Bulletin

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ISSUE NUMBER 26

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.

Court of Appeal Decisions

On 4 December 2018, the Court of Appeal heard the matter of *Livers v Legal Services Commissioner* (see: Bulletin issue number 23), in which the Solicitor appealed against NCAT's order that his name be removed from the Roll of Local Lawyers.

The Court reserved its decision. WIRO will report on the judgment in due course.

Supreme Court – Common Law Decisions

Court declines to grant prohibition to insurer in respect of a Court Attendance Notice issued by the Local Court of NSW upon an application by an injured worker

Employers Mutual Limited v Heise [2018] NSWSC 1842 – McCallum J – 28 November 2018

Background

On 11 April 2017, the worker claimed compensation under s 66 WCA. This is the 'claim' for the purposes of s 283 *WIMA*. However, EML failed to determine the claim.

On 25 July 2018, the worker filed an ARD with the WCC and EML filed a Reply.

The worker then requested the Registrar of the Local Court of New South Wales to issue a CAN alleging that EML breached s 283 (1) *WIMA*. The Registrar issued the CAN (the date of issue is not clear) and it was served on EML on 30 October 2018.

Relevant legislation

Section 283 WIMA provides:

> (1) A person who fails to determine a claim as and when required by this Part is guilty of an offence unless the person has a reasonable excuse for the failure.
>
> Maximum penalty: 50 penalty units.

(2) A person does not have a reasonable excuse for a failure for the purposes of this section unless the person has an excuse that the Workers Compensation Guidelines provide is a reasonable excuse.

(3) A person who has or anticipates having a reasonable excuse for the purpose of this section must notify the claimant in writing as soon as practicable.

Section 14 of the *Criminal Procedure Act 1986 (CPA) provides*:

Common Informer

A prosecution or proceeding in respect of any offence under an Act may be instituted by any person unless the right to institute the prosecution or proceeding is expressly conferred by that Act on a specified person or class of persons

Section 172 of the *CPA* provides:

(1) Proceedings for an offence are to be commenced in a court by the issue and filing of a court attendance notice in accordance with this Division.

(2) A court attendance notice may be issued in respect of a person if the person has committed or is suspected of having committed an offence

(3) A court attendance notice may be issued in respect of any offence for which proceedings may be taken in this State, including an offence committed elsewhere than in this State.

Section 174 *CPA* provides:

(1) If a person other than a police officer or public officer is authorised under section 14 of this Act or under any other law to commence proceedings for an offence against a person, the person may commence the proceedings by issuing a court attendance notice, signed by a registrar, and filing the notice in accordance with this Division.

(2) A registrar must not sign a court attendance notice if:

(a) the registrar is of the opinion that the notice does not disclose grounds for the proceedings, or

(b) the registrar is of the opinion that the notice is not in the form required by or under this Act, or

(c) the registrar is of the opinion that a ground for refusal set out in the rules applies to the notice.

(3) If a registrar refuses to sign a court attendance notice proposed to be issued by any such person, the question of whether the court attendance notice is to be signed and issued is to be determined by the court on application by the person.

Judicial Review

EML filed a Summons in the Supreme Court of NSW seeking judicial review of the Local Court Registrar's decision to issue the CAN. In effect, it argued that the Local Court has no power to deal with a breach of s 283 *WIMA* laid at the request of a person other than SIRA.

In its written submissions, EML acknowledged that s 245 (5) *WIMA* expressly provides that proceedings for an offence against the *WIMA* can be instituted by a person other than SIRA. However, it argued that because s 283 *WIMA* is a "penalty notice offence" and ss 246 (1) and (6) *WIMA* together with cl 71 of the Workers Compensation Regulation 2016 (the Regulation) provide that only an "authorised officer" can issue a penalty notice, the worker is prohibited from instituting the Local Court proceedings.

The worker argued that:

- A prosecution for an offence can be commenced by way of a CAN under s 172 CPA and s 174 CPA expressly provides for the commencement of private prosecutions;
- There is nothing in either the *WIMA* or the Regulation that expressly prohibits the issuing of a CAN and s 245 (1) *WIMA* expressly retains the power for the issuing of CANs and matters being dealt with by a Court;
- Read plainly, s 246 (5) *WIMA* provides that the penalty notice procedure may be employed, but that the provision of penalty notice offences does not prohibit the ability to proceed by way of a charge in the Local Court or the District Court as provided by the "other provision[s]" contained at ss 283 and 245 *WIMA*; and
- The use of the word "may" in s 246 (1) *WIMA* confers a discretion to an authorised officer to issue a penalty notice, but it does not impose a statutory obligation on that officer to issue a penalty notice for an alleged contravention of s 283 *WIMA*. It would require express words to oust the entitlement of a private citizen to bring a prosecution and there is no such prohibition.

However, the worker did not dispute that: s 283 *WIMA* is a "penalty notice offence"; only an "authorised officer" may issue a "penalty notice" and that she is not an "authorised officer"; s 246 *WIMA* provides the power to issue a penalty notice; and she has no capacity under the *WIMA* to issue a penalty notice.

McCallum J noted the worker's concessions, but stated that it does not follow that the alternative method of prosecuting, by commencing criminal proceedings in a court by a CAN, is foreclosed. She held:

> 26 First, as submitted on behalf of Ms Heise, the right to commence a prosecution as a common informer is an important common law right and its exclusion would have to be expressed in clear terms. It is not. On the contrary, s 245(5) of the *WIMA* provides:
>
> > Proceedings for an offence against this Act, the 1987 Act or the regulations under those Acts may be instituted by (but not only by) the Authority.
>
> 27 Secondly, the proposition that there is a bifurcation in the ways in which criminal proceedings can be commenced (between, on the one hand, the issue of a penalty notice and, on the other, the issue of a court attendance notice, each being a path to the same end) is one which finds support in the provisions on which I was addressed at the hearing.
>
> 28 The first such indication is that s 283 itself has a maximum penalty of 50 penalty units, which calculates to an amount of $5,500. The penalty notice provisions permit an authorised officer only to issue a penalty notice for $500. On the plaintiff's argument, no insurer could ever be penalised for an offence against s 283 for any more than $500, with the result that the prescribed maximum penalty would have no work to do.
>
> 29 The second indication in support of a bifurcated approach is s 245 of *WIMA*, which provides:
>
> > 1) Proceedings for an offence against this Act, the 1987 Act or the regulations under those Acts are to be dealt with summarily:
> >
> > (a) before the Local Court, or
> >
> > (b) before the District Court.

(2) The maximum monetary penalty that may be imposed in those proceedings by the Local Court is 200 penalty units or the maximum monetary penalty provided in respect of the offence, whichever is the lesser.

(3) The maximum penalty that may be imposed in those proceedings by the District Court is the maximum penalty provided in respect of the offence…

(5) Proceedings for an offence against this Act, the 1987 Act or the regulations under those Acts may be instituted by (but not only by) the Authority.

30 Unsurprisingly, the section contemplates that offences under the Act will be dealt with by a court. Further, it is to be noted that subsection (2) limits the penalty that can be imposed by the Local Court to 200 penalty units whereas the maximum penalty that may be imposed in proceedings in the District Court is the maximum penalty provided in respect of the offence. The section thus contemplates a hierarchy of prosecutions even within the Court system.

Her honour held that there is no mandatory expression in the statute itself to the effect that the offence must be dealt with by way of penalty notice and that there is nothing in the legislation that expressly prohibits the issue of a CAN.

As the insurer's submissions focussed on SIRA's role and concerned its functions, Her honour afforded it an opportunity to be heard and a representative of the Crown Solicitor appeared for it on short notice, as amicus curiae. Her honour stated:

34. … He provided helpful and succinct submissions, in short supporting the contention on behalf of Ms Heise that the Authority does have power to prosecute an offence either by issuing a court attendance notice or by a member of staff of the Authority, as an authorised officer within the meaning of the Act, issuing a penalty notice under cl 71 of the regulation…

36 Mr Frommer submitted that it is extremely difficult to see what the intended effect of that subsection might be if it is not to make clear that the penalty notice procedure is not an exclusive procedure for the prosecution of penalty notice offences. I accept that submission.

Her honour concluded:

40. As already indicated, however, the right of a common informer to commence a private prosecution is an important common law right. And even having regard to those matters, I do not think there is anything in the language of the relevant statutes to suggest any intention to exclude that right. The circumstances recited at the outset of this judgment provide some illustration as to the importance of having an entitlement to bring a private prosecution alongside the prosecuting authority of a statutory body such as SIRA.

Accordingly, she dismissed the summons.

Supreme Court– Judicial Review Decisions

Meaning of "additional further information" in s 327 (3) (b) WIMA

State of New South Wales v Ali - [2018] NSWSC 1783 – Harrison J – 21 November 2018

Background

The first defendant was employed by the plaintiff. In 2001, he suffered a psychological injury because of bullying and harassment at work. In 2017, he obtained an assessment of 23% WPI from his treating psychiatrist. However, the plaintiff disputed that assessment.

On 22 November 2017, the first defendant lodged an application with the WCC under s 319 WIMA, seeking an assessment of the degree of whole person impairment from an AMS. The plaintiff filed a response to that application, which included 4 surveillance reports from investigators (x 2), which were issued between 11 June 2014 and 31 January 2016.

On 21 December 2017, an AMS issued a MAC that assessed 22% WPI due to the injury. However, on 18 January 2018, the plaintiff lodged an application to appeal against the decision of the AMS, relying upon ss 327 (3) (b), (c) and (d) WIMA. However, it ultimately did not rely upon ss (3) (c) and (d) WIMA. It sought to rely upon a further surveillance report dated 16 January 2018, which related to surveillance of the first defendant from 8 January 2018 to 12 January 2018.

The worker opposed the appeal.

On 1 February 2018, a delegate of the Registrar of WCC (the second defendant) determined that they were not satisfied that at least one of the grounds of appeal specified in s 327 (3) had been made out and that the appeal was not to proceed. In relation to s 327 (3) (b) WIMA, the delegate decided that the further surveillance evidence was not "additional relevant information" and that the nature of the allegations in the new report "are essentially the same" as those that were before the AMS.

Judicial review

The plaintiff sought judicial review of the delegate's decision by the Supreme Court.

Harrison J noted that the Registrar's delegate did not determine whether the January 2018 report was not available to, or could not reasonably have been obtained by, the plaintiff before the AMS' assessment was conducted, but rather referred to its "mere temporal unavailability… at the time of issuing the MAC' (the surveillance and the report of it clearly post-date the AMS' examination).

The plaintiff argued that the delegate erred in law in characterising the January 2018 report as 'essentially the same" as the evidence in the earlier investigations reports, although it accepts that the classification of the reports as revealing "work related activities" us accurate. His honour noted that the investigators' statements regarding "work-related activities" by the first defendant were "a statement of opinion", but a far more substantial difference between the January 2018 report and the earlier reports is that the investigator provided a description that is consistent with the first defendant undertaking work activity and being seen doing it. The plaintiff argued that this observation is sufficient to establish the report as being "additional relevant information".

However, His honour held that "relevant" means that it must be relevant to the assessment to be undertaken by the AMS, and that for the purposes of s 327 (3) (b) WIMA, "additional relevant information" means "information of a medical kind or information that is directly related to the decision required to be made by the Approved Medical Specialist".

He noted that under the Guidelines, psychological impairment is assessment by reference to the PIRS rating scheme, of which 2 of the assessable matters are 'employability' and 'social and recreational activities' and that the investigator's observations are inconsistent with the first defendant's history to the AMS, which the AMS relied upon to assess total impairment with respect to employability.

The plaintiff argued that determining whether the January 2018 report was different to the earlier surveillance evidence required the delegate to review the earlier evidence to decide whether the investigator's opinion was accurate. However, the delegate did not do so, but instead relied upon the fact that the earlier investigations reports indicated that the first defendant had attended his daughter's tile shop on numerous occasions. The delegate's failure to consider the substance of the earlier reports compared to the January 2018 report indicates that they failed to properly consider the questions required of them - whether the January 2018 report was 'in substance additional relevant information' and was 'directly related to the decision required to be made by' the AMS.

