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UPDATES
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ISSUE NUMBER 30

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

Limitation period - property damage – Majority held that the cause of action for damages accrued when the insured event occurred

Globe Church Incorporated v Allianz Australia Insurance Ltd [2019] NSWCA 27 – Bathurst CJ, Beazley P, Ward, Meagher & Leeming JJA – 26 February 2019

Background

The plaintiff claimed against 2 insurers (Allianz Australia Insurance Ltd and Ansvar Insurance Ltd) under an Industrial Special Risks Policy (the 2008 policy) arising out of alleged property damage to a church building and its contents. The first claim was made on 29 September 2009 and both insurers denied liability.

On 4 November 2016, the plaintiff commenced court proceedings alleging that the defendants' denied indemnity (or failed to indemnify) in breach of the 2008 policy and that it had suffered loss and damage as a result. The defendants argued that the were statute barred.

On 6 September 2018, Davies J referred 2 questions of law to the Court of Appeal for determination based upon a Statement of Agreed Facts, namely:

(1) In respect of any of the alleged property damage that occurred between 8 June 2007 and 31 March 2008, which (if any) of the plaintiff's claims in these proceedings in respect of the 2008 Policy accrued at the time of alleged damage, for the purposes of s 14(1) of the *Limitation Act 1969* (NSW)?

(2) In light of the answer to (a), which (if any) of the plaintiff's claims in these proceedings in respect of the 2008 Policy for that damage are maintainable?

Bathurst CJ, Beazley P & Ward JA held that on the proper construction the 2008 policy requires the insured to be held harmless against loss as soon as the property damage arises (and to provide the additional cover and indemnity against consequential loss once such loss arises).

Their Honours stated that in *CGU v Watson,* the Court did not endorse the dicta of Giles J in *Penrith City Council* (regarding the timing of accrual of the cause of action for a breach of a contract of indemnity insurance) and the *"intermediate appellate authority that supports the defendants' position is not plainly wrong and should be followed".* This accords with the conclusions of the Full Courts of the Supreme Courts of Western Australia and Tasmania.

Further, the ratio of *Penrith City Council* was that, under a liability insurance policy, the cause of action does not accrue until the insured's liability to the third party is established (whether by judgment, settlement or adjudication). Any suggestion that there must be notification to the insurer and failure by the insurer to indemnify before liability accrues under such a policy is obiter. They also rejected the proposition that *CGU v Watson* gives rise to a conflict with the intermediate appellate authority that the defendants rely upon.

As the claim for damages under the 2008 policy accrued at the time of the property damage (no later than 31 March 2008 and the claim for damages in relation to additional costs, business interruption and professional fees accrued no later than the end of September 2009), none of the plaintiff's causes of action were sustainable. They made orders dismissing the proceedings against Allianz with costs (subject to specific costs provisions) and remitted the matter to Davies J for directions regarding their further conduct.

Meagher JA (dissenting) held that the plaintiff's claims under the 2008 policy are not statute barred and he ordered the defendants to pay the plaintiff's costs of the hearing of the separate questions and remitted the matter to Davies J.

Leeming JA agreed with Meagher JA and stated, relevantly:

> 300. On the view that I take, it is wrong to proceed from the premise that an insurer is liable in "damages" for breach of its obligation to hold its insured harmless, to the conclusion that the insurer is in breach of its promise before it has even been notified of a claim. That is the opposite of the historical position…
>
> 301. But no such broader review of the position is needed to resolve the questions referred to this Court. The answers turn on the particular contract…
>
> 302. The defendant insurers invoke a limitation defence. That defence recognises that the plaintiff's claim is for breach of contract. The insurers accepted that their defence would fail if the cause of action of their insured did not accrue until a claim was made and a reasonable time had elapsed. The insurers submitted that it was a term of their contract that they indemnify their insured immediately upon the happening of Damage, before any claim was made and indeed before either the insured or insurer was aware of the Damage. On settled principles of construction, and with all respect to those taking a different view, I do not see how that can be so. The questions should be answered as Meagher JA proposes.

Supreme Court Decisions – Judicial Review

Jurisdictional error - Judicial review of Registrar's decision – Decision set aside because the Registrar failed to consider a submission that the AMS had either not considered or had overlooked evidence

Wentworth Community Housing Limited v Brennan [2019] NSWSC 152 – Harrison AsJ – 27 February 2019

Background

On 26 January 2013, the worker suffered a psychological injury due to the nature and conditions of employment with the Plaintiff. The Registrar referred the matter to an AMS for assessment of WPI and on 9 January 2018, a MAC assessed 24% WPI.

On 7 February 2018, the plaintiff lodged an application for appeal against the decision of the AMS under ss 327 (3) (b), (c) and (d) WIMA. It alleged that the AMS: (1) failed to consider the evidence enclosed in the ARD and Reply; (2) based his opinion solely on the worker's subjective report of symptoms during the examination; and (3) failed to compare the history obtained from the worker to the evidence annexed to the ARD and Reply. It sought leave to rely upon 'fresh evidence' (reports that that it obtained as a result of an investigation regarding the accuracy of the AMS' history).

The worker opposed the appeal and objected to the plaintiff adducing fresh evidence and she argued that the 'fresh evidence' was not *"information of a medical kind or which was directly related to a question required to be made (sic) by the AMS".*

On 21 March 2018, a delegate of the Registrar refused the plaintiff's applications to appeal against the MAC and to adduce fresh evidence in an appeal. Under the heading "Availability of Additional Relevant Information", the delegate stated, relevantly:

> 8. Among the documents contained in the referral to the AMS were the Reply and the attachments to the Reply, including two surveillance reports from M&A Investigations dated 27 August 2015 and 11 October 2016, together with two social media reports of the same organisation dated 13 July 2015 and 12 September 2016. It is therefore apparent on the face of the MAC that the AMS had regard to the material placed before him, including the reports of M&A Investigations. Those reports contain evidence which is broadly consistent with that sought to be relied upon in the appeal.
>
> 19. The role of the AMS is to consider the material referred to them and to reach their own findings and conclusions based upon that material and their own assessment. The admissibility of new material in an appeal such as this is conditional on that material being not reasonably available at the time of the assessment…
>
> 21 The appellant's submission at paragraph six … is predicated on the assumption that the AMS relied solely on the respondent's version of events. On the face of the MAC this is not the case. Rather, the AMS had regard to the documentation before him and made his assessment based not only on his examination of the respondent, but also on the documentation referred to him.

