then that question was not one which could be determined by NCAT, because it involved the determination of a matter in federal jurisdiction arising under the Constitution. **Only a superior court can pronounce authoritatively on the limits of its own jurisdiction.** At best, all that NCAT could do was to form and express an opinion, in accordance with what Brennan J had said, sitting as President of the Administrative Appeals Tribunal, in *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 242:
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> > An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect.

His Honour also stated, relevantly:

> 284. … First, … It has long been established that a court is able in its inherent jurisdiction to hear and determine a case in separate phases, aside from the separate question of procedure authorised by modern rules of court: see *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421 at 427 and *O'Connor v State of New South Wales* [2017] NSWCA 335 at [17], both referring to the fact that the English Supreme Court Practice has long contained the following note: "Apart from these rules, the trial judge has inherent jurisdiction to try any separate issue or question before the others". I see no reason why the Appeal Panel of NCAT could not take the same course, irrespective of its status as court or tribunal...
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> 285. Secondly, the Appeal Panel was doing more than "signalling" its future determination of the proceedings. Rather than merely expressing its reasons and conclusions, the Appeal Panel made *orders* answering questions, which conveyed a concluded determination on the questions it had identified. It does not matter that the "orders" were not such as to give rise to a directly enforceable obligation. What matters is that they formally recorded a concluded determination on two legal issues.
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> 286. Thirdly, the right of appeal conferred by s 83 of *the NCAT Act* is, like all appeals, a creature of statute. One aspect of that principle is that the metes and bounds of the appeal are determined by statute… The right of appeal conferred by s 83 is narrow insofar as it is confined to a question of law and qualified by the requirement of leave. However, it is broad insofar as it extends to "any decision", rather than, as is common, "any judgment or order".
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> 287. Fourthly, I see no reason why the broader language of "decision", reinforced by the word "any", does not extend to the answers to separate questions embodied in the Appeal Panel's orders… For present purposes, it suffices to say that nothing in s 5 or elsewhere in the Act cuts down the meaning of "any decision", and there is no reason to read that broad language narrowly, so as not to extend to the answer to a question.
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> 288. Fifthly, … nothing turns upon the absence of a separate grant of a right of appeal from an answer to a question (such as in s 103 of the *Supreme Court Act 1970* (NSW)) when once it is borne in mind that the right of appeal granted by s 83 is broader and extends to any *decision*.

His Honour noted that s 54 (4) of *the NCAT Act* prevents it from proceeding in a manner or making a decision that is inconsistent with the Supreme Court's opinion on a point of law. He held [at 292] that s54 (4) is 'entirely otiose' unless NCAT is not a court and that the purpose of Part 3A of *the NCAT Act* ("Diversity Jurisdiction") is plain and NCAT's authority to determine classes of disputes is now qualified 'insofar as they are matters in federal diversity jurisdiction'. The parties are permitted to apply to a court, which unquestionably does have jurisdiction to hear and determine those disputes.

His Honour also stated that as there was no argument or notices under s 78B of the *Judiciary Act*, it was not appropriate to address whether there was a "matter" before NCAT (a matter addressed by Basten JA).

Basten JA agreed that NCAT was not a court of a State.

The Court remitted the matters to NCAT to be dealt under Part 3A of *the NCAT Act* and dismissed the Summonses seeking judicial review.

Deputy President constructively failed to exercise jurisdiction under s 351 WIMA & denied the appellant procedural fairness

Taylor v J & D Stephens Pty Ltd [2018] NSWCA 267 – McColl AP, Payne JA & Simpson AJA – 12 November 2018

Background

The appellant was employed as a shearer, wool presser and shed hand from 1996 to 2011, at times by the respondent, and from 2012 to 2015 he was employed by the respondent. On 24 June 2015, he injured his right arm because of a faulty piece of equipment. However, he was later diagnosed with injuries to his neck, back, both arms, and both legs because of the nature and conditions of his employment. He relied upon ss 4 (b) (i) and 4 (b) (ii) WCA. He claimed lump sum compensation under s 66 WCA for those injuries.

On 20 June 2017, Arbitrator Bamber entered an award for the respondent and found that the appellant had failed to prove that he suffered a 'disease injury' under ss 4 (b) (i) or (ii) WCA, essentially as there was no contemporaneous evidence of complaints of 'symptoms' and because of perceived inconsistencies in the appellant's evidence. \

The Arbitrator did not doubt that work as a shearer is heavy work and physically demanding, and is a type of work that could cause injury to the body parts claimed and aggravation of disease. However, she held that the evidence that caused injury was lacking in the appellant's case and he bears the onus of proof. In *Nguyen,* the Court of Appeal said a tribunal must feel an actual persuasion of the existence of facts and she was not so persuaded. She held that there was not only a lack of contemporaneous complaints about these body parts, but also many inconsistencies in his history which left her unable to be satisfied on the balance of probabilities that he has injured those body parts.

On appeal, the appellant asserted that the Arbitrator: (1) misdirected herself as to whether there needed to be a complaint of symptoms for the Appellant an 'injury'; (2) … should have found in favour of the appellant; and (3) misapplied authorities such as *Department of education (sic) v Ireland* [2008] NSWWCCPD 134.

On 14 November 2017, DP Wood determined the appeal on the papers and dismissed the appeal.

In relation to ground (1), DP Wood held that the appellant's challenge was confined to the test that the Arbitrator applied in determining injury and that he argued that all that is required in a disease case is to establish that there is a disease condition and that employment with the respondent was employment 'to the nature of which' it is due. She held that this challenge was not argued before the Arbitrator and that the appellant had not established any 'exceptional circumstances'. She refused to allow the ground to be raised and stated that ground 1 one of the appeal is limited to what legal tests the Arbitrator was required to apply in determining the appellant's entitlement.

DP Wood rejected ground 2 and held that this was "based on a misreading of [61] of the Arbitrator's reasons". She also rejected ground 3 and held that the Arbitrator did not err in applying the principles relevant to the onus of proof.

Court of Appeal

Simpson AJA, with whom McColl AP and Payne JA agreed identified the relevant question as being 'whether the Deputy President misapprehended what was put to the Arbitrator and therefore failed to address the issue that was put to her?' She held [at 105] that DP Wood "misunderstood" what had been argued before the Arbitrator, as plainly inherent in the argument put to the Arbitrator was the proposition that contemporaneous complaint of symptoms was not a pre-requisite for a finding of disease injury. In expressing the view that this had not been argued before the Arbitrator, and refusing to allow it to be "raised" before her, DP Wood failed to exercise the jurisdiction that had been entrusted to her, which is an error of law.

Her Honour also held that DP Wood failed to address the substance of the issue, which was whether a complaint of symptoms is necessary before disease injury can be established. By failing to deal with that argument, she denied the appellant procedural fairness: see *Dranichikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229. She also failed to give any weight to the medical and radiological evidence, which also amounted to a failure to exercise jurisdiction: see *Lovell v Lovell* (1950) 81 CLR 513 at 591; *Kumar v Legal Services Commissioner* [2015] NSWCA 161 at [112] per Leeming JA.

Her Honour stated that DP Wood should have remitted the matter to an Arbitrator for determination in accordance with a decision that should have included a direction under s 352 (7) *WCA,* to the effect that the absence of contemporaneous complaint was not determinative of whether the appellant had suffered a disease injury.

Accordingly, the Court allowed the appeal, set aside the decision of DP Wood and ordered that the appeal from the Arbitrator be allowed. It remitted the matter to the Commission for determination according to law and ordered to respondent to pay the appellant's costs.

Court confirms that a total knee replacement is an "artificial aid" within the meaning of s 59A (6) (a) WIMA

Pacific National Pty Ltd v Baldacchino – [2018] NSWCA 281 – Macfarlan JA, Payne JA, Simpson AJA – 23 November 2018

Background

The worker injured his left knee at work on 27 October 1999. At the age of 67 he required a total knee replacement and an Arbitrator determined that this was reasonably necessary because of the work injury. However, he was precluded from recovering the costs of the surgery under s 59A WCA unless the knee replacement fell within the definition of an 'artificial member' or 'artificial aid' in s 59A (6) WCA.

The Arbitrator determined that the total left knee replacement satisfied the definition of "other artificial aid" under s 59A (6) WCA. The appellant appealed and DP Snell confirmed the Arbitrator's decision.

Court of Appeal

The appellant's main argument was that 'on no proper interpretation of 'artificial aid' could two or three pieces of plastic surgically inserted in a knee to replace lengths of human bone that were excised… come within s 59A (6)' WCA. It argued that an 'artificial aid' was an 'article or object complete, which serves a purpose'. However, in contrast, a total knee replacement involves 'interference with part of a human body and the insertion of objects which come together as part of an overall [or unified] operation'.

The appellant also argued that the Arbitrator and Deputy President found against it because they followed the decision in *Thomas v Ferguson Transformers Pty Ltd* [1979] 1 NSWLR 216, when that case had been rendered of no assistance by later changes in the law. Alternatively, it argued that if compensation was payable in respect of the cost of the materials to be used in the operation, the cost of the surgery was not covered.

The Court held, relevantly:

(1) The primary decision maker did not err in finding that the respondent's total knee replacement was an "artificial aid" within the meaning of s 59A (6) (a) WCA (see: [27] - [31], [37] - [41], [44] and [45].

(2) DP Snell did not err in having regard to *Thomas* because: (i), he did not rely solely on *Thomas*, but rather said that in his view that decision was consistent with the words of the statute; (ii) *Thomas* remains a relevant authority, notwithstanding that the present legislation is, to some extent, in a different form to that considered in that case; and (iii) even if *Thomas* does not support the decision below, it is clear that it does not contradict it (see: [32] -[36], [44] and [45]).

(3) The appellant's fall-back argument was rejected as the "provision of" the artificial aid requires surgery and the surgery is therefore within s 59A (6) (a) WCA. However, this is not to be regarded as adopting a general rule that the cost of surgery is always a cost of "[t]he provision of … artificial aids", but rather each case must be decided on its own facts (see: [42], [44] and [45]).

Macfarlan JA (with Whom Payne JA and Simpson AJA agreed) accepted that 'artificial aids' must work to ameliorate the effect of a person's disability and may comprise a single object or a composite of objects working together and that a knee replacement has those characteristics. He rejected the argument that the article or object must be 'complete', as this is not evident in the words of the statute or supported by any authority. Many artificial aids involve a process of connection of articles to the body in a manner comparable to that involved in knee replacements.