His honour held that the summons was misconceived for the following reasons:

(1) The information contained in the 2018 report is neither additional nor relevant as properly understood. He stated:

> 32. … Additional relevant information" contemplates or anticipates a qualitative addition to the information otherwise previously available. It is not concerned with the information being merely quantitatively different, in the sense that there is more of the same. That is made plain by the words in parentheses, which emphasise that the additional relevant information must also qualify as information that could not reasonably have been obtained before the medical assessment appealed against. As a matter of plain language, that does not mean or refer to something that could not have been obtained simply because it came later in time. Everything that occurs later than an earlier event is by definition additional in a temporal sense. That is obviously so in the present case, in which the so-called additional relevant information consists of the investigation report, which uncontroversially, "could not reasonably have been obtained… before."

(2) The plaintiff's contentions do not accord with the approach emphasised by Hoeben J (as he then was) in *Petrovic v BC Serv No 14 Pty Ltd & Ors* [2007] NSWSC 1156:

> [31] In my opinion the words 'availability of additional relevant information' qualify the words in parentheses in s 327 (3) (b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327 (2) which identifies the matters which are appealable. They are restricted to the matters referred to in s 326 as to which a MAC is conclusively taken to be correct. In other words, 'additional relevant information' for the purposes of s 327 (3) (b) is information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by s 327 (3) (c) and (d) but they do not come within subs 327 (3) (b).
>
> [32] It follows that the statutory declarations which related to the way in which the AMS carried out his examination and the way in which questions and answers were interpreted during the examination were not 'additional relevant information' for the purposes of subs 327 (3) (b) and should not have been treated as such by the Registrar. …

> [34] There is another consideration which I have taken into account. If the function of the Registrar under s 327 is to be in reality that of a gatekeeper, then statutory declarations such as were sworn in this case should not be regarded as 'additional relevant information' for the purposes of s 327 (3) (b). If they are, it would be open to every dissatisfied party to challenge the assessment process of an AMS in the same way thereby gaining automatic access to an appeal.

His honour held:

> 36. …However, even though the Guidelines advert to matters, among others, such as employability and social and recreational activities as an aid to assessing (relevantly for present purposes) the existence or extent of a person's psychiatric condition, and hence their degree of permanent impairment, they are not matters that could be said to exist "on the face of the application" in accordance with s 327 (4) even notwithstanding the plaintiff's submissions concerning them. The plaintiff's opinion or assertion that Mr Ali is employable or is capable of engaging in social activities cannot qualify as "additional relevant information" as it is unrelated to the medical exercise in which the Approved Medical Specialist was required to engage. In my view, the same applies to the latest surveillance material which is only quantitatively different to the earlier obtained reports.

(3) Accepting for the purposes of the argument, that the 2018 report is capable of supporting an assertion that the degree of permanent impairment may be potentially different, His honour was not satisfied that the plaintiff could not reasonably have obtained it before the AMS' assessment. He stated, relevantly:

> 37. …The fact that the plaintiff contends that the latest surveillance material suggests or supports a different degree of permanent impairment does not mean that it was also not available or could not reasonably have been obtained before the impugned assessment was made.

(4) The information is not additional in the sense required. He stated, relevantly:

> 38. … The fact that the latest investigation reports appear (according to the plaintiff) to provide some enhanced forensic support for its assertions that Mr Ali's assessed degree of permanent impairment is questionable does not thereby convert the reports themselves into additional relevant information. "Additional relevant information" is not the same thing as the (potential) availability of an argument in support of a different forensic outcome.

(5) His honour stated, relevantly:

> 39. …Section 327 (3) (b) cannot be read in any other way: it deals with the circumstances in which an appeal will lie from an assessment that was allegedly made without the benefit of information that existed at the time. It is not concerned with offering an aggrieved party the chance to run the assessment again because circumstances have *since* changed. It may be contrasted with s 327 (3) (a), which contemplates an appeal when circumstances have actually changed, although limited to cases of an increase in the degree of permanent impairment and not the opposite. That limitation suggests, as a matter of ordinary statutory construction, that an appeal with respect to an alleged reduction in the degree of permanent impairment is neither contemplated by the words of s 327 in general nor provided by s 327 (3) (b) in particular.

Accordingly, he dismissed the Summons with costs.

Dust Disease Tribunal of NSW Decision

Plaintiff not entitled to double compensation – the injured party should receive compensation which would put them in the same position they would have been in had the tort not been committed

Single v Workers Compensation Nominal Insurer [2018] NSWDDT 9 – Russell Sc DCJ – 30 November 2018

Background

The plaintiff was the daughter/executrix of the deceased worker. From about 1950 to 1987, the deceased worked as an apprentice carpenter, carpenter, builder and labourer in New Zealand and from about 1950 until 1982, he worked with and around asbestos cement building products and was exposed to and inhaled asbestos dust and fibre. From about 1989 until March 1992, he was employed by a company in NSW (Omar) as a carpenter and labourer and he worked with and around asbestos cement building products and was exposed to and inhaled asbestos dust and fibre.

The parties agreed that in breach of its duty of care to the deceased, Omar negligently exposed him to asbestos dust and fibre, which he inhaled.

In about December 2017, the deceased was diagnosed as suffering from mesothelioma.

In about December 2017, the deceased made an application for compensation to the Accident Compensation Corporation of New Zealand (ACC) under the Accident Compensation Act 2001 (NZ) (the NZ Act) and on 28 December 2017, the ACC approved the application and the deceased received a lump sum payment of NZD $136,705.79. On 22 December 2017, he filed a statement of claim in the Dust Diseases Tribunal. He died from mesothelioma on 7 February 2017.

The parties agreed that the plaintiff was entitled to judgment against the Nominal Insurer and they agreed that total damages of $415,000 are payable. However, the court was required to determine whether the lump sum payment made by the ACC under the NZ Act should be deducted from the damages it assessed for the disease of mesothelioma.

Judge Russell found that the deceased could not have brought common law proceedings in any New Zealand court against his employers in that country whose actions caused his exposure to dust and led to his mesothelioma. He cited the decision of the New Zealand Court of Appeal in *McGougan v Depuy International Limited* [2018] NSWCA 91, in which the Court stated:

> An essential component of the ACC scheme is the social contract in which those who suffer personal injury covered by the ACC Act receive a set of entitlements funded by the community in exchange for relinquishing their right to sue for compensatory damages at common law. The scheme aims to spread the economic consequences of negligence conduct across the community and provide for rehabilitation and compensation regardless of fault…

His honour noted that *Manser v Spry* 181 CLR 428 is the leading High Court authority regarding whether payments made to an injured worker should be deducted from damages payable by a defendant. Ms Spry was injured in a motor vehicle accident caused by Mr Manser's negligence, but she suffered an aggravation or exacerbation of those injuries in a subsequent work accident and received workers compensation payments under the South Australian scheme. The Court was asked to determine what impact, if any, those workers compensation payments should have on the assessment of Ms Spry's damages in the motor vehicle proceedings. The High Court noted the general principle of compensation in *Haines v Bendall* 172 CLR 60, where the majority held:

> The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept.

Further, in *National Insurance Co of New Zealand Limited v Espagne* 105 CLR 569, the High Court held that the decision of whether a statutory benefit is to be enjoyed independently of, and cumulatively upon, the right to damages, requires the court to endeavour to discover the intention of the legislature – *Manser at 436.2.* The key passage in *Manser* is:

> There are three possible indicia of relevant legislative intention: the financial source of the benefit; the presence of a provision which requires a repayment of a statutory benefit out of the damages awarded or paid and the nature of the benefit. If a scheme for provision of a benefit be funded by contributions made by employers and employee-beneficiaries as a kind of insurance against misfortune, the principle in *Bradburn v Great Western Railway Co* indicates that the benefit is to be enjoyed by a beneficiary who encounters the misfortune without reduction of the damages to which he or she is otherwise entitled. That view has been taken of benefits paid under contributory pension schemes created under statute. If statute provides that a particular benefit is to be repaid out of damages, there is a clear indication that the benefit is not to go in reduction of the tortfeasor's liability. When such a provision relates only to one or some of the benefits provided under the statute, the non-repayable character of the other benefits may imply, according to the context, wither that the legislature intended that the receipt and retention of the benefit should not be taken into account in the assessment of damages or that it had no such intention. Whether an implication of such a legislative intention should be drawn depends largely on the nature of the benefit. Gibbs CJ said in *Redding v Lee*:
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> > If the statute expressly provides (as some statutes relating to workers compensation have done) that a plaintiff who has recovered damages shall repay the amount of the benefit it will be clear that the receipt of the benefit must be disregarded in the assessment. In many cases, however, the statute under which the benefit is provided will give no assistance of this kind. Then it will be necessary to consider closely the nature of the benefit itself. The conclusion that the benefit is intended for the plaintiff personally and not in reduction of the damages may more readily be drawn when it is seen that the receipt of the benefit is not dependent on the loss of wages or earning capacity … for which the plaintiff claims damages (cf. *Parry v Cleaver,* per Lord Wilberforce) and is not intended to replace the lost wages or remedy the loss of earning capacity.
>
> Finally, if all indicia of intent fall, the 'settled principle governing the assessment of compensatory damages' which the majority stated in *Haines v Bendall* must be applied.

His honour applied these indicia to the current matter as follows:

(1) Financial source of the benefit payable.

His honour held that the financial source of the benefit payable under the NZ Act gives no indication of a legislative intention that the payment should be retained in addition to full damages and this factor "points away from the plaintiff being entitled to full damages in the tribunal without deduction of the New Zealand entitlement".

(2) Provision for repayment of a statutory benefit out of damages awarded

His honour noted that the ACC's power to recover from the recipient of the entitlement, as a debt due, is a discretionary one and was considered by the New Zealand Court of Appeal in *McGougan.* He stated, relevantly:

> 61. As the High Court said in *Manser*, if the statute provides that a particular benefit is to be repaid out of damages, there is a clear indication that the benefit is not to go in reduction of the tortfeasor's liability. The discretion vested in the Corporation… must be understood to be a discretion to recover any entitlements paid under the Act, where the recipient has one of the few remaining entitlements to bring a common law claim in New Zealand. There must be a correlation between the circumstances which led to the payment of the entitlement and the circumstances which found the common law action for damages. In the present case that correlation would be found in the employment of the deceased in New Zealand, which employment led to him being exposed to asbestos dust. It is not to the point that the deceased would not have had any right to bring common law proceedings in New Zealand in relation to his New Zealand employment exposure. What is important is to recognise that the discretionary right to recover the entitlement would only apply to damages for a cause of action which arose in New Zealand, and in no circumstances, could the Corporation put its hand out to ask the present plaintiff to repay the entitlement out of damages awarded by the Tribunal for Australian exposure and negligence…
>
> 63. So far as the second indicium is concerned, there is no provision which requires repayment of the statutory benefit out of the damages to be awarded in the Tribunal relating to the Australian negligence and the Australian exposure.
>
> 64. … This actor also points away from the plaintiff being entitled to full damages in the Tribunal as well as retention of the New Zealand entitlement.

(3) The nature of the benefit

His honour noted that in *Manser*, the workers compensation benefits paid to Ms Spry comprised hospital and medical expenses, weekly payments because of incapacity for work and lump sum compensation for non-economic loss for a permanent and compensable disability (which was made in substitution for her entitlement to damages for non-economic loss). The High Court said at 438.7:

> All of these payments are made in respect of the same matters as are taken into account in assessing damages in tort and for which the plaintiff has claimed in her action… The Act is not designed to confer benefits to be added to the damages to which the worker might otherwise be entitled at common law for a loss caused by an event that is not work-related. The compensation benefits paid or payable under the Act are ordinary incidents of a worker's employment which must be taken into account in assessing the damages of a plaintiff-employee for loss and damage for which a tortfeasor is liable at common law.