Judicial review

The plaintiff applied for judicial review of the delegate's decision based upon jurisdictional error or error on the face of the record. It alleged that the Registrar erred as follows:

> Grounds (1), (2) and (3) – in not allowing the appeal, he misconstrued "additional relevant information" for the purposes of s 327 (3) (b) WIMA;
>
> Ground (4) – He misconstrued its submissions that the AMS' assessment was based upon incorrect criteria because the surveillance and social media reports contradicted the information that the AMS relied upon in completing PIRS, and his failure to allow an appeal under s 327 (3) (c) WIMA resulted in procedural unfairness and denial of justice;
>
> Grounds (5) and (6) – In dealing with demonstrable error under s 327 (3) (d) WIMA, for failing to have regard to relevant material (the surveillance and social media reports attached to the Reply and the worker's statement dated 11 August 2017); and
>
> Grounds (7) and (8) – He failed to accept the submission that the AMS did not have regard to the workers statement that contained concessions as to social and fitness activities including participation in ultra runs and staying in Manly every alternative

weekend with her partner. These concessions were not reported in the MAC, which allows an inference to be drawn (and a finding on the balance of probabilities) that the statement was not considered. As the concessions were relevant to the assessment of impairment under the PIRS, this was a demonstrable error under s 327 (3) (d) WIMA.

Harrison AsJ decided to first consider grounds (5) and (6) and she held:

> 75. It is my view that the Registrar erred when he stated that the AMS had regard to the material placed before him and that the evidence was broadly consistent with that sought to be relied upon in the appeal, in circumstances where the AMS had not referred to the discrepancy between the first defendant's evidence and the surveillance and social media reports. The Registrar offered an explanation for, rather than a consideration of, the underpinning error, which concerned whether the AMS had either failed to consider the material shown in the media posts and surveillance reports, or simply overlooked them. In my opinion, it was an error of law on the face of the record for the Registrar to not have considered the submission that the AMS had either not considered or had overlooked these reports. Accordingly, the Registrar misconstrued his statutory task under s 327(3)(d) of the *WIM Act*, and made a jurisdictional error.

Accordingly, her Honour set aside the Registrar's decision dated 21 March 2018 and remitted the matter to the WCC to be determined in accordance with law.

WCC Presidential Decisions

Alleged factual error – application of Whiteley Muir & Zwanenberg Ltd v Kerr and associated authorities

Bonica v Piancentini & Son Pty Ltd [2019] NSWWCCPD 4 – Deputy President Michael Snell – 15 February 2019

Background

In 2011, the worker claimed compensation for frank injuries to his head, neck and left shoulder on 14 November 2005 and the insurer accepted the claim. However, in 2015, he sought approval for left shoulder surgery and the insurer refused to approve it. In 2016, he sought approval for different surgery to his left shoulder and the insurer refused to approve it on the grounds that there was no work-related injury to the left shoulder and that the proposed treatment was no reasonably necessary because of an injury.

On 31 August 2018, ***Arbitrator William Dalley*** issued a COD, which indicated that the issue in dispute was whether the proposed surgery was appropriate because of the injury at work on 14 November 2005. He observed the 'relative absence' of references to the left shoulder in clinical records before 2011 and accepted that there was no complaint of any left shoulder injury to a doctor before January 2012. He noted that the injury to the left shoulder in 2005 was not sufficiently serious to require x-rays or treatment and that clinical records indicated that the right shoulder was injured and treated at that time. He also noted that the worker argued that Mildura Base Hospital *"confused the shoulders"* and he asserted that *"…he tended to say the opposite of what he meant and that he would say right shoulder when he meant left shoulder".*

The arbitrator held that the worker did not have a clear recollection of the accident and its consequences and his medical support was based on a history of continuing problems in the left shoulder from the date of the accident, which was not established on the evidence. As he was not actually persuaded that the need for surgery resulted from an injury to the left shoulder in November 2005, he entered an award for the respondent.

Appeal decision

The appellant appealed and alleged that the arbitrator: (1) Erred in law in finding that, in the absence of contemporaneous evidence of complaint or treatment, he was not satisfied that the need for surgery was causally related to the injury; (2) Erred in finding that the respondent had discharged its evidentiary onus to establish that the effects of the injury to the left shoulder in 2005 had ceased; (3) Erred in finding that there was a failure by the appellant to discharge his onus of proof, on the causal linkage between the injury in 2005 and the need for surgery, based on an absence of complaint to doctors after 2005; and (4) Failed to decide the matter in accordance with the issues in dispute in the s 74 notice dated 16 February 2017. He sought to rely upon a further statement dated 31 October 2018, but the respondent opposed leave to admit fresh evidence.

Deputy President Michael Snell conducted an oral hearing on 5 February 2019. He noted that ground 4 was not spelled out in the original three grounds of appeal, but it was raised in the submissions in support of each of those grounds and the respondent did not assert prejudice and was given an opportunity to address this at the oral hearing. He granted leave to add ground 4 and determined it on its merits.

Snell DP refused grant to rely upon the fresh evidence and he cited the Court of Appeal's decision in *CHEP Australia Limited v Strickland,* in which Barrett JA (Macfarlan JA agreeing) said:

> 27. 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…
>
> 31. … The part of s 352(6) concerning 'substantial injustice' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that 'would' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion.

In *Orca v KAB Searing Systems Pty Ltd,* Roche DP stated:

> The legal profession is reminded, yet again, that it will only be in the most exceptional case where a party will be permitted to tender on appeal evidence that, with reasonable diligence, was readily available at the arbitration. Arbitrations are not a dress rehearsal where the parties can await the outcome and then attempt to tender, on appeal, evidence that could and should have been tendered at the arbitration, as if the arbitration was merely a preliminary hearing. (emphasis in original)

In *Raulston v Toll Pty Ltd* Roche DP applied the decision in *Whiteley Muir & Zwanenberg Pty Ltd v Kerr* to an appeal that involved factual error and stated:

> (a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.

(b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the 'fact of the [Arbitrator's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.

(c) It may be shown that an Arbitrator was wrong 'by showing that material facts have been overlooked or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong.

In *Davis v Ryco Hydraulics Pty Ltd,* Keating P confirmed that these principles have been consistently applied in the Commission.

In *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*, Roche DP cited *Raulston* as follows*:*

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

Further, in *Northern NSW Local Health Network v Heggie* Sackville JA held:

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

Snell DP held that s289A (1) WIMA did not prevent the dispute (identified in the s 74 notice) being determined by the Commission and that the arbitrator: did not err in dealing with the respondent's acceptance of liability in 2011; found that the causal link had been broken and the requirement for surgery did not result from the injury to the left shoulder in 2005; dealt with the clinical material with care, his analysis of the material was properly available, and he was clearly aware of the nature of the causation issue; and did not accept that the history relied upon by the appellant's doctors was established by the evidence and by applying settled principles (*Hancock* and associated authorities), he deprived that medical opinion of weight.