His Honour also stated, relevantly:

> 31. Furthermore, in my view, *Thomas* remains a relevant authority, containing a useful explanation of what constitutes an "artificial aid", notwithstanding that the present legislation is, to some extent, in a different form to that considered in that case. The only arguably material change in the form of the legislation has been the insertion in it of express reference to "the modification of a worker's home or vehicle" as constituting medical treatment (s 59A (6) (b)). By this change, the legislature confirmed that the finding in *Thomas* reflected its intent that the injured worker's right to compensation in respect of the cost of such modification should not be subject to a time limit.
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> 32. The effect of the insertion is thus to endorse, rather than contradict, the outcome in *Thomas*. If an inference were to be drawn about the legislative intent in making the insertion, it would be that it was intended to be a confirmation of the decision in

Thomas (see *Ex parte Campbell* referred to at [17] above) and not, as the applicant effectively submits, to narrow, in an undefined fashion, the ambit of the expression "other artificial aids" in the legislation. There is no basis for concluding that the legislature so intended.

33. In any event (and particularly if, contrary to my view, *Thomas* is no longer regarded as applicable), it is for this Court to interpret the expression. Even if, as the appellant contends, *Thomas* does not support the decision below, it is clear that it does not contradict it. At best for the appellant it is neutral. It is not therefore a binding, or indeed any, authority supporting the appellant's case.

The Court dismissed the appeal and application for leave to appeal with costs.

Supreme Court– Judicial Review Decisions

Jurisdictional error on the face of the record

Hearne v Spamil Discretionary Trust [2018] NSWSC 1631 – Hamill J – 30 October 2018

Background

The plaintiff suffered a frank injury to her left shoulder, pain in her chest wall and pain in her neck at work in 2001. She was later deemed to have injured both arms on 15 August 2006. On 8 November 2010, she was awarded compensation under s 66 WCA based upon a MAC dated 7 July 2010, which assessed: (1) 2001 injury - 10% permanent loss of efficient use of the left arm at or above the elbow; and (2) 2006 injury – 7% WPI (7% WPI for the left upper extremity less a 5/7 deductible under s 323 WIMA and 5% WPI for the right upper extremity).

The plaintiff filed a further ARD on 10 August 2016, which claimed additional compensation under s 66 WCA. On 21 October 2016, an AMS (Dr Boyce) issued a MAC that assessed combined 34% PWI (comprising 27% WPI for the cervical spine (based upon evidence of radiculopathy), 10% WPI for the left upper extremity and 12% WPI for the right upper extremity). The AMS certified that maximum medical improvement had been reached.

On 18 November 2016, the first defendant appealed against the decision of the AMS. The plaintiff opposed the appeal, but generally conceded that there should be a deductible under s 323 WIMA for pre-existing injuries. She also lodged further evidence with her Opposition including a further report of Dr Curtis dated 30 December 2016.

On 13 February 2017, the Registrar's delegate decided to remit the matter to the MAS for reconsideration under s 329 (1) (a) WIMA, as Dr Curtis commented on possible cervical spine surgery, which was relevant to whether maximum medical improvement was reached. The Registrar provided the AMS with copies of the further evidence, an amended Referral and the original brief of evidence.

On 27 February 2017, the AMS briefly responded to the Registrar. He disagreed with Dr Curtis' opinion that there has been a progressive decrease in the size of a cervical disc, which can be attributable to either injury, and he confirmed his opinions dated 21 October 2016. He did not mention the proposed spinal surgery and he did not explicitly reconsider whether maximum medical improvement had been reached or correct the conceded error in his MAC (failure to apply a deductible under s 323 WIMA).

On 7 April 2017, the Registrar referred the matter to the MAP, which decided that Dr Noll should re-examine the plaintiff. He reported, relevantly:

> [S]he had a further MRI scan of the cervical spine and was advised that she should undergo a surgical procedure on her neck, details of which have not been made available. She said that she was keen to pursue this recommendation. She said however that the insurer has not provided approval for the procedure.

The MAP determined that the AMS wrongly diagnosed radiculopathy. It adopted Dr Noll's clinical findings and issued a new MAC, which assessed 7% WPI for the cervical spine and 0% for both upper extremities (it applied a 100% deductible for each assessment). This did not satisfy the threshold under s 66 (1) WCA.

The plaintiff then applied for judicial review by the Supreme Court of NSW and alleged that the MAP erred in law by: (1) by failing to consider whether the plaintiff had reached maximum medical improvement; (2) by failing to give reasons why it concluded the plaintiff had reached maximum medical improvement; and (3) by failing to give reasons why it assessed the 7% WPI for the cervical spine.

Hamill J held there was jurisdictional error on the face of the record, as the MAP did not consider whether the plaintiff had reached maximum medical improvement or, if it did, it failed to provide reasons for its implicit conclusion that she had done so. He also stated that the circumstances in which the appeal was referred to the MAP "were somewhat unsatisfactory" and this was because the reconsideration decision did not address the issues raised by the Registrar. He described the AMS' response as "pithy" and stated:

> 24. Finally, s 328 (2) of the *WIM Act* provides that the appeal was to be limited to the "grounds of appeal on which the appeal is made" and s 328(3) limits the evidence to that which upon which the original evidence was based. However, by the time the Appeal Panel considered the matter, the plaintiff had successfully applied to rely on new evidence and Dr Boyce had reconsidered the matter based on that new material. Neither party raised the provisions in sub-ss 328(2) or (3) and I take it to be common ground that it was properly before the Appeal Panel.

Further, the MAP's reasons do not explain how it assessed 7% WPI for the cervical spine based upon Dr Noll's findings. Accordingly, he quashed the MAP's decision and remitted the matter to the Registrar for referral to a differently constituted MAP for determination according to law. He also ordered the first defendant to pay the applicant's costs.

No jurisdictional error established

Elsworthy v Forgacs Engineering Pty Ltd [2018] NSWSC 1638 – Fagan J – 31 October 2018

Background

On 2 May 2011, the plaintiff suffered frank injuries to his left wrist, left elbow and left knee and he alleged that he suffered a consequential Chronic Regional Pain Syndrome (CRPS). He claimed lump sum compensation under s 66 WCA. On 20 March 2017, the Registrar referred the dispute to an AMS for the assessment of permanent impairment of both upper and lower extremities.

On 8 May 2017, the AMS issued a MAC, which assessed 0% WPI. The AMS noted that the plaintiff suffered an avulsion fracture to his left wrist, which was treated

conservatively. About one month later, he suffered severe left knee pain when he bent over to pick up items from the floor and he was diagnosed with a meniscal injury, which was treated arthroscopically in July 2011. The left wrist pain continued and spread and by October 2011, he suffered tremors in both arms. He later suffered symptoms in his left foot, left knee and the left side of his face. He considered the diagnostic criteria for CRPS under the Guidelines. He found one sign in the each of the sensory and sudomotor/oedema categories, which were equivocal for that diagnosis, and no sign in the vasomotor category. As required by item 4 of Table 17.1 of the Guidelines, he opined that a more plausible diagnosis was "Fibromyalgia with significant psychological difficulties".

The plaintiff appealed against the AMS' decision under ss 327 (3) (c) and (d) WIMA and the Registrar referred the appeal to a MAP. On 1 September 2017, the MAP confirmed the AMS' decision. He then applied to the Supreme Court of NSW for judicial review of the MAP's decision and he also sought an extension of time in which to seek judicial review of the AMS' decision. If the Court granted that extension of time, he sought a declaration that the original MAC (and the AMS' statement of reasons) is void.

The matter was heard by **Fagan J** and I have summarised his decision below.

In relation to ground (b)*,* the plaintiff argued that the MAP should have found that the AMS misapplied the Guidelines by eliminating each of the observed signs on the basis that they could be explained by another condition such as Fibromyalgia. Instead, he should have recorded all signs and symptoms (required by items 1 to 3 of Table 17.1) and determined under item 4 whether there was no other diagnosis that better explained the totality of the symptoms and signs.

His Honour rejected this construction as being "rigid and restrictive" and said that the AMS is not precluded from considering whether one or more of the clinical signs is better explained by a diagnosis other than CRPS, provided that all other signs and symptoms are considered.

In relation to ground (c)*,* the plaintiff argued that the MAP should have found that the AMS erred by considering, separately and individually, "whether the manifestations (symptoms or signs,) which satisfied items 1 – 3 in Table 17.1 resulted from CRPS" and based upon the true operation of Table 17.1, the AMS' findings satisfied steps 1 to 3.

His Honour held that this ground could only apply to item 3 of Table 17.1, because the AMS determined items 1 and 2 in the plaintiff's favour, and that the second part of this ground is *"an apparent contention that the MAP should have found that the AMS made a demonstrable error in determining whether the requirements of Table 17.1 were satisfied".* He found no demonstrable error in the AMS' reasons that the MAP should have identified because the AMS *"set out in very clear terms precisely the basis upon which some of the 'sub-components' of item 3 were not satisfied by his clinical findings"*.

In relation to ground (d)*,* the plaintiff argued that in applying item 4 of Table 17.1 of the Guidelines, the MAP should have found *"that the AMS wrongly used a test of whether some other diagnosis than CRPS 'consistently explained the signs and symptoms' and he ought to have asked whether another diagnosis 'better explains the signs and symptoms'."*

His Honour rejected this ground and repeated his previous reasons. He also stated that this ground *"would be unsustainable, even if it had been considered on its merits…"* and there was no merit or substance in the plaintiff's arguments.

In relation to ground (e)*,* the plaintiff argued that the *MAP "…should have found that, in applying items b, c and d at the commencement of Table 17.1 (concerning whether a diagnosis of CRPS had been present for at least one year, whether the diagnosis had been verified by more than one examining physician and whether other possible diagnoses had been excluded), the AMS erred by treating these items as directed to a diagnosis under Table 17.1 rather than 'being factual enquiries directed to the history and management of the worker'."*

His Honour held that if the first part of this ground was established, it could not justify setting aside the MAP's decision as neither the AMS nor the MAP had to consider items b to d unless item a was satisfied and the diagnosis of CRPS was confirmed by the criteria in Table 17.1. However, as a diagnosis of CRPS was not confirmed, items b and c did not arise. The second part of this ground did not relate to a ground of appeal before the MAP.

In relation to ground (f)*,* the plaintiff argued that the MAP failed to consider whether the AMS erred by finding that the symptoms were more consistent with a diagnosis of fibromyalgia than CRPS.

His Honour rejected this argument and repeated his earlier reasons.

In relation to ground (g)*,* the plaintiff argued that the MAP should have re-examined him.