He held that the nature of the benefit paid to the deceased under the NZ Act is a factor that" points away" from the intention of the legislature being that the deceased could retain it without diminution in his common law right to damages.

His honour noted that in *Davis v Cockatoo Dockyard Pty Ltd* [2000] NSWDDT 6, Curtis DCJ applied the three-stage test in *Manser.* He stated:

> 87. I have been greatly assisted in reaching a conclusion in the present case by considering the approach of Judge Curtis in *Davis v Cockatoo Dockyard Pty Limited.* The legislation has to be examined to discern the intention of Parliament. While the case is not directly on point, as the New Zealand legislation is in different terms (and

is probably unique in the common law world), the approach mandated by the High Court in *Manser* requires me to look at the three indicia set out by the High Court, and discern the intention of the New Zealand Parliament as to whether or not there was an intention in the legislation that the deceased could keep his New Zealand entitlement, in addition to any common law damages recovered in these proceedings.

His honour held that the relevant legislative intention is that the benefits provided under the NZ Act are not be enjoyed independently of, and cumulatively upon, the right to damage. He ordered that the NZ entitlement of NZD $136,705.79 be deducted from the agreed damages of AUD $415,000, as otherwise there would be double compensation.

WCC Presidential Decisions

Challenge to Arbitrator's findings of fact fails – COD confirmed

Gardener v Sauer's Bakehouse Pty Ltd [2018] NSWWCCPD 49 – Deputy President Snell – 14 November 2018

Background

The appellant was employed by the respondent as a co-ordination/office manager. On 29 July 2016, he fell from a ladder and injured his lumbar spine. The insurer accepted liability for that injury and he underwent spinal surgery on 20 September 2017. However, an MRI scan dated 12 August 2017 indicated bilateral femoral head avascular necrosis and a treating specialist sought approval to perform a right total hip replacement. However, on 6 December 2017, the insurer disputed liability for the alleged hip injuries on the basis that they were not causally related to the incident at work on 29 July 2016.

On 10 May 2018, the appellant lodged an ARD that sought an order under s 60 WCA including the cost of a future total hip replacement.

Arbitrator Wynyard discussed the evidence, the parties' submissions and the case law that they relied upon and considered that it was "quite remarkable" that the appellant "neither took himself to hospital nor to a GP until almost three months after the event". When he did, on 17 October 2016, he "did not mention the fall but simply complained about only two weeks of back pain which would date its onset to early October". He noted that the appellant's counsel submitted that he was "a stoic individual" but found that this does not explain the inconsistencies in the evidence and that the entry in the clinical notes on 17 October 2016, made no reference to hips. The first mention of hips was in the MRI scan report dated 12 August 2017, when "the radiologist noted clinical indications of four months' pain and diagnosed bilateral avascular necrosis".

The Arbitrator that the fact that there was no contemporaneous evidence of injury to the right hip between the date of the fall and 12 August 2017, raised the possibility that the appellant "may have, quite unwittingly, reconstructed actual events and genuinely made assertions that have not been established by the contemporaneous evidence". He entered an award for the respondent.

Appeal

The appellant raised 6 grounds of appeal and asserted that the Arbitrator by: (1) Taking irrelevant considerations into account; (2) Failing to take relevant evidence into account; (3) Misunderstanding the medical evidence; (4) Misconceiving the matter before him, in considering it was to be resolved by record of contemporaneous complaint; (5) Failing to address the fact that the onset of right hip pain occurred before any left hip pain; and (f) Failing to consider the significance of symptoms recorded by treating doctors prior to the diagnosis of avascular necrosis.

On 4 September 2018, the appellant's solicitors sent an email to the WCC and the respondent's solicitors, advising that the appellant had recently undergone bilateral total hip replacement surgery and that during the surgery," it was discovered that the right hip was fractured". They stated:

> We intend to rely upon further evidence in respect of the causation issue regarding the fracture" and that they were "in the process of obtaining this evidence as soon as possible.

On 29 October 2018, the WCC wrote to the appellant's solicitors asking whether they intended to apply to admit fresh evidence, but they replied that they did not wish to do so.

DP Snell determined the appeal on the papers. He noted that the appellant raised factual issues concerning the Arbitrator's analysis of the medical and lay evidence relevant to the issue of causation of the avascular necrosis. He discussed the nature of the appeal process where factual error is alleged, which was determined by DP Roche in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25 (*Raulston*), in which he applied the principles stated by the High Court in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505, 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140) at [19]) as follows:

> a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.
>
> (b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the 'fact of the [Arbitrator's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
>
> (c) It may be shown that an Arbitrator was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong'."

In *Davis v Ryco Hydraulics Pty Ltd* [2017] NSWWCCPD 5, Keating P observed that these principles have been consistently applied in the WCC. Further, in *Raulston,* DP Roche also cited the following passage from *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833:

> … in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.

Further, in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (*Heggie*), Sackville AJA stated at [72]:

> *A fortiori*, if a statutory right of appeal requires a demonstration that the decision appealed against was affected by error, the appellate tribunal is not entitled to interfere with the decision on the ground that it thinks that a different outcome is preferable: see *Norbis v Norbis* [1986] HCA 17; 161 CLR 513, at 518-519, per Mason and Deane JJ.

DP Snell rejected ground (1) and stated, relevantly:

> 30. The Arbitrator's remarks about the absence of a report of injury form, and the absence of records of consultations with the general practitioner in the weeks following the fall, also should be read in context. The focus of the remarks is not on whether the incident occurred, which was common ground, but on whether the appellant made complaints of right hip symptoms, around the time of the incident. This is apparent from that part of the passage set out at [27] above, which is highlighted. The Arbitrator correctly noted that the appellant's statement said he saw Dr Khan on 30 July 2016 (the day following the incident) and in August 2016 (about three weeks after the incident) for complaints which included the right hip. The Arbitrator correctly noted that the clinical material in evidence (an apparently continuous record put on as part of the appellant's case) did not include notes from those consultations. The Arbitrator noted that the first clinical note that post-dated the fall (17 October 2016) contained no reference to the hips. These were relevant matters for the Arbitrator to consider, in dealing with the issue of whether the right hip was injured in the incident…

He held that the first report of hip pain was on 9 August 2017 and that while the Arbitrator's reference to 12 August 2017 involved error, it was trivial in nature and could not have affected the result.

He also rejected ground (2) and stated, relevantly:

> 41. A judge at first instance (or an arbitrator) has an obligation to "receive and consider the entirety of the evidence". McColl JA (Mason P and Hunt AJA agreeing) in *Ainger v Coffs Harbour City Council* [2005] NSWCA 424 (*Ainger*) said:
>
> > The primary judge was not obliged to spell out every detail of his process of reasoning (*Yates Property Corporation Pty Limited (In Liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 171, 182), however he was obliged to expose his reasons for resolving a point critical to the contest between the parties: *North Sydney Council v Lygon* (1995) 87 LGERA 435 at 442 per Kirby ACJ; *Soulemezis* at 270 per Mahoney JA, at 280 per McHugh JA: *Ainger* at [48].
>
> 42. The Arbitrator's reasons considered the various reports from treating and qualified specialists. He dealt with the appellant's statement regarding his symptoms and treatment from time to time. He dealt with the clinical material from Dr Khan's practice, and the extent to which the appellant's recorded complaints and history from time to time supported the case the appellant made on causation. The Arbitrator exposed his reasons for resolving the contest on causation in the way he did. The Arbitrator did not err in failing to specifically deal in his reasons with the certificate dated 16 March 2018.

He rejected grounds (3) to (6) (inclusive).

In relation to ground (3), the appellant alleged that Dr Habib described a mechanism by which the avascular necrosis developed over time and he argued that *"a conclusion that [the appellant] did not complain of hip pain for one year after the incident cannot be treated as determinative of the issue of causation."*

However, DP Snell noted that Dr Habib relied upon a history of "severe contusional trauma at the time of the fall, with immediate symptoms in the right hip (amongst other places), which continued until Dr Van Gelder was eventually consulted in December 2016". That explanation is inconsistent with the onset of symptoms up to a year after the fall. He also noted that Dr Chin opined that the condition "may be idiopathic or may be related to other

causes like steroid use. However, the appellant did not allege that his hip condition was caused by steroid use associated with the back surgery. He concluded that the Arbitrator did not err in the approach that he took.

In relation to ground (4), the Arbitrator held that the evidence was silent regarding the time taken for the condition to develop and be clinically apparent and the Arbitrator did not err in looking to contemporaneous evidence to deal with the issue of whether trauma was the cause.

In relation to ground (5), DP Snell noted that the appellant argued that the Arbitrator should have had regard to: his complaint that pain initially developed in the right hip; that hip replacement was first recommended on the right side; that the right hip is the greater source of pain and disability; and that the condition is more clinically advanced in the right hip. He asserted that this is consistent with the "hip problem being a consequence of the fall".

DP Snell held, relevantly:

> 90. … For reasons discussed above, the weight of Dr Habib's opinion on the causation issue is eroded, by the lack of consistency between the history on which Dr Habib relied, and the Arbitrator's rejection of that history, by reference to the inconsistencies between the history and the contemporaneous documentary evidence.

In relation to ground (6), DP Snell noted that the multiple consultations at the general practice between 29 July 2016 and 9 August 2017 do not suggest symptoms involving the right hip and "…it would be conjecture (sic) to postulate that such complaints involved the right hip, simply based on a lay observation that the right hip is in the general vicinity of the lower back, right buttock and leg". He held:

> 104. The appellant's submissions on ground no 6 do not identify any specific error, and the consequences that are alleged to have flowed…The submissions in support of ground no 6 are essentially submissions on the evidence, rather than submissions that seek to identify error on the part of the Arbitrator.
>
> 105. …There is no basis in the evidence to conclude that doctors at the general practice, or Professor van Gelder, prior to August 2017, failed to appropriately identify and record symptoms that emanated from the appellant's right hip. The submission is essentially based on conjecture. The Arbitrator did not err in failing to "engage" with this possibility.

Accordingly, he confirmed the COD.

Section 16 (1) (a) WCA and claim for compensation under s 66 WCA – deemed date of injury is the date that the s 66 claim is made

Westpac Banking Corporation v Hungerford [2018] NSWWCCPD 50 – President Keating – 15 November 2018

Background

On 11 February 2009, the worker claimed compensation for injuries to her right thumb, hand and wrist because of the nature and conditions of her employment. On 3 May 2010, the Insurer accepted liability and the worker underwent wrist surgery on 14 July 2010. She resumed suitable duties on 16 September 2010, but ceased work with the appellant in November 2011. She has not worked since then. On 4 July 2017, the worker claimed compensation under s 66 WCA for 44% WPI of the right upper extremity (thumb, hand, wrist, elbow and shoulder) and left upper extremity (thumb, hand, wrist, elbow and shoulder).

On 4 September 2017, the appellant denied the claim, but on 8 September 2018, it accepted liability for injury to the right thumb, hand and wrist, based upon an assessment from Dr Masson. It offered to pay compensation for 20% WPI, but otherwise maintained disputes regarding the right elbow and shoulder and left upper extremity.

On 20 June 2018, **Arbitrator Isaksen** determined the dispute. He held that the worker suffered an aggravation of arthritis in her right hand and wrist that was work-related and a consequential disease injury to her left hand and wrist, but he entered awards for the respondent regarding the claims for injury to both elbows and shoulders.

The Arbitrator remitted the matter to the Registrar for referral to an AMS to assess the degree of permanent impairment with respect to both upper extremities (hand and wrist) with the deemed date of injury being 4 July 2017.