He found that there was no factual error based upon the principles discussed in *Raulston* and he rejected the appellant's complaint that the respondent did not raise any issue of credit or seek leave to cross-examine him, as there is no right to cross-examine in the Commission: *Aluminium Louvres & Ceilings Pty Ltd v Zheng.* He noted that in *JB Metropolitan Distributors Pty Ltd v Kitanoski,* Roche DP stated:

> …Subject to the relevant issues having been fully and fairly ventilated in the documentary evidence, and the parties having had a reasonable opportunity to make appropriate submissions on those issues, it is open to an Arbitrator to form a view about the credit of a witness or a party even if that witness or party has not given oral evidence or been cross-examined (*New South Wales Police Force v Winter* [2011] NSWCA 330 from [81]).

Accordingly, he dismissed the appeal.

No error in exercise of discretion to exclude cross-examination – Consideration of objective evidence when witness evidence is unreliable

Dalcol v Ku-ring Gai Council [2019] NSWWCCPD 5 – Deputy President Elizabeth Wood – 20 February 2019

Background

The appellant injured his right knee at work on 20 February 2015. However, on 1 December 2016, while travelling to a rehabilitation assessment instituted by the respondent following surgery to his knee, he injured his right shoulder. He alleged that this was either consequential to the right knee injury, or was an injury arising out of or in the course of his employment or that it occurred on a journey to which s 10 WCA applied and claimed weekly payments and medical treatment expenses for that injury. The respondent disputed liability for the shoulder injury and the matter proceeded to arbitration on 21 August 2018.

Arbitrator Nick Read was not satisfied that the appellant injured his right shoulder as alleged and he entered an award for the respondent. The appellant appealed.

Appeal decision

Deputy President Elizabeth Wood determined the appeal on the papers and identified the following grounds, which depended upon acceptance of the pleaded factual matrix:

(1) The arbitrator erred in law in finding that he was not satisfied that the worker was injured as alleged; and

(2) The arbitrator erred by failing to determine, or accept, that he suffered: (a) an injury under ss 4 and 9A WCA; or (b) a consequential injury; or (c) an injury to which s 10 WCA applies.

In relation to ground (1), the appellant argued that the arbitrator should have allowed oral evidence and observed his demeanour under cross-examination before assessing his credibility. However, Wood DP held that this argument *"…failed to consider the well-established principles that were discussed by Bryson JA (Handley JA and Bell J agreeing) in Zheng"*, as follows:

> The requirements of the rules for information to be lodged in advance and for statements revealing the cases of parties to be made in advance, taken with the width of the sources of information on which the Commission is authorised to act and the ways in which it is authorised to proceed, mean that assumptions upon which common law trials are conducted should not be readily carried over when testing contentions that a hearing before an Arbitrator was not conducted in a fair way. The overall and continuing duty under s.355 to use best endeavours to bring the parties to settlement acceptable to all of them must have large influence on the manner in which proceedings are conducted. The environment of contestation and the confrontational methods of the common-law trial would not usually be appropriate; there may be issues of kinds which it is appropriate to deal with in that style, and much is left to the discretion of the Arbitrator. The Arbitrator is in a good position to decide on and to impose appropriate controls on the adduction of evidence, by cross-examination or otherwise. The Arbitrator will usually be in a position to perceive whether a wish to pursue an issue has a basis, whether it is a sound basis, whether some issue or line of questions is merely exploratory, or for that matter whether questions are merely the product of inventiveness…

> An assessment of whether the Arbitrator's decision should be set aside for want of procedural fairness is no simple matter and could not be disposed of by applying any legal tests susceptible of clear statement relating to entitlement to cross-examine an applicant, or a witness. There is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission, and decisions whether to allow cross-examination or to limit it are discretionary decisions which must be made in a context of the legislation and practices which the Commission follows, and, at least as importantly, in the context of the facts and circumstances of the case under consideration.

Wood DP held that for the appellant to successfully disturb the arbitrator's discretionary decision to deny him the opportunity to give oral evidence, he must establish that the arbitrator either: (a) made an error of legal principle; (b) made a material error of fact; (c) took into account some irrelevant matter; (d) failed to take into account, or gave insufficient weight to, some relevant matter, or (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning: *Micallef v ICI Australia Operations Pty Ltd*.

However, the appellant failed to identify any such errors and there is no obligation on a decision maker to observe the demeanour of a witness and the assessment of a witness' credibility by observations of demeanour should be treated with caution. An arbitrator is entitled to assess the credibility of the evidence before him without having it tested in cross-examination and that evidence may be rejected where it is inherently inconsistent, or where there is a credible body of evidence that contradicts it.

Wood DP held that the arbitrator made no error of fact or legal principle. He did not fail to consider a relevant matter or give insufficient weight to a relevant matter. He did not consider an irrelevant matter and his decision was not so unreasonable or unjust that it would suggest such an error had concerned. He identified the inconsistencies in the appellant's evidence that caused him to have concerns regarding his account of the injury, considered the evidence of his 3 co-workers and he gave logical reasons for not finding them compelling. He examined the objective contemporaneous records that might have supported the appellant's case (an approach consistent with the Court of Appeal authorities in *Malco Engineering Pty Ltd v Ferreira* and *Divall v Mifsud* and by Keating P in *Brines*). He considered the factors expressed by Basten JA in *Demasi* as to why caution should be exercised when considering a busy GP's notes and he considered that the details of the mechanism of injury in the entries in the clinical records were more reliable than the appellant's inconsistent account. Even if she reached a different conclusion to that of the arbitrator, which she would not have done, that is insufficient to overturn the decision.

Ground 2 also failed because the appellant failed to establish the pleaded mechanism of injury. The arbitrator did not need to determine whether the appellant had suffered a consequential injury or an injury to which s 10 WCA applied and his conclusion that the appellant's assertion that he was "protecting" his right knee *"was a recent invention in an attempt to establish a causal connection between the shoulder condition and the knee injury"* was *"obiter dictum".*

Accordingly, Wood DP confirmed the COD.

WCC - Medical Appeal Panel Decisions

Assessment of permanent impairment under PIRS - Full weight given to medical discretion of AMS as contrary medical opinions alone cannot constitute demonstrable error when it is open to the AMS to choose between two classes

Gatt v Visy Packaging Pty Limited [2019] NSWWCCMA 21 – Arbitrator Ross Bell, Dr M Hong & Dr J Parmegiani – 13 February 2019

Background

The appellant claimed compensation for a psychological injury that was allegedly caused by bullying and harassment at work since 17 August 2017. On 29 August 2018, a MAC issued that included class 2 impairment under PIRS for "concentration, persistence and pace" and class 3 impairment under PIRS for "employability".

The appellant appealed against the MAC under ss 327 (3) (c) and (d) WIMA and alleged that the AMS should have assessed class 3 impairment for "concentration, persistence and pace" and at least class 4 for "employability", as assessed by his qualified psychiatrist. The respondent opposed the appeal. The Registrar referred the appeal to a MAP.

