Bulletin

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

NOTE: The Insurer has lodged an appeal against the decision of Arbitrator Bamber in Whitton v Secretary, Department of Education [2019] NSWWCC 27. WIRO will report on the outcome in due course **NOTE: The Insurer has lodged an appeal against the decision of Arbitrator Bamber in Whitton v Secretary, Department of Education [2019] NSWWCC 27. WIRO will report on the outcome in due course**

WCC Presidential Decisions

Consequential condition – No diagnosis required – Arbitrator erred by failing to accept an opinion of a medical expert and the error materially affected the outcome – COD revoked

Arquero v Shannons Anti Corrosion Engineers Pty Ltd [2019] NSWWCCPD 3 – Deputy President Elizabeth Wood – 29 January 2019

Background

On 18 December 2000, the appellant injured his right knee at work. In 2003, he received compensation under s 66 WCA for 27% permanent loss of efficient use of the right leg at or above the knee. In 2011, he made a further claim under s 66 WCA and a MAC assessed 40% permanent loss of efficient use of the right leg at or above the knee. This application claimed further compensation under s 66 WCA for the right knee and an alleged consequential injury to the left knee. The respondent disputed the left knee claim.

On 16 August 2018, ***Arbitrator Catherine McDonald*** issued a COD, which determined that the appellant had not established a consequential injury to his left knee. She remitted the claim for the right leg to the Registrar for referral to an AMS.

Appeal decision

The appellant alleged that the arbitrator erred in fact and law: (1) by failing to take into account, or give sufficient weight to, his evidence and to provide adequate reasons; (2) by primarily determining the issue on the basis of an absence of contemporaneous complaint of injury to the left leg; (3) by misdirecting herself regarding her statutory task by inappropriately relying on the decision of *Moriarty-Baes*; and (4) by rejecting and/or not properly considering the opinion of Dr Patrick regarding the questions of causation and diagnosis of the injury to the left leg.

Deputy President Elizabeth Wood determined the appeal on the papers.

In relation to grounds (1) and (4), she stated:

> 129. The arbitrator approached the consideration of Dr Patrick's evidence by expressing the opinion that it was always difficult when the first reference to the condition was in a medicolegal report. It may be said that in some cases, that fact may pose a difficulty. However, it is not always the case. In this case, the factual basis upon which the consequential condition relies, that is the high tibial osteotomy, altered gait, limping and over-pronation, and a deteriorating condition in the right knee, is well made out in the historical reports.

Wood DP observed that Dr Patrick was not the first doctor to record the onset of left knee symptoms (Dr Breit recorded a 12-month history of symptoms in September 2016) and that it was not clear why the parties attempted to identify a diagnosis, or why the arbitrator thought that the lack of a diagnosis was a factor that detracted from the adequacy of Dr Patrick's explanation for his opinion. She cited the decision in *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 (*Kumar*) in which Roche DP applied the principles enunciated in *Kooragang Cement Pty Ltd v Bates* and stated:

> While Mr Kumar's evidence is less than ideal and the general preparation of his case by his solicitors has been sloppy, his evidence of experiencing a lot of pain in his right shoulder having to lift himself after his back surgery is unchallenged and not implausible. His symptoms were sufficient for him to seek medical treatment. Dr Di Mascio and Dr Ireland were satisfied that an aggravation had occurred in the manner alleged by Mr Kumar. In these circumstances and given that Dr Wallace did not address the proper question, the compelling conclusion is that Mr Kumar's right shoulder symptoms in June 2010 resulted from his accepted back injury.

She adopted the decision of Snell DP in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 (*Brennan*), that *"…it is sufficient to find (if the evidence supports it) a condition that results from an employment injury."* She held that Dr Patrick's failure to make a diagnosis was not a basis for rejecting his evidence or the appellant's claim. She stated:

> 143. The factual basis upon which his opinion rested was uncontroversial. Further, there was no evidence to contradict that of Dr Patrick. As a general proposition, a decision maker is not obliged to accept evidence on the basis that there is no evidence to the contrary. However, the evidence was consistent with the historical medical evidence and Mr Arquero's statement evidence. It was not inherently incredible and provided a logical basis on which the necessary causal connection could be established.

Wood DP upheld grounds (1) and (4) because the arbitrator considered an irrelevant consideration (no diagnosis) and failed to consider material evidence and her error materially affected the outcome. She revoked the COD and re-determined the issues and found that nothing turned on the absence of corroborative evidence of left knee symptoms.

She distinguished this matter on its facts from those in *Morarty-Baes* and held that the left knee condition is consequential to the injury to the right knee. She remitted the matter to the Registrar for referral to an AMS to assess permanent impairment of both legs.

WCC - Medical Appeal Panel Decisions

Demonstrable error – AMS did not set out path of reasoning that led to him disregarding complaints of right lower extremity assessment when assessing lumbar spine, but the assessment rating was appropriate

Pan v Hygrade Printing Trade Services Pty Ltd [2019] NSWWCCMA 9 – Arbitrator Catherine McDonald, Dr G McGroder & Dr B Noll – 10 January 2019

Background

On 30 October 2000, the appellant injured his neck and right shoulder in a MVA. On 11 March 2003, Terms of Settlement were filed in Compensation Court proceedings that awarded compensation under s 66 WCA for 15% permanent impairment of the beck and 5% permanent loss of efficient use of both arms at or above the elbow.

On 21 September 2018, an arbitrator determined that the appellant suffered an aggravation of a pre-existing condition in his lumbar spine because of a gym program that he performed for rehabilitation purposes. The matter was referred to an AMS for assessments under the Table of Disabilities for the neck, back and both arms and WPI (cervical and lumbar spines and both upper extremities (shoulders) for threshold purposes). On 12 November 2018, a MAC assessed 10% WPI (comprising 6% WPI cervical spine, 0% WPI lumbar spine and 2% WPI of each upper extremity).

The appellant appealed under ss 327 (3) (c) and (d) WIMA and the Registrar referred the appeal to a MAP, which decided to determine the appeal on the papers.