His Honour held that in view of the grounds of appeal, a clinical examination by the MAP could not have had any bearing on its outcome. The MAP documented its reasons for determining the matter on the papers and there was no reviewable error in doing so. He stated that the MAP had *"…no more need of a physical examination of the plaintiff to decide these matters than does the Court"*.

In relation to ground (h)*,* the plaintiff argued that the MAP applied incorrect criteria to diagnose Fibromyalgia.

His Honour held that the plaintiff made no attempt to elaborate or support this ground and the argument was irrelevant as it could only bear upon the question under item 4 (which did not arise for either the AMS or the MAP).

In relation to ground (i)*,* the plaintiff argued that the MAP gave inadequate reasons, but His Honour rejected this.

Judicial review of the original MAC

Fagan J noted that the plaintiff required an extension of time to make this application, as the Summons was filed more than 6 months late. The first defendant opposed an extension of time and argued that the proposed judicial review would be futile *"…as everything of substance as to whether the AMS made reviewable error was before the Court upon review of the MAP's decision".* He accepted that argument and said that if he had to consider the application on its merits, he would find it lacked substance as the AMS fully and adequately explained all his relevant conclusions.

His Honour dismissed the Summons and made a costs order against the plaintiff.

Supreme Court – Common Law Decisions

Statement of claim dismissed because it was materially different from that proposed in the pre-filing statement

Hall v Ecoline Pty Ltd T/As Treetop Adventure Park [2018] NSWSC 1732 – Davies J – 16 November 2018

Background

The Plaintiff was employed by the second defendant. On 6 November 2009, he injured his back while participating in a team-building exercise operated by the first defendant, but there was an issue as to exactly how the injury occurred. There was not dispute that he was above ground, was moving from tree to tree and that the exercise involved a plank or planks of wood, but it was unclear whether these were being carried or stepped on. In July 2015, he recovered compensation under s 66 WCA for 20% WPI.

On 11 June 2016, he filed a statement of claim against both defendants and both defendants lodged a defence. However, the statement of claim was filed out of time and the plaintiff required leave under s 151D WCA and the cause of injury pleaded in it was inconsistent with that pleaded in the pre-filing statement. Section 318 (1) (a) WIMA provides that a claimant is not entitled to file a statement of claim that is materially different from the proposed statement of claim that formed part of the pre-filing statement … 'except with leave of the court…'

On 7 September 2018, the plaintiff filed an amended notice of motion, seeking leave to commence the proceedings out of time (s 151D WCA) and to rely upon the statement of claim. The notice of motion was listed for hearing before Davies J on 6 November 2018.

The parties ultimately accepted that His Honour should determine the issue under s 318 WIMA and that if he found that issue against the plaintiff's interests, the statement of claim should be dismissed under r 13.4 of the *Uniform Civil Procedure Rules 2005 (NSW)* and it would not be necessary to determine the s 151D issue.

Davies J determined that the plaintiff contravened s 318 *WIMA* because his statement of claim was materially different to that in the pre-filing statement and the discretion under s 318 (2) *WIMA* was not enlivened. He held, relevantly:

> 43. No-one reading the pre-filing statement, the claim documents or the medical reports could have understood that the plaintiff was injured as a result of a fall. The first time a fall is asserted is in the statement of claim. Mr Hart appeared to concede that the description in the pre-filing statement, which was consonant with the description in all of the other documents except the statement of claim, was wrong. He submitted, however, that it was not materially different because there was no dispute that the injury occurred in the course of a team-building exercise, conducted above the ground between trees, involving a plank or planks of wood, with the plaintiff secured by a harness. As a description of the activity being performed, that is correct, but there are two essential matters not made clear from that description. The first is whether the plaintiff was carrying a plank or was required to walk on the plank. The second is the plaintiff's fall.

His Honour noted that s 318 (2) WIMA provides that leave is not to be granted unless the material concerned was not reasonably available to the party when the pre-filing statement was served, and the failure to grant leave would substantially

prejudice the party's case. He referred to the decision of Taylor DCJ in *Ortlipp v Employers Mutual NSW Limited as agent for the Workers Compensation Nominal Insurer* [2014] NSWDC 157, which considered the unsatisfactory drafting of the provision, and stated, relevantly:

> 45. … I agree with His Honour at [42] that the "material concerned" must refer to material suggestive of the different claim that the plaintiff now seeks to maintain. However, where the "material" concerns what actually happened in the accident, and it is not here submitted that the plaintiff was not aware at the time of how the accident occurred, the material concerned must have been available to the plaintiff. That is, the plaintiff must have known how the accident happened. In those circumstances, the plaintiff here does not satisfy paragraph (2) (a) with the result that the discretion in sub-s (2) is not enlivened.

His Honour held that there was no evidence that the second defendant knew that the accident occurred in the way now pleaded in the statement of claim and the very first time this cause was asserted was in the statement of claim. He dismissed the notice of motion and the proceedings against the second respondent and he ordered the plaintiff to pay the second defendant's costs of the proceedings.

WCC Presidential Decisions

WCC declines applications to extend time to appeal and to adduce fresh evidence

Marshall v Skilled Group Ltd [2018] NSWWCCPD 44 – Deputy President Wood – 17 October 2018

Background

The appellant alleged that he injured his lumbar spine and left elbow on 9 January 2015, when he jumped out of the way of a reversing excavator. His employment was terminated on 16 January 2015. The respondent disputed the claim and relied upon ss 4, 9A, 33 and 60 WCA and asserted that any permanent impairment was not result from a work injury.

The appellant commenced WCC proceedings on 2 occasions, but discontinued each matter. He filed this application on 22 January 2018 and on 12 April 2018, Arbitrator Capel issued a Certificate of Determination and entered an award for the respondent. He found that the appellant had not discharged his onus of proving a work-related injury.

On 26 June 2018, the appellant appealed against the Arbitrator's decision, but the Registry rejected the appeal. He lodged an amended appeal on 12 July 2018. DP Wood determined that it was appropriate to determine the appeal on the papers.

As the appeal was lodged late and the appellant required an extension of time to pursue it, which required him to establish the existence of exceptional circumstances. He argued that exceptional circumstances existed because "from 2 April 2018", he was very ill and he was admitted to hospital and while he was discharged, he was later re-admitted and he was not finally discharged until 17 April 2018. He also alleged a lack of communication with his previous solicitors and said that he did not become aware of the Arbitrator's decision until 27 April 2018. He then contacted WIRO, which provided him with a list of solicitors, and he contacted 'at least 15' of them', but they all declined to act for him. He then obtained the relevant forms and documentation from the Commission.

The respondent opposed an extension of time and argued that the appeal does not comply with the Practice Direction because: (1) it does not identify any grounds of appeal; and (2) for the most part, it simply regurgitates submissions made at the Arbitration, which caused it difficulty in preparing submissions in reply; (3) the appellant had not explained why he did not access his emails between 17 April 2018 (the date of discharge from hospital) and 27 April 2018 and between 9 May 2018 (when he received a copy of the documents from the Commission) and 26 June 2018 (when he first attempted to lodge the appeal); (4) there are no "exceptional circumstances"; and (5) refusing to grant an extension of time would not work a demonstrable or substantial injustice, as required by r 16.2 (12) of the Rules.

The Respondent relied upon the High Court's decision in *Gallo v Dawson* [1990] HCA 30, which set out the factors that are required to be taken into account in the exercise of the Presidential member's discretion to extend time, namely: (a) the history of the proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences to the parties for the grant or refusal of the application for extension of time; (e) the prospects of the applicant succeeding in the appeal, and (f) the fact that, upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for an extension of time is granted.

DP Wood held that the following circumstances were exceptional when considered together: (a) the appellant was hospitalised over the period in which the COD was issued; (b) he continued in ill health after being discharged from hospital; (c) his solicitors ceased to act for him; (d) he was unable to find alternative legal representation; (e) he did not have access to his file until the Commission provided it to him on 9 May 2018; and (f) he is not legally trained and has no legal experience. Determining whether the failure to extend time would cause the appellant "a substantial injustice" requires an assessment of the merits of the appeal. This required consideration of the 'new evidence' that he sought to adduce.

DP Wood noted that s 352 (6) WIMA provides that leave to admit new evidence should not be granted "unless it was not previously available to and could not have been reasonably obtained by the appellant or that failure to grant leave would cause a substantial injustice." However, she held that the 'new evidence' comprised documents that were clearly available to him at the Arbitral stage and he could reasonably have obtained them at that time. He therefore needed to prove that the failure to admit the evidence would cause him "substantial injustice".

DP Wood referred to the decision of Basten JA in *Northern New South Wales Local Health Network v Heggie*, [2013] NSWCA 255, to the effect that the basic purpose of the power in s 352 (6) WIMA is to allow the Commission to admit further additional evidence which, if accepted, would be likely to demonstrate that the decision appealed against was erroneous". She also referred to His Honour's decision in *Strickland*, where he observed:

> The part of s 352(6) concerning 'substantial injustice' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that 'would' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion: at [31].

DP Wood declined to admit the appellant's 'new evidence' and determined that he had not identified any error by the Arbitrator, but "was asserting, without foundation, that a different decision should have been made." She held:

> 207. Arbitrations are not a trial run, and the parties must live with the consequences of the forensic choices they make at first instance, including those of their legal representatives: *Super Retail Group Services Pty Ltd v Uelese* [2016] NSWWCCPD 4, [92]. The Arbitrator considered the submissions of the parties and made an evidence based decision in favour of Skilled.
>
> 208. In *D'Orta-Ekenaike v Victoria Legal Aid*, [2005] HCA 12; (*D'Orta-Ekenaike*) the plurality, (Gleeson CJ, Gummow, Hayne and Heydon JJ) said (at [34] and [35]):
>
> > 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 (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 also referred to the decision of Basten JA in *Inghams Enterprises Pty Ltd v Sok* [2014] NSWCA 217 and held, relevantly:

> 211. The onus is on the person who seeks to overturn the decision to establish there are sufficient grounds to do so: *Singh v Ginelle Pty Ltd* [2010] NSWCA 310 at [45], [47] and [50]. It is not sufficient that a different result might have been preferred: *Heggie* at [31].
>
> 212. In order to establish error on the part of the Senior Arbitrator in respect of his factual findings, what is required to be shown is that the Arbitrator either:
>
> (a) ignored material facts;
> (b) made a critical finding of fact which 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.

DP Wood noted that in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505, Barwick CJ held that it is necessary to establish that other probabilities so outweigh the Arbitrator's conclusion that it can be said his conclusion was wrong. She held that the appellant had not satisfied that test and she refused to allow an extension of time.

