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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Court of Appeal Decisions

Contributory negligence – whether there was error in finding of contributory negligence in circumstances where the worker was required to adopt a system of work – whether primary judge erred

Williams v Metcash Trading Ltd [2019] NSWCA 94 – Meagher JA, White JA & Simpson AJA – 3 May 2019

Background

The appellant worked in a product distribution centre operated by the respondent. He sued the respondent for damages in the District Court for a personal injury that he allegedly sustained while working on 1 June 2012.

Judge Dicker SC found that: (1) the appellant was injured on 1 June 2012 as a result of lifting 2 boxes of dog food from under a rack (or "pick slot") that was 1.4 metres in height; (2) the respondent breached its duty of care to the appellant by requiring the cartons to be picked from a rack measuring only 1.4m in height, but that the breach did not sound in damages because it did not cause the injury; and (3) the injury was solely caused by the appellant's conduct in lifting 2 boxes at a time. However, he assessed damages and contributory negligence (in case his finding on causation was found to be erroneous) and held that any award of damages should be reduced by 20% for contributory negligence.

Appeal and Cross-appeal

On appeal, the appellant challenged Judge Dicker's findings: (1) that the negligence was not causative of his harm; and (2) that the award of damages would have been reduced by 20% on account of his contributory negligence. The respondent cross-appealed and challenged the findings: (3) that requiring boxes of dog food to be lifted from a pick slot 1.4m in height was a breach of its duty of care; and (4) as to damages.

The Court of Appeal allowed the appeal and its reasons are summarised below.

Ground (1) - The Court set aside Judge Dicker's finding that the negligence did not cause the appellant's injury as his finding was vitiated by a failure to consider whether the injury would not have occurred because a higher pick slot afforded the appellant an opportunity to employ a safer method of lifting that was impossible to use if the pick slot were only 1.4 meters. The Court applied the decisions in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307, *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153, and *Brown v Hewson* [2015] NSWCA 393.

Ground (2) - The Court upheld Judge Dicker's finding of contributory negligence and stated that although his Honour found that the appellant undertook his duties within the system presented to him, and he had no choice other than to adopt that system, this was only one of the circumstances to be considered in finding contributory negligence. The system of work did not require him to lift 2 heavy boxes at a time and the finding of contributory negligence was open to his Honour. There was no basis to interfere with it on appeal. They applied the decisions in *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34, *Ghunaim v Bart* [2004] NSWCA 28 and *Mousa v Marsh* [2001] NSWCA 317. They referred to *Boral Resources (NSW) Pty Ltd v Watts* [2005] NSWCA 191, *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99, *J Blackwood & Son v Skilled Engineering* [2008] NSWCA 142 and *Jurox Pty Ltd v Fullick* [2016] NSWCA 180. They cited *Council of the City of Greater Taree v Wells* [2010] NSWCA 147 and they distinguished *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563.

Ground (3) - The Court upheld Judge Dicker's finding of negligence and stated that the risk of harm was formulated without challenge on appeal as being the risk of the appellant suffering a back injury whilst lifting heavy boxes from under 1.4-metre high shelving with related psychiatric complications. They referred to the decision in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54 and cited the decisions in *TNT Australia Pty Ltd v Christie* (2003) 65 NSWLR 1, *Transpacific Industrial Solutions Pty Limited v Phelps* [2013] NSWCA 31 and *South Sydney Junior Rugby League Club Ltd v Gazis* [2016] NSWCA 8.

Ground (4) - The Court held that Judge Dicker concluded that the appellant's pain was caused by a psychiatric injury (identified as a pain syndrome) that resulted from the physical injury and he did not err in accepting the medical evidence that supported this finding. As the respondent's challenge regarding damages depended upon it successfully challenging the finding of a psychiatric injury, it was not necessary to address this question.

The Court directed entry of judgment for the appellant with the amount to be calculated in accordance with Dicker SC DCJ's reasons and it ordered the parties to file either an agreed calculation, or their own calculations and short submissions in support (if there was no agreement), within 21 days. The respondent was ordered to pay costs.

Leave to appeal against a grant of leave under s 151D WCA – significance of arguments that the appellant sought to advance that were not put to the primary judge – Leave to appeal refused

ABALink Early Intervention Services Pty Ltd v Danford [2019] NSWCA 97 – Leeming JA & Payne JA – 6 May 2019

In 2006, the appellant (a labour hire company) employed the worker. On 6 March 2006, he slipped and fell at work and injured his back and right shoulder, while he was sub-contracted to Otis Elevators. He reported the injury to the leading hand and supervisor and claimed workers compensation. The Insurer accepted the claim and paid weekly compensation until August 2014.

In April 2009, the worker claimed lump sum compensation for 13% WPI with respect to alleged injuries to his back, right shoulder and left knee. The WCC issued a COD awarding him compensation under s 66 WCA for 8% WPI.

However, on 2 May 2017, the worker served a pre-filing statement upon the appellant and in November 2016, he received a certificate from the WCC that assessed 17% WPI. In February 2018, he gave notice of a claim for WID's and he asserted that he was injured because he slipped and fell on spilt oil while he was manually lifting a steel rail in an elevator shaft. However, he required leave to make that claim under s 151D WCA.

Judge Norton SC held that the discretionary considerations concerning applications for extension of time are as follows: a) The onus is on the applicant to satisfy the court that the limitation period should be extended; (b) The test is whether the justice of the case requires that the application be granted; (c) A material consideration is whether a fair trial is possible by reason of the time that has elapsed since the events giving rise to the cause of action. This is to be judged at the time of the application; (d) Both the length of the delay and the explanation for it are relevant; (e) A defendant is prima facie prejudiced by being deprived of the protection of the limitation period; (f) It is open to the defendant to adduce evidence of any further particular prejudice claimed; (g) The application should be refused if the effect of granting an extension would result in a significant prejudice to the respondent; and (h) The application may not be granted if the applicant made a deliberate decision not to commence proceedings within the limitation period.

She held that there was no suggestion that the plaintiff made a deliberate decision not to commence proceedings within the limitation period. He promptly made a workers compensation claim and as his condition deteriorated, he made further claims for lump sum compensation. Once his WPI exceeded 15% he acted promptly as did his solicitors. The defendant was kept up to date with the deterioration of his condition and had the opportunity to supervise his rehabilitation and obtain medical reports. The repeated claims for lump sum compensation taken in conjunction the history the plaintiff gave of slipping on oil on the floor would have alerted the defendant and the insurer to the possibility that a claim for work injury damages would be made if and when the plaintiff's WPI exceeded 15%. She also held that the lengthy delay was adequately explained in the affidavit of the plaintiff's solicitor.

The defendant relied upon actual and presumptive prejudice and argued that while it is still entitled to bring a cross-claim, it may not be possible to ascertain the identity of the entity that installed the sprinkler system and the entity that had overall control of the site. However, her Honour observed that this was a major project in a capital city and there was no actual evidence that documents relating to work at the site are no longer available. The accident was reported on the day that it occurred and the plaintiff inspected the accident site on that day in the company of two named individuals. She noted that there is no evidence that either of those individuals is deceased or unable to be contacted. There is little evidence of any attempt to contact them or to identify the name of the crane operator who was working with the plaintiff at the time. She also observed that the allegations of negligence are not novel or unusual. She stated:

> 71 The plaintiff has not obtained an expert's report and would now require leave to rely on such a report. This may weaken the plaintiffs case on liability but I am not satisfied that this is sufficient reason, taken together with the prejudice to the defendant, to justify refusing the application. The slippage on the oil may have been a one-off act of casual negligence or it may have been the result of an unsafe system of work or unsafe tools. The onus is on the plaintiff to show that reasonable care would have prevented the spillage.

72 The most material consideration is whether a fair trial can take place. Priestley JA in *Holt v Wynter* stated at para 79

> ... One thing seems to be clear; that is that the term is a relative one and must, in any particular case, mean a fair trial between the parties in the case in the circumstances of that particular case. Further, for a trial to be fair it need not be perfect or ideal. That degree of fairness is unattainable. Trials are constantly held in which for a variety of reasons not all relevant evidence is before the court. Time and chance will have their effect on evidence in any case, but it is not usually suggested that that effect necessarily prevents a fair trial.

73 In the circumstances of this case, I find that despite the presumptive and actual prejudice to the defendant, a fair trial can take place.

The Court of Appeal stated that the principles governing leave to appeal are well known. Generally, it is necessary to establish that there is an issue a principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]; *Be Financial Pty Ltd v Das* [2012] NSWCA 164 at [32]–[38]; *Age Co Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]; *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28].

The Court stated that while the appellant's written submissions were concise, counsel who appeared at the oral hearing departed from them and propounded a substantially new case that was not advanced to the primary judge and fell outside the draft notice of appeal. They stated that "it was far from clear that this course was appropriate" and that "applicants seeking leave to appeal should ensure that the basis on which leave is sought is articulated in the written submissions and falls within the draft notice of appeal".

The Court rejected all grounds set out in the notice of appeal, as follows:

1. *"Her Honour erred in concluding that a delay by the respondent in notifying the applicant of an intention to commence proceedings for work injury damages of approximately 10 years was adequately explained by the fact that the respondent had not been assessed during that period as having a Whole Person Impairment which equalled or exceeded 15%."*

It held that this conclusion was amply open to the primary judge and the parties and primary judge treated the "real issue" as being prejudice to the appellant due to delay.