Appellant's submissions

The appellant argued that the AMS applied incorrect methodology in assessing impairment of the upper extremities and lumbar spine, because he used *"an analogous condition of impingement instead of the range of motion method"* and the Guidelines only permit an AMS to modify the impairment rating when the evidence appears insufficient to verify that impairment of a certain magnitude exists. In relation to the lumbar spine, he argued that the AMS should have assessed DRE Lumbar Category II and the Category I assessment is inconsistent with the past award for 15% permanent impairment of the back.

Respondent's submissions

The respondent argued that para 2.5 of the Guidelines permits an AMS to abandon the range of motion method "if he described and explained his reason(s) for doing so". Further, an assessment under Category I does not mean that there are no clinical findings and the AMS explained why he applied that rating. He did not make a demonstrable error.

Appeal decision

The MAP held that the AMS correctly applied the Guidelines. There was a clear inconsistency in the range of motion observed and the AMS alerted the appellant to it. He observed abnormal illness behaviour and a range of motion that was inconsistent with tendinosis and internally inconsistent. He gave a clear explanation of his reasons for not assessing the upper extremities based on range of motion and the Guidelines permit this. Therefore, the assessment of the upper extremities does not disclose an error. In relation to the lumbar spine, the MAP held that the AMS conducted all appropriate clinical tests but did not fully set out the path of reasoning that led him to disregard the appellant's

complaints of right lower extremity pain. It held that the symptoms complained of were not explicit enough to fulfil the criteria for a non-verifiable radicular complaint and there was no inconsistency between the assessment of 0% WPI and the previous award under the Table of Disabilities, as the WPI assessment is based on specific criteria and does not take account of pain or the impact on activities. It therefore confirmed the MAC.

Matter remitted from NSWSC for determination according to law following judicial review - Section 323 WIMA deductible for psychological injury

Broadspectrum (Australia) Pty Ltd v Wills [2019] NSWWCCMA 13 – Arbitrator John Wynyard, Dr J Parmegiani & Dr N Glozier – 23 January 2019

Background

The facts of this matter were reported in Bulletin no. 22. However, Harrison AsJ set aside a decision of the previous MAP because of jurisdictional error and remitted the matter to the WCC for re-assessment by an AMS.

On 25 September 2018, A/Professor Robertson issued a MAC that assessed 22% WPI, but he applied a deductible of 1/10 under s 323 WIMA. The insurer appealed under ss 327 (3) (c) and (d) WIMA and the Registrar referred the appeal to the current MAP, which conducted a preliminary review and decided to determine the appeal on the papers.

Appellant's submissions

The appellant argued that *'an avalanche'* of medical evidence demonstrated that the worker required ongoing treatment for a pre-existing condition when the injury occurred.

Worker's submissions

The worker conceded that she suffered prior psychiatric conditions but argued that she was asymptomatic when the injury occurred.

Appeal decision

The MAP held that the AMS identified pre-existing conditions (as defined by s 323 (1) WIMA) and s 323 (2) WIMA did not apply because he canvassed the medical evidence in a comprehensive and accurate summary. It held:

> 49. However, the authorities require that all the evidence be considered in the assessment of the appropriate deduction pursuant to s 323. It is erroneous to rely on assumption or hypothesis to formulate such an assessment…

The MAP applied a deductible of 20% under s 323 WIMA. It revoked the MAC and issued a fresh MAC that assessed 18% WPI (rounded) because of the injury.

WPI assessment based on range of motion – AMS did not err in failing to diagnose Chronic Regional Pain Syndrome

Walker v Bega Cheese [2019] NSWWCCMA 10 – Arbitrator Jane Peacock, Dr D Dixon & Dr R Fitzsimons – 10 January 2019

Background

On 20 July 2018, a MAC assessed 7% WPI (right upper extremity). However, the appellant appealed against the MAC under ss 327 (3) (c) and (d) WIMA. He complained that AMS failed to diagnose CRPS and should have permanent impairment on that basis. The Registrar referred the appeal to a MAP, which decided to determine it on the papers and that no further medical examination was required.

Appeal decision

The MAP noted that the AMS reported that the appellant's right had had no vasomotor changes, no sudomotor changes, no nail changes and no hair growth changes, but there were tropic changes (joint stiffness and decreased passive motion). He considered that the radiological changes were not consistent with CRPS and that as there were less than 8 signs of CPRS, the appellant had not suffered CRPS. He considered the available medical evidence and discussed it in his reasons.

The MAP held that the fact that other experts diagnosed CRPS is not determinative of that issue as that condition can resolve. The role of the AMS is to conduct an independent assessment on the day of the examination and he is entitled to rely on his clinical findings and is required to exercise his clinical judgment and expertise in making an assessment as per the Guidelines. Chapter 17 is relevant to CRPS. Based upon the AMS' clinical findings, he could not diagnose CRPS and there was no error in the assessment. Accordingly, it confirmed the MAC.

Injuries to lumbar spine, left hip and knee – Assessment of deductible under s 323 WIMA where there is evidence of prior injuries – Assessments set out in the impairment table did not reconcile with the AMS' reasons – Recommendation that the AMS should reconsider the MAC to clarify the impairment assessments

Cole v Rose Brown Pty Ltd [2019] NSWWCCMA 14 – Arbitrator Gerard Egan, Dr B Noll & Dr M Gibson – 25 January 2019

Background

On 10 June 2009, the appellant injured her lumbar spine, left knee and hip at work. She had a prior history of injury as follows: (1) In 1997 she injured her pelvis, right femur and right knee and suffered shortening in her right leg and an altered gait, which caused back pain, because of a MVA; (2) On 15 March 1980, she aggravated the previous injuries because of a MVA; (3) In 1998, she became eligible for a part Disability Support Pension because of chronic lower back pain, arthritis, depression and PTSD; (4) In 1990, a stress fracture of the right tibia was diagnosed; (5) On 18 March 2002, she underwent a right total knee replacement; and (6) On 16 April 2009, her treating specialist stated that left total hip replacement surgery may be required in the future. On 3 June 2010, the appellant underwent left partial medial menisectomy and chondroplasty and on 15 February 2010, she underwent left total hip replacement.