Appeal decision

The MAP held that a patient's concentration deficit is readily observed by an AMS during the examination and is an example of the importance of an AMS' exercise of clinical judgment. In *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140, the Supreme Court stated at [33]:

> …the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. …
>
> In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (Ferguson [24].) ...
>
> To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.

The MAP held that it was open to the AMS to conclude, on the history taken, the findings on examination and the other medical opinions to conclude that class 2 was the applicable rating. He gave adequate reasons for his conclusion and they do not disclose a demonstrable error. It also stated that the AMS' clinical findings must be given full weight and that in *Merza,* Hoeben J stated: *"the fact that most of the medical evidence supported such a connection but that the AMS reached a different conclusion does not constitute a demonstrable error".* Accordingly, it confirmed the MAC.

Psychological injury – significant prior history of psychiatric conditions – s 323 WIMA deductible inadequate – MAP applied 50% deductible

Narrabri Shire Council v Bourke [2019] NSWWCCMA 21 – Arbitrator Deborah Moore, Prof. N Glozier & Dr P Morris – 14 February 2019

Background

On 30 July 2018, the appellant appealed against a MAC dated 2 July 2018, which assessed 22% WPI (after applying a 1/10 deductible under s 323 WIMA), under ss 327 (3) (c) and (d) WIMA. It alleged that: the AMS committed a number of factual errors; the worker did not meet the DSN-V criteria for a diagnosis of PTSD; the AMS failed to give adequate reasons for his s 323 WIMA deduction; the AMS failed to consider a large number of non-work-related incidents that contributed to the psychological condition. The worker opposed the appeal. The Registrar referred the appeal to a MAP.

Appeal decision

The MAP conducted a preliminary review and decided that the worker should be re-examined because of the extent of the evidence of a pre-existing psychiatric condition and conflicting evidence regarding the degree of her social functioning and recreational activities. She was examined by Prof. Glozier on 5 December 2018.

The MAP noted that the documents that were before the AMS exceeded 730 pages and stated that it was not surprising that he may have overlooked the extent of the evidence of both pre and post injury events that a detailed examination of that evidence disclosed. It held that there was significant evidence of a pre-existing psychiatric condition and subsequent events that contributed to the worker's condition and WPI.

Prof. Glozier assessed 19% WPI and opined that the 1/10 deductible applied by the AMS was "wholly inadequate". Based upon his opinion, the MAP applied a deductible of ½ under s 323 WIMA and assessed 10% WPI (after rounding) due to the work injury. It held:

> 40. In *Vannini v Worldwide Demolitions Pty Ltd & Ors* [2018] NSWSC 572, Fagan J considered whether the Appeal Panel had made an error of law by substituting its own view of the degree of contribution, based on its review of the evidence. The Court held that the Appeal Panel had not fallen into an error of law by substituting its own finding. Rather, the Court held that the Appeal Panel's substitution of its own view on the factual issue was in itself the requisite identification of factual error.
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> 41. As regards the extent of a Panel's findings and reasons, the Court also rejected the claim that the Appeal Panel's decision was unreasonable. It found no indication that the Appeal Panel had given undue consideration to irrelevant factors or insufficient consideration to relevant factors, and that nothing suggested the decision lacked "evident and intelligible justification".
>
> 42. This decision was confirmed by the Court of Appeal.
>
> 43. In this case, we have considered all the evidence in assessing the degree of permanent impairment that has resulted from the injury, including both pre-existing and post injury factors in reaching our decision.

Accordingly, the MAP revoked the MAC and issued a fresh MAC.

Psychological injury - AMS erred in failing to consider pre-existing psychological condition – MAC revoked & new MAC issued

Broadspectrum (Australia) Pty Ltd v Leach [2019] NSWWCCMA 23 – Arbitrator Brett Batchelor, Prof. N Glozier & Dr L Kossoff – 15 February 2019

Background

The worker was employed by the appellant as a school cleaner from 2005. He alleged that he became anxious at the start of the 2011 school year because of his workload and he consulted his GP. In April 2012, his father died from lung cancer and in September 2012, he suffered a panic attack while he was driving home from school. After November 2013, he was transferred to Newcastle High School at his request, but his symptoms continued. His brother died from a heart attack in December 2013. In 2014, he began working for himself as a cleaner and he resigned from employment with the appellant on 4 February 2015. His letter of resignation was accompanied by a letter from his doctor advising that he was resigning as a result of anxiety and depression that directly resulted from his employment as a school cleaner. In 2017 (possibly 12 April 2017), he was assaulted by four males, who knocked him to the ground, stole his wallet and kicked him several times.

On 16 July 2018, a COD – Consent Orders remitted the matter to the Registrar for referral to an AMS to assess the degree of WPI resulting from the psychological injury on 4 February 2015 (deemed). It referred to the 2017 assault, which was recorded in a document dated 12 September 2017 that was produced by the treating psychologist.

On 4 October 2018, a MAC assessed 26% WPI because of major depressive disorder, generalised anxiety disorder and panic disorder with agoraphobia, but no deductions were made for non-work-related conditions.

On 1 November 2018, the appellant lodged an application to appeal against the MAC under ss 327 (3) (c) and (d) WIMA. The worker opposed the appeal. The Registrar referred the appeal to a MAP.

Appeal decision

The MAP considered that the evidence supported a finding that the deaths of the worker's father (in April 2012) and brother (during December 2013) contributed to his mood disorder and his current level of permanent impairment and that the predominant syndrome was a mix of anxiety, panic and agoraphobia that worsened in early 2017 associated with him leaving work. It found that the anxiety disorders are attributable to the work injury and that the depressive episodes (more likely adjustment disorders) that occurred around the time of the deaths also contributed to his mood disorder and current level of impairment. As these conditions pre-dated the work injury, the AMS erred by not considering them in assessing the degree of work-related impairment, and that a deductible of 15% was appropriate. It revoked the MAC and issued a new MAC that assessed 22% WPI.

Demonstrable error - AMS failed to consider maximum medical improvement and to give sufficient reasons for 80% deduction - MAC revoked

Jahangir v Pronto Pollo Pty Ltd [2019] NSWWCCMA 19 – Arbitrator Richard Perrignon, Dr P Harvey-Sutton & Dr D Dixon – 11 February 2019

Background

On 15 December 2010, the appellant injured his hands, knees and chin at work. In July 2018, a MAC assessed 7% WPI (2% for the cervical spine, 1% for the lumbar spine,2% for the left upper extremity, 2% for the right upper extremity and 0% for both the right lower extremity and the upper digestive tract).

However, the AMS applied a deductible of 80% for effects of a Somatoform Chronic Pain Disorder with associated psychological effects. That condition was diagnosed by Dr Vickery, who opined that it was not reasonably attributable to the work injury.

