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UPDATES
INFORMATION
TRENDS

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Court of Appeal Decisions

Life insurance – benefit conditional on insurer's satisfaction as to claimant's total and permanent disablement – Insurer has overlapping obligations requiring it to act reasonably and fairly in considering questions under the policy and determining whether it was so satisfied

MetLife Insurance Ltd v Hellessey [2018] NSWCA 307 – McColl JA, Meagher JA & White JA – 12 December 2018

Note: While this decision involves a TPD claim, it is suggested that the insurer's obligation to act reasonably and fairly in considering the evidence before it applies equally to workers compensation insurers in the making and review of work capacity decisions.

Background

On 10 February 2012, the respondent (a NSW Police Officer) claimed benefits for alleged total and permanent disablement (TPD) under the First State Superannuation scheme from the appellant (the group life insurer). The policy entitled the respondent to TPD benefits if "*having been absent from…* (her occupation as a police officer) *through injury or illness for six consecutive months*, *she provided proof to [its] satisfaction that [she had] become incapacitated to such an extent as to render [her] unlikely ever to engage in any gainful profession, trade or occupation for which [she was] reasonably qualified by reason of education, training or experience"*.

Between 4 May 2001 and February 2008, the respondent was exposed to numerous traumatic incidents and had regular medical treatment for anxiety and depression and she engaged in non-operational duties. Her last day of service was 31 August 2010 (the period of 6 consecutive months' absence from work ended on 1 March 2011).

On 22 December 2014 and 19 October 2015, respectively, the appellant rejected the claim after sending the respondent's solicitors "procedural fairness" letters that invited her to respond to its assessment of the material and information provided to or obtained by it because it was not satisfied that the TPD definition was satisfied.

On 18 August 2015, the r challenged the appellant's decision and alleged that it failed to act reasonably and fairly in considering and determining her claim. On 5 December 2015 (only days before the hearing commenced), the appellant sent a 3rd rejection letter to the respondent.

First instance

Robb J found that the appellant's 3rd rejection of the claim was invalid: *Hellessey v MetLife Insurance Ltd* [2017] NSWSC 12384 at [989] and that the TPD definition was satisfied. This was not challenged on appeal. He found that the appellant rejected or gave little weight to the respondent's medical evidence because the doctors had *"not been provided with full or accurate accounts of the extent of [these] activities"*, which underscored the significance dismissing the evidence of the respondent's lay witnesses. Its consideration of that evidence was not reasonable or proper because it involved ignoring or not engaging with a substantial body of consistent evidence, which taken as a whole, "provided substantial corroboration" for the opinions of the respondent's medical professionals.

Appeal

The appellant appealed on 2 grounds: (1) Error by applying the incorrect legal test as to the "first-stage" question and having regard to considerations and evidence not properly relevant to that stage; and (2) Error in his finding that the appellant's determination was unreasonable because of its failure to consider and apply the respondent's onus of providing evidence in support of her claim; to determine whether on the evidence available it was unreasonable for the appellant not be satisfied of the matters required; and in the standard for determining the validity or invalidity of the appellant's decision.

Meagher JA (McColl JA and White JA agreeing) dismissed the appeal and stated that Fagan J's finding that the appellant breached its obligation to act reasonably and fairly in its treatment of the lay witness material was sufficient to sustain his conclusion that the 3rd rejection was invalid. His Honour stated, relevantly:

> 7. The relevant principles are those stated by McLelland J (as His Honour then was) in *Edwards v Hunter Valley Coop Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113, and approved by this Court in *Hannover Life Re of Australasia Ltd v Sayseng* [2005] NSWCA 214; (2005) 13 ANZ Ins Cas 90-123; *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68; and *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233. MetLife's liability under the policy turned on its being satisfied as to the extent of the Insured Member's incapacity. Both in considering that question and in determining whether it was so satisfied, MetLife was required to act reasonably and fairly. And breach of one or more of these overlapping implied obligations would deprive the decision of contractual effect.

His Honour stated that an insurer's decision may be set aside *"if it is shown to be unreasonable on the material before the insurer… and the process of consideration underlying it was not undertaken reasonably and fairly, even if the outcome itself is not also shown to have been unreasonable on the material before the insurer…"*

His Honour rejected ground (1) and stated (at [56]), *"…a fair reading of the relevant parts of His Honour's reasoning demonstrates otherwise".* He also rejected ground (2) and stated, relevantly:

> 59. …The point made is that MetLife could have given bona fide consideration to the lay witness material and that, acting reasonably and fairly in doing so, it might have concluded that the evidence should be given little weight…

White JA also made observations, but I have not summarised them in this report.

The appeal was dismissed with costs.

Procedural fairness - NCAT determined an allegation that was not pleaded and deprived solicitor of an opportunity for a successful outcome

Livers v Legal Services Commissioner [2018] NSWCA 319 – Gleeson JA, Barrett AJA & Simpson AJA – 14 December 2018

The Court of Appeal upheld the appellant's appeal against an order made by NCAT, that struck him off the Roll of Local Lawyers because of professional misconduct, on the basis that he was denied procedural fairness.

Gleeson JA (Barrett AJA and Simpson AJA agreeing), stated, relevantly:

> 74. Turning to what procedural fairness requires in a case such as the present, two matters require attention. The first is the statutory framework within which a decision-maker exercises statutory power is of critical importance. The second is that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* at [26].
>
> 75. As to the statutory framework, two matters are significant. One is that the *Legal Profession Act*, s 553, obliged the Tribunal to conduct a hearing into each allegation particularised in the disciplinary application made to the Tribunal. Importantly, there was no allegation that the practitioner had altered the date of the client statement.
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> 76… But in this case, neither the Commissioner nor the Tribunal sought to include an additional allegation that the practitioner had altered the date of the client statement…
>
> 78. The requirement to accord procedural fairness to the practitioner in this case is sufficiently stated in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*, where the plurality referred (at [32]) with approval to the following statement by the Full Court of the Federal Court in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 (Northrop, Miles and French JJ):
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> > It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues* and to be informed of the nature and content of adverse material. (Emphasis in original)
>
> 79. Plainly, this did not occur before the Tribunal. The allegations that the practitioner had altered the date of the client statement and that the synchronicity of the dates of the client statement and audiogram was for the purpose of minimising suspicion by WIRO over the history of the claim, and avoiding debate as to whether the audiogram was "recent", was not put to the practitioner before the Tribunal, nor was the practitioner given an opportunity to respond to the relevant issues raised by these allegations…

His Honour stated that the Court would not order a new hearing exercising its powers under s 75A of the *Supreme Court Act* "*unless it appears to the Court that some substantial wrong or miscarriage has occurred": Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 51.53*. It was also necessary to consider whether it would be futile to order a new hearing because to do so would inevitably result in the making of the same orders as made by the Tribunal: *Stead v State Government Insurance Commission* at 145. He held:

> 82. In this context all that the practitioner needs to show is that the denial of procedural fairness deprived him of the opportunity of a successful outcome. To negate that possibility, the Commissioner must demonstrate that a properly conducted hearing could not possibly have produced a different result: *Stead v State Government Insurance Commission* at 147…

He rejected the respondent's submission that the impugned findings would have had no material effect on the outcome and stated that the seriousness of NCAT's finding (at [122]) that the appellant altered the date of the client statement *"cannot be underestimated"* as it found that he had deliberately falsified a document. Further, the finding that he synchronised the dates of the client statement and the audiogram is cumulative upon the finding that he altered the date of the client statement. It is not possible to separate or unscramble the impugned finding from NCAT's findings in respect of ground 1.1 about the change of the date of the audiogram.