In 2012, a dispute under s 66 was referred to an AMS and a MAC issued on 19 November 2012, which assessed combined 14% WPI (comprising 20% WPI for the left hip less a deductible of 1/3 under s 323 WIMA and 1% WPI for the left knee). On 20 September 2017, she made a further claim under s 66 WCA, but the respondent disputed the claim for the lumbar spine.

That dispute was referred to an AMS (Dr Yiu-Key Ho) and a MAC issued on 5 November 2018, which assessed combined 17% WPI (comprising 4% WPI for the lumbar spine (8% less a deductible of ½) and 14% WPI for the left hip (21% WPI less a deductible of 1/3)). However, the AMS also expressed a separate assessment of 21% WPI for the left lower extremity, referred to a table in AMA5 that only applies to hip replacements, applied a 1/3 deductible under s 323 WIMA and assessed 14% WPI (left lower extremity (knee)) as a separate item. The Table of Assessments included 13% for the left hip (20% less 1/3 deductible) and 4% for the lumbar spine (7% less ½ deductible) but stated that these were combined by consolidating "14% and 4%".

The appellant appealed against the MAC. The Registrar referred the appeal to the MAP, which decided the appeal on the papers without conducting a further medical examination.

Appeal decision

The MAP found an obvious error in the Table of Assessments, which cannot stand with the AMS' reasons, but as the respondent had not appealed against that error it has difficulty in dealing with it based upon the decision of Davies J in *New South Wales Police Force v Registrar of the Workers Compensation Commission* [2013] NSWSC 1792, *The UGL Rail Services Pty Ltd (formerly United Group Rail Services Pty Ltd) v Attard* [2016] NSWSC 911, and *Wilkinson v C & M Leussink Pty Ltd* [2015] NSWSC 69.

However, the Registrar has power under s 325 (3) WIMA to correct an obvious error if he is satisfied that the MAC contains one. The MAP stated:

> 70. Neither party has raised the lack of specific reference to the "Left Lower Extremity (knee)" in the referral to the AMS, it appears that both parties accept that was what was referred. It appears that ultimately, this has caused the AMS to express Table 2 in the manner that he has, without express reference to the left knee. He has clearly expressed the WPI impairments (as required by the current format of Table 2) from the Left Lower Extremity (hip) as 13% WPI, and separately the combined WPI for the Left Lower Extremity of 14%. This combined total, read with the Reasons, is obviously the result of the combined left hip and left knee impairments.
>
> 71. The Panel considers the appellant's submissions involve a misreading of the MAC. It is clear, on the face of the MAC Reasons that the AMS only identified the low back and left hip to be subject to deduction under s 323.
>
> 72. When assessing left LEI, he applied the uncontested one-third deduction to the left hip to the total 50% LEI, resulting in 34% LEI.
>
> 73. The AMS also assessed the left partial medial meniscectomy, attracting 2% LEI. He combined this with the injury related 34% LEI (as he was bound to do before converting to WPI), making 35% LEI. Applying Table 17-3 of AMA 5, p 527, 35% LEI equates to 14% WPI, before combining the relevant value for the lumbar spine impairment.
>
> 74. Although the appellant purports to adopt the combined impairment from the Left Lower Extremity as the assessed impairment for the left knee alone, there is no challenge to the total WPI certified in Table 2, which clearly does not combine all the itemised impairments in the Table.
>
> 75. The Panel considers the ground of appeal to be misguided and it fails. However, the expression of the impairments in Table 2 is problematic, as the Table does not provide for the expression of two Lower Extremity impairments where one is subject to a deduction (as LEI) before being combined with another LEI not subject to deduction.

The MAP confirmed the ½ deductible for the lumbar spine and the combined assessment of 17% WPI, but it suggested that the Registrar should ask the AMS "to re-express the assessments for the left hip and knee, making it clear that, consistent with his reasons, the was no deduction from the 2% LEI assessed for the left knee".

Cardiovascular system – assessment of s 323 WIMA deduction where underlying Coronary Artery Disease contributed to the need for a heart transplant

Veljanoski v Core Civil Comm Pty Ltd [2019] NSWWCCMA 17 – Arbitrator Jane Peacock, Dr D Crocker & Dr M Burns – 7 February 2019

Background

On 19 October 2018, the appellant appealed against a MAC, which assessed 30% WPI but applied a deductible of 1/10 under s 323 WIMA, under ss 327 (3) (b), (c) and (d) WIMA. The Registrar referred the matter to the MAP, which determined the appeal on the papers without conducting a further medical examination and admitted fresh evidence in the appeal by consent.

The appellant argued that the AMS wrongly assessed class 3 impairment under Table 3.9 of AMA5 and should have assessed class 4 (50% to 100% WPI), but he also complained about the overall impairment assessment and the deductible proportion under s 323 WIMA. The respondent also sought to cavil with those matters.

The MAP held that the AMS took a history, conducted a clinical examination and exercised his judgment on the day of the assessment and applied correct assessment criteria. He did not have results of the stress test but took a history of it being undertaken and the results and the Guides do not mandate the use of the stress test in undertaking a WPI assessment. Therefore, the AMS did not err and the MAP held:

> 29. Contrary to the appellant's submission, the assessment of Class 4 (Table 3.9) (functional Class III or IV from 3.1) is precluded by the results of the Echocardiography which show excellent result from the transplant…
>
> 30. The respondent submitted that a Class 2 impairment should have been applied. However, this would require the appellant to be asymptomatic. This is not the case on the history taken by the AMS…
>
> 32. The panel notes that neither party has cavilled with the assessment of 30% within the range that is available in Class 3, the argument of each party on appeal was only in respect of the assessment of the correct class.