The appellant appealed against the MAC and submitted that: (a) There was no basis for the 80% deduction and the AMS did not explain why he adopted that figure; (b) If the AMS considered that the physical effects of the injury were exaggerated by a psychological disorder, the proper course was to decline to make an assessment on the basis that maximum medical improvement had not been reached; (c) He was denied procedural fairness because the existence of this psychological disorder was not put to him by the AMS; and (d) In assessing the cervical spine as DRE category II, the AMS failed to consider a 'small left foraminal disc protrusion potentially comprising the C6 nerve root', indicated in an MRI scan, and the AMS should have assessed impairment under DRE category III. The respondent opposed the appeal. The Registrar referred the appeal to a MAP.

Appeal decision

The MAP conducted a preliminary review and required the worker to be examined by Dr Dixon on 8 November 2018.

In relation to grounds (a) and (b), the MAP noted that reading the AMS' reasons as a whole, he found that the assessed impairment was caused by both physical injury and a psychiatric condition. He opined that the psychiatric condition occurred after the injury he did not apply a deductible under s 323 WIMA. However, it was appropriate for him to exclude from assessment any impairment not resulting from injury and he did so.

The MAP held:

> 25. Where the assessor considers that part of the impairment is due to a psychological condition not referred for assessment, the assessor must consider whether maximum medical improvement has been reached, permitting an assessment. In *Ojinnaka v ITW Australia Pty Ltd* [2011] NSWSC 208, an Approved Medical Specialist had identified 'functional overlay' as affecting the functioning of the shoulder, which had been referred for assessment, but erred by failing to consider whether maximum medical improvement had been reached…
>
> 26. In this case, it cannot be said that 'a significant feature of the impairment was disregarded', because Dr Crane had regard to the degree to which a psychiatric condition had caused the observed impairment and made allowance for it. However, in the absence of any evidence that the psychiatric condition was untreatable or permanent, the 'psychological element' – here, a Somatoform Chronic Pain Disorder with associated psychological effects – must be considered 'dynamic', as that term was used by Adams J, and "accordingly the degree of permanent impairment could not be at that point 'fully ascertainable'".
>
> 27. To give him full credit, Dr Crane was alive to the fact that much of the assessed impairment was not due to injury and made an allowance for it. However, in the circumstances, he was obliged to consider whether maximum medical improvement had been reached, in accordance with para 1.15 of the Guides. His omission to do so, in our view, constituted demonstrable error.
>
> 28. As the Guides require that all body parts be assessed together, it was not appropriate to proceed to assessment of any other body part referred for assessment until the issue of maximum medical improvement had been considered and determined.

29. The allowance of 80% constituted by far the greater part of the impairment. The amount of the allowance was an evaluative exercise, in which the assessor was required to exercise his clinical judgment. That alone, however, does not entirely dispense with a requirement to give reasons for every finding. The extent of the allowance being so great, it was in our view necessary for the assessor to give at least some reasons for the quantification. He did so in paragraph 10b of his reasons, quoted above. In summary, they were that the psychological disorder gives rise to physical symptoms, and "the physical findings bear no relationship to the minor degree of trauma sustained during the work incident on 15 December 2010".

30. In our view, there was nothing in the history obtained, the symptoms elicited, the medical reports or the results of clinical examination, capable of justifying a finding that the physical findings bore "no relationship" to trauma. Nor was there anything justifying so precise a delineation between the effects of injury and those of psychiatric disorder, of the magnitude assessed. The reasons did not, in our view, explain why an allowance of 80% was appropriate. No reasons were given for the finding that symptoms bore "no relationship" to injury.

The MAP held that the AMS' failure to give reasons, or relevant reasons, amounted to demonstrable error and the MAC must be revoked. However, it rejected ground (c), as there was no denial of procedural fairness as Dr Vickery's report had been filed and served and the worker had ample opportunity to bring contrary evidence, or to address it orally at examination, if he so wished. It also rejected ground (d), as there was no evidence that the AMS failed to consider the MRI scan.

Dr Dixon stated that there was no objective basis upon which he could attribute any of the objective signs to a psychological disorder as distinct from physical injury and he was satisfied that all signs result from the physical injuries and that maximum medical improvement has been reached. He assessed combined 14% WPI, comprising 5% WPI for the lumbar spine, 0% WPI for the cervical spine, 5% WPI for the right shoulder, 2% WPI for the left shoulder, 2% for the right knee and 0% WPI for the upper digestive tract.

Accordingly, the MAP issued a fresh MAC that assessed 14% WPI.

WCC – Arbitrator Decisions

Worker - Indicia of employment test in Stevens v Brodribb Sawmilling Co Pty Ltd applied – applicant made prior inconsistent statements that he was not injured in the course of employment – applicant used own computer for work and failed to establish any entitlement to payment evidence against respondent – held: applicant not a worker

Kekic v Turbo Exhaust Centre Pty Ltd [2019] NSWWCC 56 – Arbitrator John Isaksen – 5 February 2019

Background

The parties entered into a contract of employment on 11 August 2014, as part of an application that the respondent made for the applicant to be granted a Temporary Business Visa, under which the applicant was to be employed as an importer/exporter.

On 20 June 2015, the applicant suffered serious injuries (including burns to the left hand that resulted in the amputation of his little and ring fingers, a compound fracture of his right leg, hearing loss and tinnitus) in an explosion that occurred within the respondent's business premises. He claimed compensation, but the respondent denied that he entered into or worked under a contract of service and disputed that he was injured in the course of employment.

On 29 November 2018, ***Arbitrator John Isaksen*** conducted an arbitration hearing. However, neither party addressed him on the Social Worker's notes from RNS Hospital, which he considered as being critical evidence. He drew their attention to this evidence and invited further submissions.

The applicant argued that he was "a worker" and that the employment contract was "locked in" by virtue of the Commonwealth Migration Act and Regulations. He said that while he did not receive payments under that contract, he was content to defer or postpone payments until funds became available. He also alleged that he and Mr Kabaran (director of the respondent) *"waived or orally varied the requirement for payment of the salary set out in the employment contract because they were contemplating an increasing long-term pattern of earnings from sales of goods and services and from business with China and were probably aware that the payment obligations would only be met after greater success was achieved"*. He also alleged that Mr Kabaran persuaded him to create a false story and that he plainly had a motive in persuading him to hide the truth, including the risks of the workers compensation insurer refusing coverage of a claim and a potential prosecution by Worksafe NSW.

The applicant asserted that his later statements (dated 22 June 2017, 6 August 2018 and 12 September 2018) also "fit in completely" with the results of the official investigations undertaken by the police, WorkSafe NSW, Fire & Rescue and other consulted experts. This includes that the cause of the explosion was him transferring the welding gas from a large gas bottle to a small gas bottle using a vapour recovery unit.