2. *"Her Honour erred in misdirecting herself as to the evidence before her and in respect of the significance of that evidence and, in particular, erred in her conclusion that there was no actual evidence that documents relating to the work undertaken by the respondent at the time of his injury were no longer available."*

It noted that these statements were correct and it was open to the appellant to prove those matters, but it chose not to do so. The reference to the absence of "actual" evidence does not bespeak error, still less a reasonably clear injustice. On the contrary, it suggests that the primary judge was conscious of the distinction between the evidence tendered and the basis on which the application was run.

3. *"Her Honour erred in failing to appreciate the significance of the prejudice to the applicant by reason of the delay and, in particular, the prejudice associated with the applicant's capacity to determine whether the plaintiff's injury was the result of a casual act of negligence or some failure in a system of work which might have been determined by the applicant prior to the respondent's injury and in relation to which precautions might have been taken so as to prevent that injury."*

It stated that if the primary judge had entirely ignored the question of prejudice, which was the major issue debated before her, there would be a proper foundation for a grant of leave. However, her focus was upon the prejudice and those reasons concede that there was actual and presumptive prejudice and, ultimately, this ground is merely a way of asserting disagreement with the evaluative conclusion that she reached.

4. *"Her Honour erred in concluding that the actual and presumptive prejudice to the applicant was ameliorated by the fact that the respondent also faced difficulties in presenting his case."*

It stated that her Honour made no such conclusion and it was a misreading to say that she discounted the prejudice to the appellant by reason of the difficulties faced by the worker.

5. *"Her Honour erred in the exercise of her discretion in failing to refuse the respondent's application for an extension of the period in which to commence proceedings."*

It held that this ground takes the matter no further.

However, the Court also rejected five substantially new matters that the appellant's counsel raised in oral submissions, as follows:

1. *There was a clear error of fact by the primary judge in summarising the worker's evidence regarding the circumstances of his accident.*

It was not persuaded that there is any error in what the primary judge summarised and stated that it was difficult to see how any error bore materially on the exercise of discretion.

2. *While the reasons of the primary judge correctly stated that the onus lay with the worker to justify the grant of leave many years after his injury, her Honour had in effect reversed the onus.*

It stated, relevantly:

> 28. …This conclusion was said to derive from statements in her reasons that "there is no evidence of enquiries [being] made to ascertain who installed the sprinkler system: and that it was "possible that such documentation is still ... available" at [48], and what was said to have been error in her Honour's statements about there being "no actual evidence" that documents relating to work at the site are no longer available and there "is no evidence" that the two men named on the claim form were deceased or unable to be contacted.
>
> 29. Contrary to what was put on behalf of ABAlink, those statements are both correct statements of the evidentiary position on which the application had been brought. (The fact that it was agreed at the Bar table that subpoenas had been issued to some entities and nothing had been produced is in no way inconsistent with what her Honour had said, in the absence of evidence about the terms of those subpoenas and the responses which had been given.) Further, those statements do not imply that her Honour, having correctly stated that the onus lay with Mr Danford, failed to apply that test. True it is that the statement at [71] that her Honour was not satisfied that the absence of expert reports was a "sufficient reason, taken together with the prejudice to the defendant to justify refusing the application" might suggest a reversal of the onus, and might have been better avoided. However, the principle was stated clearly, and we are not persuaded that there is a sufficiently strong case made out that her Honour misapplied it.

3. *There was unfairness to the appellant in the worker allegedly concealing for some years the allegation that had injured himself by slipping on oil and that this allegation only emerged in a medical report served some years after the accident.*

It held that no unfairness to the appellant or its insurer was demonstrated.

4. *There had not been an adequate explanation, in circumstances where a file note exhibited to the plaintiff's solicitor's affidavit dated 24 August 2009 following receipt of a medical assessment certificate of 8% recorded the worker as saying that he believed his condition was deteriorating and that he could "make a deterioration claim and to treat this as one step along the way to try to obtain the 15% WPI for a WID claim."*

It noted that it was not put to the worker in cross-examination that he held the view that he would make a WID claim years before one was in fact made. Also, this argument was not made to the primary judge. It stated:

> 33. In *Choy v Tiaro Coal Ltd (in liq)* [2018] NSWCA 205, it was said at [70]:
>
> > There is no good reason to grant leave to determine a ground of appeal which is based upon a submission which was not made to the primary judge. '[W]hen a court is invited to make a discretionary decision, to which many factors may be relevant, it is incumbent on parties who contend on appeal that attention was not given to particular matters to demonstrate that the primary judge's attention was drawn to those matters, at least unless they are fundamental and obvious': *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [120].
>
> The reasoning is equally applicable to this proposed basis for a grant of leave. Indeed, the position is all the stronger. Not only was ABAlink's submission not put to the primary judge. When Abalink's counsel agreed with the primary judge ("Absolutely") that there had been no expectation that Mr Danford would get over the 15% WPI threshold, he was presenting a case which was inconsistent with the case now sought to be advanced in support of leave to appeal.

5. *The appellant relied upon Part 6 of the Guidelines for Claiming Compensation Benefits, of which section 3 provides:*

> ***3. Where Whole Person Impairment Not Fully Ascertainable***
>
> *Court proceedings for WID must be commenced within 3 years after the date on which the injury was received. Reference section 151D of the 1987 Act.*
>
> *When this time limit is reached but the WPI for the injured worker is not fully ascertainable, the worker should make a claim for WID setting out the particulars of the claim and the evidence to be relied upon as per clause 2 above, with the exception of the degree of assessed WPI.*

It held that it was not necessary to express a view on any aspect of this submission as the Guidelines were not placed before the primary judge or addressed before her and they were not mentioned in the appellant's written submissions in this Court.

Accordingly, the Court dismissed the summons with costs.

Supreme Court of New South Wales

S 105 WIMA does not exclude the jurisdiction of the Local Court of NSW in a claim for recovery of monies paid as workers compensation from a worker

Labourpower Recruitment Services Pty Limited v Nolland [2019] NSWSC 512 – Adamson J – 6 May 2019

The plaintiff is a labour hire company that employed the defendant from August 2015 until 11 April 2018. On 19 November 2018, it appealed against a decision of Keogh LCM to dismiss proceedings that it commenced in the Local Court of NSW to recover an alleged overpayment of compensation to the defendant. The defendant filed a notice of motion to strike out the proceedings on the basis that the Local Court did not have jurisdiction in relation to the claim. The Magistrate accepted the defendant's arguments and dismissed the proceedings.

Justice Adamson noted that the Magistrate's reasons were delivered ex tempore, but were not recorded, and she paraphrased the reasons from a solicitor's notes, as follows:

> *The defendant seeks dismissal of the statement of claim. The statement of claim seeks re-payment of $25,000. The payments were made pursuant to s 33 of the Workers Compensation Act 1987 (NSW) in consequence of an alleged work-related injury, which the plaintiff alleges were not so sustained and were sustained while the defendant was playing sport. The statement of claim indicates that it is a money claim.*
>
> *The defendant submitted that the plaintiff's claim can only be dealt with by the Workers Compensation Commission.*
>
> *Section 105 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) provides: [read out]*
>
> > *Section 105 (1) is pertinent and provides that the Commission has exclusive jurisdiction to examine, hear and determine all matters under this Act and the 1987 Act. The defendant submitted that this Court would need to examine, hear and determine a matter under the Act in these proceedings. The plaintiff submitted that this Court would not be determining an entitlement under the Workers Compensation Act but rather a fact: whether the defendant was at work or not when he suffered the injury. But, as the defendant submitted, the Commission has exclusive jurisdiction to determine whether the injury was suffered in the workplace.*
>
> *Although the monies were paid by the plaintiff and not by the workers compensation insurer, that does not give the Local Court jurisdiction. The plaintiff accepted that the payments were made under a Return to Work plan. A Return to Work plan is required by the Workers Compensation Act.*
>
> *A factual determination would be required as to whether compensation was payable under the Workers Compensation Act.*
>
> *In effect, I am asked to determine whether there has been an overpayment under s 235D of the Workplace Injury Management and Workers Compensation Act. I note that s 235D (2) provides that the Authority may order a person to repay money. It is not for me to trawl through the Act to find out how the Authority does that. If the Authority makes an order, then this creates a civil debt which would entitle the plaintiff to come to this Court to enforce the debt. In my view, the Commission has jurisdiction over this matter and this Court has no jurisdiction.*

Accordingly, I uphold the notice of motion. The matter can be determined in the Workers Compensation Commission.

The appeal was lodged under s 39 of the *Local Court Act 1970* (NSW), which permits an appeal to the Supreme Court only on a question of law, and the parties agreed that the summons raised a question of law and that leave to appeal was not required.

The plaintiff appealed on two grounds, namely: (1) The Court below erred in holding that it had no jurisdiction to hear the proceedings; and (2) The Magistrate gave no, or insufficient, reasons for her Honour's conclusion.

When the hearing commenced, counsel for the plaintiff indicated that the Statement of Claim did not accurately reflect its claim, which was really for restitution of monies it had paid to the defendant as wages for the periods during which he had come to work after the 2 alleged work-related injuries (from 10 to 21 August 2017 and from mid-January 2018 to 11 April 2018). He sought leave to amend the Statement of Claim, but her Honour held that the Court did not have power to do this under s 39 of the *Local Court Act* and she considered the appeal based on the claim as pleaded.