Appeal against an interlocutory decision made after final orders fails

Kirunda v State of New South Wales (No. 4) [2018] NSWWCCPD 45 – Deputy President Snell – 1 November 2018

Background

The appellant claimed weekly compensation, s 60 expenses and lump sum compensation for permanent impairment due to a psychological injury allegedly suffered while he was employed by NSW Police Force. The history of the matter is summarised as follows:

On 25 November 2015, WCC issued a COD and entered an award for the respondent. However, the appellant appealed and on 11 August 2016, DP Snell allowed the appeal and remitted the matter for determination by a new arbitrator. On 12 October 2016, the new arbitrator conducted a telephone conference, but the appellant complained of apprehended bias and the arbitrator recused himself. The appellant then made 2 applications for reconsideration of DP Snell's remitter order, but both applications were refused. He then appealed to the Court of Appeal, but the appeal was discontinued. On 17 October 2016, the matter was listed for arbitration hearing before Arbitrator Sweeney following 3 teleconferences. However, that hearing was vacated to allow the appellant an opportunity to instruct solicitors. He then obtained 'legal aid' and instructed solicitors and the matter was listed for arbitration hearing on 15 December 2017.

However, late on 11 December 2017, the appellant advised the Registrar by email that he was withdrawing his instructions from his solicitors and would seek an adjournment. On 12 and 13 December 2017, without leave, he forwarded written submissions to the WCC and the respondent's solicitors in 3 parts.

On 15 December 2017, the appellant (who holds a Master of Laws degree and has been admitted as a legal practitioner in NSW) appeared for himself and told the Arbitrator that: he had 'discharged his solicitors'; he did not 'have any more trust in lawyers'; and he needed 'to present the case' himself. He applied for an adjournment. The respondent opposed this and the Arbitrator refused it.

The appellant was cross-examined, by leave, and gave evidence akin to re-examination by dealing with some of the matters that were raised during cross-examination. He also made oral submissions.

On 18 December 2017, the Arbitrator issued Directions, which included granting the appellant leave to file and serve a signed statement explaining or clarifying any matter arising out of cross examination by 20 January 2018.

However, the appellant did not file any further statement, but instead applied for reconsideration of the Arbitrator's decision to allow cross-examination.

On 29 January 2018, the Arbitrator declined the reconsideration application and gave extensive reasons for his decision to allow the respondent the advantage of cross-examination. He confirmed because the appellant was not legally represented, he granted leave to him to file a statement that either explained or clarified anything arising out of cross-examination so that he would not be prejudiced. He maintained his view that allowing cross-examination was proper in a complex case and held that it would be futile to now make a contrary ruling and to strike from the record all the evidence arising from cross-examination. He extended the time for the appellant to lodge any further statement.

On 3 April 2018, the Arbitrator issued a Certificate of Determination and entered an award for the respondent. He provided 27 pages of reasons for his decision and ultimately found that the appellant had discharged his onus of proof that he suffered a psychological injury that was caused or materially contributed to by his employment.

Appeal

The appellant appealed and raised 6 general grounds: (1) Lack of procedural fairness or bias, in either case resulting in a miscarriage of justice; (2) Failing to consider relevant facts and taking into account irrelevant facts, regarding the medical evidence, and failing to apply relevant legislation and case law correctly; (3) Error in admitting the respondent's evidence of its defective s 74 notices, and additional medicolegal report, and failing to distinguish between the different claims before the Commission; (4) Failing to identify and adjudicate on late evidence and submissions, and to give reasons for findings; (5) Taking into account irrelevant considerations and failing to take into account relevant considerations, regarding the evidence and submissions generally; and (6) Failing to apply *Jones v Dunkel*.

DP Snell rejected the appeal and I have summarised his reasons below.

In relation to ground 1

- He found that the Arbitrator considered the circumstances and gave reasons for his decision not to adjourn the hearing. He noted that the appellant has legal training and that the Arbitrator had previously allowed him an adjournment to obtain legal representation. While he said that he could not properly present his case, he applied for the adjournment after deciding to represent himself. The Arbitrator made it clear to him that he had the option of discontinuing the proceedings and filing them again when he was ready and refusing the adjournment did not have the practical effect of deciding the proceedings adverse to the appellant.
- He rejected the allegations of bias (actual or apprehended) and lack of procedural fairness. He held that the Arbitrator had "treated the appellant patiently and gave him considerable latitude" by giving him repeated warnings, instead of dealing with the issue about striking out the proceedings, and the appellant's submissions tacitly concede that he refused to co-operate in cross-examination. He stated:

> 119. The allegation of bias in this matter is based on what the appellant submits should be inferred from procedural rulings with which the appellant disagrees, and with the Arbitrator's attempts to obtain compliance with these rulings, in the face of the appellant's resistance at the arbitration hearing. There is nothing from which it could be concluded that the Arbitrator prejudged the matter, or that he demonstrated actual bias. It is an allegation that should not have been made.
>
> 120. To the extent to which the appellant relies on an allegation of apprehended bias, I note the test was described by the plurality in *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; 244 CLR 427:
>
> > It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (in this case, in

> the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. No party to the present appeal sought in this Court, or in the courts below, to challenge that this was the test to be applied. Their Honours referred also to the two-step nature of such an application:

- He referred to the majority decision in *Ebner v Official Trustee in Bankruptcy,* that application of the apprehension of bias principle requires 2 steps: (1) The identification of what it is said might lead the judge to decide a case other than on its legal and factual merits; and (2) An articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.

In relation to ground 2

- He found that the Arbitrator engaged with the medical opinions of Dr George, Dr Smith and Ms Hidalgo and gave extensive reasons why he did not accept the opinions of Dr Smith and Ms Hidalgo.

In relation to ground 3

- He held that the Arbitrator correctly referred to the matter's previous history in his interlocutory decision and that the allegation that 'injury' was not properly raised between the parties is untenable. He agreed with the Arbitrator's decision to admit Dr George's second report into evidence as it complied with cl 45 (1) (b) of the Regulation. He otherwise relied upon his findings on ground 2.

In relation to ground 4

- He stated:

> 227. The basis of the allegation of error relating to the Schedule is difficult to understand…However, the schedule referred to by Arbitrator Sweeney at [89] was not a submission by the appellant's counsel. It was produced by his legal representatives at the time, as a matter of particulars, in response to an order by Arbitrator Harris. It included not only the appellant's allegations, but the respondent's responses to them. It was not simply a matter of the appellant rejecting reliance on it. It was a document between the parties, produced at the direction of Arbitrator Harris, that assisted in defining the factual issues…

- He held that the Arbitrator did not err in referring to the schedule of injuries and he treated it as an *aide memoire* and not evidence. Further, the appellant had not identified any aspect of the Arbitrator's reasoning that depended on the schedule or any way in which it affected, or could have affected, the result.
- The Arbitrator failed to refer to the appellant's affidavit sworn 29 January 2018, which suggested that he did not consider it and held that this was an error in the fact-finding process, but the appellant bears the onus of proving that it affected the result. He had not proved that this resulted in a miscarriage of justice.

In relation to ground 5

- He held that it does not assist the appellant to establish the occurrence of real events, which he perceived as creating a hostile environment, unless he can prove that this caused a psychological injury. He stated:

> 280. The respondent's submission is correct, the appellant's submissions in support of this ground are immaterial to the result. The appellant's case on 'injury' could not succeed, given the Arbitrator's analysis of the medical evidence. The Arbitrator's factual findings flowing from the analysis are at [144], [145], [157] and [158] of his reasons. The effect of these findings is that the appellant cannot prove that the events on which he relied, and his perception of them, caused a psychological injury. It follows that the errors allegedly identified in this ground, if established, would not give rise to a substantial wrong or miscarriage of justice (see [249] – [253] above, they would not represent appealable error. Ground No 5 must fail.

In relation to ground 6

- He held that as the appellant cannot prove that the alleged events at work caused a psychological injury, any error by the Arbitrator in failing to draw inferences under Jones v Dunkel could not have affected the result.

Extension of time to appeal refused as no exceptional circumstances exist

Bekkers v State of New South Wales [2018] NSWWCCPD 46 – Deputy President Snell – 5 November 2018

Background

The appellant was a registered nurse who previously worked for Justice Health in various roles as a Nurse Manager (largely managerial and administrative roles) from 2002 until 2009. From February 2013 to July 2014, she was employed by Justice Health as a registered nurse/mental health nurse at Long Bay Gaol and she said that these duties were "relatively physically arduous" and aggravated an arthritic condition in her left hip. During that period of employment, she also worked in nursing at St George Private Hospital, the University of Wollongong and the University of Sydney and since July 2014, she had worked in nursing for "a number of" other employers.

In August 2016, Dr Dixon reported to the appellant's solicitors that she would probably require a total hip replacement within the next 3 to 5 years. On 30 January 2017 and 14 February 2018, her solicitors claimed the cost of the proposed surgery from Justice Health, relying upon "the disease provisions" and alleging that that the last employment that was a substantial contributing factor was that with Justice Health until either 25 August 2014 or 28 November 2014. The insurer disputed the claim and asserted, inter alia, that it was not the last employer to the nature of which the alleged disease was due.

The matter was listed for Arbitration hearing before **Arbitrator Isaksen** on 28 May 2018. However, on 21 May 2018, the appellant's solicitors lodged a further a statement from the appellant dated 16 May 2018, in which she said that she had worked for Justice Health for a further period of 5 months in 2016 and that this *was "once again, work more of a physical nature in terms of the metal stairs, heavy doors on steel framework, contact with inmates and at times involved in accidental encounters"*.

The Arbitrator gave the respondent leave to cross-examine the appellant, after which its counsel stated that it had no record of employing the appellant in 2016, but she may have worked at Long Bay Gaol in 2016 under an Agency arrangement. Towards the end of oral submissions, the Arbitrator stated:

> … the evidence clearly is from the [appellant] today that she was undertaking heavy work in 2016, therefore it becomes extremely important for me to know whether she was in fact employed by the respondent in 2016. That has a significant effect in terms of the application of section 16, and section 4(b)(ii) and section 16 of the Act. In that regard, I intend to make a direction that both the [appellant] and the respondent are to advise by 2 June 2018 as to whether the [appellant] was employed with the respondent between March 2016 and October 2016, and to provide any evidence by way of documents to that effect if there is likely to be a dispute. It may well be that the parties will be able to reach agreement. It may be of no consequence at all. But it is a very important issue, and we need to – in order to get that looked at. So that's the direction I make, and otherwise, I will thereafter provide a decision.