His Honour also rejected the respondent's submission that NCAT's findings on grounds 1.2 and 1.3 can be treated as separate and independent of the finding that the appellant altered the date of the client statement. He stated, relevantly:

> 87. Ground 1.2 involved the charge that the practitioner amended and relied upon the client statement dated 1 March 2014 knowing it was false, or recklessly careless as to whether or not it was false in a material particular, so as to mislead and/or attempt to mislead WIRO to obtain a grant of funding. The adverse inference that may be drawn from the finding of the practitioner's involvement in the falsification of the date of the client statement cannot be separated from the Tribunal's assessment of the circumstances in which the practitioner made the amendment to par 7 of the client statement, in particular whether that amendment was made knowing it to be false, or recklessly careless, with a view to misleading and/or attempting to mislead WIRO to obtain a grant of funding.
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> 88. As to ground 1.3, again the finding as to the synchronicity of the dates of the two documents provided the foundation for the finding by the Tribunal that the practitioner knowingly sought to deceive WIRO by concealing the prior claim in the funding application in order to obtain a grant of funding.

His Honour noted that NCAT twice referred to the impugned findings in its Stage Two decision and it was not possible to separate or unscramble the cumulative effect of that finding from the other findings that led the characterisation of the appellant's conduct as professional misconduct, which justified the removal of his name from the Roll of lawyers.

However, he rejected the appellant's submission that the Court should consider the merits of NCAT's decision. Instead, he remitted the matter to NCAT for re-determination, with the costs of those proceedings to be determined by NCAT upon remittal and ordered the respondent to pay the appellant's costs of the appeal. He also continued the order made by Beazley P on 22 October 2018 (which reinstated the appellant's name on the Roll) pending redetermination by NCAT or earlier further order.

WCC Presidential Decisions

Claim under s 66 WCA for a disease injury under s 16 WCA – Deemed date of injury is the date of the claim under s 66 and not the date of onset of incapacity

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

Background

On 11 February 2009, the worker gave the appellant notice of injuries to her right thumb, hand and wrist and claimed compensation. On 3 May 2010, the appellant accepted liability and paid weekly compensation for all periods of incapacity. It also paid costs relating to surgery in July 2010. The worker ceased employment with the appellant in November 2011 and did not work after that date.

On 4 July 2017, the worker made a claim under s 66 WCA for 44% WPI, comprising impairments of the right upper extremity (thumb, wrist, elbow and shoulder) and left upper extremity (thumb, wrist, elbow and shoulder). On 8 September 2018, the appellant accepted liability for injuries to the right thumb, hand and wrist and placed an offer for 20% WPI, but disputed liability for alleged injuries to the right elbow, right shoulder and the left upper extremity.

Arbitrator John Isaksen found that the worker suffered an aggravation of an arthritic disease in her right hand to which s 4 (b) (ii) WCA applied and a consequential injury to her left hand and wrist on 4 July 2017 (deemed), but he entered awards for the respondent regarding the claims for both elbows and shoulders. He remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment.

Appeal

The appellant appealed against the decision regarding the deemed date of injury and ***President Keating*** decided to determine this on the papers.

Interlocutory issue

As the appeal concerned an interlocutory issue the appellant required leave under s 352 (1) WIMA. ***President Keating*** noted that the general principle regarding interlocutory decisions is derived from the decision of Gibbs J in *Licul v Corney* [1976] HCA 439:

> The distinction between final and interlocutory judgments is not always easy to draw and there has been disagreement as to the test by which the question whether a judgment is final or interlocutory is to be determined. One view - which was preferred by the Court of Appeal in *Salter Rex and Co v Ghosh* [[1971] 2 QB 597] - is that the test depends on the nature of the application made to the Court. The other view which, since *Hall v Nominal Defendant* [[1966] HCA 36; 117 CLR 423], should, I think, be regarded as established in Australia, depends on the nature of the order made; the test is: Does the judgment or order, as made, finally dispose of the rights of the parties?

He granted leave under s 352 (3A) as it was *"desirable for the proper and effective determination of the dispute for this issue to be resolved now".*

Fresh evidence

The appellant sought to adduce a list of payments as fresh evidence in the appeal. President Keating referred to s 352 (6) WIMA and Practice Direction No 6 and stated:

33. In *CHEP Australia Ltd v Strickland* [2013] NSWCA 351 (*Stickland),* Barrett JA (Mcfarlan JA agreeing) dealt with the application of s 352(6) of the 1998 Act. His Honour said:

> In the s 352(6) context, there are two threshold questions. They arise as alternatives and are set out in the second sentence of the provision. The first goes to the issue of availability in advance of the proceedings. The second entails an assessment of whether continued unavailability of the evidence 'would cause substantial injustice in the case'. The discretion to admit becomes available to be exercised only if the Commission is satisfied as to one of the threshold matters.

The first limb of the test in *Strickland* was not satisfied as the list of payments was clearly available and have filed in the proceedings if the appellant's solicitors chose to do so, but it clarified and confirmed the period in which the worker received weekly compensation. Its admission enabled the appeal to be determined on a correct factual footing and it did not cause the worker a substantial injustice. He therefore admitted it under s 352 (6) WIMA.

Deemed date of injury

President Keating held that the appeal was misconceived and stated:

> 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.*
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> 69. In *O'Keefe*, Handley AJA, McColl JA agreeing, set out a useful summary of the relevant principles. His Honour said:
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> > 95. The Court has decided that incapacity in s 16 (1) (a) (i) means incapacity for which weekly compensation is or can be claimed: *GIO Workers Compensation (NSW) Ltd v GIO General Ltd (GIO)* (1995) 12 NSWCCR 187, 196 per Sheller JA; *P&O Berkeley Challenge Pty Ltd v Alfonzo* (*Berkeley*) (2000) 49 NSWLR 481, 487 per Priestley JA; and *Stone v Stannard Bros Launch Services Pty Ltd* [2004] NSWCA 277, 1 DDCR 701 (*Stone*) at [5] per Handley JA, and [37] per Hodgson JA.

The President applied *O'Keefe* and held that Handley AJA's remarks make it clear that s 16 (1) (a) (i) WCA only applies to a claim for weekly payments. The authorities also establish that if the relevant claim is for lump sum compensation any earlier claim for weekly payments is irrelevant and the permanent impairment injury is deemed to have happened when that claim is made and that there may be more than one deemed date of injury. Therefore, the Arbitrator's findings were correct.

While the arbitrator also referred to s 322 WIMA, which is not relevant to the determination of the deemed date of injury, those reasons *"merely reflected the self-evident proposition that impairments that result from the same injury are to be assessed together"*. He also found that the arbitrator discharged his statutory duty to provide reasons and he cited his decision in *NSW Police Force v Newby* [2009] NSWWCCPD 75, as follows:

> To succeed in having the Arbitrator's decision set aside on this ground, the Police Force must demonstrate not only that the reasons are inadequate, but that their inadequacy discloses that the Arbitrator failed to exercise his statutory duty to fairly and lawfully to determine the application (*YG & GG v Minister for Community Services* [2002] NSWCA 247).