In relation to the deductible under s 323 WIMA, the MAP held, relevantly:

> 35. …All of the available evidence must be taken into account and the question is the extent to which the pre-existing condition has contributed to the level of permanent impairment assessed. The level of permanent impairment assessed is based on the heart transplant undergone by the appellant after injury to a diseased heart. Both the underlying significant CAD and the injury have contributed to need for the heart transplant and hence the level of permanent impairment assessed. The underlying CAD must be taken into account when assessing the level of permanent impairment as a result of the injury on 18 October 2012 and a deduction made under s 323. The appellant's own IME Dr Haber considered it appropriate to take the pre-existing condition of the heart into account by making a deduction of one-tenth to his assessment…

The MAP upheld the deductible of 1/10 under s 323 WIMA and confirmed the MAC.

WCC – Arbitrator Decisions

Heart Attack –Takotsubo Cardiomyopathy is a heart attack within the meaning of s 9B WCA because employment gave rise to a significantly greater risk of injury

Granger v NSW Police Force [2019] NSWWCC 28 – Arbitrator Michael Perry – 7 December 2018

Background

The worker was employed by the respondent as an administrative support officer at the NSW Police Academy. She was diagnosed with Takutsobo Cardiomyopathy on 1 June 2017 and claimed compensation, but the respondent disputed the claim.

Arbitrator Michael Perry determined liability issues, based upon written submissions and he identified the main issues as: (1) Whether the worker had suffered a heart attack within the meaning of s 9B WCA? and, (2) If 'yes', whether the nature of her employment with the respondent gave rise to a significantly greater risk to her suffering the injury.

In relation to (1), the arbitrator held that the worker suffered a heart attack within the meaning of s 9B WCA. He construed the term "heart attack injury" broadly held that any *"fibrillation"*, whether atrial or ventricular or otherwise, comes within the definition of *"heart attack injury"*, and the reference to *"any consequential physical harm or damage"* in s 9B (2) (n) does not require permanent or serious harm.

In relation to (2), the arbitrator stated:

> 74. In the result, I find that the general nature of the applicant's duties was predominantly administrative & student-oriented, working on a student enquiry counter, or reception, addressing questions from students, or referring them to someone who could help and providing administration support to police teaching staff, including ordering stationery, mail collection & distribution and other similar activities. But in terms of "*what the worker in fact does*", it is also relevant to include the fact that she was working in the performance of these duties as a civilian employee under a police command structure – and under or alongside sworn police officers.
>
> 75. This then feeds into the critical question of whether the nature of the employment concerned gave rise to a significantly greater risk of the applicant suffering the TC injury, than had she not been employed in employment of that nature…
>
> 87. I have had the benefit of considering the decision in *Da Silva* in relation to this critical issue as well as the "*nature of employment"* issue. It is unnecessary to trace through the detailed analysis of the Senior Arbitrator. Suffice to say, and applying the test set out at paras. 132-133 of *Da Silva*, the question in the present case is whether the nature of the employment concerned (as I have found in paras 33-34, 48, 63, 73-74 above) gave rise to a significantly greater risk of TC occurring than had the applicant not been employed in employment of that nature.
>
> 88. There is evidence in this case to suggest that working as a civilian under a police command structure did entail working with, and under, sworn police officers of whom some at least had a tendency to "*speak directly … as … police officers speak differently. It's a way of speaking directly to get things done … just say what it is. Don't beat around the bush…"* (R111-112). I find S/C Forster was one such police officer. Inspector Kay & S/Sgt Dawes were others. The applicant's evidence (see para. 33(d) & (k) above) was not specifically traversed.

> 89. The applicant was oversensitive. This is also relevant to the comparison of the risk in s.9B (1). The other component of the nature of the employment, her uncertainty as to responsibility for roles and responsibilities, is also relevant to the nature of the employment giving rise to a significant greater risk. This is part of the stress and anxiety – or, as Dr Raftos described it, "*acute on chronic occupational stress"* leading up to 1 June 2017. The "…*chronic occupational stress"* in existence prior to 1 June 2017 was also partly to do with the combination of the applicant's sensitivities and her other, similar, interactions with S/C Forster and Inspector Kay, S/Sgt Dawes and, to a lesser extent, Snr Sgt Hardy…

Whether the worker's employment gave rise to a significantly greater risk is a matter within *"common knowledge and experience"* (*Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 at [90]; cf *Ramasamy v Rail corporation of NSW* [209] NSWWCCPD 42 at [72]). He also held that *"gave rise"* in s 9B is like the phrase *"results from"* (as discussed by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) NSWLE 421 at 461 *"… the question involves a statutory definition and an employment connection needs to be shown"*.

He concluded that if the worker had not been engaged in employment of the type described, it is less likely she would have suffered the TC episode and the nature of the employment gave rise to a greater risk that she would suffer the TC than had she not been engaged in employment of that nature. He therefore found for the worker.

Section 39 WCA – Weekly payments ceased in December 2017, but the threshold was not satisfied until July 2018 – S 39 does not apply - The worker is entitled to weekly payments from date of cessation until the date of the MAC

Hochbaum v RSM Building Services Pty Limited [2019] NSWWCC 31 – Arbitrator Josephine Bamber – 7 January 2019

Note: This decision is currently still under appeal

Background

The worker injured his right leg at work on 1 September 2000. On 2 August 2017, the insurer issued a notice under s 39 WCA, based upon an assessment of 5% WPI from an IME. On 6 April 2018, the worker's solicitors served an assessment of 49% WPI from Dr Patrick upon the insurer, but the insurer disputed liability for "a number of" the assessed body parts.

On 19 June 2018, ***Arbitrator Josephine Bamber*** conducted a conciliation conference and the parties agreed that the threshold dispute should be referred to an AMS for assessment of the right lower extremity (ankle & Achilles tendon), scarring and consequential conditions of the right upper extremity (wrist) from a fall in June 2012 and the lumbar spine.

On 16 July 2018, a MAC assessed 21% WPI and the insurer agreed to recommence weekly payments from that date, but the worker claimed weekly payments from 26 December 2017 to 23 July 2018 at the rate of $839.29 per week. The insurer disputed the entitlement to weekly payments during that period.