On 31 May 2018, the appellant's solicitors lodged her further statement dated 30 May 2018, in which she said that her last date of physical employment with Justice Health was 25 August 2014 and her employment was terminated on 1 December 2014.

On 14 June 2018, the Arbitrator issued a Certificate of Determination and entered an award for the respondent. He found that employment at Long Bay Gaol was the main contributing factor to the aggravation and acceleration of a disease process in the appellant's left hip and that the employer in 2016 should be liable, but the appellant had not identified the last employer.

Appeal

The appellant appealed and alleged that the Arbitrator erred by finding that the appellant had not identified the relevant employer and that there was "an overwhelming inference that the relevant employer was the Respondent" and that it was the last employer. She also alleged that the Arbitrator failed to give appropriate weight to her "uncontested" further statement dated 30 May 2018, regarding the last date that she worked for the Respondent.

DP Snell determined the appeal on the papers. He noted that the appeal was filed late and that the appellant required an extension of time under s 352 (4) WIMA and r 16.2 (12) of the Rules.

The appellant's solicitor swore an affidavit in support of the application for an extension of time, in which he provided reasons for the delay in lodging the application. The reasons included delays in obtaining advice (and grounds of appeal) from counsel and a significant family issue, as a result of which the Appeal was ultimately lodged on 24 July 2018. He argued that: (1) The appeal was initially within time when it was first lodged and there is no prejudice; (2) The Registrar is not required to act as a gatekeeper and it is up to the Presidential member to determine the merits of an appeal; and (3) The appeal has 'extremely good prospects of success' and it would cause a substantial injustice if it were not allowed to proceed.

The appellant relied upon *ING Administration Pty Limited v Singh* [2008] NSWWCCPD 48 (*Singh*), which held that an appeal (which did not include grounds) was not out of time, as the grounds could be "construed" from the submissions, and

Kleinbergs v Central West Pathology Service, [2007] NSWWCCPD 206, in which time was extended, the appeal having been originally lodged within time, and rejected due to "a formal defect".

The respondent opposed an extension of time for reasons that included that the original appeal lacked grounds and an objective reader could not construe from the submissions, any alleged errors that they purported to support. It argued that the solicitor's failure to comply with a time limit because he was awaiting counsel's advice is not uncommon or rare and does not constitute 'exceptional circumstances' and that the appeal has no prospects of success.

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

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

DP Snell found that there are no exceptional circumstances and stated, relevantly:

> 42. … The explanation does not explain the basis on which the rejection could be described as a formal defect. It does not explain why, after the appeal was initially rejected, it took between one and two weeks to redraft and relodge the amended document. It refers to one aspect of the history that is outside the usual, the admission of the appellant's solicitor's mother to hospital on 17 July 2018, but offers no indication of whether (or how) this contributed to the delay. The explanation of the delay is inadequate.

However, a Presidential member is also required to consider whether losing the right to appeal would work "demonstrable and substantial injustice": *Bryce v Department of Corrective Services* [2009] NSWCA 188 (*Bryce*) per Allsop P (Beazley and Giles JJA agreeing). In *Bryce*, the Court of Appeal determined that exceptional circumstances existed for the following reasons: (a) the discretion to extend the time to appeal must be exercised in order to do justice between the parties; (b) the appeal was filed only 1 day late; (c) the respondent has pointed to no prejudice he will face if time to appeal is extended by 1 day; (d) the appeal raises issues that are strongly arguable and strict compliance would work demonstrable and substantial injustice to the Department, as it will lost the opportunity to have the matter determined according to its substantial merits; and (e) the Department's solicitor acted with reasonable promptness, once instructions to appeal were given.

Further, in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290, Campbell JA stated (at [66] Tobias JA and Handley AJA agreeing):

> Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very

> rare, but they cannot be circumstances that are regularly, routinely or normally encountered…
>
> Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional.

Whether losing a right to appeal would cause demonstrable and substantial injustice to the appellant involves consideration of the merits of the appeal. In this matter, the dispute essentially concerned identification of the appellant's last employer and the respondent denies that it is the last employer.

In relation to the appellant's submissions in reply, DP Snell adopted the principle stated by the Court of Appeal in *Bale v Mills* [2011] NSWCA 226:

> 59. Not only have the parties and their legal representatives no right (whether they agree among themselves to do it or not) to place before the court without prior leave further material after an appeal has been heard, it is wrong. It undermines and derogates from the principle of the open administration of justice. The practice is not legitimated by sending the material and in that material seeking leave. The proper course (unless prior leave, statute or court rule permits otherwise) is for the proceedings to be relisted so that an application to enlarge the record can be made and determined in open court.

In the context of the WCC's procedures and s 354 WIMA, if a party seeks to file additional submissions outside any timetable that has been set, they should first seek leave from the Commission and notify all other parties and the Commission can then consider the application with as much formality the circumstances require. He found that as the submissions in reply were lodged late and raised matters that were well outside anything that could be regarded as submissions in reply, it was appropriate that he ignore them.

DP Snell found that the appellant's evidence regarding her employment was "somewhat confused" and that she did not address the proposition raised by the Arbitrator during the hearing, namely whether she worked at Long Bay Gaol in 2016 for an entity other than the respondent (such as an agency). He held:

> 76. For the appellant to succeed against the respondent, in the circumstances of this case, it was necessary that she establish 'injury' in the relevant sense pursuant to s 4(b)(ii) of the 1987 Act. It was then necessary that she establish that the respondent was "the employer who last employed the worker in employment that was a substantial contributing factor to the aggravation, acceleration, or deterioration" that comprised the injury: s 16(1)(b) of the 1987 Act. The Arbitrator's finding, that he was not satisfied the respondent was the last such employer, was well available on the evidence. The appellant's grounds and submissions could not establish appealable error, applying the principles discussed at [22] – [25] above…
>
> 78. The appellant carried an onus to establish, amongst other things, that the respondent was the last relevant employer for the purposes of s 16(1)(b). By the time of the telephone conference on 5 June 2018, at which admission of that statement was dealt with, the proceedings had otherwise run to conclusion, the appellant had given her evidence in cross-examination and the parties had addressed. The evidence regarding whether the respondent was the last relevant employer is summarised at [74] above. To describe the

appellant's evidence in her statement dated 30 May 2018 at [3] as "uncontested" is simply artificial. There was significant evidence and submissions to the contrary. There was clearly an issue between the parties on whether the respondent was the relevant last employer.

DP Snell held that the appeal would not succeed on its merits and that it did not have any prospects of success. He therefore refused to grant an extension of time.

The text of s 38A (1) WCA, as enacted, "makes no reference either expressly or impliedly to a worker's earnings." Hee applied.

Vostek Industries Pty Ltd v White [2018] NSWWCCPD 47 – President Keating – 8 November 2018

Background

The decision of Arbitrator Capel in *White v Vostek Industries Pty Ltd* [2018] NSWWCC 161 was discussed in issue no. 21 of the WIRO Bulletin. Arbitrator Capel determined that the weekly payments payable to a worker with highest needs may exceed the entitlement that is calculated against PIAWE.

The Insurer appealed and submitted that the Arbitrator misconstrued s 38A WCA by finding that it authorises the payment of weekly compensation of $788.32 (as adjusted) to a worker with highest needs, without considering the worker's earnings. It argued that the word "amount" where it appears the second time in s 38A (1) WCA means the combined total of compensation and earnings.

President Keating determine the appeal on the papers. After discussing the parties' submissions and the relevant authorities regarding statutory interpretation, he noted that the appellant concedes that the literal meaning of the words of s 38A WCA are plain and that it means that the amount of weekly compensation payments is to be treated as $788.32, without having regard to any income earned or capable of being earned, by the worker. However, the Minister's second reading speech to the Workers Compensation Amendment Bill 2015, cannot be reconciled with the plain words the legislature enacted. He stated:

> 107. It is well settled that the intention of Ministers in second reading speeches or explanatory memorandum cannot displace the clear meaning of the legislation actually passed by the legislature. In *Re Boulton; Ex parte Bean* 1987] HCA 12; 162 CLR 514 (*Re Boulton*). the High Court said:
>
> > The words of a Minister must not be substituted for the text of the law. ... The function of the Court is to give effect to the will of Parliament as expressed in the law.
>
> 108. In *Harrison v Melhem,* [2008] NSWCA 67 the Court of Appeal stated:
>
> > Statements in Parliament, even by ministers during the Second Reading debate, will however seldom be available to elucidate the meaning of the later-enacted text. Identification of mischief and purpose is one thing, statement of meaning is another.

Keating P held:

> 116. As I noted in *Hee No 2*, the additional special benefits provided by s 38A of the 1987 Act are only payable if certain conditions are satisfied. Firstly, there must be a "determination" made of the amount of weekly payments of compensation payable in accordance with Subdiv 2. Secondly, there must be an "amount of weekly payments of compensation payable". Thirdly, the

amount of compensation must be an amount that is less than $788.32 (as adjusted). It is not disputed that those conditions have been met in the circumstances of this case, nor is it disputed that there is a requirement to satisfy those conditions to enliven an entitlement under s 38A. As discussed above, what is disputed is the quantification of Mr White's entitlement under s 38A.

117. There is nothing in s 38A of the 1987 Act to indicate that the special benefits available are to be capped in the manner the appellant contends. The plain words of the section are to the contrary.

118. It does not follow contextually that, because some of the benefits available in the provisions of Subdiv 2 limit the compensation to a proportion of a worker's PIAWE that all of its provisions must be so limited. That is particularly so when one considers that s 38A of the 1987 Act is a special provision clearly intended to provide additional benefits to workers of highest needs.

His Honour concluded that the language of s 38A WCA is clear and unambiguous and the express words are capable of only one construction – it is intended to provide a minimum amount of compensation if the terms of s 38A (1) are met. He confirmed the Certificate of Determination dated 19 June 2018.

WCC - Medical Appeal Panel Decisions

Medical Appeal Panel declines to exercise power to reconsider a decision under s 378 (1) WIMA

Central Coast Council v Whitten [2018] NSWWCCMA 107 – Arbitrator Marshal Douglas, Dr David Crocker & Dr Roger Pillemer – 26 October 2018

Background

The worker injured his right knee at work on 23 April 2001 and he injured both knees on 9 July 2014 (deemed).