The respondent argued that the applicant had no involvement with the turbo exhaust business and had never worked for, been employed by or remunerated by that business. Mr Kabaran allowed him to use part of his business premises to start up an LED business and they verbally agreed that if this business was successful, Mr Kabaran would have some involvement in it. The applicant only worked in his own business and he used his own tools and equipment. However, after the accident occurred, he was told that something had blown up in the main workshop area and the applicant did not normally work in that area and he was not permitted to use it.

The respondent also argued that the existence of the contract is not determinative, and the indicia test set out by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* must be applied. On that basis, there was no contract of service between them at any time before the accident occurred. He asserted that the applicant's statements should not be believed as they are drastically different to those made to Worksafe NSW, the Police and the insurer.

The Arbitrator cited the following entry from clinical notes of the Hospital's Social Worker:

> Pt & wife discussed business in China. Pt makes custom made electronic items such as neon signs. Wife was working with him in sales. He is concerned about his business whilst he is in hospital but is aware that he has to be patient. He maintains he was working on his tackle box when accident occurred & not working on any equipment. Aware police will come to visit him next week.

The arbitrator stated:

> 154. The determination of whether an injured person who claims workers compensation is a worker involves a consideration of all relevant indicia in the relationship between the person claiming to be a worker and the entity claimed to be the employer. In *Stevens,* Mason J said at [9]:

> … the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it as merely one of a number of *indicia* which must be considered in the determination of the question… Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.

155. Wilson and Dawson JJ in *Stevens* said at [11]:

> The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person to the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.

156. The balance of indicia was also referred to by Kirby P in *Connelly v Wells* (1994) 10 NSWCCR 396 (*Connelly*) when he said at [412D]:

> Both parties to the appeal agreed that the proper approach of this Court was to follow the course mandated in *Stevens* and to examine the *indicia* appointing respectively in favour of, or against, the conclusion that Mr Wells was a "worker" of Mr Connelly…

The arbitrator stated that the contemporaneous evidence, including the applicant's own statements, points strongly to him running his own LED sign business and not working under a contract of service for the respondent, despite the contract of employment between them that allowed his entry into Australia. He considered that the Social Worker's notes *"are measured and are consistent with the details that the applicant provided to Safe Work NSW and Employers Mutual several weeks later"* and they confirm that the applicant was operating his own business; that the business was involved in neon signs and importing/exporting; that he was operating his business in another part of a factory that is operated by his friend's exhaust business; that he was concerned about the viability of his business as a result of his injuries; that he was preparing fishing equipment immediately prior to the explosion; and that he could not identify the cause of the explosion.

The arbitrator was not satisfied that the applicant was working under a contract of service for the respondent in regard to any import/export work. He endeavoured to determine the dispute on what Gleeson CJ, Gummow and Kirby JJ referred to in *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31] *"on the basis of contemporary materials, objectively established facts and the apparent logic of events."* He concluded that the applicant did not sustain an injury in the course of employment with the respondent and he entered an award for the respondent.

Worker/Deemed worker - Indicia test in Stevens v Brodribb Sawmilling Company Pty Ltd applied

Kochmanz v Rekani Pty Ltd t/as Entertainment Solutions [2019] NSWWCC 64 – Arbitrator Philip Young – 14 February 2019

Background

On 18 November 2014, the applicant injured his right lower leg and also suffered scarring. He also alleged that he had suffered a stroke and a consequential condition in his left lower extremity, but later withdrew those allegations. He claimed compensation for 30% WPI under s 66 WCA. The issue in dispute was whether he was a worker or deemed worker.

The worker relied upon the decisions of the High Court of Australia in *Stevens v Brodribb Sawmilling Company Pty Ltd* and *Hollis v Vabu Pty Ltd.* He alleged that the place of work, the equipment to be used, the work to be performed and the time that the work was to be carried out were all determined by the respondent. When the respondent initially arranged for the applicant to perform work in Melbourne, the applicant was informed that he was to drive a truck to Melbourne, but the respondent later arranged and paid for him to fly to Melbourne. The applicant alleged that he was working under the respondent's control and direction. While he had an ABN, this had lapsed before he commenced work for the respondent and he was not permitted to delegate any work to others or employ any other workers and he argued that he was not carrying on business on his own account.

The respondent relied upon the decisions in *Malivanek v Ring Group Pty Ltd* and *Scerri v Cahill* and argued that because the applicant was using an ABN, the work was clearly incidental to a trade or business regularly carried on by the applicant in his own name or under a business or firm name. As the applicant was not a deemed worker, he could only succeed if he could prove that he was a common law worker (under s 4 WCA). The applicant had previously subcontracted to the respondent and the applicant was left to organise stage equipment once it was unloaded at the worksite. While the ABN had lapsed at the date of injury, it was current when the contract was made, and the applicant issued an invoice to the respondent in the name of "Trust in Passion Touring", which provided for payment by EFT. This indicated a contractual relationship as an independent contractor.

Arbitrator Philip Young stated that the decisions in *Stevens* and *Hollis* require the weighing of factors in favour of a finding, and against a finding, of worker and indicate that the control test is not necessarily determinative of the issue and the total relationship between the parties must be considered. Based on the decision of the Privy Council in *AMP v Chaplin* (1978) 52 ALJR 497, a written contract that expressly states the nature of the relationship is not necessarily determinative. After discussing the evidence, he held:

> 30. On balance in my view, the applicant was working within the business of the respondent, was subject to overall control and direction from Mr Mace and was not acting as any representative of his own business. Accordingly, on the balance of probabilities I am comfortably satisfied that the applicant was engaged in a contract of employment with the respondent at the time of his injury.
>
> 31. If I am wrong about this conclusion, it is necessary to have regard to Schedule 1 clause 2 of the 1998 Act. Ms Goodman has properly conceded that the central issue in this regard is part of the test set out in *Scerri v Cahill* (1995) 14 NSWCCR 389, namely (for our purposes) whether "(3) the work is not work incidental to a trade or business regularly carried on by the applicant in his (or her) own name or under a business or firm name.

32. It is significant in my view that the applicant's evidence of not having worked for three months prior to this work makes it difficult to conclude that he was operating a business and also difficult to conclude that he was doing so "regularly". The engagement strikes me as being an ad hoc arrangement entered into by the applicant in the hope that it would potentially lead to further work over time. It is also significant that the applicant did not advertise at all and had obtained all of his work through word of mouth.

The arbitrator was comfortably satisfied that if the applicant was not a worker for the purposes of s 4 WCA, he was a "deemed worker" as defined in Sch 1 cl 2 WIMA. He therefore remitted the s 66 dispute to the Registrar for referral to an AMS.