The insurer conceded that it made a work capacity decision *"at some point in 2017"* and that the worker was entitled to continuing weekly payments under s 38 WCA. Further, if the worker's interpretation of s 39 WCA was accepted, the Commission had power to make an award of weekly payments during period claimed.

The respondent relied upon the decision of arbitrator McDonald in *Taumololo.* However, the arbitrator held that she is not bound to follow that decision and that it did not assist her to determine this dispute. She stated (citations excluded):

> 34. I agree with Arbitrator Sweeney in *Kennewell v ISS Facility Services Australia t/as Sontic Pty Limited (Kennewell)* wherein he found that section 39 *"does not provide an entitlement to compensation or enact the means by which compensation is to be ascertained. Rather, it limits the period during which compensation is to be paid pursuant to s 38…"* In this sense, it is my view that section 39 is not a "gateway" provision, but a limiting provision. If one wishes to use the language of a "gateway provision", it would apply to section 38 not 39. A worker needs to have proceeded through the "gateway" in section 38 to get to a point where he has received 260 weeks of weekly compensation, because it is section 38 which governs the entitlement to weekly compensation after 130 weeks. So, every worker to which section 39 will apply, should have necessarily been assessed by the insurer as being entitled to weekly compensation under section 38.

The arbitrator referred to the High Court's statements in *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 and to *Hesami v Hong Australia Corporation Pty Limited* [2011] NSWWCCPD, in which DP Roche summarised the principles of statutory interpretation that the Court of Appeal considered in *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198. She also referred to the High Court's decision in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41 and stated:

> 41. While Arbitrator Sweeney in *Kennewell* was primarily concerned with construing clause 28C of Schedule 8 of the Regulation, his finding in [51] that once section 39 does not apply there is no temporal restriction on the applicant's entitlement to compensation does seem consistent with an examination of the text of the provision. The wording of section 39 (2) is quite plain, in my view. It allows for no ambiguity. It provides that "This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%". Here Mr Hochbaum submits he is such an injured person as his injury has resulted in permanent impairment of 21% WPI.
>
> 42. I agree with, and adopt the reasoning of, Arbitrator Sweeney that the language of section 39 does not have a temporal component. It does not contain temporal embargoes such as appear in other parts of the workers compensation legislation, for example in sections 59A(2), (3) and (4) of the 1987 Act. Had the Parliament wished to limit payments to workers, such as Mr Hochbaum, from week 260 until after they had an assessment of greater than 20% WPI, the Parliament could have so provided.
>
> 43. Quite simply if a worker is assessed at greater than 20% WPI, section 39 does not apply to that worker. Therefore, if it does not apply, Mr Hochbaum has an entitlement to weekly compensation benefits, subject to the operation of section 38. As noted earlier in these reasons, the insurer has already recommenced payments to Mr Hochbaum from the time of the MAC.

The respondent argued that *Kennewell does not apply to this matter as it concerned* cl 28C of the 2016 Regulation, but the arbitrator held that arbitrator Sweeney dealt with the respondent's temporal arguments regarding the operation of 39 WCA and she agreed with his analysis. Therefore, s 39 WCA does not apply and she awarded the worker weekly payments from 26 December 2017 to 15 July 2018 *"consistent with the work capacity decision previously made by the insurer"*.

Provision of company t-shirt to claimant and the fact that the respondent accompanied the claimant to hospital suggested an employment relationship

Daoud v RAF Constructions Pty Limited [2019] NSWWCC 44 – Arbitrator Paul Sweeney – 17 January 2019

Background

The applicant injured his left wrist, right knee and low back on 24 January 2015, but he also alleged injuries to his thoracic spine and right hip. He claimed weekly payments, s 60 expenses and lump sum compensation under s 66 WCA.

The first respondent was uninsured. It disputed that the applicant was a worker and that he properly claimed compensation. The Nominal Insurer (second respondent) disputed that the applicant was a worker or a deemed worker, the injuries alleged, incapacity and the entitlement under s 66 WCA.

Arbitrator Paul Sweeney conducted arbitration hearings on 29 August 2018, 1 November 2018 and 10 December 2018. He discussed the evidence in detail and described the applicant and Mr Hadchiti (proprietor of the first respondent) as "unimpressive witnesses" but he ultimately preferred the applicant's evidence. He stated:

> 99. Then, there is the issue of the company T-shirt which the witnesses agree Mr Hadchiti provided to the applicant. There is little specificity about this evidence. However, I do not accept Mr Hadchiti's evidence that he provided the applicant with a company T-shirt so that he could promote the company by wearing it in the local community. The provision of a company T-shirt is suggestive of a relationship of employment between the applicant and the first respondent. Certainly, it would not, standing alone, prove such a relationship but in the context of the evidence, it carries some weight. So, does the actions of Mr Hadchiti, following the applicant's injury, in accompanying him to the hospital. I may be underestimating Mr Hadchiti's charitable nature, but his travelling to hospital with the applicant is evidence, however slight, from which a relationship of employment might be inferred by the Commission…
>
> 105. Ultimately, I have reached the conclusion on the probabilities, that the evidence of the witnesses, who state that they did not see the applicant must be explained on the basis that he was only on the site for short periods of time on each of the three days that he worked. I have reached this conclusion because I find the other evidence touching on the issue of employment compelling. That evidence, in my opinion, requires a conclusion that the applicant was employed on the day of his injury.

The arbitrator held that the applicant injured his left wrist (with consequential scarring), right knee and low back, but did not injure his thoracic spine or right hip. He assessed PIAWE as $500 per week and found the applicant had no current earning capacity from 24 January 2015 to 15 March 2015 and that he was able to earn $330 per week from 16 March 2015 to 23 July 2017. He awarded weekly payments under s 36 WCA from 24 January 2015 to 23 April 2015 (at specified rates) and under s 37 WCA from 24 April 2015 to 23 July 2007 at the rate of $70 per week. He ordered the first respondent to pay medical and related treatment costs under s 60 WCA and remitted the s 66 dispute to the Registrar for referral to an AMS. He also made an order against for payment of compensation by the second respondent under s 154D WCA.