On 13 April 2018, an AMS assessed 40% permanent loss of efficient use of the right leg at or above the knee with respect to the injury in 2001. However, he applied a 1/10 deductible for pre-existing osteoarthritis under s 68A WCA (as saved), which reduced his assessment to 30%. In relation to the 2014 injuries, he assessed 20% WPI for each lower extremity, applied a 1/10 deductible under s 323 WIMA, and assessed combined 33% WPI. The appellant appealed and the Registrar referred the appeal to the MAP for determination. It found that the MAC contained a demonstrable error. It revoked the MAC and issued a replacement MAC that certified combined 31% WPI, which was comprised as follows:

- Injury in 2001 – 18% permanent loss of efficient use of the right leg at or above the knee (after a deductible under s 68A WCA for pre-existing osteoarthritis); and
- Injuries in 2014:
  - 18% WPI for the left lower extremity (20% WPI less 1/10 deductible); and
  - 16% WPI for the right lower extremity (20% WPI less 2/10 deductible).

On 13 August 2018, the appellant's solicitor applied for reconsideration of the MAP's decision under s 329 WIMA (that was clearly an error as s 329 does not apply to reconsiderations by a MAP and the WCC treated this as being made under s 378 (1) WIMA).

The appellant argued that the MAP failed to make a deduction for pre-existing arthritis for the 2001 injury and, in relation to the 2014 injury to the right knee, it should have applied deductibles of 1/10 for arthritis and 1/5 for the 2001 injury.

However, regarding the 2001 injury, the MAP stated that it applied a deductible of 1/10 under s 68A WCA for pre-existing arthritis and in relation to the 2014 injury, it applied a deductible of 1/5 under s 323 WIMA, because of both the 2001 injury and pre-existing osteoarthritis. It held that the matters it must have regard to when deciding whether to reconsider a decision are set out by DP Roche in *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 141. It stated:

> 16. In this case, the Appeal Panel is of the view that the appellant has not advanced any valid reason why the Appeal Panel should reconsider its decision. The matters about which the appellant complains were taken into account by the Appeal Panel.

Accordingly, the MAP declined to exercise its discretion to reconsider its decision.

Demonstrable error established but no change in WPI assessment and MAC confirmed

Penrith Rugby League Club Ltd v Jenkins [2018] NSWWCCMA 106 – Arbitrator Carolyn Rimmer, Dr Michael McGlynn & Dr David Crocker – 26 October 2018

Background

The worker was employed by the appellant as a security guard. On 7 December 2014, he fractured his right hand while assisting in breaking up a fight at work and underwent several surgeries including arthrodesis and fusions that used bone taken from his hips. He claimed lump sum compensation under s 66 WCA.

On 4 June 2018, Arbitrator Wardell issued a COD – Consent Orders, which amended the ARD to include an allegation of scarring to the right hand and both hips. The dispute under s 66 was remitted to the Registrar for referral to an AMS for assessment of the degree of permanent impairment of the right upper extremity and for scarring.

On 29 June 2018, the AMS issued a COD, which assessed combined 11% WPI (comprising 9% WPI for the right upper extremity and 2% WPI for scarring). However, the appellant lodged an appeal against the AMS' decision and relied upon ss 327 (3) (c) and (d) WIMA. The Registrar referred the appeal to the MAP. Neither party sought a re-examination by the MAP and it decided that the matter should be determined on the papers.

The appellant argued that the AMS failed to provide a diagnosis for the right wrist and the MAC did not indicate a causal link between the accepted finger injury and the alleged limited wrist movement, which was not supported by any radiological investigations.

The MAP held that the AMS failed to make a clear diagnosis regarding the right wrist, which was required in the Guidelines. While he made a diagnosis of a comminuted fracture of the base of the right fifth metacarpal, he did not explain that this extended to involve the wrist. It considered the failure to make an adequate and clear diagnosis and to provide an adequate explanation between the injury to the finger and the WPI allocated to the wrist was a demonstrable error and involved the application of incorrect assessment criteria.

However, the MAP decided that the AMS had sufficient radiological reports upon which to base his opinion, which indicated an intra-articular fracture at the wrist level, and it was satisfied that the restriction in movement of the right wrist was due to the injury and subsequent surgeries. It accepted the AMS' clinical findings and his WPI assessment of 9% WPI for the right upper extremity. It concluded:

> 50. In conclusion, the Panel considered that the MAC contained a demonstrable error and was made on the basis of incorrect criteria but the assessment of impairment by the Panel was the same as that made by the AMS.
>
> 51. In those circumstances, the Panel will confirm the MAC as the review has not led to a different result and should not be interfered with (*Robinson v Riley* (1971) 1 NSWLR 403*).*

The MAP confirmed the MAC.

WCC – Arbitrator Decisions

Arbitrator awards weekly payments under s 39 WCA

Kennewell v ISS Facility Services Australia Limited t/as Sontic Pty Limited [2018] NSWWCC 216 – Arbitrator Sweeney – 14 September 2018

Background

The worker injured his right shoulder at work on 2 May 2005. He underwent surgery on 13 July 2009 and revision surgery on 7 May 2013. In 2015, he claimed lump sum compensation for permanent impairment under s 66 WCA. That dispute was referred to an AMS, Dr O'Keefe, and on 6 May 2015, a MAC certified the degree of permanent impairment resulting from the injury as 11% WPI.

On 8 November 2017, the insurer gave notice under s 39 WCA that weekly payments would cease on 24 February 2018. It said that as further surgery was pending, it could not assess his ongoing entitlement to weekly payments as the degree of permanent impairment 'could not be confirmed', but that if an AMS certified that he had not reached maximum medical improvement he may be entitled to weekly payments for a further period.

Before weekly payments ceased, the worker filed an Application for Referral to an AMS and on 22 February 2018, the Registrar referred a General Medical Dispute to an AMS, with instructions to determine whether the degree of permanent impairment was fully ascertainable under s 319 (g) WIMA.

On 6 April 2018, the AMS determined that maximum medical improvement had not been reached and the insurer resumed weekly payments from that date. However, it declined to make payments for the period from 25 February 2018 to 5 April 2018. The worker filed an ARD claiming weekly payments for that closed period.

The Insurer argued that cl 28C of Pt 2A Sch 8 of the Workers Compensation Regulation 2016 (cl 28C) operates prospectively from the date on which the AMS certified that maximum medical improvement has not been reached and there is no indication that it can apply retrospectively. It argued that no assessment was "pending" until 6 April 2018, being the date of the AMS' examination.

However, the worker argued that he is entitled to ongoing weekly payments from 25 February 2018, as an AMS certified that the degree of permanent impairment is not fully ascertainable and the 260-week limitation does not apply, and when

weekly payments ceased, an assessment of the degree of WPI was pending in at least two respects: (1) He had recently undergone surgery and the degree WPI was potentially not ascertainable; and (2) he applied for an assessment of WPI before the end of the 260-week period.

Arbitrator Sweeney held that s 39 WCA does not apply and that the worker's entitlement to weekly payments of compensation must continue beyond the 260-week period. He found that cl 28C does not envisage that weekly payments may cease and recommence when its conditions are met, but rather than weekly payments will continue beyond 260 weeks until maximum medical improvement has been reached and the degree of permanent impairment is fully ascertainable. Once s 39 "does not apply", there is no temporal restriction on the applicant's entitlement to compensation and it continues uninterrupted beyond 260 weeks, subject to the application of s 38 WCA, until maximum medical improvement is achieved. If the worker then cannot establish that his permanent impairment is greater than 20%, his compensation ceases.

The Arbitrator also held that a "pending assessment" refers to the one that will follow the AMS' decision to decline to make an assessment and that this construction of cl 28C does not create uncertainty.

As to whether the WCC has jurisdiction to make an award under s 38 WCA, the Arbitrator noted that neither party submitted that such an award would breach s 43 WCA or the reasoning in the *Bunnings* case. He concluded that the Commission has jurisdiction to order that the respondent pay the applicant weekly compensation in respect of the period claimed. He gave the parties liberty to apply to argue either that he had exceeded jurisdiction or that there should be a specific award of weekly payments.

Note: The decision in Kennewell conflicts with the decision of Arbitrator McDonald in Taumalolo, and it is currently the subject of a Presidential appeal. WIRO will report on the outcome of the appeal in due course.

Arbitrator declined to award weekly payments under s 39 WCA

Taumalolo v Industrial Galvanizers Corporation Pty Ltd [2018] NSWWCC 243 – Arbitrator McDonald – 11 October 2018

Background

The worker injured his lumbar spine at work on 30 May 2001 and 17 October 2003 and he ceased work in 2005. On 10 October 2007, Dr Pillemer, AMS, assessed 4% WPI. The doctor re-examined the worker in 2011, but neither of the MAC's was in evidence. The worker underwent surgery on 10 March 2014.

During 2017, the Insurer gave the worker notice that his weekly compensation would cease in late-2017 under s 39 (1) WCA, unless the degree of whole person impairment was more than 20%. Weekly payments ceased on 25 December 2017. On 19 September 2017, the worker's solicitor filed an ARD, claiming lump sum compensation under s 66 WCA for a further 21% WPI, based upon an assessment from Dr Bruce (25% WPI less prior award). The insurer qualified Dr Breit and he assessed 22% WPI, but he apportioned this between injuries.

The Registrar referred the dispute to an AMS for assessment, with instructions to assess permanent impairment with respect to both dates of injury. The worker requested a combined assessment, but the Registrar declined this request on the

basis that there was no threshold dispute for work injury damages. The worker failed to attend the AMS examinations and on 11 January 2018, the ARD was discontinued during a teleconference.

On 1 February 2018, 2 further ARD's were lodged seeking: (1) A WPI assessment for the purposes of s 39 WCA; and (2) weekly payments from 25 December 2017, lump sum compensation under s 66 WCA, and an assessment for the purposes of a threshold dispute for work injury damages. The Registrar ordered that the ARD's be combined.

On 12 March 2018, an Arbitrator conducted a teleconference and made ex-tempore orders. The claim for weekly payments was discontinued, the previous payments under s 66 WCA were set out and the s 66 dispute was remitted to the Registrar for referral to an AMS to assess the degree of permanent impairment because of the 2003 injury and a combined assessment for the purposes of s 39 WCA and a work injury damages claim.

On 11 April 2018, Dr Pillemer issued a MAC that assessed 13% WPI for the 2003 injury and a combined of 23% WPI. The Insurer resumed weekly payments from 11 April 2018. The worker sought reinstatement of weekly payments from 25 December 2017, but the insurer declined this. On 10 July 2018, an ARD claimed weekly payments from 25 December 2017 to 10 April 2018.