Proposed surgery not reasonably necessary because of workplace injury – Briginshaw applied & no common-sense causal relationship established

Jenkins v Pilditch Commercial Landscapes Pty Ltd [2019] NSWWCC 71 – Arbitrator Gerard Egan – 20 February 2018

Background

This decision involves 2 separate applications for frank injuries to the neck that the worker suffered on 17 January 2000, while lifting a wheelbarrow, and on 19 June 2001, while shovelling. The respondent accepted liability. One application indicated a threshold dispute for the purposes of s 39 WCA and the other sought a finding or declaration under s 60 (5) WCA that proposed surgery (at the C7/T1 level) was reasonably necessary as a result of the accepted injuries.

Arbitrator Gerard Egan held that if the proposed surgery was reasonably necessary the degree of permanent impairment would not be fully ascertainable until the surgery was completed, and an appropriate recovery period had elapsed. He noted that on 15 March 2018, a COD – Consent Orders (issued in 6727/17) remitted the threshold dispute to the Registrar for referral to an AMS to determine whether the degree of permanent impairment was fully ascertainable as a result of injury on 18 January 2001. However, that date was cited in error and no injury occurred on 18 January 2001, and the COD *"is meaningless for the purpose of the true nature of the proceedings"*. The relevant date of injury was 17 January 2000.

By consent, the COD was set aside (which negated the binding nature of the MAC), but the parties agreed that it could be evidence in the proceedings (primarily for the history it contains). The parties also agreed that the accepted neck injury was at the C5/6 level.

The arbitrator identified the following issues:

(1) Whether the worker suffered injury to C7/T1 segment on 17 January 2000 and/or 19 June 2001; and

(2) Whether the proposed surgery at C7/T1 is reasonably necessary as a result of the injuries on 17 January 2000 and/or 19 June 2001.

The evidence indicated prior complying agreements under s 66A WCA under which the worker was awarded compensation as follows:

(1) 16 August 2008 – 15% permanent impairment of the neck and 10% permanent loss of efficient use of the left arm at or above the elbow; and

(2) 6 July 2011 –further 7.5% permanent impairment of the neck and further 3% permanent loss of use of the left arm at or above the elbow.

In relation to issue (1) the arbitrator was "sufficiently persuaded" that the worker suffered injury to the C7/T1 segment in the 2000 incident: *Kooragang Cement Pty Limited v Bates; Briginshaw v Briginshaw.* However, after the 2001 injury, the symptoms were clearly related to the left side and subsequent investigations over many years identified pathology only at C5/6. He therefore held that the effects of the injury to the neck around the C7/T1 level on 17 January 20000 were *"relatively short lived"* and *"no relevant discal or other pathological spinal changes resulted from it"*.

In relation to issue (2), the arbitrator stated that the worker need only establish that the accepted injury materially contributed to the need for surgery: *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 48, [58] per Roche DP. He stated:

> 111. I am not persuaded by Dr Spittaler's explanation, essentially on two bases: first he does not consider the confirmatory diagnostic tests undertaken by Dr Tame when expressing that opinion, and the same analysis as set out above regarding Dr Hopcroft's views applies. Secondly, the fact that there is degenerative bony stenosis on the right at C7/T1 first confirmed by radiology in November 2014 (despite numerous previous imaging reporting on the relevant level without identifying any abnormality) is a chronic consequence of a cervical disc injury, does not address the absence of any changes at that level over a period of more than 14 years before it emerged in that investigation. Further, the absence of any right-sided symptoms over all of those years is not consistent with the development of a chronic consequence of a cervical disc injury at that level on the right side. Dr Spittaler does not grapple with this issue and as a result, I find his conclusion, although possible, is insufficient to persuade me on the balance of probabilities that the applicant suffered the relevant injury…
>
> 113. The result is, that even though I accept that a neck injury involving pain around the C7/T1 level probably occurred in the 2000 injury, there was no identifiable spinal pathology associated with it, and it is speculative to now, after so many years, associate pathology first recognised in 2014 with that injury. I accept Dr Machart's opinions on this, to the effect that the jump from identification of the right-sided pathology to the chromic results of a disc injury, in the absence of any chronic symptoms over the years, is not justified. This is more so when neither Dr Hopcroft nor Dr Spittaler considers the prospect of constitutional spondylosis as an alternative diagnosis. While I acknowledge Dr Machart's concession that objective evidence by doctors around the time of injury is objective evidence of injury (as I have concluded when finding that there was a neck injury producing tenderness around the C7/T1 area), the subsequent settling of that injury and diagnoses by all examining specialists (treating and independent) subsequently lead me to conclude as I do.

The Arbitrator held that the worker had not discharged his onus of proving the causal relationship between the need for surgery and the injury and he entered an award for the respondent. He remitted the threshold dispute to the Registrar for referral to an AMS to determine whether the degree of permanent impairment was fully ascertainable for injuries to the neck on 17 January 2000 and 19 June 2001.

Psychological condition and subsequent heart attack – Connair Pty Ltd v Frederiksen followed – Did work have the inherent tendency to cause heart condition – Section 9B WCA did not apply and worker could claim for heart attack

Smith v Westrac Pty Ltd [2019] NSWWCC 73 – Arbitrator Philip Young – 20 February 2019

Background

The worker alleged that she suffered a psychological injury as a result of the nature and conditions of employment until 2 August 2016 (when her employment was terminated) and a consequential heart attack for which she underwent triple bypass surgery on 2 January 2018. She claimed weekly payments, lump sum compensation for permanent impairment of her cardiovascular system and a general order for payment of s 60 expenses.

The worker relied upon an opinion from Dr Bench, who took a history of workplace bullying and that she complained of the onset of chest pain after the events that she described. In particular, the worker said that on 26 November 2015, she had a performance meeting with the Branch Manager and a representative from HR, during which she was told that she did not have appropriate training, that her work colleagues don't trust her and that her attendance and punctuality were poor. After treatment for her coronary heart disease she underwent further disciplinary meetings on 29 March 2016, 20 April 206, 14 July 2016 and 15 July 2016 and her employment was terminated on 2 August 206. She believed that these 'performance reviews' were an attempt to bully and harass her.

The worker argued that her underlying psychological condition had been aggravated by the events at work and she relied upon evidence from Dr Brereton, that an unsatisfactory work environment can lead to an increased adverse outcome with diabetes, which can then lead to an acceleration of underlying coronary artery disease. She argued that the relevant test of causation of her heart condition is *"results from"*: *Kooragang v Bates.*

The respondent relied upon s 11A WCA and argued that the worker was not harassed at work and that her performance was simply unsatisfactory and that there were significant issues regarding her credit. It also argued that there was no evidence that the nature of her employment, which was sedentary, gave rise to a significantly greater risk of injury. While the worker considered that it was seeking to terminate her employment for some time, its actions were reasonable having regard to her performance issues and she was the cause of her own problems. Further, if the Commission is not satisfied that the worker suffered a primary psychological injury, there cannot be a compensable consequential heart condition.