Appeal

The appellant appealed against the determination of the deemed date of injury and **President Keating** determined the appeal on the papers. He stated that as the appeal concerned an interlocutory decision, leave was required under s 352 (3A) WIMA. He held:

> 29. Whether it is before or after the matter is referred to an AMS for the purposes of an assessment of Ms Hungerford's whole person impairment, the question raised on this appeal, namely the "correct date of the deemed date of injury", must be determined. If leave to appeal is refused, the matter would proceed to an AMS to determine the extent of any whole person impairment suffered by Ms Hungerford. At that point, the Commission would enter final orders and the appellant would be entitled to lodge a further appeal.

Keating P held that it was desirable for the proper and effective determination of the dispute that the issues be determined and he granted leave under s 352 (3A) WIMA.

The appellant sought to adduce further evidence, being a list of weekly payments made to the worker. It argued that this is evidence that the worker had received weekly payments since 14 July 2010. However, the worker opposed this. Keating P held, relevantly:

> 37. Applying *CHEP Australia Ltd v Strickland*, I make the following findings. As to the first limb, the appellant's submissions do not address whether with due diligence the evidence was available to be placed before the Arbitrator. Clearly the evidence was available as the list could readily have been obtained from the insurer and filed with the Application had the appellant's legal representatives chosen to do so. It follows that this limb fails.
>
> 38. As to the second limb, it is arguable that continued unavailability of the evidence would cause a substantial injustice in the case. It is clearly in the interests of justice that the issues before me proceed on the correct factual footing. The list of payments enables the matter to proceed on the correct factual footing, because it clarifies and confirms the period Ms Hungerford has been in receipt of weekly payments of compensation because of her injury.
>
> 39. The respondent's submissions proceed, at least inferentially, on the assumption that Ms Hungerford has been incapacitated since 14 July 2010 and has been in receipt of weekly payments of compensation since that time. In the circumstances, there is no injustice to the respondent in allowing the fresh evidence to be introduced.
>
> 40. For the above reasons, I am of the view that the exclusion of the fresh evidence would cause substantial injustice. It follows that the second limb succeeds.

Accordingly, he admitted the fresh on the appeal under s 352 (6) WIMA.

In relation to the deemed date of injury, the appellant argued that the Arbitrator provided inadequate reasons for his decision and failed to explain why s 16 (1) (a) (ii) WCA, and not s 16 (1) (a) (i) WCA, applied and/or why the deemed date of injury was held to be the date of the claim under s 66 WCA and not the date of incapacity.

The appellant also argued that the cases that the Arbitrator cited do not support his conclusion that the deemed date of injury under s 16 WCA is determined simply by reference to the type of compensation claimed. It noted that *Stone v Stannard Brothers Launch Services Pty Ltd* [2004] NSWCA 277 (*Stone*) involved a claim for permanent impairment compensation where there was and could be no claim for weekly compensation. The Court therefore determined that the deemed date of injury was the date on which the claim under s 66 WCA was made. Further, *Alto Ford Pty Ltd v Antaw* 1999] NSWCA 234 (*Antaw*) involved the application of s 15 WCA and not s 16 WCA. Unlike *Antaw*, this matter was not a further claim under s 66 WCA and the worker had been continuously incapacitated since 14 July 2010.

The appellant relied upon the decision of DP Roche in *White v Sylvania Lighting Australasia Pty Ltd* [2011] NSWWCCPD 7 (*White*), which applied the decision in *Antaw*, as follows:

> Mr White's aggravation injury first caused incapacity in May 2000. However, as in *Antaw*, *his incapacity* (in the sense explained in *Alfonzo*) *has not resulted from the further losses for which he claimed additional lump sum compensation on 13 January 2010.* Therefore, an application of *Antaw* leads to the result that Mr White's injury, for the purposes of his claim for additional lump sum compensation, is deemed to have happened on the date he made his claim on 13 January 2010.
>
> *Antaw* involved a claim for *additional* lump sum compensation because of a *further loss*, as does Mr White's claim. Though *Antaw* concerned s 15 and not s 16 of the 1987 Act, that is of no consequence. The Court referred to sub-s (4) of s 15, which is in identical terms to sub-s (3) of s 16…" (emphasis added by the appellant)

Keating P held:

> 66. This appeal is misconceived. Contrary to the appellant's submissions, the authorities relied on by the Arbitrator support the finding that the deemed date of injury, in the circumstances of this case, is determined by reference to the type of compensation claimed.
>
> 67. The Arbitrator found that the injury to the right hand and right wrist consisted in an aggravation of a disease injury under s 4 (b) (ii) of the 1987 Act, caused by the repetitive work undertaken by Ms Hungerford as a bank teller. That finding is not challenged. In such cases, s 16 of the 1987 Act applies to determine when such an injury is deemed to have happened.
>
> 68. The application of s 16 of the 1987 Act has been the subject of numerous decisions in this Commission including *Visy Board Pty Ltd v Ali*, *White* and *Simon*. Those cases trace the line of authority commencing with *GIO Workers Compensation (NSW) Ltd v GIO General Ltd*

He noted that in *O'Keefe*, Handley AJA (McColl JA agreeing), set out a useful summary of the relevant principles, which he set out in his decision. He held that this matter is "like *O'Keefe"*, and as Handley AJA made clear, s 16 (1) (a) (i) WCA only applies to a claim for weekly payments and the authorities establish that if the claim is for lump sum compensation any earlier claim for weekly payments is irrelevant. He stated:

> 70: …A permanent impairment injury is deemed to have happened when the lump sum compensation claim is made. The appellant's submissions to the contrary are incorrect.
>
> 71. The authorities establish that there may be more than one deemed date of injury… However, as the only relevant claim before the Arbitrator was the claim for permanent impairment compensation, s 16 (1) (a) (ii) fixes the deemed date of injury to be the date of the claim for permanent impairment compensation. It follows that the Arbitrator's findings were correct.

He concluded that the Arbitrator had discharged his statutory obligation to provide a brief statement setting out reasons for his decision and he confirmed the COD.

Material facts were overlooked or given too little weight

Reln (Manufacturing) Pty Ltd v Smith [2018] NSWWCCPD 51 – Deputy President Wood – 19 November 2018

Background

On 17 April 2012, the worker was injured in a motor vehicle accident while on a journey to work, when her vehicle lost traction on an oily road surface. She was hospitalised and subsequently attempted to return to work, but could not continue to work and she ceased work on 5 March 2013.

The worker claimed weekly payments and lump sum compensation under s 66 WCA with respect to the cervical and lumbar spines, the pelvis, scarring, the right upper extremity and the central and peripheral nervous system. However, the insurer disputed injury to the cervical and lumbar spines and the central and peripheral nervous system.

At Arbitration, the only issue regarding the weekly payments claim was the date upon which the WCC's jurisdiction ceased. Arbitrator Elizabeth Beilby awarded weekly payments up to and including 31 August 2015, when the worker was transitioned onto the current scheme of weekly payments. She was not satisfied that the worker had injured her lumbar spine, but found for the worker in relation to the alleged injuries to the cervical spine and central and peripheral nervous system.

Appeal

The appellant appealed on 3 grounds and alleged that the Arbitrator erred: (1) in finding that the worker suffered a significant amnesiac event at the time of the accident which could have amounted to a loss of consciousness; (2) in finding that the worker suffered an injury to the central nervous system; and (3) in finding that the worker suffered an injury to her cervical spine.

DP Wood noted that the Arbitrator's decision involved findings of fact and drawing of inferences from those facts. She accepted the opinion of Dr Teychenné and found the existence of facts that formed the basis for his opinion and rejected the opinion of Professor Kiernan, at least partly because the facts that he relied upon were inconsistent with the worker's statement, her history to Dr Teychenné and her own factual findings.

DP Wood stated that in determining whether the Arbitrator erred in respect of a factual finding, the Commission has consistently applied principles stated by Barwick CJ in *Whitely Muir & Zwanerberg Ltd v Kerr* (1966) 39 ALJR 505, which were recited by DP Roche in *Raultston v Toll Pty Ltd* [2018] NSWWCCPD 25. She also referred to the decision of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd,* which was followed by the Court of Appeal in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255. She held:

117. In order for Reln to succeed on this appeal, it must establish that material facts were overlooked or given too little weight, or that the available opposite inference is so preponderant that the decision must be wrong. It is necessary to examine the evidence of the facts that pertain to each of the three findings in which Reln alleges error.

Ground 3

DP Wood noted that the only evidence supporting the allegation of a cervical cord injury was the opinion of Dr Teychenné, but the appellant criticised the Arbitrator's reasons for accepting his opinion because the doctor's findings were: (a) inconsistent with contemporaneous material; (b) not observed or recorded by any other practitioner; and (c) based on an assessment four years after the accident. She stated that the substantial difference between the observations and examination findings of Dr Teychenné, compared with all other medical practitioners and especially Dr Rail (the treating neurologist), is of significance. The Arbitrator was required to consider that material evidence and not merely recite it. She also failed to consider the inconsistency between the worker's contemporaneous complaints and her statement made 5 years after the accident. She held:

125. It is apparent from the decision that the Arbitrator made no analysis of the competing evidence (other than that of Professor Kiernan) and gave no explanation for rejecting it.

126. I am satisfied that in reaching her conclusion, the Arbitrator has failed to take into account material facts and has accorded no, or little weight, to the body of evidence that was inconsistent with the evidence she accepted. I am further satisfied that the Arbitrator has fallen into error by having failed to analyse the evidence and by failing to give reasons for rejecting that evidence. On that basis, Reln succeeds on this ground. I set aside the Arbitrator's finding that Ms Smith suffered injury to the cervical spine in the nature of a spinal cord lesion.

Ground 1

DP Wood stated, relevantly:

138. It is not clear whether the Arbitrator made a finding that Ms Smith did in fact lose consciousness. The Arbitrator's unqualified acceptance of the opinion of Dr Teychenné would indicate that she did make that finding. It that is the case, then that finding was made without a consideration of the contrary evidence, other than Professor Kiernan… The evidence included: …

139. The arbitrator did not give consideration to that evidence, and gave no reasons for rejecting that evidence.

140. The Arbitrator's finding (if made) that Ms Smith suffered loss of consciousness was arrived at without consideration of material evidence. Reln has established error on the part of the Arbitrator and the finding is set aside.

Ground 2

DP Wood noted that the finding of injury to the central and peripheral nerve system was dependent upon an acceptance that the worker suffered an incomplete cervical cord lesion and/or a traumatic brain injury because of the accident. She found that the Arbitrator's reasoning process was flawed and that her finding regarding this injury was also flawed. She held, relevantly:

152. The history provided to Dr Teychenné was based on Ms Smith's recollection of the date of onset, which is inconsistent with the evidence above and first asserted some four years after the accident.

153. The acceptance by the Arbitrator that Ms Smith's seizures occurred in much closer proximity to the injury is against the body of evidence that she did not consider. Her finding that the onset of seizures occurred within four months is unsound and I set aside that finding.

154. It is equally unclear as to whether the Arbitrator in fact made a finding that Ms Smith suffered a traumatic brain injury, however her acceptance of the opinion of Dr Teychenné would indicate that she did. Such a finding is critical to the acceptance of Dr Teychenné's opinion as to injury to the central and peripheral nervous system…

156. Where there is evidence supporting a party's position, and the party has made submissions on that evidence, the evidence and submissions must be considered in the Arbitrator's reasons. It is not sufficient for the Arbitrator to set out the evidence adduced by each side, then find she prefers the evidence of one and not the other without giving proper consideration to that evidence. In failing to consider the material evidence before her, the Arbitrator has erred.

Accordingly, she set aside the finding of injury to the central and peripheral nervous system. She also revoked paragraphs 2, 3 and 4 of the COD and remitted those matters to a different Arbitrator for determination under s 352 (7) WIMA.