Accordingly, the Certificate of Determination was confirmed.

Worker not entitled to obtain a further MAC where ARD was discontinued before a COD was issued

Singh v B & E Poultry Holdings Pty Ltd [2018] NSWWCCPD 52 – Deputy President Snell – 3 December 2018

Background

The appellant injured his back at work on 23 February 2013, and he underwent surgery (L5/S1 microdiscectomy) on 11 June 2014. The respondent accepted liability. On 26 October 2015, Dr Bodel assessed 13% WPI (lumbar spine) and he claimed lump sum compensation under s 66 WCA. The respondent qualified Dr Casikar, who assessed 10% WPI, and it issued disputed the claim. The dispute was then referred to an AMS (Dr Wong) and on 29 June 2016, a MAC certified that he had suffered 14% WPI. However, on 1 July 2016, the appellant filed an Election to Discontinue Proceedings.

On 2 February 2018, the appellant made a further claim under s 66 WCA for 16% WPI, based upon an assessment from Dr Khan, as well as claims for weekly payments and WIDs. The respondent disputed the claim based upon a further report from Dr Casikar and stated that it considered the MAC dated 29 June 2015 to be binding.

On 11 May 2018, the appellant filed this ARD, seeking compensation for 16% WPI and weekly payments. The respondent objected to the s 66 dispute being referred to an AMS.

Arbitrator Debra Moore decided to determine the dispute on the papers based upon written submissions from the parties.

The appellant relied upon passages from *Avni v Visy Industrial Plastics Pty Ltd* [2016] NSWWCCPD 46 (*Avni*) and argued that: (1) a worker can recommence a claim after discontinuing it; (2) a dispute is determined by the issue of a Certificate of Determination; (3) a MAC is only binding in the proceedings in which it is issued (see: *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158 (*Livaja*)); and (4) there is no estoppel in circumstances capable of change (see: *Railcorp NSW v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 231). He also argued that *Woolworths Ltd v Stafford* [2015] NSWWCCPD 36 is authority that a worker can amend a claim to change the level of impairment claimed.

The respondent argued that cl 11 of Sch 8 of the Regulation does not apply as the initial claim under s 66 WCA was made after 19 June 2012 and s 66 (1A) WCA applies. As 'claim' means 'a valid claim' (see: *Tan v National Australia Bank Ltd* [2008] NSWCA 198 (*Tan*), a broad range of conduct may amount to the making of a claim and the case law does not support a decision that a claim has only been made if it is finally determined. The prohibition against making more than one claim after 19 June 2012 is substantive law that was approved by the High Court in *ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18 (*Goudappel*).* Based upon *Avni*, a worker may recommence a claim, but he cannot make a fresh claim and the MAC dated 29 June 2016 is the only MAC that can be used in respect of the injury (see: s 322A WIMA).

Arbitrator Moore stated that s 66 (1A) WCA does not necessarily prevent a worker from re-commencing proceedings where no COD has been issued, but the more problematic issue is the application of s 322A WIMA. She held that s 322A is clear and that the appellant cannot simply obtain a further MAC. She also held that only the Registrar or the Commission can order reconsideration of a MAC under s 329 WIMA (as an alternative to an appeal). She cited the decision of DP Roche in *Milosavljevic v Medina Property Services Pty Ltd* [2008] NSWWCCPD 56 (*Milosavljevic*) as authority that the reconsideration power should not be used in an unrestrained or unlimited way. She concluded that the worker was not entitled to make a new claim and to obtain a new MAC.

Appeal

The appellant appealed against the Arbitrator's decision and alleged that she erred in law by: (1) failing to exercise her statutory powers to determine the proceedings; and (2) failing to give adequate reasons why she dismissed the proceedings.

Interlocutory issue

As the appeal concerned an interlocutory matter, leave was required under s 352 (3A) WIMA. ***DP Snell*** held that the statutory test is whether *"determining the appeal is necessary or desirable for the proper and effective determination of the dispute",* which requires *"a consideration of the nature of the dispute and the orders sought on appeal"* (see: *Collingridge v IAMA Agribusiness Pty Ltd* [2011] NSWWCCPD 31 per DP Roche). He granted leave to appeal as the dispute could not otherwise be resolved.

Fresh evidence

The appellant sought to adduce the letter of demand dated 17 December 2015 and the Election to Discontinue Proceedings as "fresh" evidence" in the appeal. However, ***DP Snell*** noted that this evidence was before the arbitrator. Therefore, the first limb of the test under s 352 (6) WIMA could not be satisfied. The second limb of that test requires that *"failure to grant leave would cause substantial injustice"* and in *CHEP Australia Ltd v Strickland* [2013] NSWCA 351 (*Strickland*) Barrett JA (Macfarlan JA agreeing) said:

> The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that 'would' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion.

As the 'fresh evidence' was not controversial and was potentially useful in clarifying the factual background of the prior claim, he admitted it under s 352 (6) WIMA.

DP Snell rejected ground 1. He held that the arbitrator correctly rejected the appellant's submission that a referral to an AMS for assessment could be made under s 293 WIMA. He also held the appellant did not apply for reconsideration by the arbitrator under s 329 (1) WIMA and she did not err in failing to make that order (see: *Watson v Qantas Airways Limited* [2009] NSWCA 322 and *Brambles Industries Limited v Bell* [2010] NSWCA 162). In any event, such an application would have been futile because DP Roche's decision in *Milosavljevic* and *O'Callaghan.* He stated:

> 55. The course adopted by the appellant, if it were properly available, potentially has the effect of avoiding the application of s 322A of the 1998 Act. A worker could make a claim, undergo medical assessment by an AMS, obtain a MAC, and if he or she was dissatisfied with the assessed level of permanent impairment, simply discontinue the proceedings before a Certificate of Determination was issued consistent with the binding MAC. If the worker subsequently obtained a higher medicolegal assessment, the worker could simply 'amend' the claim, and repeat the process, potentially on more than one occasion.

DP Snell held that s 322A WIMA does not entitle the appellant to be referred to an AMS for a further assessment of permanent impairment under ss 293 or 321 WIMA and he dismissed the appeal. However, as there was still a live dispute regarding for weekly payments, he remitted the matter to the Arbitrator for determination of that dispute.

WCC refuses strike out a Pre-Filing statement despite significant delay

Workers Compensation Nominal Insurer v Athena Malikourtis as executrix of the Estate of the late Steven Malikourtis [2018] NSWWCCPD 53 – President Keating – 5 December 2018

Background

The deceased worker was employed as a butcher's assistant and suffered a crush injury to his left hand on 22 February 2012. On 21 December 2012, he claimed compensation under s 66 WCA and that claim was resolved by way of consent orders for 25% WPI.

On 22 August 2013, the deceased's previous solicitors served notice of a claim for WIDs upon the employer and on 21 May 2015, they served a pre-filing statement. On 18 June 2015, the insurer's solicitors served a pre-filing defence on the worker's solicitors (correctly naming it as the defendant under s 154A WIMA as the employer had been deregistered).