Arbitrator McDonald identified the relevant issues as being: (1) whether the worker was entitled to weekly payments for the period from 25 December 2017 to 10 April 2018; and (2) whether the WCC had jurisdiction to determine that claim, as the entitlement was subject to s 38 WCA. She held, relevantly:

> 46. In *Lee* ([2013] NSWWCCPD 54), the President said that it is "clear from the unambiguous terms of s 38 that an entitlement to compensation under that section, must be assessed by the insurer, not by the Commission." The Commission's lack of jurisdiction arose from the fact that the first and second entitlement periods had been exhausted and that the worker's entitlements fell to be determined under s 38. The question of whether a work capacity decision had been made was not relevant to that issue. The decision in Lee was applied recently in *Paterson v Paterson Panel Workz Pty Limited:* [2018] NSWWCCPD 27.
>
> 47. In *Sok*, a case concerning transitional provisions and the power of the Commission to determine a dispute about weekly compensation when a work capacity decision had not been made, the employer argued that the Commission had no jurisdiction to determine matters which could be the subject of a work capacity decision. It is not relevant to the question to be determined.
>
> 48. Section 39 does not authorise the payment of compensation. Sub-section (1) provides that compensation is not payable after an aggregate period of 260 weeks. Sub-section (2) sets out the circumstances in which the section does not apply – being claims by workers who suffer more than 20% WPI. Sub-section (3) sets out the method of assessing the degree of permanent impairment.
>
> 49. If the Commission has no jurisdiction to determine the entitlement to weekly compensation after the expiration of the second entitlement period, it follows that the Commission has no jurisdiction to award compensation during

that period when IGC's insurer declined to pay compensation because of the operation of s 39.

The Arbitrator noted that s 39 (3) provides that the degree of permanent impairment is to be assessed as provided by s 65 of the 1987 Act and s 65 (3) provides that if there is a dispute about the extent of permanent impairment, the Commission may not award permanent impairment compensation unless the degree of impairment has been assessed by an AMS. Therefore, the Commission 's role in matters to which s 39 applies is to resolve permanent impairment disputes and questions arising in permanent impairment disputes, such as whether the impairment arising from two injuries can be aggregated for the assessment of WPI. In this matter, she noted that the dispute about whether assessments could be aggregated remained unresolved and she declined to make an award of weekly compensation for the period claimed.

Consent awards and notations contained in a COD do not estop a worker from claiming compensation for further permanent impairment or alleging deterioration in his condition since an award was made

Simon v Master Windows Pty Limited [2018] NSWWCC 242 – Arbitrator Perrignon – 9 October 2018

Background

The worker injured his back at work on 15 March 2001. He claimed lump sum compensation and on 26 August 2013, the Compensation Court made awards under s 66 WCA for 20% permanent impairment of the back, 5% permanent loss of efficient use of each leg at or above the knee and 30% permanent loss of use of the sexual organs, but it applied a deductible of 2/3 to each assessment.

On 11 June 2015, the worker claimed further lump sum compensation under s 66 WCA, based upon assessments from Dr Dias (27% permanent impairment of the back and 9% permanent loss of efficient use of each leg at or above the knee), but the respondent disputed the claim. On 18 August 2015, he filed an ARD, which claimed weekly payments, medical treatment expenses and further lump sum compensation under s 66 WCA, but on 21 October 2015, he filed an amended ARD that deleted the s 66 claim.

On 9 November 2015, the Commission issued a COD – Consent Orders and awarded the worker weekly payments and medical treatment expenses. It restored the claim under s 66 WCA, but entered an award for the respondent in respect of that claim. It also noted the following agreements: (1) The applicant acknowledges that he has not suffered further loss of or impairment to any body part beyond that for which he has received lump sum compensation; and (2) The applicant acknowledges that when the agreed awards and orders have been paid he will have received all entitlements to compensation from the respondent and its insurer.

Because of s 66 (1A) WCA and the decision in *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250 (*Cram Fluid*), no further s 66 claim could be made at that time. However, on 13 November 2015, cl 11A was inserted into Sch 8 of the *Workers Compensation Regulation 2010,* which overcame the decision in *Cram Fluid* and enabled one further claim under s 66 WCA to be made.

On 18 August 2016, in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213 (*Hine*), the Court of Appeal determined that no issue estoppel arose from a finding made by consent that the worker had 'fully recovered' from the effects of a psychological injury.

On 13 November 2015, the worker's solicitors re-agitated the s 66 claim. The insurer disputed the claim under s 66 (1A) WCA and argued that the worker made his one further claim on 11 June 2015, and this was determined by consent on 9 November 2015.

However, at arbitration the respondent did not rely upon s 66 (1A) WCA, but instead argued that the award for the respondent regarding the s 66 claim was binding on the parties and amounts to a finding that, as of 9 November 2015, no further permanent impairment had been suffered since the awards dated 26 August 2003. It argued that the worker needed to establish deterioration since 9 November 2015 and he had not done so. Alternatively, it argued that the ARD should be dismissed under s 354 (7A) WIMA, because it essentially re-litigated a claim that was made and determined in 2015.

Arbitrator Perrignon identified the relevant issues as being: (1) Was the worker estopped from making the current s 66 claim because of the COD dated 9 November 2015, due to either: (a) issue estoppel, or (b) res judicata; and (2) Should the ARD be dismissed under s 345 (7A) WIMA.

Based upon the Court of Appeal's decision in *Hine,* the Arbitrator held that the awards and notations dated 9 November 2015 ***did not give rise to a res judicata***, because: (1) At that time, s 66 (1A) WCA had removed any statutory cause of action under s 66 WCA; and (2) Where there was a dispute regarding the extent of permanent impairment resulting from the injury, s 65 WCA obliges the WCC to refer that dispute for assessment by an AMS. Without such referral and assessment, the WCC lacks power to determine that dispute. He also held that ***no issue estoppel arises*** as: (1) The issue of deterioration was not necessarily determined because s 66 (1A) WCA removed any cause of action, which was sufficient to justify an award for the respondent; and (2) Any such determination would have been beyond power. This was not a case where appendant jurisdiction was exercised, but rather where there was a lack of jurisdiction.

As the WCC lacked power to make the consent finding on 9 November 2015, the worker did not have to show a deterioration in his condition after that date, but rather only a deterioration since the awards in 2003. The Arbitrator was satisfied that there was expert evidence of such deterioration and s 354 (7A) WIMA was not engaged. He remitted the matter to the Registrar for referral to an AMS to assess the degree of permanent impairment of the back and the loss of efficient use of each leg at or above the knee.

Applicant not a worker or deemed worker at the date of injury

Sweetman v Coffey and Nominal Insurer [2018] NSWWCC 253 – Arbitrator Grahame Edwards – 15 October 2018

Background

On 20 January 2016, the applicant suffered significant injuries (multiple fractures in his thoracic spine, a fractured right first rib and a right hemopneumothorax and injuries to his cervical and lumbar spines) when he fell from a ladder while performing building work on a property owned by the First Respondent. He claimed workers compensation as a worker or deemed worker, but the First Respondent was uninsured. The Second Respondent disputed that the applicant was a worker or deemed worker.

The applicant argued that he was acting at the direction of the first respondent, who had control of the building site and the work to be done and provided the materials,

including scaffolding, ladders, drop saw, screw guns and other hand tools, except for some materials that he bought (for which he was reimbursed). He was paid at an hourly rate for his work only and did not provide any quotations. He denied carrying out work incidental to a trade or business and said that while he held an ABN, he did not collect GST or issue tax invoices, he was not a certified builder or tradesman and he did not advertise his services. He relied upon Presidential decisions in *Bains v Hay* [2018] NSWWCCPD 14, *Cabra-Vale Ex-Active Servicemen's Club Ltd v Thompson* [2013] NSWWCCPD 49 and *Malivanch v Ring Group Pty Ltd* [2014] NSWWCCPD 14 (*Malivanch*).

The second respondent argued that the statements from the applicant and first respondent indicate that there was an intention between them to create legal relations. It argued that the first respondent was not a building contractor and did not carry on business as a builder, but was rather a home builder who engaged the services of the applicant to undertake building work for him. The applicant was a contractor who provided building and handyman services as well as his own tools and equipment and a ladder. There was no contract of service between the applicant and first respondent under which the applicant provided exclusive services to the first respondent. The first respondent did not exercise control over the applicant and any directions that he gave to the applicant were given as a home owner to an independent contractor. The applicant was a business entrepreneur who regularly performed work incidental to a trade or business of a builder/handyman as an independent contractor in his own name and he charged an hourly rate for his services. In other words, none of the indicia discussed in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 were present to establish a contract of service.

The second respondent also argued that the applicant was not a deemed worker within the meaning of Sch 1, cl 2 (1) (a) WIMA, because he was carrying on the small business entity of a builder/handyman operating as a sole trader, as evidenced by the ABN and the tax documents that were in evidence. It relied upon the decisions in *Hollis v Booth* [2011] FCA 366 and *Malivanch*.

The Arbitrator held that it was necessary to consider the entire relationship between the applicant and first respondent to determine whether they intended to create legal relations and the applicant bears the onus of proof. The essential feature of the definition of a "worker" in s 4 WIMA is the 'contract of service" between the alleged employer and the alleged worker and establishing this involves principles of contract law, such as offer and acceptance, consideration, mutual obligation and intention to create legal relations. He held:

> 95. The High Court in *Stevens* held that the concept of the employment contract is undefined. The current test is to balance the indicia in favour of an employment contract with those not in favour of that relationship. The list of indicia is not closed, and a court (tribunal) is free to use whatever indicia appear to be appropriate in the particular case.

The control test is not determinative of an employer/employee relationship and other indicia must be considered, including the provision of tools and equipment, the method of remuneration, arrangements about hours of work and the provisions of holidays, the obligation to work, the arrangements about taxation and the capacity to delegate work.

The Arbitrator found that the first respondent was not carrying on the business of a builder and any control he exercised over the applicant was regarding the work he

wanted done to a satisfactory standard as a home builder. The applicant had the building skills that the first respondent needed to undertake alterations to his home. The applicant did the building and construction work while the first respondent supplied the materials and undertook the labouring work. He was paid by cash or partly by cash and the balance by deposit into his account as requested by his emails to the first respondent, which itemised the hours that he worked and sought reimbursement for materials that he purchased for the job. The payment at an hourly rate may be consistent with either an employer/employee relationship or an independent contractor relationship. The fact that there was no arrangement for sick leave, holiday or other leave benefits normally associated with a contract of service and that no taxation was deducted from payments made, points to an independent contractor relationship. The power to delegate is also an important factor, but the evidence does not indicate whether the applicant could have delegated the work.