WCC - Medical Appeal Panel Decisions

AMS' reasons do not disclose any error or the application of incorrect criteria

Kiely v Mercy Centre Lavington Ltd [2018] NSWWCCMA 111 – Arbitrator Gerard Egan, Dr Lana Kossoff and Dr Brian Parsonage – 7 November 2018

Background

This matter was previously reported in WIRO Bulletin issue number 24 (Mercy Connect Limited v Kiely [2018] NSWSC 1421).

It has a lengthy history including 2 medical appeals, with the decisions of each medical appeal panel being set aside for jurisdictional error and the matter being remitted to the WCC for redetermination by a differently constituted panel.

Second re-hearing of medical appeal

On 7 November 2018, the current MAP delivered its decision. It decided that a further medical examination was not required because: the nature of the appeal does not raise any matters of clinical observation and further examination would serve no purpose; and the MAP does not consider that the MAC has been shown to contain an error, or the application of incorrect criteria.

The current MAP noted that the MAC assessed 17% WPI, but that the AMS apportioned this 12% WPI to primary psychological injury and 5% to secondary psychological condition. It confirmed that in assessing the permanent impairment, the AMS was required, and directed to, have regard to the provisions of s 65A WCA. It stated, relevantly:

64. In *Kiely No. 2,* Harrison (As)J has at [96] outlined the two-step process required, which is set out verbatim above. That approach was:

(a) to apply the PIRS tables to assess total WPI;

(b) then, to assessed the secondary psychological injury and deduct the impairment in accordance with s 65A "leaving the primary psychological injury remaining".

65. The AMS adopted consistent with the process as suggested by *Kiely No 2* in assessing the overall impairment at 17% WPI and then, doing the best he can, assessing for the effects of the secondary psychological injury…

68. The AMS clearly noted the difficulty of his task. He was correct to do so. However, that did not absolve him from the responsibility of undertaking the task to which he had been assigned, namely the assessment of the WPI resulting from the primary psychological injury, without regard to the effects of the secondary psychological injury. The existence of the secondary psychological injury was a matter agreed and enshrined in the COD, and referred to in the referral to the AMS. He performed the task applying his own skills and judgement.

69. The appellant has not suggested an alternate method for approaching the task to which the AMS was set. The Panel, consistent with *Kiely No 2* considers the AMS approached that task without demonstrating error, and applied the relevant criteria in the Guidelines as best he was able in the circumstances of the case…

71. Further the Panel considers that the reasons expressed by the AMS, as to the process he adopted, and the particular manner in which he approached that task is as clear as he could make it given the difficulty of separating the impairment between a primary and secondary psychiatric disorder when no clear methodology to do so is provided by the Guidelines. The reasons of the AMS do not disclose any error or the application of incorrect criteria.

Accordingly, the MAP confirmed the MAC.

AMS erred in assessing permanent impairment for Complex Regional Pain Syndrome (CRPS)

Careers Australia Group Pty Ltd v Cardemil [2018] NSWWCCMA 116 – Arbitrator Gerard Egan, Dr Brian Noll & Dr David Crocker – 14 November 2018

Background

On 2 February 2016, the worker's left forearm was crushed and trapped between closing lift doors. She underwent conservative treatment and cortisone injections into the left wrist and base of the thumb. On 19 January 2017, Dr Vasic, treating Pain Management Specialist, diagnosed CRPS of the left arm. However, the doctor did not apply the Guidelines in making that diagnosis.

The worker claimed compensation under s 66 WCA for 50% WPI, based upon an assessment from Dr Sun. However, the appellant disputed the claim and relied upon an opinion from Dr Watson, who diagnosed abnormal illness behaviour and stated that there was no pathology consistent with CRPS.

The dispute under s 66 WCA was referred to an AMS (Dr Rosenthal). On 1 August 2018, he issued a MAC that assessed 28% WPI based upon a diagnosis of CRPS Type 1.

Medical Appeal

The appellant alleged that the MAC was based upon incorrect assessment criteria and contained a demonstrable error, as the AMS did not properly apply the provisions of Ch 17 of the Guidelines in making his diagnosis of CRPS. It argued that the AMS should have assessed impairment based only on range of movement.

The worker neither consented to nor opposed the appeal and she did not file an Opposition.

The MAP determined the appeal on the papers and held that it accepted the appellant's submissions regarding the criteria under Ch 17 of the Guidelines. It found that the AMS applied incorrect assessment criteria, which led to a demonstrable error in the MAC, and that the MAC should be revoked. It stated, relevantly:

> 31. Accordingly, the Panel must reassess the impairment according to law, in particular by application of Chapter 2 of the Guidelines, and parts of Chapter 16 of AMA5. As neither party has challenged the clinical findings of the AMS, there is sufficient information within the MAC to reassess in accordance with the law and the Guidelines: *Drosd v Workers Compensation Nominal Insurer* [2013] NSWSC 1053.
>
> 32. The grounds of appeal are limited to the assessment using Table 17.1, and the assessment of the AMS is not otherwise challenged. The worker has not opposed the alternate approach suggested by the employer, using re-assessment based on range of motion only. The Panel accepts that that approach is appropriate, noting in particular the negative nerve conduction studies on 20 October 2016, and the findings of the treating hand surgeon, Dr Nabarro on 6 June 2016 that there was no neurovascular deficit.

The MAP adopted the AMS' clinical findings and assessed 19% upper extremity impairment, which converts to 11% WPI. It revoked the MAC and issued its own MAC that assessed 11% WPI.

Demonstrable error in MAC – WPI assessment of a body part that was not the subject of a claim

AKM Projects Pty Ltd and Tomislav & Ranka Divljak v Dotlic [2018] NSWWCCMA 114 – Arbitrator William Dalley, Dr Damodaran Prem Kumar & Dr Philippa Harvey-Sutton – 12 November 2018

Background

On 21 June 2012, the worker suffered an injury to his spine while lifting concrete at work. He later developed a consequential injury to his digestive tract. He claimed compensation under s 66 WCA.

Arbitrator Garth Brown determined that the worker was employed by the second appellants, who were uninsured, and the first appellant was asserted to be the Principal for the purposes of s20 WCA.

The dispute under s 66 WCA was referred to an AMS (Dr Berry) and he issued a MAC on 2 November 2015, which assessed combined 15% WPI (7% WPI for the cervical spine, 5% WPI for the lumbar spine and 2% WPI for the upper digestive tract).

First medical appeal

Both appellants lodged appeals against the decision of the AMS and relied upon ss 327 (3) (c) and (d) WIMA. The Registrar referred the appeal to a MAP and, after a preliminary review, an AMS-member of the MAP (Dr McGroder) re-examined the worker. He provided a report to the MAP, which was adopted, and the MAP confirmed the MAC.

Judicial review

The employers then applied for judicial review by the Supreme Court of NSW and the Supreme Court found that there was evidence of jurisdictional error. It quashed the decision of the MAP and remitted the appeal for redetermination by a differently constituted MAP.

Second medical appeal

The MAP conducted a preliminary review and was satisfied that there was sufficient evidence to enable the appropriate assessment of WPI to be carried out.

The first appellant argued that the AMS erred by assessing the cervical spine as DRE Category II as the findings on clinical examination did not support that assessment and the AMS failed to provide reasons for the assessment of 2% for ADL's. It also argued that the AMS erred by assessing the lumbar spine as DRE Category II and that the AMS had failed to provide a diagnosis as required by the Guidelines. It also asserted that the evidence did not support this assessment.

The second appellants argued that the AMS erred by failing to apply a deductible under s 323 WMA to the assessment for the cervical spine. In relation to the lumbar spine, they asserted that the clinical findings did not support the assessment of DRE Category II and failed to consider whether a deductible under s 323 WIMA was appropriate. He also failed to consider this issue in relation to the upper digestive tract. They also argued that the AMS erred in assessing 1% WPI with respect to the anus, as there was no evidence to support that assessment and the worker had not made a claim for impairment "arising from internal haemorrhoids".

Cervical spine

The MAP determined that the AMS had not identified the reasoning process that led to the conclusion that the worker's impairment should be assessed under DRE Category II because it is not apparent how the conclusion that there was asymmetry of motion was reached. However, it accepted the clinical findings of Dr McGroder, namely: "…(he) does have some dysmetria with some asymmetry of movement in the AP plane and he is also able to identify an area of non-verifiable radicular complaints with no evidence of radiculopathy".

However, the MAP accepted the first appellant's submission that the AMS' reasons do not adequately explain his reasoning for assessing 2% for ADLs and it found that the AMS erred in making that assessment and it was required to re-assess this impairment. In re-assessing this, the MAP adopted the findings and assessment of Dr McGroder (2% WPI). It also found that there was no evidence of any pre-existing pathology that could justify a deductible under s 323 WIMA.

Lumbar spine

The MAP accepted that the MAC contained a demonstrable error as it did not disclose the AMS' reasoning and the relevant facts upon which his conclusion was based. It therefore decided to re-assess the impairment. In doing so, it accepted Dr McGroder's assessment of DRE Category II as being soundly based and that the evidence does not justify a deductible under s 323 WIMA.

Upper digestive tract

The MAP found that no medical practitioner whose report was in evidence suggested that a deductible under s 323 WIMA was appropriate as there was no evidence of prior injury. It confirmed the AMS' assessment of 2% WPI.

Lower digestive tract

The MAP held that the AMS fell into demonstrable error in assessing impairment in the anal region, without a claim being made, and that he denied the appellants procedural fairness. It stated, relevantly:

143. In the circumstances, it is not appropriate that the Panel assess the anal region as it was not properly before the AMS. The Panel does not accept the submission on behalf of Mr Dotlic that this lay within the medical dispute submitted for assessment.

144. The Panel considers that, if assessment was appropriate, it would of necessity be an assessment of 0% as the current guidelines note that "constipation is a symptom, not a sign and is generally reversible. A WPI assessment of 0% applies to constipation." The internal haemorrhoids observed on colonoscopy result from constipation and are readily reversible. There is no pathology demonstrated in the anal region which would attract an assessment of impairment greater than zero.

Accordingly, the MAP revoked the MAC and issued its own MAC, which assessed combined 14% WPI.

WCC – Arbitrator Decisions

Death claim - Deceased was neither a worker nor a deemed worker

Marinic v RPC Interiors Management Pty Ltd [2018] NSWWCC 281 – Arbitrator Cameron Burge – 18 October 2018

Background

On 2 December 2016, the deceased died because of a heart attack that was caused by acute hypertension due to extreme heat at the end of a work day. His widow, who was the sole dependant, claimed death benefits, funeral expenses and interest on the basis that the deceased was either a worker or deemed worker at the date of his death.

The respondent admitted injury and dependency, but it disputed that the deceased was a worker or a deemed worker at the time of his death and that the applicant was not entitled to compensation under the Act.

At the date of his death, the deceased provided manual carpentry labour services; he had his own ABN and rendered tax invoices that charged for his services at a daily and hourly rate; he did not employ anyone else while carrying on his business and the evidence was that his business consisted of providing his labour. The respondent was paying his invoices at an hourly rate plus GST. It also let on hire the deceased's labour to another firm (Ultra) with whom it had an ongoing relationship to swap labour from time to time depending upon which of the firms was busy. At the time of his death, the respondent was charging Ultra $60 per hour plus GST for the deceased's labour.

For about five weeks leading up to 17 November 2016, the deceased provided his services to another company (Forrest Building and Maintenance), which was a maintenance company owned by Mr Rob Clarke (who is the Managing Director of the respondent). He provided his services at the same rate that he charged the respondent. However, from 23 November 2016 to the date of his death, the deceased provided labour to the respondent and in the week prior to his death he worked on a residential townhouse development in Zetland. Ultra was also contracted to the developer of that site.

On the day of his death, the deceased was preparing door frames and he was working with Ultra's Leading Hand on the site. It was a very hot day. Towards the end of the day, a truck arrived with a load of timber doors for the development and various workers on the site carried them from the truck to the work site. After unloading a number of these doors, the applicant began to pack up his equipment to leave the site. However, he suffered a heart attack and died.