The plaintiff argued that s 105 *WIMA* does not exclude the jurisdiction of the Local Court to determine a money claim by an employer against a worker for overpayment of income, whether the monies amounted to compensation or income for a worker who had suffered an injury and was not fit for full duties. It relied upon *Melesco Manufacturing Pty Ltd v Thompson* (1966) 40 NSWLR 525 (*Melesco*) as support for the argument that s 105 was insufficient to divest the Local Court of the jurisdiction which it would otherwise have in respect of money claims such as this. Further, although s 235D *WIMA* provided it with an avenue of recovery, other rights were expressly preserved by s 235D (5) and it could sue for the monies claimed in the Local Court.

The defendant argued that *Malesco* could be distinguished from this matter as it concerned the variation of an award by the Compensation Court that had the effect of decreasing the amount of weekly compensation payable to the worker. However, this matter turned on an allegation that the defendant was not entitled to workers compensation for a period because of his own misleading or fraudulent conduct. He argued that it would be necessary for the tribunal that determined the claim to determine the question of his entitlement to workers compensation and this was a matter squarely within the jurisdiction of the Commission and s 105 *WIMA* therefore excluded the jurisdiction of any other court or tribunal. The plaintiff had a right under s 235D *WIMA* to apply to the Authority for an order that the defendant refund the amount of any overpayment to the plaintiff and if it did not obtain that order, it could seek review of the Authority's decision by the Commission.

Her Honour rejected the defendant's argument this matter was distinguishable from *Melesco*. She held that it is plain from the wording of s 235D (5) that the section does not intend to exclude other rights of recovery and, indeed, contemplates that there may be other rights of recovery. Section 235D (5) would have no work to do if there were no other rights of recovery which inured to an employer such as the plaintiff. Section 235B (2) (b) applied to this matter because it confers a right to recover on a person who has paid an amount to the claimant in connection with the claim if it is established that, for the purposes of obtaining a financial advantage, the claimant made a statement concerning an injury with knowledge that the statement was false or misleading within the meaning of s 235B (1).

Her Honour stated:

> 34. Neither party contended that the Commission had jurisdiction under s 235B (2) (b) to order a worker such as the defendant to repay to the employer the amount of a financial advantage. As the Commission is a body created under statute, it has no general powers other than those specifically conferred. Section 105 (1) confers exclusive jurisdiction to hear and determine all matters arising under the *Workplace Injury Management and Workers Compensation Act* and the *Workers Compensation Act*. It operates to limit the jurisdiction of other courts and tribunals. The jurisdiction it confers on the Commission is limited by the wording of s 105 (1), as the Court of Appeal held in *Melesco*. The Commission has no inherent jurisdiction but only has such powers as are necessary and incidental to the exercise of its statutory jurisdiction.
>
> 35. It would appear that a claim for recovery referable to s 235B could be the subject for an application for an order under s 235D. Had the legislature intended that the recovery claim under s 235B be brought directly to the Commission, it would have expressed its intention in clearer words. That the Commission's role under s 235D is only supervisory, the principal decision being one for the Authority, is further evidence that the legislature did not intend that s 235B would give rise to a claim that could be brought directly by an employer in the Commission.
>
> 36. It follows that the legislature, by enacting ss 235B and 235D, has not excluded the plaintiff's right to recover payments alleged to be overpayments of workers compensation, which is a common law right to recover monies had and received. The removal of a common law right to sue to recover an overpayment requires express words or necessary intention: *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15; cited in *Carricks Ltd v Pizzaro* (1995) 38 NSWLR 274 at 280 (Cole JA) and *Melesco* at 532 (Sheller JA) and 541 (Powell JA). Nor is s 105 (1) sufficient to remove the jurisdiction of the Local Court to determine money claims within its jurisdictional limit: *Melesco*. The claim which the plaintiff brought in the Local Court was for monies recoverable at common law and was not a matter arising under the *Workers Compensation Act* or the *Workplace Injury Management and Workers Compensation Act*.

Her Honour held that the Magistrate erred in dismissing the claim, but noted that neither party had given the Magistrate the benefit of *Melesco*, which determines the question in the plaintiff's favour. She set aside the Magistrate's order, reserved costs and concluded:

> 41. I confirm for completeness that my reasons are not to be understood as expressing any view as to the merits of the plaintiff's claim. The only issue which arises in the proceedings before this Court is the Local Court's jurisdiction to hear the plaintiff's claim.

I note that her Honour did not address s 235 (1) *WIMA*, which provides, *Compensation under this Act (including the 1987 Act and the former 1926 Act): (a) is not capable of being assigned, charged or attached, and (b) does not pass to any other person by operation of law, nor can any claim be set off against that compensation.*

Further, s 235D (4) *WIMA* provides to the effect that if the Authority is satisfied that a person has received an overpayment as a result or partly as a result of an act that contravenes s 235A (fraud on workers compensation scheme) or s 235 C (false claims), it may order the person to refund the amount of overpayment to the person who made the payment. However, s 235D (5) provides that any such refund may be deducted from future payments of compensation, but not if it is payable under an award of the Commission. It is possible that the full implications of s 235 were not drawn to her Honour's attention.

Extension of time to commence WID proceedings under s 151D WCA granted based upon a concept of "representative error"

Humphries v McDermott Drilling Pty Ltd [2019] NSWSC 508 – Schmidt J – 7 May 2019

The plaintiff sought leave under s 151D WCA to extend the time to bring proceedings for WID's for injuries that he suffered in September 2009, while working in or about a coal mine. He was working with Mr Botica at that time.

The plaintiff commenced similar proceedings in 2012, which were discontinued in 2015 and argued that this was due to "representative error". The defendant opposed the granting of leave and sought orders under r 14.28 of the UCPR Rules 2005 (NSW), striking out the statement of claim and, in the alternative, orders permanently staying the proceedings under s 67 of the Civil Procedure Act 2005 (NSW).

Schmidt J stated that the only issue for determination was whether the leave sought by the plaintiff should be granted *"nunc pro tunc"* (retroactively to correct an earlier ruling). She noted that in *Salidio v Nominal Defendant* (1993) 32 NSWLR 524, Gleeson CJ stated in relation to s 54 (4) of the *Motor Accidents Act 1988,* which is a similar provision to s 151D *WCA,* that the immediate purpose of the Court's discretion is to "protect respondents against the injustice of stale claims and to promote forensic diligence". Consideration must also be given to the diligence, or lack of diligence, of the plaintiff's solicitors in asserting his rights; the extent of the delay; the reason for it; and the resulting forensic disadvantage for the defendant and its ability to defend the claims. She stated:

> 11. In *Salidio* reference was made to what the High Court said in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, at 547, 550 and 555, which may be summarised as: that it is for the respondent to adduce evidence that leads the court to conclude that actual prejudice would result and for the applicant to show that this does not amount to material prejudice; that the real question is whether the delay has made the chances of a fair trial unlikely, so that if it has not, there is no reason why the discretion should not be exercised; but that if actual prejudice of a significant kind is shown, the extension discretion should not trump the limitation period.

Her Honour stated that the proper question in determining an application under s 151D *WCA* is whether it would be fair and just to grant leave: *Itex Graphix Pty Limited v Elliott* [2002] NSWCA 104 (*Itex*). She noted that in *Itex*, a fully informed decision not to proceed within the 3-year limitation period and a further significant delay before the plaintiff changed her mind weighed heavily against the granting of the leave, particularly as there was no explanation for that course of action. However, in this matter it was relevant that the plaintiff not only notified his claims within the limitation period and commenced the 2012 proceedings within time, he also explained not only how they came to be discontinued and how the delay in bringing these proceedings occurred. Therefore, the issue is the adequacy of that explanation.

Her Honour noted that before the commencement of the 2012 proceedings, the plaintiff's solicitors (P K Simpson & Co) engaged investigators to locate Mr Botica and in April 2012, he provided information about the accident to the investigators and agreed to provide a statement. However, he failed to provide a statement and he did not respond to any further attempts to contact him. The 2012 statement of claim was served on both the defendant and Mr Botica. No defences were filed, but a notice of appearance was filed for both parties before the proceedings were discontinued in 2015 (after transfer to the District Court).