On 4 September 2015, the deceased's previous solicitors filed an Application for Mediation with WCC, but on 6 September 2015, the deceased died because of a pulmonary thromboembolism. On 16 September 2015, they informed the insurer's solicitors that they would advise them whether the deceased's estate intended to pursue the WIDs claim. However, they failed to do so.

On 1 October 2015, the insurer's solicitors filed a response to the Application for Mediation and a Mediator was appointed. However, on 4 November 2015, the deceased's previous solicitors wrote to the Mediator requesting 'postponement' of the Mediation until February 2016, as they were awaiting the Coroner's report to ascertain whether there was any causal link between the work injury and death. The Mediation was duly postponed.

On 15 January, 22 April and 4 July 2016, the insurer's solicitors sought updates from the deceased's previous solicitors, but they did not respond. On 18 July 2016, the deceased's current solicitors advised them that they now acted for the estate, upon instructions from the executrix (the deceased's widow), and that they required a further period of 14 days in which to consider their position. On 1 August 2016, they indicated that they would provide advice as to the estate's position "shortly".

On 2 November 2016, the deceased's current solicitors sent an email to the insurer's solicitors regarding a potential resolution of the WIDs claim. In response, on 3 November 2016, 25 January 2017 and 7 March 2017, respectively, the insurer's solicitors asked whether the WIDs claim was proceeding.

On 13 March 2017, the deceased's current solicitors sent an email to the insurer's solicitors regarding payments under 'the death benefits provisions' and the possible execution of a deed of release. In or around April 2017, they made a complaint to the HCCC regarding the medical treatment that was provided to the deceased immediately before his death.

The insurer's solicitors sought updates from the deceased's current solicitors on 9 May 2017, 23 May 2017 and 30 June 2017, respectively. On 19 July 2017, they replied that the HCCC had referred the matter to the Medical Council of NSW and that a meeting of that Council was scheduled on 25 July 2017.

On 8 September 2017, the Medical Council of NSW published an Outcome, which indicated that the complaint was considered by its Performance Committee and that it was considered that the doctor's treatment of the deceased the day before his death was "appropriate". However, it criticised the doctor for not adequately documenting her assessment and treatment of the deceased.

On 11 September 2017, the deceased' current solicitors advised the insurer's solicitors of the outcome and said that they would advise of their client's position "shortly and following a conference" with counsel.

The insurer's solicitors sought further status updates from the deceased's current solicitors on 21 September 2017, 16 November 2017, 19 January 2018, 14 August 2018 and 21 August 2018, respectively. On 22 August 2018, they replied: "I confirm that you will hear from us shortly", but they failed to do so.

On 4 October 2018, the insurer's solicitors filed an Application to strike out the pre-filing statement under s 151DA (4) WCA, citing the extensive delays and that no action was taken to prosecute the WID claim since September 2015.

On 19 November 2018, the deceased's current solicitors filed a reply, which focussed on the complaint to the HCCC and the Outcome issued by the Medical Council of NSW. The executrix argued that the estate was awaiting preparation of an expert report regarding the claim for death benefits and stated that the estate had not sought to finalise the WIDs claim "should it create an estoppel or otherwise prejudice and/or extinguish the rights of the estate and/or the dependents of the deceased". She argued that it would be premature to finalise the WIDs claim until satisfactory medical evidence was received, that numerous attempts had been made to obtain this evidence between December 2016 and June 2018, and that the expert's report was anticipated in early December 2018.

Consideration

President Keating noted that there is no dispute concerning the threshold under s 151H WCA and there are no impediments under ss 151DA (3) or (4) WCA to the application being determined (as more than 6 months has elapsed since the pre-filing defence was served). He found that since the deceased's death, the executrix *"has pursued enquiries about the possibility of commencing medical negligence proceedings",* which were delayed by proceedings with the HCCC and the Medical Council of NSW (those proceedings concluded on 8 September 2017). He also found that the delay in the estate's solicitor receiving instructions from, and conveying advice to the executrix, was due to *"her continuing grief"*. He stated:

> 52. Whilst the potential overlap between the injuries sustained in the workplace on 22 February 2012 and the events leading to the deceased's death on 6 September 2015 is somewhat obscure, I am satisfied that Mrs Malikourtis is taking active steps to prosecute the work injury damages claim. Mrs Malikourtis should be given the opportunity to assess Associate Professor Kennedy's advice before reaching a concluded view on whether to proceed with the work injury damages claim. However, I remind her that, if steps are not taken to prosecute the claim in a timely fashion following the receipt of Associate Professor Kennedy's opinion, it remains open to the applicant defendant to file a fresh application to strike out the pre-filing statement.

Accordingly, he dismissed the application to strike out the pre-filing statement.

WCC - Medical Appeal Panel Decisions

Appeal dismissed as grounds lack merit

Boehme v Donau Pty Ltd [2018] NSWWCCMA 122 – Arbitrator Gerard Egan, Dr Richard Crane & Dr John Dixon-Hughes – 30 November 2018

Background

On 19 June 2012, the appellant suffered a sub-umbilical hernia at work, which was repaired surgically, but he also suffered a hernia to his left abdominal wall after returning to work. He underwent surgeries for this hernia on 20 September 2012, 30 July 2014 and 31 March 2016. On 13 July 2018, he claimed compensation under s 66 WCA for 22% WPI (digestive system – hernia and scarring) based upon assessments from Dr Hopcroft (class 2 impairment of the abdominal wall (15% WPI) + 2% WPI for scarring). However, the insurer disputed the degree of permanent impairment. The dispute was referred to an AMS (Dr Berry) and a MAC was issued that assessed 12% WPI.

On 2 October 2018, the appellant appealed against the MAC and alleged that the AMS: (1) Erred by applying incorrect criteria to arrive at the impairment of the digestive system; (2) Fell into demonstrable error in failing to provide a WPI because the effects of analgesia on his digestive tract; and (3) Applied incorrect criteria to arrive at the impairment for scarring.

The Registrar referred the matter to the MAP. The appellant requested a re-examination by the MAP, but it decided that no further examination was necessary as it did not find any error in the MAC, and that the appeal should be determined on the papers.

Consideration

Ground 1

The appellant argued that the AMS failed to assess impairment arising from peripheral nerve damage because of the hernia and that clauses 16.2 and 16.3 of the Guidelines provide for that assessment. He also argued that this assessment may be combined with the assessment under Table 6.9 of AMA5 (page 136). He purported to rely upon the findings and reasons in *George Moses v Nuplex Industries (Aust) Ply Ltd* [2009] M1-004185/09 (*Moses*), at [22]; and *Bradley Welsh v The Laminex Group* [2012] NSWWCCMA 24 (*Welsh*).

However, the respondent argued that Dr Hopcroft did not specifically refer to the digestive system or make any allowances for peripheral nerve impairment or the effect of analgesia upon the digestive tract. Further, while the appellant challenged the assessment of 3% WPI for scarring, Dr Hopcroft assessed only 1% WPI.

The MAP rejected ground 1. It held that *Moses* is not authority for any proposition relevant to the appeal and that *Welsh* concerned a claim for impairment of the ilio-inguinal nerve. It stated that this ground was without merit.