Arbitrator Philip Young noted that the evidence indicated that from 21 April 2014 until June 2015, there were some minor errors on the part of the worker, but no disciplinary issues. He held that the worker's pre-employment mental condition should be considered under operation of *the "egg-shell skull"* principle and the respondent must take its workers as it finds them. He held:

> 62. … the next issue is the extent to which the respondent can satisfy its onus under section 11A of the 1987 Act. In my view, the respondent's actions were not "wholly or predominately" caused by action taken by the respondent in relation to performance appraisal or discipline. I reason this because there were a number of other matters occurring at the respondent's workplace to which the applicant was subjected, on the evidence. These matters aggravated or exacerbated her psychological condition. They include: (a) An unhappy hostile climate for the applicant, generally within the respondent's workplace; (b) The applicant's evidence

concerning paper being thrown at her; (c) The exclusion of the applicant from a number of emails circulated to staff; (d) Personality issues with "Nicole" and tension concerning the availability of sufficient work for the applicant; (e) The necessity for the applicant to remain in the office whilst others took lunch break; (f) The absence of reasonably immediate attention to the applicant's allegation of bullying by Mr Thompson; (g) The pressure placed upon the applicant to stay at work despite her friend's funeral; (h) The reduction of the applicant's hours of work and requirement for her to sign a new contract; (i) Comment(s) by the applicant's supervisor, in the presence of a work colleague, to the effect the applicant was "dodgy"; (j) A barrage of three meetings (and termination of employment) concerning a mistake regarding payment of wages; (k) Despite the generally favourable outcome of the meeting of 3 March 2016, escalation of the "performance appraisal" process beyond that date; and (l) The comment on 26 November 2015 that the applicant's fellow workers "did not trust her".

The arbitrator held that if he was wrong in this conclusion, the respondent's actions were not reasonable because its conduct was not fair. In any event, the worker was suffering psychological symptoms before the meeting on 26 November 2015.

In relation to the heart condition, the arbitrator held:

> 73. In my view on the balance of probabilities, the link between the applicant's emotional distress and poor control of diabetes is established. The final component is addressed by Doctor Haber on 4 July 2018 and clarified in Doctor Haber's further report of 22 July 2018. Doctor Haber concludes that if the work events caused the worsening of the applicant's diabetes because of emotional stress, then:
>
> > …It is a fact that employment gave rise to a significantly greater risk of suffering worsening of coronary disease had she not been employed in the nature which exposed her to stress and anxiety.
>
> 74. I appreciate that it is for the Commission to determine "significantly greater risk" by reason of the applicant's employment. Mr Combe put the argument in terms of "sedentary work" but I believe, with respect, that such an argument glosses over the factual examination of the precise nature of the applicant's work and her day-to-day exposures. The argument is a general argument concerning the applicant's general occupation and ignores the specific effects which may be experienced by a worker in employment. Section 9B in the context of the beneficial legislation cannot be meant to globally categorise individuals' occupations and likely exposures, but rather is to be interpreted and applied in each specific factual circumstance, without reference to stress and strains which may apply generally to certain occupations. This test is how it has affected this worker, not how it should affect workers of this occupation.

The arbitrator held that the facts that he found, *"…were underpinned by unreasonable action or inaction and hostility by her superiors within that structure. The nature of her employment included an inability, by reason of the respondent's structure, to have her grievances properly dealt with in a timely fashion. The work events were particularly upsetting and stressful for the applicant…"* As to whether the nature of the employment concerned *"gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been in employment of that nature"*, he adopted the discussion of Senior Arbitrator Snell in *De Silva* at [105]:

> Section 9B (1) does not require a significant risk. It requires a comparison of (1) the risk to which the nature of the employment concerned gives rise and (2) the risk had the worker not been employed in employment of that nature. It is necessary that the

first of these be 'significantly greater' than the second, if compensation is to be payable.

The arbitrator held that the worker had no capacity for work at the relevant times and he awarded her weekly payments under ss 36 and 37 WCA and made a general order for payment of s 60 expenses. He remitted the s 66 dispute to the Registrar for referral to an AMS to assess the degree of permanent impairment of the cardiovascular system.

Causal link between accident and condition not established – time between accident and onset of the condition was too long for the possibility of causation

Ellis v Alsco Services Pty Ltd [2019] NSWWCC 76 – Arbitrator Ross Bell – 21 February 2019

Background

The worker lodged an application for assessment of WPI for the purposes of a threshold dispute for WID's. The worker claimed compensation for further alleged injuries to both shoulders and the respondent disputed those injuries. However, there was no dispute that the worker injured her neck and suffered bilateral epicondylitis as a result of an incident at work on 8 December 2000.

In previous proceedings in the Compensation Court (53118/01), the worker was awarded compensation under s 66 WCA for permanent impairment of the neck and permanent loss of efficient use of both arms at or above the elbow. In WCC proceedings (2115/15), an AMS issued a MAC and the Registrar issued a COD that awarded the worker additional compensation under s 66 WCA for permanent loss of efficient use of both arms at or above the elbow.

Arbitrator Ross Bell noted that the worker argued that Dr Parkinson's report dated 20 March 2003 supported the allegation of work-related shoulder injuries, but he noted that the first mention of a complaint recorded in the notes was on 6 August 2001. He noted that the worker does not remember the time of the onset of shoulder symptoms, but there is nothing in the evidence to allow a conclusion that she suffered shoulder symptoms before they were first recorded in the clinical notes. She agreed that the light clerical work that she resumed in May 2001 was not likely to cause any injury to the shoulders. While she relied upon Dr English and Dr Parkinson, the arbitrator stated that each expressed a bald opinion regarding causation. Dr English did not consider the contemporaneous evidence or provide an analysis of how the work caused the shoulder symptoms to develop after the heavier duties ceased. This diminished the probative value of his opinion.

The arbitrator found the opinions of Dr Burns and Dr Mastroianni, that work is not the cause of the shoulder injuries, to be more compelling than Dr English's opinion. He also accepted the presence of fibromyalgia or a pain syndrome, which was treated by Dr Salmon. He held:

> 56. Taking all the evidence into account, I find that Ms Ellis's claim for the shoulders fails to satisfy the requisite standard of proof. There is simply too large a gap in the causative chain at the outset which is not remedied by the later medical opinions. Ms Ellis herself is uncertain as to the time of the onset of the shoulder symptoms. The first evidence of any complaint was in August 2001, several months after she ceased the process work on 11 December 2000; work to which she never returned. There were also unrelated and non-organic elements diagnosed. 57. There is evidence of a degenerative shoulder condition confirmed in imaging studies more recently, but insufficient evidence to connect that condition in the shoulders to the work which ceased in December 2000.

He entered an award for the respondent with respect to the alleged injuries to the shoulders and remitted the matter to the Registrar for referral to an AMS to assess permanent impairment with respect to the neck and both arms.

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