Psychological injury – s 11A WCA defence fails

Dinning v Westpac Banking Corporation [20219] NSWWCC 49 – Arbitrator John Isaksen – 25 January 2019

Background

The worker alleged that in 2011, she felt harassed and bullied and experienced constant put-downs in relation to her job performance, but she had no significant issues with her manager before 2017. From February 2017, she was subjected to constant targeting by her manager, which culminated in a meeting on 19 April 2017, when her manager aggressively questioned her in relation to her work for about 2 hours. She ceased work in late April 2017, because of a psychological injury, and claimed compensation. However, the respondent disputed the claim and relied upon s 11A WCA (performance appraisal and discipline). The worker filed an ARD claiming weekly payments and s 60 expenses, but she discontinued the weekly payments claim at arbitration.

Arbitrator John Isaksen determined the liability issues as follows:

> *"Performance appraisal"*

He cited the decision of Geraghty J in *Irwin v Director General of School Education (18 June 1998 – unreported),* that *"performance appraisal"* seems to be *"… a rather precious and precise expression. It is framed within the context of other processes like "transfer", "demotion", "promotion", retrenchment or dismissal" of workers. It must be seen in this context. Furthermore, performance appraisal is a process, an established process involving various steps. Perhaps it will involve the completion of questionnaires and forms. It requires discussion between various parties about performance, written appraisal, sometimes even self-appraisal, maybe even a score. It is a process in which parties are engaged and knowingly engaged."* Geraghty J also stated:

> Performance appraisal is not a vague, continuing, informal process which begins on the first day of employment although, in a sense, we can say that we are continually under scrutiny and being appraised in somewhat the same way as students in a classroom are being scrutinised on a day-to-day basis. But "performance appraisal" is somewhat like an examination, not a continuing assessment. Performance appraisal is more like a limited discreet process, with a recognised procedure to which the parties move in order to establish an employee's efficiency and performance.

Further, in *Bottle v Wieland Consumables Pty Limited* [1999] NSWCC 32, Neilson J held that "performance appraisal", *"… is putting an estimate of value (that is monetary value) upon the work being performed by the employee."* Also, in *Smyth v Charles Sturt University* [2007] NSWWCCPD 184, DP Byron described this as *"… a process almost by definition."*

The arbitrator was not satisfied that the events between 10 March 2017 and 19 April 2017 amounted to performance appraisal and he held:

> 101. There were meetings occurring but they were in response to managerial issues that arose from the applicant's work. There was no formal process put in place where by the applicant knew there was a set of guidelines to follow which she could recognise as an appraisal of her work performance…
>
> 107. I consider that what occurred between 10 March 2017 and 19 April 2017 was a "vague, continuing, informal process" (*Irwin*), recognised as such by Ms Strickland and Ms Feher, and which dealt with managerial issues which the respondent needed to address with the applicant. By 19 April 2017 there was not a limited, discrete process with a recognised procedure that both the applicant and the respondent

understood would amount to performance appraisal. I am therefore not satisfied that the applicant was the subject any action taken or proposed to be taken by the respondent with respect to performance appraisal pursuant to section 11A of the 1987 Act.

108. Even if what occurred between 10 March 2017 and 19 April 2017 is regarded as performance appraisal, I do not consider such action by the respondent to have been reasonable…

111. Applying an objective test, it was not reasonable for the respondent to embark on an appraisal of the performance of the applicant without putting in place a process with a recognised procedure for such appraisal to occur.

The arbitrator was also not satisfied that the worker was the subject of any action taken or proposed to be taken by the respondent with respect to discipline. He held that the deemed date of injury is 19 April 2017 and ordered the respondent to pay reasonable medical and related treatment expenses under s 60 WCA.

Arbitrator refuses insurer's recusal application based upon apprehended bias

Marion Ewins v CSR Limited [2019] NSWWCC 48 – Arbitrator John Harris – 23 January 2019

Background

The background to this matter was reported in Bulletin no. 27. However, during a further teleconference on 7 December 2018, the respondent's solicitor stated that he *"may be making a recusal application"* and sought an oral hearing. The arbitrator ordered that any such application and written submissions should be filed by 21 December 2018.

On 20 December 2018, the respondent's solicitor filed a recusal application based upon alleged "apprehended bias". He alleged that the arbitrator *"entered into the arena"* on 9 October 2018, regarding the amendment of the ARD and that he made the application to amend it (on behalf of the worker). He also relied upon *"a hearsay representation purportedly made by the respondent's employee to their legal representative during the hearing to the following effect: Why is the arbitrator now conducting the case for the applicant?"* He also referred to *"a series of both expressed and implied criticism of the respondent and its representatives were (sic) those criticisms were not raised prior to the Statement of Reasons issues and no opportunity has been given to the respondent to address any such criticisms"* and complained that the respondent was denied opportunities for an oral hearing and to cross-examining the worker.

The worker opposed the application.

Arbitrator John Harris noted that the principles concerning apprehended bias arising from a decision of a Deputy President were discussed by Basten JA in *Inghams Enterprises Pty Ltd v Belokoski (Belokoski)* [2017] NSWCA 313, in which his Honour stated (citations excluded):

15. There was no dispute as to the relevant legal test. As explained in Johnson v Johnson, the question is "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide." It was not submitted that a different test should apply to the Deputy President of the Commission, although it was accepted that the application of the test must have regard to the statutory function of an arbitrator and the role played by a Deputy President on an appeal.

16. Although the test of apprehended bias is relatively relaxed in its terms, care must be taken in its application in two respects. First, as noted in Livesey v New South Wales Bar Association: 'If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of prejudgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court.' …

18. The second matter of principle is encapsulated in the second finding made by the Deputy President relating to the logical connection between the basis of the apprehension and the nature of the proceedings from which recusal is sought. In *Michael Wilson & Partners Ltd v Nicholls*, the joint reasons in the High Court stated:

> In *Ebner v Official Trustee in Bankruptcy*, the plurality pointed out that application of the apprehension of bias principle requires two steps. First, it requires the identification of what it is said might lead the judge to decide a case other than on its legal and factual merits. And secondly, there must be an articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits. ... [T]he bare assertion that the judge appeared to be biased through prejudgment would be of no assistance without articulation of the connection between the events giving rise to the apprehension of bias through prejudgment and the possibility of departure from impartial decision making.