Ground 2

The MAP rejected ground 2 and noted that the appellant did not make a claim for injury or consequential condition to the upper digestive tract or the colon, rectum or anus. It held:

> 52. If there was such a claim, it would need to be considered by the Respondent, and either accepted, or determined favourably to the Appellant before such a claim could be referred for assessment in the first place: s 293 (3) (a) and s 321 (4) (a) of the 1998 Act.

> 53. Clause 16.9 of the Guidelines, p 78, refers to the effects of analgesics on the upper and lower digestive tracts. This is to account for the additional impairment arising from a consequential condition where "there are symptoms and signs of digestive tract disease". As no claim has been made on the basis of any such disease, nor is it evident that any liability for any such claim has been dealt with, the AMS was not in a position to entertain any such assessment, even if it were warranted.

The MAP found that as the AMS did not record any existence of digestive tract disease, and liability for that condition has not been admitted or determined, it could not consider any ground of appeal based on the effects of analgesics on the digestive tract.

Ground 3

The MAP also rejected ground 3 and found that the appellant did not identify any evidence that justified a higher assessment.

Accordingly, the MAP confirmed the MAC.

Whether a further MAC is ultra vires is not a matter for a Medical Appeal Panel to determine and the issue of a further MAC is not a demonstrable error

Inghams Enterprises Pty Ltd v Hickey [2019] NSWWCCMA 2 – Arbitrator Carolyn Rimmer, Dr James Bodel and Dr Margaret Gibson – 11 December 2018

Background

On 6 April 2013, the worker injured her right wrist and hand and a consequential injury to her right shoulder when she slipped on an icy floor in a chiller room.

On 19 May 2017, ***Arbitrator Gerard Egan*** issued a COD. He remitted the s 66 dispute to the Registrar for referral to an AMS for assessment of the "right wrist (primary injury); right shoulder (consequential condition)," but failed to deal with claims for the right hand and scarring.

The appellant appealed and alleged that the arbitrator *"erred in fact, law or discretion in finding that (the applicant's) right shoulder condition was causally related to (the applicant's) right wrist injury"*. However, that appeal was dismissed: *Inghams Enterprises Pty Ltd v Hickey* [2017] NSWWCCPD 36.

The dispute under s 66 WCA was referred to an AMS (Dr Mellick), but contrary to the terms of the referral he issued a MAC that assessed 15% WPI (including 1% WPI for scarring).

On 25 October 2017, the worker's solicitors wrote to the Registrar seeking a referral for a further assessment under s 329 WIMA because the COD indicated that there was evidence of injury to the tendons in the right hand. However, the appellant objected and argued that the referral was consistent with the original orders and that the worker's request should have been dealt with by way of an appeal.

On 24 November 2017, a Delegate of the Registrar decided that the MAC dated 13 October 2017 was issued regarding a referral for the right wrist and shoulder and there was no basis for reconsideration for *"non-assessment of the right hand".*

On 9 November 2017, the appellant appealed against the MAC and argued that the inclusion of an assessment for scarring was a demonstrable error. The appeal was referred to a MAP, which held that there was a deficiency in the referral because the right hand (as part of the right upper extremity) and the skin should have been referred to the AMS. It stated, relevantly:

> The Panel observes that it may be appropriate for the Commission to consider the potential to reconsider the original orders under s 350 (3) of the 1998 Act, and also to exercise powers under s 329 (1) and/or (1A) and refer the skin and right hand for assessment.

The MAP revoked the MAC and issued its own MAC, which assessed 14% WPI (right wrist and right shoulder) and deleted the assessment for scarring. However, no orders for the payment of compensation were made and that ARD has not been finalised.

On 28 February 2018, the worker wrote to the Registrar requesting: (1) reconsideration of the original COD "to include the injury to the right hand" under s 350 (3) WIMA; and (2) a further referral for examination by Dr Mellick under s 329 (1A) WIMA. However, the appellant objected.

On 1 May 2018, ***Arbitrator Egan*** issued an amended COD, which indicated that during a telephone conference on 27 March 2018, he conceded that he erred in failing to include the right hand and scarring in the original COD. He revoked his previous orders and remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment of the right wrist and hand, right shoulder and scarring. He stated:

> 106. Neither party, in particular the respondent, has raised the application of s 322A of the1998 Act or its interplay with s 329 (1) (b) of the 1998 Act. However, I will consider the matter briefly.
>
> 107. Section 329(1) provides for "a matter referred for assessment" to be "referred again", that is, the same matter that was previously referred: O'Callaghan v Energy World Corporation Ltd [2016] NSWWCCPD 1; Pidcock Panel Beating Pty Ltd v Nicolia [2017] NSWWCCPD 32 (Nicolia), Snell DP at [89]). …
>
> 109. Although the proceedings in this case are undoubtedly the same proceedings, the matter to be referred is the entirety of the applicant's claim, as amended by this decision and Orders to include the hand and the skin. I am therefore of the view that it would be inappropriate to purport to exercise the power under s 329 (1) (b) myself.
>
> 110. As the original COD will be altered in accordance with these reasons, the matter is in effect a referral of that matter for the first time.
>
> 111. Although the matter could be referred pursuant to s 321 by me, as the Commission, I consider it most appropriate to follow the standard procedure that the matter be remitted to the Registrar for referral for assessment pursuant to s 321 (1) of the 1998 Act, in accordance with these reasons and the Orders as are proposed.

The Registrar then referred the dispute to an AMS (Dr Stephenson) and on 13 June 2018, he issued a MAC that assessed 25% WPI (24% WPI of the right upper extremity + 1% WPI for scarring).

On 31 July 2018, the appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) WIMA and sought an oral hearing. The Registrar referred the appeal to the current MAP, which decided that no further medical examination was required and that the appeal should be determined on the papers after parties had an opportunity to make further submissions.

Fresh evidence

The appellant sought to tender Dr Mellick's MAC as fresh evidence in the appeal and alleged that the Registrar "refused to allow the report to be admitted" and that it was relevant to the dispute as it evidenced a substantial inconsistency between the current assessment and that of the previous AMS.

The MAP declined to admit the MAC as fresh evidence as it was available to the appellant before Dr Stephenson's assessment, but stated that it would consider it because it was information that it would call for.

Appellant's submissions

The appellant's argued that the MAC should be revoked, or in the alternative, it should be significantly altered, because:

- Dr Stephenson's MAC was ultra vires as the Act provides that only one MAC can be issued regarding permanent impairment and the MAC dated 16 February 2018 is current and binding: s 322A WIMA;
- Dr Stephenson's MAC contains a demonstrable error and is based upon incorrect assessment criteria as he failed to make a deduction for the right shoulder under s 323 WIMA. He also failed to consider the consequences of a right shoulder injury that occurred at home on 11 June 2013; and
- Dr Stephenson erred by "double counting" impairments of the right upper extremity, by not isolating each body part in assessing impairment, and in failing to note substantial inconsistencies between his clinical examination and that of Dr Edwards.