In *Australian Air Express Pty Ltd v Langford* [2005] NSWCA 96, at [16], McColl JA held:

> The second observation concerns the distinction between an employee and an independent contractor. That distinction has been said to be 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own': *Marshall v Whittaker's Building Supply Co* [1963] HCA 49; (1963) 109 CLR 210 at 217 per Windeyer J. Although this statement was criticised by Wilson and Dawson JJ in *Stevens* (at 34) as 'posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer', it was referred to with approval by the majority in *Hollis* (at 38 – 39 [39] – [40]).

Further, in *Malivanek* (sic), DP Roche said that the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

> > Viewed as a 'practical matter':
> >
> > (i) is the person performing the work an entrepreneur who owns and operates a business; and,
> >
> > (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

The Arbitrator held that the applicant had not discharged his onus of proving that he was a worker at the date of injury. As to whether he was a deemed worker, the issue was whether the work that the applicant performed on 20 January 2016 was incidental to a trade or business that he regularly carried on in his own name or as a small business entity of a handyman?

The Arbitrator identified 26 indicia that pointed to the applicant being an independent contractor and he held that the answers to the question posed by DP Roche in *Malivanch* are 'yes'. He accepted the first respondent's evidence that his arrangement with the applicant was 'pretty loose' and that the applicant worked for other customers. Therefore, he was not a deemed worker.

The Arbitrator entered awards for the respondents.

Risk of a poor outcome does not mean that treatment is not reasonably necessary

Sbrana v Toll Holdings Pty Ltd t/as Toll Priority [2018] NSWWCC 256 – Arbitrator Catherine McDonald – 18 October 2018

Background

The worker injured his left shoulder at work on 6 December 2011. He underwent surgery in 2012 and returned to work with the respondent. In 2014, he injured his back and resumed work both before and after spinal surgery. However, in August 2016, he suffered increased left shoulder pain while undergoing rehabilitation for his back injury. He was referred to Dr Trantalis, who advised that he could perform a further rotator cuff repair and that this had about a 50/50 chance of success. The insurer declined the claim under s 60 WCA on the basis that the proposed surgery was not reasonably necessary.

Arbitrator McDonald listed the general principles for determining if treatment was reasonably necessary, as set out by Burke J in *Rose v Health Commission (NSW)* [1986] NSWCC 2:

> 1. Prima facie, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
>
> 2. However, although falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the parties seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.
>
> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
>
> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. that involved the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
>
> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.

Further, in *Diab v NRMA Ltd* [2014] NSWWCCPD 72, the Commission held:

> [86] Reasonably necessary does not mean "absolutely necessary" (*Moorebank* at [154]). If something is "necessary", in the sense of indispensable, it will be "reasonably necessary". That is because reasonably necessary is a lesser requirement than "necessary". Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is

one of those treatments. A worker certainly does not have to establish that the treatment is "reasonable and necessary", which is a significantly more demanding test that many insurers and doctors apply…

[88] In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:

(a) the appropriateness of the particular treatment;
(b) the availability of alternative treatment, and its potential effectiveness;
(c) the cost of the treatment;
(d) the actual or potential effectiveness of the treatment, and
(e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

[89] With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.

[90] While the above matters are "useful heads for consideration", the "essential question remains whether the treatment was reasonably necessary" (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression "no reasonable prospect" should be understood, "[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content".

The Arbitrator held that the risk of a poor outcome does not necessarily mean that the treatment is not reasonably necessary. In *Yee*, Roche DP noted that the question was not one for statistical analysis. She therefore awarded the worker compensation under s 60 WCA.

Section 11A WCA - Psychological injury due to conditions encountered after a transfer and not as a result of the respondent's action in effecting it

Gazi v Canterbury Bankstown City Council [2018] NSWWCC 257 – Arbitrator John Isaksen – 22 October 2018

Background

The worker was employed by Canterbury Council for approximately 30 years until 15 May 2016 and from 2012, she was its Senior Finance Officer. However, on or about 15 May 2016, Canterbury Council and Bankstown City Council amalgamated and the worker became an employee of the Respondent. She alleges that she suffered a psychological injury because of bullying, harassment and ostracism by her new supervisors, as well as being subjected to an excessive workload and lack of assistance in training on new operating systems. The respondent did not dispute that the worker suffered a psychological injury, but it disputed causation and argued that the injury was wholly or predominantly caused

by reasonable action taken with respect to the transfer of the worker.

Arbitrator Isaksen decided that he needed to separately address the claims of bullying and harassment on the one hand and excessive demands of work on the other (the latter also requiring consideration of the s 11A WCA defence). He referred to the decision of DP Roche in *Attorney General's Department v K* [2010] NSWWCCPD 76, which reviewed many authorities that considered psychological injuries arising out of or in the course of employment, as follows:

> (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 *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 *Sheridan*);
>
> (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* 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.

DP Roche stated (at [54]):

> The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances. It is not necessary to establish that the worker's response was 'rational, reasonable and proportional.

The Arbitrator found that the worker had not been bullied or harassed, treated unfavourably or subjected to inappropriate behaviour in the workplace, but he was satisfied that excessive work demands were placed upon her and that difficulties that she encountered at work from late-June 2017 until 28 August 2017 caused the psychological injury and that her employment was a substantial contributing factor.

The respondent argued that the transfer to the amalgamated Council was mandated by the Government's Council Amalgamation Proclamation in 2016 and that "transfer" covers the entire period from when steps were put in place for the transfer of the worker's team to the Bankstown premises until August 2017. It relied upon the decision of Sackville AJA in *Northern NSW Local Health Network v Heggie*

[2013] NSWCA 255, although that matter concerned the meaning of 'discipline' under s 11A WCA.

However, the worker relied upon the decision of Davies AJA in *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465:

> 26. The principal matter debated in this appeal was whether Mr Doyle's injury was *'wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer'*, within the meaning of s 11A(1)(b). In this provision, emphasis is placed upon action taken or proposed to be taken by or on behalf of the employer. The provision differentiates between the worker's psychological response to work done and required to be done in the course of employment and the worker's psychological response to action taken or proposed to be taken by or on behalf of the employer. It is only the latter circumstance which causes the provision to operate.
>
> 27. The criterion of s 11A(1)(b) is *'reasonable action taken ... by or on behalf of the employer'*. The words *'with respect to'* are of wide application. Transfer, demotion, promotion, etc may be the subject of the action or proposed action taken by or on behalf of the employer or matters with respect to which that action or proposed action is connected or may themselves constitute the action or a part of the action. However, the provision does not speak of an injury caused by the transfer, demotion, promotion, etc of a worker but of an injury caused by action taken or proposed to be taken by or on behalf of the employer with respect to such a matter. The words '*performance approval, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers*' all clearly refer to matters other than the performance by a worker of his duties. The paragraph is thus looking to the worker's response to the employer's action or proposed action, not to the worker's response to employment conditions encountered after a transfer, demotion, promotion, etc. Senior counsel for Mr Doyle put the matter well when he submitted that the section was looking to the process of transfer, demotion, promotion etc rather than those acts *per se*.

The Arbitrator applied Davies AJA's comments in *Doyle* and held that the worker suffered a psychological injury as a result of response to employment conditions encountered after the transfer and not as a result of the respondent's actions in effecting it. He found that the worker has no current work capacity and he awarded weekly payments under ss 36 and 37 WCA from 28 August 2017 to date and continuing. He also made a general order for payment of s 60 expenses.

Work Capacity Procedural Review Decisions

WIRO lacks prerogative powers and is unable to interfere with an insurer's decision under s 38 (3) (c) WCA

Procedural review decision no. 2118 – 15 October 2018

Background

The worker injured her neck, shoulders and lower back at work on 9 August 2001. The insurer accepted liability and made weekly payments for all relevant periods. She is currently certified as having capacity for some type of employment for 20 hours per week, but has only been offered 16 hours per week by the employer.

On 16 April 2018, the insurer made a work capacity decision, which informed the worker that as she had received weekly payments for more than 130 weeks (payments had been made for 850 weeks at that time) she was subject to scrutiny under s 38 WCA. Section 38 (3) (c) WCA provides:

> (3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:
>
> > (c) the worker is ***assessed by the insurer*** as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.

The Insurer used its discretion and determined that the worker was not working to her maximum capacity and it decided to terminate weekly payments. This decision was maintained upon internal review.

On 4 June 2018, the worker applied for a Merit Review by the Authority. In its Merit Review decision dated 25 July 2018, the Authority found that the worker did not satisfy the special requirements under s 38 (3) (c) WCA for the continuation of weekly payments of compensation.

On 11 September 2018, the worker applied to WIRO for a Procedural Review, on the basis that the insurer's decision and procedures are "incorrect". The application was filed out of time, but WIRO exercised its discretion and conducted a procedural review.

The only contentious issues for determination were:

(1) Was the worker 'a worker with high needs'?

There was no evidence before the Insurer, the Authority or WIRO that satisfied the threshold of "greater than 20% whole person impairment" and while the worker's made representations to the Authority about the existence of such evidence, none was produced. In *Hallman v National Mutual Life Association Australia Ltd* [2017] NSWSC 151, Wilson J found (at [40] – [43]) that the Insurer does not need to be satisfied about any level of permanent impairment before making a work capacity decision and that the onus of proof lies with the worker.

While the worker possibly possesses medical reports that provide high assessments of permanent impairment under the Table of Disabilities, these do not translate to assessments of "whole permanent impairment" at the same level. Therefore, the worker is not a "worker with high needs".

(2) Can the insurer's decision under s 38 (3) (c) WCA be reviewed under s 44BB (3) WCA?

WIRO decided that the answer to this question is 'no', as s 44BB (1) (c) WCA provides that the review is *"only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer".*

The words "assessment by the insurer" found in s 38 (3) (c) WCA fall squarely within the meaning of "judgment or discretion exercised by the insurer" in s 44BB (3) WCA. As a result, the Supreme Court of New South Wales is the

only forum in which the worker's current challenge may have some prospects of success as it has the power to issue prerogative writs.

In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, the House of Lords found that there is no such thing as an unreviewable discretion. Private clauses of themselves cannot oust the jurisdiction of Royal prerogative that is exercised by the Supreme Court. However, WIRO does not have prerogative powers and it cannot interfere with decisions made under s 38 (3) (c) WCA.

WIRO decided that the Insurer fully complied with the legislative requirements in making the work capacity decision and there are no procedural errors in that process. Therefore, the application for procedural review was dismissed.

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 in the first instance.

Kim Garling