Her Honour also noted that TurksLegal filed a notice of appearance for both defendants, and stated:

> 26. On the evidence of Mr Vorbach of TurksLegal, it appears that no statement has been taken from Mr Botica by GIO, the solicitors who acted in the 2012 proceedings, or TurksLegal. It also appears that Mr Botica has never himself given TurksLegal instructions, either to enter an appearance for him in these proceedings, or to file a defence…no contact has ever been made with him, despite the efforts of an investigator engaged by TurksLegal after these proceedings were commenced… to locate him. Its instructions have only ever come from GIO.
>
> 27. That evidence raised obvious questions about TurksLegal's retainer to act for Mr Botica, given the contractual nature of the relationship between a solicitor and client, which ordinarily requires agreement: *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1.
>
> 28. There may be circumstances in which such an agreement may be implied from conduct, courts generally accepting the existence of a retainer when a solicitor has performed work on behalf of a person with his or her knowledge and assent, in circumstances which are consistent with that person being the solicitor's client: *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 at [19]…
>
> 38. Under the relevant conduct rules, Mr Humphries' solicitors are ordinarily not entitled to deal directly with Mr Botica, without TurksLegal's consent: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*. That well explains why efforts to obtain a statement from Mr Botica were not pursued by Mr Humphries' solicitors, after the 2012 proceedings were commenced.
>
> 39. Given Mr Vorbach's evidence that since the 2018 proceedings were commenced, he has not been located, it may of course be that TurksLegal is not truly retained by Mr Botica. He was recalled to give evidence about the underlying facts. Then he said:
>
> - his instructions had come from … GIO, the workers compensation insurer;
> - an appearance was filed for Mr Botica, because it was conceded that he was an employee of McDermott for whom it was vicariously liable;
> - he had not had direct contact with either McDermott or Mr Botica;
> - he was disappointed to find that in the 2012 proceedings, the solicitors engaged by GIO, had focussed entirely on the status of McDermott as an employer in the mining industry, rather than the injury itself; and
> - GIO's file had been subpoenaed and produced, apart from privileged documents.
>
> 40. The circumstances in which a legal practitioner's retainer may be challenged arose for consideration in *Doulaveras v Daher* (2009) ALR 627; [2009] NSWCA 58. There it was concluded, after an extensive review of the authorities, that a challenge to a retainer cannot be properly raised by a defence, although it can become an issue in the proceedings, if raised by a party, even informally: at [76] to [153].
>
> 41. There it was also observed at [150] that it is a "clear" abuse of the process of the Court to bring litigation supposedly in the name of a person, when that person has not authorised the litigation and that the Court will deal with such an abuse, once it is established that a supposed plaintiff has not given authority for the litigation to be brought. It is difficult to see that the position is any different, if it is an unauthorised appearance and defence which has been filed in the proceedings.

42. On Mr Vorbach's evidence it is McDermott's insurer, GIO, who has instructed TurksLegal, as the result of which an appearance has been entered not only for the insured, McDermott, but also one of its employees, Mr Botica.

43. The basis upon which a contact of insurance between an employer and an insurer could entitle the insurer to enter an appearance for such an employee, is not immediately obvious, despite what was submitted for McDermott, as to its vicarious liability for the negligent acts or omissions of Mr Botica. But the employee could certainly consent to the insurer acting for him or her, as was the case in *Le v Williams* [2004] NSWSC 645; [2005] NSW ConvR 56-109.

44. But it was not Mr Vorbach's evidence that there had been such authorisation given by Mr Botica. To the contrary, his evidence was that no contact had been able to be made with Mr Botica, since these proceedings were commenced.

45. It clearly does not follow in these circumstances, that at trial it would be expected that Mr Humphries would call evidence from Mr Botica. After all, he is a defendant in the proceedings legally represented by the same solicitors as act for McDermott. In the result, how *Jones v Dunkel* inferences could be drawn against Mr Humphries, if he did not call Mr Botica at trial, is not readily apparent.

46. That principle was explained in *RHG Mortgage Limited v Rosario Ianni* [2015] NSWCA 56 at [75] - [96]. The three relevant considerations are: first, that the missing witness would be expected to be called by one party, rather than the other; secondly, that this evidence would elucidate a particular matter and thirdly, that the absence is unexplained.

47. If those conditions are satisfied, then the inference may be drawn that the witness' evidence would not have helped the party's case. That inference may then be used in two ways. Firstly, in deciding whether to accept any particular evidence given, either for or against that party, which relates to a matter about which the person not called as a witness could have spoken. Secondly, in deciding whether or not to draw inferences of fact, which are open in relation to matters about which that person could have spoken.": at [79].

49. Mr Botica being an active party to the proceedings, if he did not give evidence at trial, the inference available to be drawn would be that his evidence would not have assisted the case which he advanced by his defence.

Her Honour held that the evidence establishes that the discontinuation of the 2012 proceedings was the result of "representative error" on the part of one of the solicitors who acted on Mr Humphries' matter regarding counsel's advice, and not because he desired to abandon his common law claims. She stated:

64. The delay in the initiation of these proceedings after 2015 appears to be the attention given to the question of the law applicable to coal miners and whether it applied to Mr Humphries, about which the parties are now agreed. It was submitted for McDermott and Mr Botica, that had involved further representative error, but from the correspondence it is apparent that it was not only Mr Humphries' solicitors who were districted by this issue, before it was finally agreed.

65. It is also relevant that from what is in evidence and the submissions advanced, it is apparent that had defences been filed in the 2012 proceedings as they ought to have been, before those proceedings were discontinued, given the applicable Rules, what has now been agreed about Mr Humphries being a coalminer is likely then to have emerged. The error made in the discontinuation of those proceedings, is likely, thereby to have been avoided.

Her Honour considered the circumstances in this matter to be far removed from those in *Itex,* and she held that it has not been established that actual prejudice, let alone substantial prejudice, would result for the defendants if leave was granted or that the delay made the chances of a fair trial unlikely. Therefore, she granted leave under s 151D.

Her Honour ordered the plaintiff's solicitors to pay all parties' costs of the motions, as it appeared that inadequate supervision of the many solicitors who worked on the matter resulted in the erroneous discontinuance of the 2012 proceedings.

The concept of "representative error" appears to be a novel basis for the granting of leave under s 151D *WCA* and the decision appears to fly in the face of the legal concept that a lawyer is the agent of their client and that the client is bound by their agent's actions.

WCC Presidential Decisions

Psychological injury – causation test in s 11A (1) WCA with respect to "transfer" – application of Manly Pacific International Hotel Pty Ltd v Doyle

Canterbury Bankstown Council v Gazi [2019] NSWWCCPD 14 – President Judge Phillips – 11 April 2019

Background

The decision at first instance was summarised in Bulletin no. 25. However, ***Arbitrator John Isaksen*** held that the worker's psychological injury was caused by the conditions that she encountered after the transfer to the appellant Council and not as a result of its action in effecting it.

The appellant appealed on 5 grounds and asserted that the Arbitrator erred in as follows: (1) In fact and law in failing to consider whether the transfer was the whole or predominant cause of the psychological injury, as required by *Manly Pacific International Hotel Pty Ltd v Doyle (Doyle);* (2) In fact and law in finding that the worker's responses to employment conditions after a physical transfer were not relevant to this enquiry; (3) In law in failing to hold that a broad view of the expression "action with respect to transfer", extending to the whole process of transfer, including, but not limited to, learning new work systems and a new computer software system, moving premises, learning new procedures and new protocols, coming under new management and supervision, and adapting to new work tasks and responsibilities: per *Northern NSW Local Health Network v Heggie*; (4) In fact and law in failing to hold that the worker's injury was wholly or predominantly caused by reasonable action taken by or on behalf of the appellant with respect to transfer within the meaning of s 11A of the 1987 Act; and (5) In fact in finding that the worker was exposed to an excessive workload after her physical transfer to Bankstown.

President Judge Phillips noted that the worker sought an oral hearing of the appeal and sought to raise a cross-appeal in which she asserted that the Arbitrator erred by not finding that she was bullied, harassed or treated unfavourably or subjected to inappropriate behaviour in the workplace. He regarded the attempt to pursue a "cross-appeal" as unusual, as the *WIMA, the WCC Rules and Practice Direction No 6* do not permit this.

His Honour determined the appeal on the papers but declined to determine the proposed "cross-appeal". He allowed the appeal in part and his reasons are summarised below.

In relation to grounds (1) and (3), His Honour considered noted that the relevant issue was whether the appellant's action with respect to transfer continued after the worker was physically moved to the new amalgamated Council at Bankstown. These grounds essentially depend on whether the Arbitrator erred in applying the appropriate test under s 11A *WCA*.

The appellant argued that the Arbitrator erred by misapplying the decision in *Doyle* regarding the application of the appropriate test in s 11A *WCA.* However, he noted that the passages of Davies AJA's decision that the Arbitrator relied upon in determining the s 11A defence was in the minority. This was the approach urged by the respondent's counsel. However, the majority (Fitzgerald JA (with whom Mason P agreed)) stated:

> 7. Davies AJA has stated (at [28]) that the Compensation Court 'held that the circumstances under which Mr Doyle worked [after his transfer] were the predominant cause of his breakdown' and expressed the opinion (at [27]) that, for the purpose of s 11A(1), the consequences of actions 'taken or proposed to be taken by or on behalf of the employer with respect to transfer' do not include 'the worker's response to employment conditions encountered after a transfer...'. In my opinion, that proposition is too broadly stated.
>
> 8. It was an action taken by the appellant with respect to the transfer of Mr Doyle, namely, the transfer of him from one position to another, which caused him to work in 'the circumstances... which ... were the predominant cause of his breakdown'. That being so, the appellant's material action, the transfer of Mr Doyle, cannot be automatically excluded as the whole or predominant cause of Mr Doyle's psychological injury. Whether or not the appellant's transfer of Mr Doyle was the whole or predominant cause of his psychological injury within the meaning of subs 11A(1) is a question of fact and degree, which involves consideration of all the factors which produced Mr Doyle's condition. (emphasis added)

His Honour stated that the Arbitrator should have considered whether the transfer was the whole or predominant cause of the psychological injury, which is a question of fact and degree involving a consideration of all of the factors that produced the condition in accordance with the majority decision on this point in *Doyle*. Those factors may include the circumstances in which a worker was required to work because of the transfer from one position to another, or in the present case the circumstances in which she was required to work following the physical transfer to the amalgamated premises. This is consistent with the broad approach taken in *Heggie*. He stated:

> 174. Section 11A (1) of the 1987 Act, when properly construed, provides an employer with relief from liability in eight identified categories. Each category is to be viewed through the lens of the words of the section immediately preceding the listing of the eight categories. Namely, was the psychological injury wholly or predominantly caused by reasonable action taken, or proposed to be taken, by or on behalf of the employer with respect to one (or more as the case may be) of the eight listed categories.
>
> 175. The Court of Appeal in *Heggie* was dealing with the category of "discipline" in s 11A of the 1987 Act and was of the view that a broad approach should be taken to "action with respect to discipline". While the decision in *Heggie* is factually distinct from *Doyle* and the present case, it remains relevant to the proper approach to be taken to determining s 11A (1) of the 1987 Act. There is no warrant to depart from the approach taken in *Heggie* with respect to the category of "transfer" or the other categories in s 11A. As was said by the majority in *Doyle*, it is a "question of fact and degree" as to whether the relevant category was the whole or predominant cause of a worker's psychological injury within the meaning of s 11A (1).