The arbitrator did not accept that the respondent's hearsay representation accords with that of the fair-minded lay observer and that it is inconsistent with his previous findings. The Commission also has a wide discretion to adopt the appropriate procedure for a particular case: *South Western Sydney Area Health Service v Edmonds (Edmonds).* He also stated:

32. Consistent with well settled authority set out earlier herein, the respondent is required to show *"a logical connection between the basis of the apprehension and the nature of the proceedings from which recusal is sought."*

33. The respondent made no submissions directed to this point, despite the fact that the respondent's solicitor who drafted the submissions, acted in *Belokoski*.

He confirmed that his reasons to date have addressed interlocutory matters and he has not determined any substantive issues and the respondent has not exercised any right of appeal against those previous rulings. He concluded:

38. However, none of these matters are relevant to the issues for consideration at the hearing. I cannot see any connection and no submissions were made by the respondent suggesting any logical connection between my conduct and the possibility of departure from impartial decision making.

He therefore refused the application.

Worker not disentitled to weekly compensation by reason of the former s 52A (4) WCA where there was significant deterioration in the worker's condition since previous proceedings in the Compensation Court (in 1999) and WCC (in 2010) – WCC has jurisdiction to determine the ARD

Odzic v Watt Export Pty Ltd [2019] NSWWCC 42 – Arbitrator Michael Perry – 16 January 2019

Background

On 12 February 1999, the worker injured his knees and right arm because of a fall. On 4 September 2018, he claimed weekly payments from 21 June 2002 to 13 May 2017 and s 60 expenses for alleged injuries to the right arm, wrist, forearm and elbow, the left leg and knee, right hip and knee (in the alternative secondary injuries to the right hip and knee) and secondary depression.

There have been previous proceedings and awards as follows:

(1) Compensation Court 10470 of 1993 – Grayson C awarded: (a) Section 66 WCA - 15% permanent loss of efficient use of the left leg at or above the knee; (b) Previous s 37 WCA (total incapacity) from 20 October 1990 to 31 December 1991; and (c) Previous s 40 WCA - continuing from 1 January 1992 at the rate of $100 per week.

(2) Compensation Court 10470/963(1) – Consent award under s 66 WCA for a further 5% permanent loss of efficient use of the left leg at or above the knee and 5% permanent loss of efficient use of the right arm at or above the elbow.

(3) Compensation Court 49479/1999 –Wright C awarded: (a) weekly payments under s 40 WCA from 1 April 1998 to 5 December 2000 to $190 per week but found that s 52A WCA then applied; and (b) Section 66 WCA - a further 10% permanent loss of efficient use of the left leg at or above the knee. However, he was not satisfied that the worker had proved a work-related condition in his right leg.

(4) WCC 1664/15 – COD (MAC dated 28 May 2015) – Section 66 WCA for a further 10% permanent loss of efficient use of the left leg at or above the knee and a further 15% permanent loss of efficient use of the right arm at or above the elbow.

The worker sought a review of the award of weekly payments under s 55 WCA (which was repealed in 2012) and s 350 (3) WIMA and alleged that he has been totally incapacitated since 21 June 2002. However, he conceded that the Commission lacks power to award weekly payments after 31 December 2012. Both parties filed written submissions, which are summarised below:

Respondent's submissions

The respondent argued that Wright C's determination that s 52A WCA applied (see (4) above) was a final decision of the previous Court and ended the worker's entitlement to weekly payments.

Section 55 WCA provided, *"…any weekly payment of compensation may, because of a change in circumstances, be reviewed by the Commission at the request of the … worker …",* but this was repealed in 2012, and the transitional provisions do not assist the worker as he was not an existing recipient of weekly payments immediately before 1 October 2012. The section depended upon *"any weekly payment of compensation"* being in existence and there was none. It also argued that the Commission lacks power to reconsider Wright C's decision under s 350 (3) WIMA.

Worker's submissions

The worker argued that the transitional provisions preserved s 55 WCA for the reasons provided by Arbitrator Josephine Snell in *Alexandrou v ANI* [2014] NSWCCR 136, but he did not press his reliance on s 350 (3) WIMA. He argued that s 52A WCA does not apply because he had become totally incapacitated and while Wright C's award was binding, it was directed entirely to past events.

Arbitrator Michael Perry held that s 55 WCA was not available because there was no weekly payment at any relevant time and it was not necessary to consider whether it was saved for the reasons set out in *Alexandrou.* However, s 52A (4) WCA applied and this provided, relevantly *"…the fact that the worker becomes totally incapacitated for work after the relevant time does not affect the operation of this section in respect of partial incapacity for work … this section does not affect any entitlement to compensations under this Act in respect of any period of total incapacity for work…"*

He also held that an inconsistency between Wright C's findings and those made in the current matter does not bring about an estoppel and that he was *"more than comfortably satisfied"* that the worker had become totally incapacitated (based upon the matters referred to in s 43A WCA) since at least 2 November 2010. He awarded the worker weekly payments under the previous s 37 WCA from 2 November 2010 to 31 December 2012 at the indexed rate for a single worker and made a general order under s 60 WCA.

Accepted injury to left knee - Alleged consequential injury to right knee – Causation of consequential condition – award for the respondent for alleged tight knee injury

John Panuccio v DMB Holdings Pty Ltd (de-registered) [2019] NSWWCC 57 – Arbitrator Deborah Moore – 5 February 2019

Background

The worker was the working Director of the respondent company. On 26 October 2004, he injured his neck and left shoulder at work and the insurer accepted liability. In March 2007, the parties entered into a Complying Agreement that awarded compensation under s 66 WCA for 8% WPI (comprising 5% for the cervical spine and 3% for the left lower extremity (knee).)