Worker's submissions

The worker argued that the MAC should be confirmed for reasons that included:

- "Ultra vires" ground is not a proper ground of appeal under s 327 (3) WIMA and the AMS did not err by issuing a MAC based upon the referral;
- *Cole v Wenaline Pty Ltd* requires the assessor to have *"regard to the evidence as to the actual consequence of the earlier injury, pre-existing condition or abnormality".* The AMS' decision regarding the deductible under s 323 WIMA, is consistent with that principle and is open to him on the evidence. The 2013 shoulder injury is not significant and does not warrant a deduction under s 323 WIMA;
- The appellant failed to explain how the alleged "double counting" occurred; and
- A difference of opinion is not a demonstrable error on the face of the document; and

Consideration

The MAP held that the issue of the MAC is not a demonstrable error for the purposes of s 327 (3) (d) WIMA. It stated that in *Merza,* Hoeben J defined *"demonstrable error"* as *"an error which is readily apparent from an examination of the medical assessment certificate and the document (that) referred the matter to the AMS for assessment"*. It held that this was *"a purely legal error and a discussion of it should not be held under the guise of a medical appeal"* and that this is a jurisdictional issue that an arbitrator should determine. It held (at [58]) that in the reconsidered COD, the arbitrator noted that the appellant did not raise the issue of s 322A WIMA or its interplay with s 329 (1) (b) WIMA.

It held that the AMS erred by reporting that there were no previous or subsequent accidents, accidents or conditions. It applied the decision in *Cole v Wenaline Pty Limited* and noted that in *Vitaz v Westform (NSW) Pty Limited and Ors* [2010] NSWSC 667, Johnson J stated: *"…it is insufficient to assume that the existence of a pre-existing injury or condition will always contribute to the impairment flowing from any subsequent injury: Cole v Wenaline Pty Limited at [30]*". It applied a 1/10 deductible under s 323 WIMA to the right shoulder assessment only.

The MAP held that there was no demonstrable error as the injury on 7 July 2013 was not significant and it did not result in any impairment.

It held that the AMS did not engage in any double counting and also stated:

> 133. The Panel was satisfied that in assessing permanent impairment, the AMS had taken into account any inconsistencies in the respective movements detected on examination to ensure that any assessment was in fact permanent. The Panel considered that the appellant seeks to cavil with the sound exercise of clinical judgment of the AMS. The assessment of permanent impairment is a matter for the AMS' clinical judgment on the day of assessment. Further, a difference of opinion is not a demonstrable error on the face of the document.

Accordingly, the MAP revoked the MAC and issued its own MAC, which assessed 24% WPI.

WCC – Arbitrator Decisions

No entitlement to weekly compensation established, but limited s 60 expenses awarded

El-Chami v DME Engineering Services Pty Ltd [2018] NSWWCC 297 – Arbitrator John Isaksen – 29 November 2018

Background

On or about 6 February 2015, the worker commenced employment with the respondent. He alleges that on 15 May 2015, he injured his neck, right shoulder, right arm, upper and lower back when he was struck by s steel beam at work and consequential depression. The respondent initially accepted the claim and paid weekly payments and medical treatment expenses, but it disputed the claim on 24 August 2015.

The worker alleged due to his work injuries he had no work capacity from 15 May 2015 to June 2016 and only limited work capacity from then until 26 June 2017, but he made no claim after that date because he suffered serious injuries in a non-compensable MVA on 27 June 2017.

Arbitrator John Isaksen held that the worker suffered soft tissue injuries to his neck and lower back because on 15 May 2015 and while he would have suffered pain in the right shoulder region and right arm, there was no evidence of discrete, diagnosable injuries. He found that the medical evidence did not support a finding of injury to the upper back and he was not comfortably satisfied that the psychological condition (which commenced in June 2015) was compensable and/or what (if any) effect it had upon the worker's work capacity.

The arbitrator noted that in *DHL Exel Supply Chain (Australia) Pty Ltd v Hyde* [2011] NSWWCCPD 22 (*Hyde*) President Keating held that medical certificates were of little probative value in the absence of a medical report to explain them or to set out the history on which they are based: *Greif Australia Pty Ltd v Ahmed* [2007] NSWWCCPD 229; 6 DDCR 461. He stated:

> 98. In the circumstances of this particular dispute I consider that the medical certificates provided by Dr Vij between 24 August 2015 and 23 March 2016 are of little probative value in the absence of any other medical evidence, in particular medical reports, that address the issue of whether the applicant had no current work capacity during this period. Those medical certificates on their own do not provide me with sufficient explanation as to why the applicant, with soft tissue injuries to the neck and lower back but presenting to doctors with severe pain and restriction of movement throughout his spine, was not fit for his pre-injury employment or some suitable employment during the period that he has claimed weekly payments of compensation.

> 99. I am therefore not at all satisfied from the evidence available that the applicant had no current work capacity between 24 August 2015 and 26 June 2016 as he has claimed. However, I also do not have any evidence available that would allow me to find that the applicant had some limited work capacity in some suitable employment and award a payment of weekly benefits of compensation pursuant to section 37 (3) of the 1987 Act.

He awarded the worker weekly compensation under s 37 (3) WCA from 24 August 2015 until 26 June 2016 and ordered the respondent to pay medication costs for treatment for the neck and lower back under s 60 WCA, subject to restrictions imposed by s 59A WCA.

Respondent denied opportunity to arrange a further IME

Ewins v CSR Limited [2018] NSWWCC 301 – Arbitrator John Harris – 4 December 2018

Background

The worker filed an ARD on 29 June 2018, claiming compensation for a psychological injury because of bullying and harassment at work and alleging the date of injury as 28 September 2017. The respondent sought an order directing the worker to attend an IME with Dr Roberts under s 119 WIMA and that the proceedings be suspended under s 119 (3) WIMA if she failed to attend it.

Arbitrator John Harris noted that interlocutory rulings were made by another arbitrator during a teleconference on 26 July 2018, and that the respondent was granted leave to file and serve a direction for production of medical records upon Dr Choudury and three psychologists, but it did not complain about the state of the pleadings at that time.

On 2 August 2018, the respondent's solicitor served a direction for production addressed to Dr Choudury. However, on 10 August 2018, Ms Frazer (an employee of Idameneo (No 123) Pty Limited) advised him that the company had custody, power and control over the medical records.

Despite this advice, on 16 August 2017, the respondent served summonses to attend the arbitration upon Ms Frazer and Dr Choudury. On 22 August 2018, the company's solicitor asked him to withdraw the summons, but he refused to do so and said that he *"specifically disagreed with the assertions made"* regarding control of the records and privacy matters. He did not provide any reasons for his view that the medical records were in Dr Choudury's custody, power and control.

On 30 August 2018, the company's solicitor emailed the WCC advising that Ms Frazer lived in Dubbo and it suggested that the WCC should instead issue a direction for production addressed to itself. The WCC treated this as an application to set aside the summonses and it set a timetable for the urgent filing of submissions.

On 31 August 2018, the company's solicitor advised the WCC that the respondent had not tendered any conduct money with the summonses. However, the respondent's solicitor did not file any submissions.

On 6 September 2018, the WCC advised the parties that the summonses were set aside and that reasons would be provided at the hearing. However, the respondent's solicitor then advised the WCC that he was *"not aware that submissions were sought or required".*

On 7 September 2018, the WCC emailed the respondent's solicitor, confirming the directions that were emailed on 31 August 2018, and advising, inter alia, that it was considering whether to set aside the Summonses on its own motion. It advised that the company alleged non-payment of conduct money and directed him to respond by 12 noon on 10 September 2018 regarding this issue.