He held that the Arbitrator failed to undertake the appropriate task (to analyse the circumstances alleged by the appellant as causative of the injury and properly evaluate the evidence against his findings on injury in determining the s 11A defence). This was an error of law and grounds (1) and (3) are made out.

In relation to grounds (2) and (4), his Honour stated:

> 182. Whilst in grounds two and four the appellant alleges both errors of fact and law, it is apparent from a consideration of the submissions that the substance of this complaint relates to the Arbitrator's mistaken application of the minority decision in *Doyle* and that the facts in the present case should have been considered consistently with the majority decision. The error of law in terms of the misapplication of *Doyle* and the failure to apply and consider the majority view in that decision was an error that affected the Arbitrator's fact finding exercise and ultimate approach to determining the s 11A defence.

His Honour rejected ground (5) based upon the principles stated by Roche DP in *Raulston.* While there was conflicting evidence about whether the worker was exposed to an excessive workload, the appellant had not explained how other probabilities so outweigh that chosen by the Arbitrator that it can be said that his factual conclusion was wrong.

He found that the worker perceived that she had a heavier workload and accepted that she felt that she was under stress during this period due to work. He also found that the worker approached the move to the Bankstown premises with optimism, but later found that she was unable to cope with learning and operating the SAP system and the workload being placed on her, which lead to her suffering symptoms of stress. Those findings were open to the Arbitrator on the evidence and he was entitled to consider the worker's perception of real events in determining what was causative of the injury for the purposes of s 4 *WCA.*

Accordingly, his Honour revoked orders 1 and 2 of the COD and remitted the s 11A defence to the Arbitrator for redetermination in accordance with his reasons. He also observed that:

(1) All of the medical evidence supports a history of varying problems in the workplace following the amalgamation;

(2) It is clear that the worker's psychological injury was multifactorial and there was no specific medical evidence going to the s 11A issue except for a supplementary report from Dr Whetton. This report was prepared at the request of the appellant and the doctor did not evaluate why he formed the view that the transfer, or any specific actions taken or proposed by the employer in respect of it, wholly or predominantly caused it; and

(3) While expert evidence may assist in determining causation, that evidence is not necessarily determinative and the ultimate determination of whether the requirements of s 11A *WCA* are met is a matter for the Commission to answer based upon an assessment of all of the evidence.

Breach of procedural fairness - application of Muin v Refugee Review Tribunal - error in fact-finding

Hancock v Holman Industries Pty Ltd [2019] NSWWCCPD 16 – Deputy President Snell – 24 April 2019

The decision at first instance was summarised in Bulletin no. 26. ***Arbitrator Jill Toohey*** entered an award for the respondent primarily due to inconsistencies between the appellant's evidence on causation of his injuries and his doctors' clinical records.

The appellant appealed on five rounds and alleged that the Arbitrator erred: (1) In accepting that the incident occurred, and then failing to properly consider whether the incident was capable of causing the injury to the left knee demonstrated on the MRI scan of 27 June 2015; (2) When she failed to properly consider that all doctors accepted that the injury was caused by the incident of 18 May 2015; (3) When she failed to properly consider that Dr Ong was of the view that the injuries were caused by the incident when he had the

advantage of having seen the appellant both before and after the incident; (4) When she placed significance on the fact that Dr Ong's notes of 1 June 2015 do not describe an incident but did not weigh that against the fact that his note of 6 March 2015 also did not describe an incident; and (5) When she failed to give reasons why Dr Giblin's report of 9 July 2018, which required explanation.

Deputy President Michael Snell cited the decision of Roche DP in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25 (*Raulston*), which applied the decision of *Whitely Muir & Zwanenberg Ltd v Kerr* [1966] 39 ALJR 506 (which was cited with approval by the High Court in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140) regarding the nature of the appeal process involving factual error under s 352 *WIMA.* He noted that in *Raulston*, Roche DP also cited this passage from *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd:*

> … 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.

He confirmed that the WCC has consistently applied these principles and he cited the statement of Sackville JA in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255, that *"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 considered grounds (1), (3) and (4) together. He cited the decision of McHugh J in *Muin v Refugee Review Tribunal* [2002] HCA 30, that *"Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power"* and held:

> 41. If a court or tribunal proposes deciding a case by reference to matters outside the parties' submissions and how they have conducted the matter, that prospect should be raised with the parties.51 It follows that there was a breach of the rules of procedural fairness, in how the notations were dealt with at [40] to [41] of the reasons. It could not be concluded that this error could not have affected the result. A perceived lack of reliability in Dr Ong's notes and reports was a factor in the Arbitrator's analysis, which led to her conclusion that the appellant's onus was not discharged (see the reasons at [100] and [107]). It follows that this constituted appealable error…
>
> 53. An issue having arisen regarding the possible significance of the earlier incident on 6 March 2015, the appellant relied on a report from the treating general practitioner which recorded that any symptoms at that time "settled with the use of Mobic", and a report from the qualified orthopaedic surgeon Dr Giblin, that the earlier incident had no part to play in causation of symptoms that followed the later incident. This evidence, if accepted (and there was no evidence to the contrary) would have rendered the incident on 6 March 2015 an irrelevance.

54. In *Charles Sturt University v Manning,* Roche DP briefly summarised a number of authorities dealing with the need to engage with medical evidence as part of the fact-finding process:

> 52. The extent of an Arbitrator's duty to engage with the evidence depends on the circumstances of each case (*Mifsud v Campbell* (1991) 21 NSWLR 725 at 728). However, where there is disputed expert evidence, the 'parties are entitled to have the judge enter into the issues canvassed before the Court and to an explanation by the judge as to why the judge prefers one case over the other' (*Archibald v Byron Shire Council* [2003] NSWCA 292; 129 LGERA 311 at [54] per Sheller JA (with whom Beazley JA agreed), quoted with approval by McColl JA in *Hume v Walton* [2005] NSWCA 148 at [69]).
>
> 53. The Arbitrator was required to engage with the conflicting medical evidence (*Sant v Tsoutsas* [2009] NSWCA 3; *Sourlos v Luv A Coffee Lismore Pty Ltd* [2007] NSWCA 203 at [25] and *Wiki v Atlantis Relocations (NSW) Pty Ltd* [2004] NSWCA 174; (2004) 60 NSWLR 127). As Bingham LJ explained in *Eckersley v Binnie* (1988) 18 Con LR 1 at 77–78, 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons' (quoted with approval by Beazley JA (as her Honour then was) in *Taupau v HVAC Constructions (Queensland) Pty Limited* [2012] NSWCA 293 at [133])…

> 57….The Arbitrator appears to have misapprehended the potential effect of the supplementary reports, and the use the appellant sought to make of that evidence. The way in which the Arbitrator dealt with the supplementary reports constituted factual error. The consequence of this was that the Arbitrator failed to "enter into the issues canvassed" in the appellant's medical case, particularly as these related to the significance (or lack of it) of the earlier of these incidents. This constituted factual error of the type identified in *Raulston* (see [21] above), in that the Arbitrator failed to meaningfully consider the significance of evidence contained in the supplementary reports. The effect of this was that the fact-finding process miscarried.

He concluded that when the Arbitrator's reasons are read as a whole, her approach to the incident in March 2015 and its potential causative role in the appellant's symptoms constituted a significant factor in her conclusion. The error affected the result and is an appealable error.

Accordingly, he allowed the appeal, revoked the COD and remitted the matter to a different arbitrator for redetermination under s 352 (7) *WIMA.*

Application for assessment by an AMS to determine a threshold dispute under s 39 WCA - Monetary threshold required by s 352 (3) WIMA not satisfied – no right of appeal against Arbitrator's decisions regarding liability and admissibility of evidence

Lambropoulos v Qantas Airways Limited [2019] NSWWCCPD 17 – Deputy President Elizabeth Wood – 3 May 2019

Background

On 3 July 2010, the appellant injured his cervical and thoracic spines at work and suffered consequential gastrointestinal symptoms due to the use of prescribed medications. Following receipt of a s 39 notice from the respondent, he filed an application for assessment by an AMS with respect to alleged injuries to the cervical and thoracic spines, both shoulders, both arms, both hands and gastrointestinal tract. However, the respondent

disputed liability for both shoulders and any consequential condition of the reproductive organs.