On 6 November 2018, the worker filed an ARD claiming compensation under s 66 WCA for permanent impairment of the cervical spine, lumbar spine, left upper extremity (shoulder) and both lower extremities (knees) and he alleged that the right knee injury was consequential to the left knee injury. The insurer disputed injury to the right knee.

Arbitrator Deborah Moore accepted the worker's evidence regarding symptoms in his right knee but found that these were not a consequence of his left knee injury. Her reasons are summarised as follows:

- There was consistent medical evidence that the right knee symptoms were "probably part of the wear and tear with ageing, precipitated by his labour-intensive work in his youth as a fishmonger";
- The worker's medical specialists appear to have "simply assumed" that the worker was either limping or in some way favouring his injured left knee and that this was the only explanation for the right knee symptoms. However, "assumptions are not evidence" and there was very little objective evidence to support this proposition;

- The test for a consequential injury is less stringent than that under s 4 WCA, as stated by DP Roche in *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8, quoting Kirby P in *Kooragang Cement Pty Ltd* v Bates (1994) 35 NSWLR 452:

  > Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act…
  >
  > The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain.

- A common sense evaluation of the causal chain suggests that it was the progressive development of well-documented osteoarthritic and degenerative changes in the right knee that were responsible for the symptoms, which more likely than not occurred in about 2014. There do not appear to be any complaints of limping or altered gait at that time.
- In *Moriarty-Baes v Office Works Super Stores Pty Ltd* [2015] NSWWCCPD 28, Roche DP stated (at [100]):

  > In assessing and weighing the evidence, the Arbitrator was entitled to note the lack of clear evidence from Ms Moriarty-Baes on the very issue in dispute, namely, whether, because of the injury to the left wrist, she had in fact overused her right shoulder in such a way as to cause the condition now said to be present in it. The Arbitrator's statement accurately reflected the unsatisfactory state of the lay evidence and disclosed no error.

Accordingly, she entered an award for the respondent with respect to the right knee. She awarded the worker s 60 expenses for the accepted injuries and remitted the s 66 dispute to the Registrar for referral to an AMS.

Worker or deemed worker - Equipment was largely supplied by respondent, the applicant was required to attend the respondent's premises to be transported to worksite and there was no evidence that he was running a contracting business

Zhou v Ming Guang Lin t/as Gobig Building Services [2019] NSWWCC 60 – Arbitrator John Wynyard – 7 February 2019

Background

The first respondent initially engaged the applicant to do "rendering work" in 2013. On 28 October 2017, the first respondent engaged him to do "rendering work". On 4 November 2017, after doing this work for 7 days, the applicant fell off a ladder and injured his back. However, the first respondent denied that the applicant was a worker or deemed worker and alleged that he was a contractor.

Arbitrator John Wynyard discussed the evidence in detail and held (citations excluded):

> 59. Whether in a given set of circumstances a person can be described as a worker has been the subject of considerable judicial opinion. The current approach to the problem was considered by DP Roche in *Malivanek v Ring Group Pty Ltd* and adopted by DP Wood in *Baines v Hany*. DP Wood said:
>
> > 14 Those authorities have been discussed in a number of Presidential decisions. The indicia are helpfully set out in the decision of Deputy President Roche in *Malivanek v Ring Group Pty Ltd*. The factors considered included:
> >
> > (a) the control test, and whether there were set times to work;
> >
> > (b) whether he was paid an hourly rate as opposed to a set fee, the hourly rate being indicative of an employment relationship;
> >
> > (c) the provision of tools;
> >
> > (d) deduction of income tax;
> >
> > (e) exclusivity of the relationship;
> >
> > (f) whether there was an obligation to perform the work, and
> >
> > (g) the entitlement to bring others on to the site.
>
> 60. It is not necessary to consider in detail the authorities referred to by DP Roche in *Malivanek*, or by DP O'Grady in *Mohamed*, as the circumstances of this dispute are not complex. Suffice it to say that recent authority has been concerned with more sophisticated disputes, such as the status of courier cyclists the impact of franchise agreements and other situations involving the interpretation of contractual documents and the like.

He stated that he was satisfied that the applicant was under first respondent's control and that he found the first respondent's evidence to be "disingenuous". He inferred that the transportation arrangements meant that the applicant was required to work between the hours of pick up and drop off and also stated:

> 66. With regard to the method of payment, I accept Mr Zhou's evidence in this regard also. He maintained that there was an agreement that he would be paid for $35 per hour. Mr Lin alleged on the other hand that he had an "expectation" that Mr Zhou would do the work and then invoice Mr Lin without any discussion regarding the hourly rate.
>
> 67. There are a number of problems with Mr Lin's proposition. Firstly, it is not probable that a head contractor in the position of Mr Lin, who had many subcontractors and workers at the worksite, would responsibly allow such an open-ended arrangement to occur, as no doubt budgetary considerations were of some importance to him.
>
> 68. Secondly, it is highly improbable that Mr Lin would have agreed to be invoiced in the light of his knowledge of Mr Zhou's business acumen. I found Mr Lin's statement that Mr Zhou did not know how to generate an invoice illuminating, as it brought into question the validity of Mr Lin's assertion that he had agreed that Mr Zhou would invoice him at the end of the job.
>
> 69. Thirdly, I find it implausible that no quote was ever given after Mr Lin had in fact been working for seven days. I think it more probable that he worked for a week without discussing the payment because it had already been agreed at $35 per hour. I reject Mr Feng's submission that it was simply a coincidence that Mr Lin paid a

figure that divided exactly into $35 per hour when the applicant had been working eight hours per day for seven days. I am satisfied that the sum of $1,960 was calculated upon the basis that it was a $35 per hour engagement.

The Arbitrator held that there was no evidence that the applicant engaged in any other work for any other person during the relevant period and he was satisfied that the relationship was 'exclusive'. The applicant was a worker, but if he was wrong in that conclusion, he was satisfied that he was a deemed worker under Sch 1 Cl 2 WIMA.

Accordingly, he ordered the Nominal Insurer to pay the applicant weekly payments under ss 36 and 37 WCA and s 60 expenses and he ordered the first respondent to it.

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