Arbitrator Burge determined that the deceased and the respondent were engaged in a contract for services, rather than a contract of service, for the following reasons:

- The deceased was paid at a set hourly rate plus GST, which indicated a relationship of principal and contractor, as did the fact that he deducted his own income tax and claimed business-related deductions and depreciation on capital equipment in his tax return;
- He brought his own tools of the trade to the worksite, which is a 'neutral indicator' as to whether an employment relationship existed;
- The evidence did not suggest that the respondent was responsible for and had control of the applicant's working hours at the site and the deceased's working hours were set because these were the hours that the site was open;
- He did not have an obligation to work for the respondent and instead, he contracted through his own business to carry out work on a site for the respondent. The evidence indicated that he invoiced multiple other businesses over the years, at varying rates, which is consistent with him carrying on his own business rather than operating as an employee of the respondent;
- The respondent's site foreman exercised a substantial degree of control over the deceased at the work site, but the mere presence of a foreman does not mean that independent contractors are not present on the site; and
- The fact that the deceased did not advertise his business to the general public is not of great significance, as the evidence indicated that he had substantial contacts within the building industry and arranged to carry out work for them from time to time and at different rates.

In relation to the issue of "deemed worker", the Arbitrator noted that the respondent relied upon the decision of the Court of Appeal in *L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15, in which the Court approved the decision of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 401-402 (which discussed analogous provisions in the Victorian legislation as follows):

> I think that the purpose of the exception or exclusion expressed by the words in question was to confine the benefit of the conclusive presumption which it establishes to persons who do not conduct an independent trade or business, who are not holding themselves out to the public under their own or a firm or business name as carrying on such a trade or business and who do not in the course of that trade or business, as an incident of its exercise, undertake the work by entering into the contract. The provision will thus cover men who work for the principal but have no independent business or trade and men who though carrying on an independent trade or business undertake a contract outside the scope or course of that business.

The Arbitrator accepted the respondent's submission that the deceased had regularly carried on a business in his own name and had done so for at least the last three years before his death. He stated:

> 112. For the reasons articulated in [108] and [109] above, I find that the deceased in fact regularly operated a business in his own name. Accordingly, in my view clause 2A of schedule 1 is of no assistance to the applicant in deeming the deceased a worker.
>
> 113. Consequently, having considered the relevant statutory provisions and the evidence in this matter, I am not satisfied that the applicant has discharged the onus of proving the deceased was a deemed worker under the provisions of the 1998 Act.

The Arbitrator entered an award for the respondent.

Suspension of weekly payments under ss 48 and 48A WIMA upheld

Cross v Department of Education & Training [2018] NSWWCC 275 – Arbitrator Brett Batchelor – 9 November 2018

Background

The worker was employed by the respondent as an Administrative Officer at Orange High School. She injured her lumbar spine and left shoulder at work on 13 August 2014, after which she was off work for about 1 to 2 weeks and then resumed work on light duties, and 2 February 2015, after which she received weekly payments until 5 April 2015, and from 27 July 2015 to 27 March 2016 (an aggregate of 42 weeks). She underwent left shoulder surgery on 30 July 2015 and did not return to work thereafter. She moved to Victoria on 16 August 2015.

On 21 May 2018, the worker lodged an ARD which claimed continuing weekly payments from 27 March 2016 and s 60 expenses including the cost of further proposed surgery to her left shoulder. The s 60 dispute was the subject of a referral of a general medical dispute to an AMS (Dr Machart) and he issued a MAC dated 23 August 2018.

At a teleconference on 5 September 2018, the respondent agreed to pay the cost of the future surgery and s 60 expenses incurred 'to date' based upon Dr Machart's opinion. The Arbitrator ordered the respondent to file and serve evidence in reply to the worker's evidence regarding its defence under s 48A WIMA and he listed the weekly payments claim for Arbitration hearing on 2 November 2018.

The respondent disputed the claim for weekly payments under ss 48 and 48A WIMA and asserted that during the period that voluntary payments were made the worker did not make reasonable efforts to return to work in suitable employment at Orange High School.

However, the worker essentially argued that it was not reasonable for her to return to work in Orange when the respondent understood she had moved to live in Victoria and had signalled her intention to do so before the first injury occurred.

Arbitrator Batchelor identified the following issues:

> (a) Did the applicant as at the date from which she is claiming weekly benefits (27 March 2016) have a current work capacity?
>
> (b) Did the applicant make reasonable efforts to return to work in a suitable employment at Orange High School, offered by the respondent?
>
> (c) What is the period during which the applicant is entitled to receive weekly benefits in the event that there is an award for such benefits in her favour? Is it 260 weeks, being twice the sum of the first and second entitlement periods referred to in section 32A of the 1987 Act as submitted by the applicant, having regard to the fact that she suffered two injuries in the course of her employment with the respondent, or is it 130 weeks only, as submitted by the respondent?
>
> (d) Are sections 48-49 of the 1998 Act "beneficial legislation"?

The worker argued that she suffered 2 injuries and should be entitled to weekly payments for a maximum period of 260 weeks (the sum of the 2 entitlement periods referred to in s 32A WCA). She argued that the first period of incapacity results from the first injury and the second period results from the second injury and that she was totally incapacitated during the whole of the period claimed as Dr Kossman stated that she had no capacity to return to work as an Administrative Officer in a school. Relevant factors under s 32A WCA were her inability to drive and she was awaiting surgery to treat a frozen shoulder and was suffering chronic pain.

The Arbitrator referred to an issue 'arising under section 48 of the 1987 Act', although I note that the respondent raised issues under ss 48 and 48A WIMA. He stated:

> 17. In respect of the issue arising under section 48 of the 1987 Act, the applicant points to the fact that the respondent is a very large employer, and having regard to the principle that workers compensation legislation is still beneficial legislation, the section should not be fettered by an interpretation which results in unfairness for a genuinely seriously injured worker. The "reasonable efforts to return to work in a suitable employment or pre-injury employment at the worker's place of employment or at another place of employment" referred to in subsection (1) of that section 48 are emphasised.
>
> 18. The applicant submits that it was unreasonable for the respondent to offer return to work at Orange when it was aware of the applicant's move to Melbourne, and it was disingenuous of the claims managers of the respondent's insurer to offer her light duties at a place where it knew she was not living, and at which she had no accommodation. In this regard attention is drawn to section 49 of the 1987 Act and to the obligation on the employer are referred to the ring to provide a suitable work to a worker who has been totally or partially incapacitated.
>
> 19.The applicant highlights her difficulty to engage in any employment because of the failure of the respondent to provide early treatment, as a result of which her recovery has been severely compromised. The applicant also emphasises the pressure placed upon her, as evidenced in the email exchanges, when the respondent knew that the applicant had no accommodation in Orange once she had sold her house.

The respondent disputed that the worker is entitled to weekly payments for an aggregate of 260 weeks and relied upon the decision of Roche DP in *Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWWCCPD 35 (*Barnes),* which found that there was one discrete injury with the same pathology although different events gave rise to that injury. In this matter, the worker claimed in respect of the same pathology in the left shoulder and it therefore treated the second injury as a recurrence of the first. It also noted that all treating doctors certified the worker fit for restricted duties for 30 hours per week.

The respondent also argued that it offered the worker suitable employment as defined by s 32A WCA at Orange High School and it satisfied its obligation to provide her with suitable work under s 49 WIMA. None of the provisions in s 48 (2) WIMA apply to the worker 'in so far as she could have been treated as having made a reasonable effort to return to work in suitable employment' and it therefore adopted the procedure in s 48A WIMA. It gave her written notice, suspended her weekly payments and then terminated them.

The respondent rejected the worker's submission that ss 48 and 48A WIMA are 'beneficial legislation' as they deprive a worker of an entitlement to compensation benefits under the WCA.

The respondent also argued that if there was to be an award for the worker, she must be assessed as having capacity for suitable employment for 30 hours per week, which is the employment that it offered to her and which she should have accepted. As she had been paid weekly payments for an aggregate of 42 weeks until 27 March 2016, she would be entitled to a further 88 weeks of payments calculated against PIAWE of $749.08 (80% = $603.90 per week).

The Arbitrator relied upon the decision in *Barnes*, that the worker can only rely upon the one 'injury' (that is pathology) and he held that she is currently entitled, at most, to an award for a maximum period of 130 weeks under ss 32A, 36 and 37 WCA. Further, there was no dispute that the insurer had complied with the procedural requirements of s48A WIMA and the relevant issue was whether the worker made reasonable efforts to return to work in suitable employment or pre-injury employment at her place of employment or at another place of employment. He held:

> 54. In my view, having regard to all of the evidence, the applicant has not in co-operation with the respondent or the insurer made it (sic) efforts to return to work in suitable employment at Orange High School. There is no evidence that she made such efforts at another place of employment. Further, I do not find that the applicant is to be treated as making a reasonable effort to return to work in suitable employment or pre-injury employment during any reasonable period for the reasons set out in section 48 (2) of the 1998 Act.

He held that ss 48 - 49 WIMA are "clearly not beneficial" and there is no constructional choice that would enable s 48 to be interpreted to avoid its application to the worker's entitlement. As a result, the respondent was entitled to rely upon s 48 WMA.

The Arbitrator entered an award for the respondent in respect of the weekly payments claim and stated that if there were to be any further WCC proceedings, he accepted the respondent's calculation of PIAWE.

Where different methods of combining assessments are proposed by the parties, which impacts on a threshold, the AMS has exclusive jurisdiction in the application of AMA5 and Guidelines

Veenstra v State of New South Wales [2018] NSWWCC 278 - Arbitrator John Harris – 13 November 2018

Background

The worker injured her right knee at work on 5 August 2002 and underwent multiple surgeries including total knee replacement. She claimed compensation under s 66 WCA and the parties entered into 2 separate complying agreements, which provided for permanent impairment of the right lower extremity and scarring, respectively.

On 9 February 2018, the worker filed an ARD in which she alleged that she suffered consequential injuries to her left shoulder on 3 June 2014, because of a fall, and pain in her left hip because of an altered gait. She claimed further compensation under s 66 WCA under Sch 8 cl 11 of the Workers Compensation Regulation 2016.

On 11 May 2018, the matter was listed for Arbitration hearing and, by consent, the matter was remitted to the Registrar for referral to an AMS to assess the degree of WPI with respect to the left upper extremity and left lower extremity because of the 2002 injury. It was agreed that the previous complying agreements evidenced 15% WPI (right lower extremity) and 1% WPI (scarring) and that any assessments of the left upper and lower extremities are to be included in a combined WPI assessment.

The Registrar referred the dispute to Dr Beer and he issued a MAC on 9 July 2018, which assessed 4% WPI (left upper extremity) and 3% WPI (left lower extremity).

However, on 30 July 2018, the respondent's solicitors requested reconsideration of the MAC under s 329 WIMA. On 6 September 2018, Dr Beer issued an amended MAC, in which he substituted an assessment of 2% WPI for the left upper extremity and provided a combined assessment of 5% WPI. However, he did not provide a combined assessment that incorporated the previously agreed impairments.

During a teleconference on 9 November 2018, the parties informed the Arbitrator that they could not reach agreement on the combined assessment of WPI, as they each applied different methods of combining the impairments and these produced different results, which impacted upon a threshold.