On 30 October 2018, ***Arbitrator Gerard Egan*** conducted an arbitration hearing, at which the appellant was legally represented. He sought to rely upon further evidence that his solicitors filed on 24 October 2018. The Arbitrator admitted a single clinical note dated 3 July 2010, but declined to admit any other evidence. On 2 November 2018, he issued a Certificate of Determination, in which he determined that he was not satisfied that the appellant had injured his shoulders. He remitted the s 39 dispute to the Registrar for referral to an AMS to assess the degree of permanent impairment of the cervical and thoracic spines, the digestive system and the reproductive system.

The appellant sought to appeal against the Arbitrator's decision. However, the Certificate of Determination did not award any amount of compensation and neither party made submissions about the need to satisfy ss 352 (3) (a) and (b) *WIMA.*

On 9 April 2019, ***Deputy President Elizabeth Wood*** directed each party to lodge submissions that addressed this. She also drew their attention to the decision of DP Snell in *Abu-Ali v Martin Brower Australia Pty Ltd (Abu Ali)* and her decision in *Anderson v Secretary, Department of Education (Anderson).*

The respondent argued that *Abu-Ali* is directly on point with this matter and that there is no right of appeal because the threshold under s 352 (3) *WIMA* is not satisfied. It also observed that the appellant commenced other WCC proceedings in 2018, in which he claimed future medical expenses totalling $107,600, but the claim was not particularised and the proceedings were discontinued during the conciliation/arbitration.

The appellant sought leave to adduce fresh evidence under s 352 (6) *WIMA* and argued that the failure to grant leave would cause substantial injustice. He said that he commenced WCC proceedings in 2018, which were "put on hold" based upon advice from his former legal representatives pending the Arbitrator's determination in this matter, and in 2017 he commenced (and discontinued) proceedings that specifically concerned the shoulders. Also, while no amount of monetary compensation in issue in these proceedings, this did not mean that a monetary claim would not be the subject of a claim made after this claim was determined and it is essential that his treatment costs (claimed in 2017) are included in this claim as these clearly satisfy the threshold. He also argued that *Mawson v Fletcher International Exports Pty Ltd* is authority for the proposition that where there is no monetary compensation awarded, s 352 (3) (b) *WIMA* does not apply and it is not necessary to establish that at least 20% of the amount awarded is in issue.

Wood DP that in noted that in *Northern New South Wales Local Health Network v Heggie,* the Court of Appeal considered the Commission's power to admit late evidence on appeal under s 352 (6) *WIMA.* Basten JA held that the purpose of this power was to allow the Commission to admit further evidence which, if accepted, would be likely to demonstrate that the decision appealed against was erroneous. Further, in *CHEP Australia v Strickland,* Barrett J observed that the task is to decide whether the absence of the evidence would cause substantial injustice in the case and there must be a decision regarding the result that would emerge if the evidence was considered and the result that would emerge if it were not. She stated:

> 41. The extracted pages from the ARD filed in the 2017 claim do not constitute "evidence", but are an attempt by the appellant to place an amount in issue between the parties for the purpose of satisfying the monetary threshold requirement. If, by filing the documents, the appellant is seeking to amend his claim to include a

monetary amount, then such an amendment is not permissible in an appeal. Section 352 (1) of the 1998 Act provides for an appeal to a Presidential member from a decision of an arbitrator. Section 352 (8) of the 1998 Act provides that a "decision" includes an award, interim award, order, determination, ruling and direction.

42. The amount of compensation at issue on the appeal must be determined by reference to the amount at issue in the proceedings at first instance. The decision of the Arbitrator in this case is the decision issued on 2 November 2018, in respect of proceedings in which no monetary amount was claimed. The parties did not argue, and the Arbitrator did not consider, such a claim.

43. The general purpose and policy of the provision is to require a certain monetary threshold to be met, that is, there is "an amount in issue". The provision restricts the right of appeal in a number of circumstances. The requirement is not a simple formality or technicality and its application does not offend the principles and objectives of the Commission set out in subss 354 (1) and 354 (3) of the 1998 Act.

44. Admission of the documents is clearly not for the purposes of establishing that the Arbitrator's decision was erroneous. The appellant's submissions as to why those documents should be admitted point to the alleged substantial injustice that would arise if his appeal does not satisfy the monetary threshold to appeal.

45. Even if those documents are sought to be relied on in order to establish liability on the part of the respondent, they are of no probative value and would not change the outcome. None of them go to proving a causal connection between the shoulder conditions and the appellant's injury.

Wood DP refused to admit the fresh evidence as it could not possibly change the outcome of the proceedings and no substantial injustice arises by excluding it. As to the threshold issue, she referred to the decisions in *Abu-Ali* and *Anderson* and stated:

54. The appellant has not asserted that these two authorities can be distinguished, and I cannot see how they are any different to this case. It is appropriate to apply the ratio decidendi in *Abu-Ali* and *Anderson* to this appeal.

55. No amount of monetary compensation was claimed in these proceedings. I am not satisfied that the appellant has met the monetary threshold pursuant to s 352 (3) (a) of the 1998 Act and consequently, the appeal cannot be brought.

Accordingly, the monetary thresholds in 2 352 (3) *WIMA* were not satisfied that there is no right of appeal against the Arbitrator's decision.

Section 11A defence "reasonable action with respect to transfer, discipline and termination of employment" upheld on appeal

AS v State of New South Wales [2019] NSWWCCPD 18 – Deputy President Elizabeth Wood – 8 May 2019

This matter was reported in Bulleting no. 26. However, by way of summary, ***Arbitrator Michael Perry*** upheld the respondent's defence under s 11A WCA and found that the appellant's psychological injury was predominantly caused by reasonable action taken or proposed with respect to transfer, discipline and dismissal of a worker. He entered an award for the respondent.

The appellant appealed on three grounds, namely: (1) The Arbitrator erred by accepting the opinion of Dr Allan and determining that the predominant cause of the appellant's injury related to the allegations contained in the letter dated 9 February 2015 and the management of the disciplinary process that followed; (2) The Arbitrator erred in finding that the "allegations" by AT, which came to light before the letter dated 9 February 2015,

formed part of the s 11A actions of the employer, or that those allegations were predominantly causative; and (3) The Arbitrator erred in finding that the respondent had proved its actions reasonable in requiring the appellant to work with officers with whom he was in dispute.

Wood DP rejected ground (1). She noted that the Arbitrator rejected Dr Rastogi's opinion as it was founded on a history that he did not accept because it was reliant upon the reliability of the appellant's evidence. It was open to the Arbitrator to do so.

She also rejected ground (2) and noted that the appellant had not provided any reasons as to why the Arbitrator's conclusion was wrong. This was a finding of fact for which he provided reasons and a finding of fact will not be disturbed on appeal unless it can be established that the Arbitrator considered irrelevant material, overlooked material evidence or gave insufficient weight to the evidence. The appellant pointed to no evidence to support his assertion that the Arbitrator erred.

Ground (3) was also rejected as the appellant was unable to establish any error on the part of the Arbitrator.

Accordingly, she confirmed the COD.

WCC – Medical Appeal Decisions

AMS erred in certifying that the degree of permanent impairment was fully ascertainable – MAC revoked

Field v WH Health, ML, EC, MH, TA, JR [2019] NSWWCCMA 18 – Arbitrator Jane Peacock, Dr R Pillemer & Dr G McGroder – 11 February 2019

The appellant injured his lumbar spine on 31 January 2000. The Registrar referred the matter to an AMS to determine whether the degree of permanent impairment was fully ascertainable in accordance with s 319 (g) *WIMA* with respect to the lumbar spine and scarring.

On 14 December 2018, Dr McKee (AMS) issued a MAC, which certified that the degree of permanent impairment was fully ascertainable. However, on 8 January 2019, the appellant appealed against the MAC worker and asserted that the MAC contains a demonstrable error (s 327 (3) (d) *WIMA*). The respondent opposed the appeal. The Registrar referred the appeal to the MAP.

The MAP expressed the view that the AMS had not given sufficient reasons for his decision to certify that the degree of permanent impairment was fully ascertainable. It held that three (3) criteria need to be considered, namely: (1) the length of time since the injury; (2) the length of time since the last surgery/significant treatment; and (3) whether any further treatment is being carried out or planned.

The MAP held that criterion (1) was satisfied. However, with respect to criterion (2), the appellant last underwent surgery 8 months ago and that it is usually suggested that after spinal surgery at least 12 months should be given before a final assessment is made and it was relevant that the AMS' clinical findings show that the appellant was still recovering from the surgery. In relation to criterion (3), it noted that the appellant was to have a further CT-guided nerve block injection "in the near future" and that a spinal fusion may be necessary. It stated, relevantly:

> 24. …Given what the AMS specifically said in this regard, the AMS clearly erred when he came to the conclusion that "the degree of permanent impairment is fully

ascertainable". This conclusion could only be reached if no further treatment was being contemplated, which is obviously not the case.

Accordingly, the MAP revoked the MAC and certified that the degree of permanent impairment as a result of the injury on 31 January 2000 is not yet fully ascertainable.