The respondent's solicitor responded to the effect that the summonses should not be set aside and that the recipients were required to attend *"so that the records could be obtained, and an adjournment avoided".* He asserted that he did not receive the initial email from WCC, but he did not address the alleged non-payment of conduct money.

On 10 September 2018, the WCC advised the parties that the summonses were set aside and that oral reasons would be given at the arbitration and on 12 September 2018, ***Arbitrator Harris*** made those orders and gave oral reasons. He gave the respondent leave to file and serve a direction for production upon the company's solicitor by 13 September 2018 and ordered it to provide "proper particulars" of the s11A defence by 19 September 2018. He listed the matter for further arbitration on 9 October 2018 and observed that the respondent's conduct had delayed the matter and directly led to unnecessary correspondence.

On 19 September 2018, the respondent advised the WCC that it did not rely upon s 11A WCA *"in respect of the injury as currently pleaded"* and on 3 October 2018, it filed and served further documents that were produced under the direction by the company.

At the arbitration on 9 October 2018, the respondent argued that the ARD pleaded a frank injury, but the worker argued that she pleaded a disease injury with a deemed date of injury. The COD indicates that most of the hearing time was consumed by this issue. The Arbitrator gave the worker leave to amend the ARD and gave oral reasons (set out at [46]), but while he agreed that the pleadings were unsatisfactory, it was clear *"that this claim was clearly a deemed date of injury and the respondent was clearly on notice of that allegation"*. The medical evidence indicated a disease injury, which was addressed in the dispute notice, and the respondent was aware at all material times that his was a disease claim. There are also numerous Presidential that the WCC is not a Commission of strict pleadings.

The respondent sought leave to amend the dispute notice, which the arbitrator refused because disease was disputed in 2 notices. However, later that day the respondent asked him to reconsider that decision and he refused to do so. He then made further orders including: (1) Granting leave to the worker to amend the date of injury in the ARD to read "29 September 2017 (deemed)"; (2) Ordering the worker to provide particulars of the incidents alleged to have caused injury by 19 October 2018; (3) Ordering the respondent to produce to the worker the surveillance DVD from a recent investigator's report and a copy of its letter of instructions to Dr Roberts by 19 October 2018; (4) Granting leave to the respondent to issue a direction for production of the worker's employment records on her current employer; and (5) Listing the matter for a further teleconference on 13 November 2018.

During the teleconference on 13 November 2018, the parties disagreed about whether the worker could be re-examined by Dr Roberts and the worker disputed that the respondent had complied with the orders made on day 2. The Arbitrator made further orders, including: (1) Requiring the respondent to file and serve the surveillance DVD, its letter of instructions to Dr Roberts and evidence of its compliance with the previous orders by 16 November 2018; (2) Requiring the worker to ensure that its particulars have been filed with the WCC by 16 November 2018; and (3) Listing the matter for a further teleconference on 21 November 2018 regarding the issue of whether the worker is required to attend a further examination with Dr Roberts.

During a further teleconference on 21 November 2018, the respondent sought an order under s 119 WIMA that the worker attend a further medical examination with Dr Roberts. However, the arbitrator refused to make that order, partly based upon his reasons dated 9 October 2018. He also stated, relevantly:

87. I accept the applicant's submission that the letter of particulars reflects the applicant's allegations contained in her statement which was obtained by the respondent's investigator and provided to Dr Roberts. The particulars are not evidence and simply a summary of the applicant's evidence. That document does not enlarge the applicant's allegations of the events that are causative of injury.

88. The amended pleading reflects the substance of the applicant's claim on the respondent. The particulars do not enlarge what was otherwise known to the respondent through the detailed accusations contained in the applicant's statement

89. The respondent also referred to other evidence which was the subject of submission by it on 9 October 2018 and rejected in my Reasons. However, I will repeat my Reasons for rejecting those submissions…

95. The respondent's present application ignores my previous ruling. I do not accept the respondent's submission that the leave granted on 9 October 2018 was to allow the applicant to run a claim of injury not previously advised…

99. The power to order a medical examination cannot be ordered otherwise in accordance with a clear statutory entitlement. In *Fernando*, Priestly JA considered that the legislation required "an unmistakable and unambiguous intention" as to whether the type of medical procedure was authorised by statute.

100. The principles discussed by Priestly JA in *Fernando* were based, in part, on the decision of the High Court in *Coco v The Queen* ((1994) 179 CLR 427 at 437). They were applied by the Court of Appeal in *Nominal Defendant v Adilzada (*[2016] NSWCA 266) *(Adilzada)* when considering an interpretation of the rights to order a medical examination under the *Motor Accidents Compensation Act* 1999 (NSW). In *Adilzada* Meagher JA stated (at [19], McColl and Gleeson JJA agreeing):

> Section 86 does not in terms confer power on a court to order that any request to undergo a medical examination or assessment be complied with. Nor would the conferral of that power be implied unless it was clearly necessary to do so, because of the basic rights which its exercise would override: *Coco v The Queen* [1994] HCA 15; (1974) 179 CLR 427; *Fernando v Commissioner of Police* (1995) 36 NSWLR 567. Subsection 4(b) provides a sufficient sanction in the event that a claimant fails without reasonable cause to comply with a request under subs (1). That sanction is that court proceedings cannot be commenced, or if commenced, cannot be continued, whilst the failure to comply with that request continues…

103. Section 119 (1) does not provide a further right to examine where that right has been exercised.

The Arbitrator listed the matter for a further recorded teleconference on 7 December 2018.

Section 11A WCA - Psychological injury wholly or predominantly caused by reasonable action taken… with respect to transfer

Drylie v Transport for NSW [2019] NSWWCC 2 – Arbitrator John Wynyard – 7 December 2018

Background

The worker was employed by the respondent from 2008 until 12 August 2013. He alleged that he suffered a psychological injury on 12 August 2013 (deemed) because of workplace bullying and harassment and claimed compensation. The deemed date of injury coincided with the hearing of his complaint to the Fair Work Commission to the effect that he would suffer psychological harm and his children would suffer if he had to resume night shift.

On 20 October 2015, the insurer disputed the claim and relied upon s 11A WCA. The worker filed an ARD in 2015, but he discontinued those proceedings. On 21 February 2018, the Insurer issued a notice under s 287A WIMA and confirmed its 2015 decision and on 23 July 2018, the worker filed this ARD.

There was no dispute that the suffers from a psychiatric condition and the disputed issues were whether employment was the main contributing factor to an aggravation, exacerbation, acceleration or deterioration of that condition and, if so, whether it was wholly or predominantly caused by reasonable actions taken etc. by the employer.