Arbitrator Harris held:

> 21. Section 322 of the 1998 Act specifies that the assessment of the degree of permanent impairment of a worker is made in accordance with the Workers Compensation Guidelines. This assessment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines). The fourth edition guidelines adopt the 5th edition of the AMA 5. Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth guidelines prevail.
>
> 22. Separate impairments resulting from the one incident are aggregated in accordance with the Combined Values Chart in AMA5, subject to the provisions of the fourth edition guidelines.
>
> 23. Accordingly, the AMS is required to aggregate the various impairments in accordance with the provisions of AMA 5 and the fourth edition guidelines. An error by an AMS by incorrectly combining the assessments would arguably be a basis for an appeal to a Medical Appeal Panel based on the application of incorrect criteria. This is another reason why the application of the correct criteria under AMA5 and the 4th edition Guidelines is a matter for the exclusive jurisdiction of the Approved Medical Specialist.
>
> 24. The legislation clearly establishes that a combined assessment involves the application of AMA 5 and the fourth edition guidelines in assessing a final combined whole person impairment. The combined assessment, combining the four body parts results in the "degree of permanent impairment of the worker as a result of injury" as provided by s 326 of the 1998 Act.
>
> 25. I have earlier referred to the parties' respective contentions as to how the combined assessment of whole person impairment should be calculated. I express no opinion concerning the respective contentions as this is a matter for the AMS.
>
> 26. For the reasons expressed, where there is a dispute, the calculation of any combined impairment falls within the exclusive jurisdiction of an AMS. Accordingly, I agree with the parties' joint submission that it is appropriate that the AMS be requested to provide a combined assessment.

Accordingly, the Arbitrator remitted the matter to Dr Beer under s 329 (1) (b) WIMA with a request to provide a combined WPI assessment from the 2 body parts agreed in the complying agreements and the 2 body parts assessed in the Amended MAC.

Section 11A defence succeeds – reasonable action with respect to transfer, discipline and termination of employment

Torres v State of New South Wales [2018] NSWWCC 277 – Arbitrator Michael Perry – 13 November 2018

Background

The worker worked in the Security Management Unit (SMU) of the NSW Police Force (NSWPF) from 23 April 1992 as a senior special constable. The SMU provides a protective service to selected NSWPF and external agency sites and facilities, including at NSW Parliament House.

On 25 May 2015, the worker gave notice that he suffered a psychological injury at work on 10 February 2015, when he received a letter from the Professional Standards Command of NSWPF (PSC). This letter put formal allegations to him that he "may have engaged in misconduct as follows:

> 1. Sexually harassed Special Constable Hutchinson in November 2014 by asking her "will you suck my cock";
>
> 2. Following that comment, you allegedly rang… Hutchinson on her days off and advised her… someone… raised the issue with you. You asked her to confirm you did not say anything offensive or inappropriate to her and … you had gotten Vito De Francesco moved from … (PH)… because you know Superintendent O'Reilly and… you "know people" … Hutchinson was intimidated and felt threatened by your contact;
>
> 3. Over… weekend of 7 and 8 February 2015, you attempted to contact… Hutchinson by telephone on several occasions in an effort to persuade her not to complain about your behaviour. Such behaviour may be viewed as harassing and bullying; and
>
> 4. Behaved unprofessionally on several occasions in front of your colleagues, making inappropriate and offensive comments in the workplace.

The letter advised the worker that it would investigate the matter and that he should provide a response to the allegations within 2 weeks.

At some time between 9 February 2015 and 9 August 2015, PSC again wrote to the worker and provided further detail of, and scope to, the allegations against him.

On 9 August 2015, PSC advised the worker that all allegations had been found to be proved and that termination of his employment was being considered. He was provided with 14 days to respond with any submissions or additional information to be considered in relation to the proposed disciplinary action. His employment was terminated in January 2016.

The insurer initially accepted liability, but it issued a dispute notice on 15 June 2017 relying upon ss 4, 9A, 11A and 14 (2) WCA. Weekly payments ceased on 3 August 2017. However, the respondent did not rely upon ss 4 and 9A WCA at the Arbitration hearing and the live issues remained: (1) whether the psychological injury was caused wholly or predominantly by reasonable action taken or proposed to be taken on behalf of the employer within the meaning of s 11A WCA; and (2) if there is a compensable injury, whether it was caused by the worker's own serious and wilful misconduct within the meaning of s 14 (2) WCA.

In relation to s 11A WCA, the respondent relied upon "transfer, discipline and dismissal" and argued that it had little option but to take the action that it took, including putting the allegations formally to the worker, commencing an investigation and requesting him to respond within 2 weeks. It argued that its decision to transfer the worker from Government House to Sydney Police Centre (SPC) was reasonable given the nature of the allegations and the security of the house itself. The safety of junior offices under the worker's supervision was also an important factor in the investigation process. It believed that the worker needed supervision, which was best achievable at SPC.

The worker argued that the s11A defence had not been made out and he alleged that his injury had already occurred before the bulk of the "reasonable actions" taken by the employer occurred.

The Arbitrator stated, relevantly:

141. Both Drs Rastogi and Allan recorded broadly similar histories regarding various psychological or emotional insults the applicant said he received since about 1995. As already noted, I am very wary of accepting the applicant's evidence.

142. Nevertheless, I bear in mind that because there are a number of potentially causative factors raised in the evidence, I need to deal with the causation issue by reference to the expert medical evidence. On the other hand, I also need to be satisfied that the history taken by either or both doctors provided a fair climate for the acceptance of either opinion (*Paric v John Holland (Constructions) Pty Ltd* [1985 HCA 58… This requires an examination of the clinical notes…

148. Even though the clinical notes again show him regularly consulting his GP between 2008 and 2015, there is no record of complaint about psychological or emotional problems until 16 February 2015.

149. The clinical notes therefore show that there was no complaint to his GP about any work-related psychological problems for nearly 13 years until 16 February 2015 – in the context of regular and multiple complaints about other medical problems…

The Arbitrator held that Dr Rastogi's history was not taken in a fair climate for his opinion to be accepted. He stated:

175. Accordingly, I am comfortably persuaded, bearing in mind it is the respondent who carries the onus, that the psychological injury was predominantly caused by the actions of the employer between 9 February 2015 and November 2015, and I so find. I also find that such causation was with respect to transfer, discipline and dismissal. The 9 February 2015 PSC letter, ongoing investigations and the 9 August 2015 PSC letter – titled "Initial determination and proposed action" (setting out the allegations and considerations and proposed action – including that dismissal from his employment as being considered) are all actions which fall within the definition of transfer, discipline and dismissal in s.11A (1).

As to whether the respondent's actions were reasonable, the Arbitrator noted that in *Northern NSW Local Health District v Heggie* [2013] NSWCA 255, Sackville AJA referred to the observations of Spigelman CJ in *Department of Education & Training v Sinclair* [2005] NSWCA 465, when noting that "*the formulation in s 11A … extends to the entire process involved in … 'discipline' including the course of an investigation… also… actions with respect to discipline usually involve a series of steps which cumulatively can have psychological effects … more often than not it will not be possible to isolate the effects of a single step. In such context, the 'whole or predominant cause' is the entirety of the conduct with respect to … 'discipline'.*

He found that those comments apply to this matter and that also considered Sackville AJA's comments in *Heggie* at [59]:

i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.

ii) …for s.11A (1) to apply, the…injury must be…predominantly caused by reasonable action taken or proposed to be taken **by or on behalf of the employer.**

iii) An employer bears the burden of providing that the action with respect to discipline was reasonable.

iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused…injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.

v) Where the…injury sustained by the worker is…predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed…

vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which those rights are to be given weight in a particular case depends on the circumstances…

He held that the allegations set out in the letter dated 9 February 2015 were not fabricated, and were not "false" and that the respondent has proved that its actions in raising the allegations with the applicant on 9 February 2015, and the process that continued through to its findings and taking of disciplinary action, were reasonable.

He also found it was reasonable for the respondent to require the worker to work with Mr Pennington and co-workers until 16 February 2015, as prior to that date it had no reason to know that there were any factors that were distressing him. He rejected the evidence of the worker and Mr McVicker, that Mr Pennington was "approaching staff members in Parliament House and threatening them to be witnesses in this matter to give evidence to the PSC" and found that PSC had asked Mr Pennington to contact staff to be interviewed as he was a duty officer at the time and that PSC gave him the names of witnesses. He merely he facilitated the interviews.

The Arbitrator held that in view of his findings regarding the s 11A defence, it was not strictly necessary to deal with the respondent's allegation of 'serious and wilful misconduct', but based upon its own medical case, he would have rejected that allegation.

The Arbitrator entered an award for the respondent.

Worker fails to discharge onus of proving work-related injury

Hancock v Holman Industries Pty Limited [2018] NSWWCC 279 – Arbitrator Jill Toohey – 15 November 2018

Background

On 18 May 2015, the worker suffered an injury at work. He resigned from his employment with the respondent in February 2016. However, he lodged a claim form on 26 June 2016 and alleged that he injured his left knee at work on 18 May 2015. However, the insurer disputed the claim and relied upon ss 4, 9A and 60 WCA and s 261 WIMA.

On 19 February 2018, the worker's solicitors gave notice of a claim for weekly payments and s 60 expenses for injuries to the left knee and back and they also alleged that the worker suffered a DVT and pulmonary embolism because of surgery to his left knee. On 12 March 2018, the insurer disputed those additional claims.

On 3 August 2018, the worker's solicitors lodged an ARD which alleged injury to left knee and a consequential injury to the lumbar spine due to 'altered gait' and claimed weekly payments from 13 October 2015 to 27 October 2015 and from 17 February 2016 to date and continuing and s 60 expenses.

Arbitrator Toohey identified the issues as being: (1) whether the worker suffered an injury to his left knee and lumbar spine; and (2) whether he suffered a consequential injury to his lumbar spine.

The worker's counsel argued:

- The Commission does not need to determine the precise circumstances in which the injury occurred, so long as it is satisfied that the injury arose out of or during his employment, and that employment was a substantial contributing factor;
- The respondent seeks to place too much significance on the precise wording used by the worker in describing what occurred on 18 May 2015;
- The worker did not suggest to any of the doctors that he fell to the ground and his account is consistent with his GP's notes;
- The treating GP and specialist are clear that he suffered a consequential injury to his lumbar spine and there is no contrary medical opinion; and
- Therefore, the Commission should find that the worker suffered injuries to his left knee and lumbar spine on 18 May 2015 and a consequential injury to the lumbar spine.

The respondent's counsel argued:

- The claim form alleged injury to the left knee on 18 May 2015, but no injury to the lumbar spine;
- The fundamental flaw in the worker's case is that he gave different accounts in different statements;
- Different doctors had different understandings of what occurred on 18 May 2015. While this is not fatal, it is critically important to the weight that can be placed on their opinions. It is now impossible to say what each doctor understood happened on 18 May 2015;
- The Commission cannot be satisfied that any of the doctors had the appropriate information on which to take a full and proper history of precisely what happened at work on 18 May 2015… (it) cannot be satisfied on the evidence as to what happened and what were the medical consequences; and
- The worker has not discharged his onus of proving, on the balance of probabilities, that he injured his left knee and lumbar spine on 18 May 2015 and a consequential injury to his lumbar spine.

The Arbitrator stated, relevantly:

> 89. That said, in my view, too many questions as to what occurred on 18 May 2015 are raised by Mr Hancock's accounts, by Dr Ong's records, and by the doctors' reports, for the Commission to be satisfied that he sustained the injuries he claims.

She noted that contrary to his email to his employer on 20 May 2015 and the incident report dated 13 October 2015, the worker did not see his GP until 1 June 2015. She stated:

> 91. Mr Hancock has not offered any explanation for his statement to Mr Cruse. He does not suggest, and there is no reason to think, that Dr Ong's records are not correct. The reliability of Mr Hancock's account must be in question as a result.
>
> 92. More significantly, according to Dr Ong's report of 30 July 2018, he saw Mr Hancock on 6 March 2015 for what appears to be an incident in almost identical circumstances at Bunnings. Dr Ong's report calls for some explanation but Mr Hancock has not offered one. If Dr Ong was mistaken as to the date, it is not apparent on the evidence. In fact, Dr Ong's report is consistent with his notes for 6 March 2015 which appear to refer to lumbosacral spine and left knee. He was apparently sufficiently concerned to send Mr Hancock for scans of both. His report of 30 July

2018 shows that he sent Mr Hancock for scans of his left knee and lumbosacral spine, neither of which showed any "significant abnormality".