AMS did not err in certifying that the degree of permanent impairment was not fully ascertainable due to insufficient treatment – MAC confirmed

Kitchingham v State of New South Wales [2019] NSWWCCMA 38 – Arbitrator Marshal Douglas, Dr J Parmegiani & Professor N Glozier – 14 March 2019

The appellant was employed by the respondent as a paramedic. On 16 April 2005, he suffered a psychological injury as a result of an incident at work (the suicide of a work colleague). On 24 July 2018, he claimed lump sum compensation under s 66 *WCA* for 19% WPI. However, the insurer disputed the claim. He then filed an ARD.

On 11 October 2018, ***Arbitrator Graeme Edwards*** issued a COD – Consent Orders, which remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment as a result of the psychological injury. This indicated that the dispute was confined to the degree of permanent impairment that resulted from the injury.

On 12 December 2018, Dr P Morris (AMS) issued a MAC, in which he noted that the appellant: (1) had never been referred to a psychiatrist; (2) had not seen a psychologist since 2017; (3) he had not been on any medication for his psychiatric conditions for the past 18 months; and (4) was not presently receiving any treatment. He expressed the view that maximum medical improvement had not been reached. He stated, relevantly:

> I believe that Mr Kitchingham has not received adequate treatment for his psychiatric conditions. He has not taken any antidepressant medication for 18 months and has not had any psychological therapy since early 2017. In my opinion Mr Kitchingman requires intensive treatment by a psychiatrist, including management of his medications, and intensive psychological therapy from a clinical psychologist including cognitive-behavioural therapy and exposure-based therapy. I believe that his condition is likely to change substantially in the next year if he has this recommended psychiatric and psychological treatment.

The AMS certified that the degree of permanent impairment was not fully ascertainable and declined to assess permanent impairment. However, on 7 January 2019, the appellant appealed against the MAC under s 327 (3) (d) *WIMA* (demonstrable error). He argued that the AMS erred by obtaining an incorrect history regarding the treatment that he had received and by failing to properly consider that he had trialled antidepressants in 2006, 2009, 2014 and 2016 and had not taken any anti-depressant medications for 18 months. He alleged that these errors resulted in him wrongly concluding that there had been insufficient treatment and that his impairment was likely to substantially change in the coming 12 months.

The respondent opposed the appeal. It submissions included that the AMS provided a proper and adequate explanation for his opinion that psychological and psychiatric treatment would substantially change the appellant's impairment.

The MAP conducted a preliminary review and decided to determine the matter on the papers. It decided that the ground of appeal was not established and that as it could not revoke the MAC, its power to require the appellant to be re-examined was not enlivened: *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792. It referred to paras 1.16 and 1.32 of the *Guidelines.* It noted that the AMS' conclusions, including that the appellant had never been referred to a psychiatrist and had

not seen a psychologist since 2017, are sound and unchallenged on appeal. The AMS expressed his view that the appellant required intensive treatment by a psychiatrist, including management of medications, but as he had not been offered such treatment he could not have refused it and para 1.34 of the *Guidelines* does not apply.

The MAP accepted that different assessors may have come to a view, that it is unlikely that the appellant would undergo or would respond to further treatment, and may have concluded differently to the AMS regarding the benefit that the appellant is likely to obtain from the additional and different treatment that he outlined. However, it was open to the AMS to reach that conclusion and his opinion is consistent with para 1.16 of *the Guidelines*, that maximum medical improvement has not been achieved, and he was able to decline to make an assessment under s 322 (4) *WIMA.*

The MAP also held that the factual errors made by the AMS regarding the history do not affect or render wrong his view, which was based upon the exercise of his clinical judgment, that the additional treatment that he proposed was likely to benefit the appellant. In forming that opinion, he had proper regard to the appellant's history of taking anti-depressant medication in the past.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Worker estopped from making a claim under s 66 WCA for an injury that was the subject of a previous consent award for the respondent – Following the 2018 amendments, Trustees for Roman Catholic Church for the Diocese of Bathurst v Hine is not good law

Etherton v ISS Property Services Pty Limited [2019] NSWWCC 107 – Arbitrator John Wynyard – 18 March 2019

Background

On 16 April 2015, the worker injured his right leg as a result of a fall at work.

On 17 May 2016, the parties entered into Consent Orders in Commission proceedings, in which the worker claimed weekly payments and s 60 expenses including the cost of a right total knee replacement. The application was amended to add an allegation of injury to the right knee as a result of the nature and conditions of employment until 15 April 2015 and an award for the respondent was entered with respect to that allegation. The was awarded weekly payments totalling $17,500 and s 60 expenses totalling $3,871.21, but there was an award for the respondent with respect to all other claims for weekly payments. Further the worker consented to an award for the respondent for the right knee replacement costs on the basis that this was not reasonably necessary as a result of the injury on 15 April 2015.

The worker claimed lump sum compensation under s 66 WCA for 18% WPI based upon an opinion from Dr Giblin. However, the respondent disputed this claim and asserted that the worker was not entitled to pursue the claim due to the previous award for the respondent with respect to the injury and that an issue estoppel resulted from the Consent Orders.

On 12 February 2019, ***Arbitrator John Wynyard*** conducted an arbitration hearing. The worker's counsel was granted leave to delete the allegation of injury as a result of the nature and conditions of employment, but he alleged that the fall in 2015 resulted in the total knee replacement surgery.

The respondent's counsel argued that as a result of the 2018 amendments to the Acts (to s 65 *WCA* and s 322A (1A) *WIMA*), which commenced on 1 January 2019, the principle in *Roman Catholic Church for the Diocese of Bathurst v Hine* no longer applies and the Commission now has jurisdiction to make orders in relation to lump sum payments. Therefore, the Arbitrator had jurisdiction to consider the admissions contained in the consent orders.

However, the worker's counsel argued that no estoppel arose from the consent orders, as the issue in those proceedings the issue was whether the total knee replacement surgery was reasonably necessary and this case is concerned with the claim for lump sum compensation only. He also argued that the 2018 amendments do not apply as the matter was before the commission before their commencement date.

Arbitrator Wynyard stated, relevantly:

> 54. The effect of Order 5 of the Consent Orders is that Mr Etherton is unable to claim that the right total knee replacement surgery resulted from the injury of 15 April 2015. This is, however, precisely what Dr Peter Giblin alleged in his opinion. Dr Giblin made a provisional diagnosis of soft tissue injury to the right knee "reasonably causally related to the subject injury 15 April 2015." Whilst he acknowledged the presence of pre-existing age-related changes within the right knee he nonetheless found that the injury caused "a material aggravation" which produced a "symptom complex formation" which necessitated the right total knee replacement.

He held that the estoppel is not limited to the date of the consent orders (i.e. *Rail Services v Dimovski*) as order 5 went to causation and no subsequent evolution of the worker's condition could alter the finality of the order and no alternative diagnosis could affect that curial break in the chain of causation. The fact that the order referred to surgery did not derogate from its fundamental basis that there was no causal connection between the surgery and the injury. He stated:

> 64. It follows that Order 5 of the Consent Orders of 17 May 2016 in matter 658/2016 acts as a total bar to the recovery of lump sum compensation by Mr Etherton. Lump sum compensation can only be recovered in the case of a total knee replacement by an assessment of the criteria relating to the outcome of that procedure. The terms of Order 5 were that the right total knee replacement was not reasonably necessary as a result of the right knee injury on 15 April 2015.
>
> 65. No appeal was made from that Consent Order, unsurprisingly, and neither was any application made pursuant to s 350(3) of the 1998 Act for it to be reconsidered. The issue cannot be debated for me when it has already been decided in matter 658/2016…
>
> 67. Accordingly, I find that Mr Etherton is estopped from alleging that he has any entitlement to compensation upon the basis that injury to the right knee was caused by the fall of 15 April 2015.

He entered an award for the respondent.

Psychological condition caused by alleged bullying & harassment at work & physical injuries resulting from a suicide attempt – workplace injury resulted from worker's perception of actual evidence – Attorney-General's Department v K applied

Webb v Secretary, Department of Education [2019] NSWWCC 119 - Arbitrator Cameron Burge – 28 March 2019

The worker was employed by the respondent as a primary school teacher. She alleged that she suffered a psychological injury on 9 September 2014 (deemed) as a result of the nature and conditions of employment. She also alleged that she suffered secondary physical injuries (including scarring) on 23 January 2016, as a result of an attempted suicide.

The worker alleged that in 2007, the Principal of the public school approached her and made "a disturbing suggestive comment regarding my future in my chosen profession" and that events that occurred at work from December 2007 until 9 September 2014 caused her severe anxiety and stress. Her complaints against the Principal during this period included, but were not limited to, sexual advances and propositions made to female staff members that resulted in him being transferred and demoted. She described a toxic culture of bullying and blatant sexual harassment of staff by the Principal, which resulted in an EPAC investigation in 2011, and she became involved in this investigation after another teacher asked for her assistance. Further, in 2013, she reported an episode of alleged child abuse/neglect caused by a teacher leaving a child in a classroom unsupervised. Disciplinary action was taken against her for following the code of conduct in reporting this and the teacher, who was a good friend of the Principal, was promoted. Since then, her treatment by staff at the school further deteriorated and on 9 September 2014, after a difference of opinion in relation to a job promotion with another teacher, she was "bullied out of the staff car park by other teachers insisting that I leave. It was my last straw, upset and disappointed that some teachers could in the space of two years go from friendly to hostile towards me." She also alleged that she was discriminated against because she refused the Principal's sexual advances.