Arbitrator John Wynyard summarised the worker's evidence and stated, relevantly:

> 88. Mr Drylie said that on 19 August 2013 he ceased work. He said: *"I felt that the manner in which I was treated was unsupportive and demeaning. Where I had concerns that required feedback or performance management, my employer generally responded with bullying and dismissive behaviour. I know an employer has the right to instruct workers, address problems and give feedback, but the rude and dismissive manner in which my employer did these things was unreasonable."*

The worker conceded that several personal events outside work had contributed to his stress, but he argued that these only made a small contribution to his psychological condition. He said that on 23 February 2017, Centrelink "forced" him to commence work with National Parks and Wildlife Service as a Field Officer, but he needed to take many sick days because of his psychological condition and his employment was terminated on 19 February 2018. He also argued that his pre-existing condition, which was not wholly or predominantly caused by the respondent's actions, caused him to misperceive the ordinary running of its business as bullying and harassment.

However, the respondent relied upon documentary evidence concerning disciplinary and other meetings regarding the worker's allegations of bullying, his drug use and his actions in the Fair Work Commission. These indicated a history of performance management processes on 1 July 2009 and 14 September 2009, and on 3 June 2010, he was placed on a performance plan because of his absences from work. In 2010, he made a complaint of racial vilification against a co-worker and a formal meeting was held on 3 November 2010, but he declined to have this investigated by the respondent's investigation unit.

The respondent argued that the contemporaneous evidence indicated that the injury was wholly or predominantly caused by its reasonable actions regarding the worker's poor work performance, which included performance appraisal, discipline employment benefits (regarding the worker's "NAIDOC issue"), retrenchment and dismissal, and the worker's perception of bullying only arose when he was asked to perform his job properly.

Arbitrator Wynyard stated:

> 183. The evidence establishes that Mr Drylie has a personality that is quite unusual. As has been seen, he has constantly been under notice, virtually from when he commenced work with the respondent. He has shown himself to be unable to stay out of performance appraisals for his unsatisfactory attendance since 2009, and has gained an unenviable record as a complainer, whose conduct demonstrates that his sense of entitlement may be disproportionate to his sense of duty as an employee. That elevated sense of entitlement is shown in the comment from Mr Drylie's Kanwal Medical Centre on 22 August, that the practice was unable to give preferential treatment to certain patients, from which I infer that Mr Drylie had been seeking the same. Mr Drylie's approach to his obligations as an employee has been shown to reflect his comment on social media that got him into trouble in 2011, that "you can get away with just about everything."

The Arbitrator held that employment was the main contributing factor to the worker's psychological injury and said that in considering the s 11A defence, it is necessary to establish the facts and circumstances and to resolve the conflicts in the "considerable body of evidence that constitutes contemporaneous materials…" He described the worker's statement as being *"rambling, imprecise, and contradictory… The generalities with which Mr Drylie peppered his statement were never particularly identified, and, more significantly, he was unconcerned with his own course of conduct, which had him continually under notice since 2009."* He found that the worker's allegations about bullying by his superiors *"…were all in the context of his poor work performance, and yet he would not agree that his work ethic was poor. He said that he had never been told he was put on a performance management plan, and yet the independent records of the respondent show that he was constantly being performance managed."* He held:

> 211. Whether Mr Drylie thought that his record would not be accessed by the respondent in reply to these accusations, or whether he considered that his part in the various incidents was irrelevant, the conclusion nonetheless is that he was happy to manipulate the truth. Other examples are: …

He found that the worker's documentary evidence did not assist his case as evidenced the sequelae of the disciplinary action taken against him because of his positive drug test on 14 December 2012. He noted that in an email dated 12 February 2013, the worker stated that he feared being bullied if he returned to work there at Hornsby Maintenance Centre (HMC). Mr White then placed the worker in Central Lost Property at Hornsby station, but he then *"…caused his own downfall when, in a recognisable reaction to being questioned about his run-in with Ms Jenkins, accused her of being rude. Mr White invited him to lodge a grievance against Ms Jenkins, which he did, and thus found himself back at HMC, and having to do night shift work."* After failing to extend his exemption from night duty, the worker complained to the Fair Work Commission. At a hearing on 20 August 2013, he was ordered to particularise his claim (he wrote an email on 21 August 2013 to that effect), but he did not tender any evidence regarding that application or its outcome. The Arbitrator inferred that the worker *"did not pursue it"*.

The Arbitrator rejected the worker's evidence and found that the worker's pre-existing psychiatric condition did not cause him to misperceive the ordinary reasonable actions of the respondent because the alleged incidents of bullying and harassment did not occur, and the principal cause of the injury was the worker's aversion to night shifts and that when the worker found himself back at HMC. He concluded:

> 239. The complaint about transfer was made to the medical practitioners. It is the only alleged fact that has been proven from the assumptions they were asked to make. I have rejected any other cause, and it follows that the opinions of Dr Gertler and Dr Murphy may be accepted, with the reservation that the unproven assumptions accepted by Dr Gertler may also have had a part to play. Although the probative weight of their opinions might thereby be weakened, it nonetheless establishes a persuasive case, and therefore, in the absence of any contrary opinion, satisfies the respondent's onus.

Accordingly, he entered an award for the respondent.

AMS not informed of prior award under s 66 WCA before MAC issued – Matter remitted to AMS for reconsideration, but arbitrator declines to direct 'mathematical recalibration'

Thuy Nga Lang v Core Community Services Pty Ltd and Our Lady of the Rosary Catholic Parish, Fairfield [2019] NSWWCC 3 – Arbitrator Elizabeth Beilby – 7 December 2018

Background

On 23 October 2004, the worker was paid compensation under s 66 WCA for 7% WPI (lumbar spine) by the first respondent. On 6 June 2018, a Certificate of Determination issued, which found that the worker had suffered a disease injury to her lumbar spine as a result of the nature and conditions of her employment with both respondents. As the deemed date of injury was 23 August 2017, the second respondent was liable.

The dispute under s 66 WCA was referred to an AMS (Dr Meakin) and on 23 July 2018, a MAC assessed 11% WPI. However, the AMS did not make any deduction for the previous injury under s 323 WIMA.

Arbitrator Elizabeth Beilby noted that the AMS was not advised of the previous award for 8% WPI against the first respondent. She stated:

> 9. What should be made clear is that the injury against the first respondent and the injury found against the second respondent both arise out of the nature and conditions of employment, being an injury by way of disease of gradual onset. There is no submission advanced by either the worker or the respondent that the pathology in respect of the lumbar spine is different in respect of the assessments under the two separate claims.
>
> 10. The second respondent submits that there was only one injurious event which has occurred with two different employers and therefore there should be mathematical recalibration in effect so that a credit is given in the sum of $8,750 to the second respondent.
>
> 11. The applicant opposes the course sought by the respondent and says that there is a separate employer now and a separate injury (with a new date of injury) and for that reason the appropriate way to take the previous claim into account is for the AMS to make a section 323 deduction.
>
> 12. After considering these arguments I agree that the appropriate way to take into account the prior Award and payment of compensation is through the mechanism provided by section 323. I agree that the claim that was referred to Dr Meakin is a different claim as there is a new date of injury and a new employer.
>
> 13. Section 323 directly turns its mind to making allowance for any proportion of the impairment that is due to a previous injury. This is the appropriate mechanism to take into account the previous award, that is the previous injury.
>
> 14. In those circumstances, I decline to direct the 'mathematical recalibration' as suggested by the respondent.

Although the time to appeal the MAC had expired, the arbitrator relied upon s 329 (4) WIMA and referred the matter to the AMS for reconsideration of the MAC based upon the previous award.