The Arbitrator rejected the worker's submission that Dr Ong "immediately" sent him for scans of his lumbar spine and left knee, as it appeared that he discussed a more detailed investigation of what was raised at the consultation on 6 March 2015.

She also noted that in his report dated 9 July 2018, Dr Giblin opined as to the significance of an injury in "early March [2015]" in virtually identical circumstances (although he refers to a left thigh injury). It was therefore reasonable to infer the worker gave him that account and while the report calls for some explanation, the worker had not offered any. She held:

> 95. It is not possible to know what to make of Dr Ong's and Dr Giblin's recent reports. The reference to the two injuries remains unexplained. The earlier scans do not appear to have been made available to any of the doctors, and other than Dr Giblin, none of the doctors appear to have known of a similar incident two months earlier. In particular, neither Dr Kirsh nor Dr Diwan appears to have known this. This evidence only raises further questions about what occurred on 18 May 2015 and its significance for a finding that Mr Hancock sustained the injury claimed.
>
> 96. It should not have been an onerous task to clarify the doctors' reports with them. In particular, it should not have been difficult for Dr Ong to clarify his records and his report. A real possibility is raised by his notes on 6 March 2015 and his subsequent report that Mr Hancock suffered a similar event, or experienced lumbar pain, two months before the incident the subject of his claim and that the visit on 1 June 2015 was follow up to that earlier visit. A real question arises as to the reliability of Mr Hancock's statements…

The Arbitrator concluded that the worker's evidence raises serious questions about what occurred at work on 18 May 2015, the significance of the earlier incident, and the weight that can be placed on the doctors' opinions. The dispute notice dated 12 March 2018 put him on notice that these matters were "squarely in issue" and the conflicting histories in the doctors' reports and the lack of detail as to why they found a causal connection to work, undermines the reliance that can be placed on their opinions.

Accordingly, she was not satisfied that the worker had established on the balance of probabilities that he injured his left knee and lumbar spine at work with the respondent and that his employment was a substantial contributing factor. She was found that he had not suffered an injury to the lumbar spine because of a compensable left knee injury. She entered an award for the respondent.

Application to an Arbitrator for reconsideration of decision by a delegate of the Registrar is futile while a Certificate of Determination remains in place

Watson v Woolgoolga Returned Services Club Ltd [2018] NSWWCC 280 – Arbitrator John Harris – 15 November 2018

Background

The worker injured her lumbar spine at work on 10 March 2016. On 19 March 2018, she filed an ARD claiming compensation under s 66 WCA based upon an assessment from Dr Bodel (22% WPI less a deductible of 1/10 under s 323 WIMA). However, the respondent qualified Dr Stephen who assessed 22% WPI but applied a deductible of 2/3 under s 323 WIMA. The respondent did not dispute liability and on 10 April 2018, the Registrar referred the dispute to an AMS. The referral was amended on 26 April 2018 to include documents that were lodged late by the respondent, but it did not take any steps to have the matter listed for teleconference to obtain access to clinical records.

On 10 May 2018, the AMS (Dr Holman) issued a MAC, which assessed 22% WPI, but he applied a deductible of 25% under s 323 WIMA and assessed 17% WPI because of the work injury.

Attempted appeal

On 6 June 2018, the insurer lodged an Application for Appeal against the decision of the AMS, which alleged that the AMS: (a) has not based his opinion on any medical information and results of investigations prior to the injury with the … employer; (b) erred in concluding the worker had a satisfactory result following surgery; (c) erred in applying a deduction pursuant to s 323 WIMA of only 25%; (d) failed to refer to medical information and investigations when addressing why the deduction of Dr Stephen's was excessive; and (e) failed to comment on the opinions of Dr Stephen and Dr Mock in respect of injury to the sacroiliac joints.

However, on 9 August 2018, a delegate of the Registrar determined that no ground of appeal had been made out and that the insurer had not identified the medical evidence or investigations that the AMS had allegedly ignored. She provided detailed reasons for her decision comprising 60 paragraphs.

On 17 September 2018, Arbitrator Farrell issued a Certificate of Determination based upon the MAC. However, on 24 September 2018, the insurer's solicitors applied for reconsideration and rescission of the COD and reconsideration of the delegate's decision.

Arbitrator Harris conducted a teleconference before determining the matter on the papers. While he accepted that the insurer had moved with due diligence in filing the applications for reconsideration, its application has no merit. His reasons included:

- He could not identify the documentation establishing the 'several' efforts made to obtain medical records. However, there was no explanation from the respondent why it did not seek order from the Commission seeking leave to issue directions for production of the medical records before the matter was assessed by the AMS. The time to seek that order was before the medical assessment and not after the issue of the MAC when the respondent was aggrieved by the decision;
- He could not identify the insurer's request for 'particulars of employment' dated 13 February 2018. In any event, there was no explanation from the respondent as to why it did not raise the worker's failure to provide particulars before the AMS' examination;
- The interests of justice do not favour granting a reconsideration application where the moving party failed to act or prevent the precise injustice it is now seeking to rectify. In effect, it did nothing to articulate this issue in the Commission until after the MAC was published and an application to appeal was filed;
- There is otherwise no evidence supporting the insurer's submission that the unidentified material would somehow advance its case. The AMS asked various questions and made findings supportive of the applicant's case;
- There is no merit in the submission that the AMS failed in his obligation under s 324 WIMA to call for the production of medical records. That section confers a discretion on the AMS and there is no proper basis to suggest that the AMS failed in the exercise of that discretion;
- At the teleconference, the insurer was informed that it had a remedy with respect to the decision of the Registrar's delegate, namely Judicial Review in the Supreme Court of NSW. The exercise of that right is not contingent on the COD being rescinded; and

- He rejected the general submission that the Registrar had no regard to the Reply or its submissions 'as a whole'. On the contrary, the Registrar's delegate provided clear reasons on the various grounds for her decision that a ground of appeal had not been made out. He stated, relevantly:

> 52. …Absent specific submission identifying error by the Registrar's delegate, I do not propose to speculate on or otherwise attempt to analyse this general submission.

The Arbitrator stated that it was not clear whether the application for reconsideration of the delegate's decision was contingent upon his determination or was a separate application. He stated, relevantly:

> 56. Section 327 (7) of the 1998 Act provides that there can be no appeal under that section "once the dispute concerned has been the subject of determination by the …Commission". That sub-section means that the existence of the COD prevents any application to appeal the MAC.
>
> 57. However, I have no power to make any orders that affect the role of the Registrar (or his Delegate) under s 327 of the 1998 Act. Accordingly, whilst I believe that the reconsideration application of the delegate's decision is futile whilst the orders of Arbitrator Farrell stand, I will, in any event, remit the balance of the application to the Registrar to take whatever further steps are appropriate.

Pre-2012 injury – Mitchell steps applied to calculate entitlement to weekly payments under the former s 40 (1) WCA

Homa v Anne Petroleum Pty Limited [2018] NSWWCC 287 – Arbitrator Josephine Bamber – 21 November 2018

Background

In about September 2008, the worker commenced part-time employment with the respondent as a general hand. He had a prior history of injury to his lower back in 2002 and said that he worked part time because of his back injury. He earned approximately $270 per week.

The worker alleged that he injured his neck and both shoulders as a result of the nature and conditions of his employment from 29 September 2008 to 20 April 2009, and particularly as a result of repeatedly lifting 20kg boxes onto shelving above shoulder height. He claimed weekly payments from 20 April 2009 to 23 May 2012, incurred medical treatment expenses and compensation under s 66 WCA with respect to the cervical spine and both upper extremities. However, the insurer disputed the allegations of injury, incapacity and need for medical and related treatment.

Arbitrator Bamber discussed the evidence and noted the parties' submissions and stated that care needs to be exercised in drawing conclusions from the general practitioner's clinical notes because they are so brief. If the notes had been more detailed and considered causation questions, the absence of any reference to the worker's employment with the respondent as a cause of the alleged injuries would be more significant. She held:

> 70. Because of the hiatus in the contemporaneous medical evidence regarding the onset of left and right shoulder complaints, and concerns about the accuracy of Mr Homa's statement in this regard, I am not satisfied that Mr Homa has discharged his onus of proof in relation to establishing injury under section 4 of the 1987 Act.
>
> 71. The relevant principles of onus of proof were discussed by the Court of Appeal in *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 (*Nguyen*) where McDougall J (McColl and Bell JJA agreeing) said at [44]:

> A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.
>
> 72. I am not persuaded to the standard required in *Nguyen* that Mr Homa has established injury to his shoulders as a result of his employment with the respondent. I find I cannot place weight on Dr Wong's opinion in this regard because I find his history about the timing of the onset of complaint and treatment seems to have been made on the basis that the consultation with Dr Hanna for his left shoulder was in 2009. This based upon the statement evidence of Mr Homa, but as discussed above seems to be out by a year.

Accordingly, she entered an award for the respondent with respect to the upper extremities.

The Arbitrator said that she was "persuaded on the balance of probabilities that Dr Wong's opinion relating to the neck should be preferred to that of Dr Rimmer" and she was concerned that Dr Rimmer's opinion was coloured by his finding that the worker was exaggerating and he had not really considered in detail the proposition of an aggravation of degenerative changes. She held that the worker had suffered an aggravation of a pre-existing disease under s 4 (b) (ii) WCA and that s 9A WCA was satisfied. However, the dispute under s 66 WCA could not be referred to an AMS because Dr Wong assessed only 6% WPI for the cervical spine, which did not satisfy the s 66 (1) threshold.

The Arbitrator held that the worker was entitled to s 60 expenses, subject to limitations under s 59A WCA. However, the worker had not discharged his onus of proving that he was totally incapacitated because of his neck injury and his entitlement needs to be assessed under the former s 40 WCA. She stated, relevantly:

> 80. Dr Rimmer, while finding against Mr Homa in relation to causation, expressed an opinion regarding his capacity to work, that Mr Homa could perform office-based sedentary work. I find that Dr Rimmer's assessment does not take into account that Mr Homa had no experience in office work. While he was university educated in Syria, his employment in Australia seems to be of an unskilled variety. Furthermore, given his age in the period claimed was approximately 63 to 66 years, I find on the balance of probabilities that on the open labour market he would have been unlikely to attract such employment. However, Dr Rimmer's opinion does support the conclusion that Mr Homa did have an ability to earn in sedentary work. Mr Homa's statement is brief on detail regarding his work history in Australia, which seems somewhat sporadic, but does refer to him performing process work for about a year.
>
> 81. Applying the steps required in the 1987 Act as set out *in Mitchell v Central West Health Service* (1997) 14 NSWCCR 526 (*Mitchell*), the agreed probable earnings figure is $270. The employer's letter states this was for 15 hours per week work, so $18 per hour.
>
> 82. I find his ability to earn in the period claimed for the effects of the neck injury would have been restricted, the extent of which is difficult to determine with precision due to the paucity of contemporaneous evidence. I am satisfied he would have had an ability to earn 10 hours per week at $18 per hour, $180 per week in light sedentary process work due to his neck injury, noting his age and his sporadic work history. This leaves an entitlement to $90 per week.

83. The respondent submitted there should be a reduction for discretionary factors under the former section 40 (1) of the 1987 Act for the back injury. I am satisfied that the respondent has made out a case for such a reduction because of the evidence to which I have referred from Dr Sheridan in relation to the prior back injury. I find the evidence from Dr Sheridan is powerful, that Mr Homa was severely incapacitated for employment due to his back. I exercise my discretion to reduce Mr Homa's entitlement by 75%.

84. Therefore, I find Mr Homa is entitled to an award in his favour of $22.50 per week from 20 April 2009 to 23 May 2012.

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