In December 2013, the worker consulted her GP and was referred to a psychologist under a mental health plan, because she felt depressed and developed paranoid thoughts of being followed. She resumed work as a relief teacher at another school from 20 April 2015 to 26 June 2015 and then attempted suitable duties at a different school from 12 August 2015 to 25 August 2015. However, she ceased work again following an incident that caused her to make a further claim for psychological injury. This was treated as an aggravation of her original injury. On 12 October 2015, the NTD diagnosed an adjustment disorder with anxiety features "possibly on a background of undiagnosed hypomania, pr4ecipitated by work stress." On 23 January 2016, she attempted suicide by jumping from a bridge and suffered severe physical injuries, namely: (a) a closed sacral fracture with radiculopathy requiring L4 – pelvis fixation and fusing as well as trans-sacral screws; (b) Bilateral, compound ankle and subtalar fractures requiring debridement with external fixator Application, adjustment of the right ankle ex-fix and open reduction and internal fixation of the left distal tibia, talus, navicular and calcaneus; (c) Right below knee amputation requiring fitting with a prosthesis; (d) Pan-Talar fusion about the left ankle; (e) Multiple rib fractures and bilateral pneumothoraxes, and (f) Bilateral compound wrist fractures which were fixed with external fixators.

The worker claimed compensation in September 2014, but the respondent disputed the claim under ss 4, 9A, 11A and 60 *WCA.* In October 2015, a dispute notice was issued in response to the second claim, based upon s 4 *WCA.*

On 13 December 2017, the worker's solicitor made claims for weekly payments, s 60 expenses and lump sum compensation under s 66 *WCA* for injuries to both upper extremities, the lumbar spine and both lower extremities. However, on 26 June 2018, the respondent issued a further dispute notice that relied upon ss 4, 9A, 33, 60 and 66 *WCA.*

Arbitrator Cameron Burge conducted an arbitration hearing on 18 February 2019 and noted that the issues were: (a) whether the worker suffered a workplace psychological injury and secondary physical injuries (ss 4 and 9A *WCA)*; and (b) whether the worker is entitled to weekly payments, medical expenses and lump sum compensation arising from the alleged injures. However, the respondent did not its defence under s 11A *WCA.* He held that the worker suffered a psychological injury in the course of her employment, with the date of injury being 9 September 2014, and that the events at the school were a substantial contributing factor to the injury.

He also accepted the opinion of Dr Teoh who diagnosed major depression with psychotic features and stated, relevantly:

> 106. It is apparent from the documentation attached to the Application that for a time during her employment, there was indeed a culture at Tregear which was troubling to her, and which had an impact upon her psychological and psychiatric well-being. I accept the applicant's evidence, corroborated as it is by file notes from an investigator employed by the respondent, that she became involved in an investigation into the conduct of the Principal Mr Hawkins, which led to his demotion and transfer. Those events, and their consequences, were a substantial contributing factor to the receipt of the injury by the applicant.

In accordance with the decision of Roche DP in *Attorney General's Department v K*, he found that the worker's perception of actual events in the workplace (the investigation into and demotion of Mr Hawkins and the reaction of staff members to it) created in her a perception of a hostile work environment from which psychological injury followed. He accepted Dr Teoh's opinion that the psychological injury caused the suicide attempt and found that the physical injuries are a consequence of the psychological injury.

In relation to the claim for weekly payments, the Arbitrator held that there was no medical certificate in evidence that established incapacity between 25 October 2015 and the attempted suicide on 23 January 2016. He entered an award for the respondent in relation to that period of the claim. However, he held that she was totally incapacitated from 23 January 2016 to 24 August 2018 (a period of 130 weeks) and he awarded weekly payments under ss 36 and 37 *WCA* based upon an agreed rate of PIAWE.

The Arbitrator also ordered the respondent to pay the worker's reasonably necessary medical and treatment expenses under s 60 *WCA.*

He remitted the claim under s 66 WCA to the Registrar for referral to an AMS to assess permanent psychological/psychiatric impairment and impairment of both upper extremities, the lumbar spine, both lower extremities and scarring.

Right knee injury resulting from Staphylococcus aureus – employment was not the main contributing factor – worker did not discharge his onus of proof

Basham v State of New South Wales (Riverina Institute of TAFE) [2019] NSWWCC 124 – Arbitrator Anthony Scarcella – 2 April 2019

The worker was employed by the respondent as a storeman. On 15 August 2011, he injured his right elbow at work. On 11 August 2017, a MAC was issued by Dr Gorman in respect of a General Medical Dispute regarding alleged injuries to the right elbow and right knee.

On 4 November 2011, the worker underwent surgical debridement of his right elbow and several days later, he tested positive for a Staphylococcus infection. He was treated with antibiotics and a further debridement in December 2011. However, in about July 2012, he was diagnosed with osteoarthritis in the right knee joint.

On 23 May 2013, the worker was hospitalised with a right knee Staphylococcus aureus infection. He alleged that his employment exposed him to numerous cuts and abrasions to his knees and that his knee became infected because of a break in the skin over it. He developed septic arthritis which led to accelerated osteoarthritis and the need for a total knee replacement on 14 August 2014. The agreed deemed date of this injury is 23 May 2013.

The worker claimed compensation for weekly payments, s 60 expenses and lump sum compensation with respect to the right lower extremity. However, the respondent disputed the claim under ss 4, 9A, 33 and 60 WCA. On 28 November 2017, it issued a further dispute notice with respect to right septic arthritis, again relying upon ss 4, 9A, 33 and 60 WCA. The worker requested an internal review, but the insurer maintained its decisions.

The issues for determination were: (1) Had the worker suffered a disease injury within the meaning of s 4 (b) (i) WCA; (2) Was the worker entitled to weekly payments for total or partial incapacity under s 33 WCA; and (3) Whether the worker's medical and treatment expenses were reasonably necessary as a result of injury within the meaning of s 60 WCA.

Arbitrator Anthony Scarcella conducted an arbitration hearing on 8 February 2019. He stated that the worker bears the onus of proving the injury and held, relevantly:

> 131. As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence. Therefore, the legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose. Such a concept is not new. Sections 4(b), 9A and 11A of the 1987 Act contain specific requirements and the provisions need to be interpreted using standard principles of interpretation. This does not mean that the common-sense approach has no place in the application of the legislation to the facts of the case.

He expressed significant concerns regarding the reliability of the worker's evidence, noting that his statement was prepared with the assistance from his lawyer about 5.5 years after the alleged work-related incident. He stated:

> 140. In *Onassis and Calogeropoulos v Vergottis*, Lord Pearce said of documentary evidence:
>
> > It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.
>
> 141. More recently, in *Watson v Foxman*, the McLelland CJ in Equity said:
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> > … Human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have

been said. All too often what is actually remembered is little more than an impression from which the plausible details are then, again often subconsciously, constructed. All of this is a matter of human experience…

150. Histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence. Care should be taken when considering such evidence, not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment. Experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga*; and applied in *King v Collins* and *Mastronardi v State of New South Wales.*

151. The caution referred to above was confirmed by Roche DP in Winter v NSW Police Force53 as follows: "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34; *King v Collins* [2007] NSWCA 122 at [34-36])."

The Arbitrator noted that in 2017, Dr Gorman (AMS) concluded that the staphylococcal aureus infection affecting the right knee was not likely to have been causally associated with and/or materially contributed to by the staphylococcus aureus infection in the right elbow in 2011 and that the worker was likely a carrier of the infection. However, he did not take any history of injury from kneeling on metal shavings at work and/or of resulting cuts and abrasions. The worker subsequently discontinued the WCC proceedings and he commenced the current proceedings after he obtained medical support from Dr Trad. He stated:

157. Based on Mr Basham's description of kneeling over his right knee on the concrete floor at work, Dr Trad opined that such description could explain how the skin could have been inoculated through cracks caused by metallic scrapings. Dr Trad did concede that the medical records did not link the condition to a cause at the time and did not specify the exact clinical location of the condition over the right shin and its vicinity to the knee.

158. Dr Trad concluded that Mr Basham's right knee condition, reflected an infection that, most likely, was acquired from or related to his work via repetitive kneeling over the right knee. He stated that support for such conclusion was evident by Mr Basham's previous history of cellulitis over the right shin area, and later, the presence of patellar bursitis demonstrated on ultrasound imaging in conjunction with the infection of his knee joint. There is no evidence that Mr Basham sustained any breaks in the skin on his right shin at work. Dr Trad's findings and opinions are based on the acceptance of Mr Basham's evidence in relation to suffering cuts and abrasions to his right knee from the metal shavings on the concrete floor at the respondent's premises. For the reasons stated above, I have significant concerns about the reliability of Mr Basham's evidence on the issue of causation, which only appears to have emerged some five years after the alleged work-related incident; after the outcome of AMS Dr Gorman's Medical Assessment Certificate and in the absence of any contemporaneous evidence of any break in the skin barrier of Mr Basham's right knee. Therefore, in these circumstances, I do not accept Mr Basham's evidence in this regard and I cannot give Dr Trad's evidence any weight…

161. A careful consideration of the whole of the evidence and for the reasons referred to above, I am not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that, within the meaning of section 4 (b) (i) of the 1987 Act, Mr Basham suffered a disease condition to his right knee on 23 May 2013 within the meaning of section 4 (b) (i) of the 1987 Act.

Accordingly, he entered an award for the respondent.

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