Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 39

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.

Decisions reported in this issue:

1. Fraser v Lingstar Pty Ltd [2019] NSWWCCMA 97
2. State of New South Wales v Worland [2019] NSWWCCMA 98
3. Fabik v State of New South Wales [2019] NSWWCCMA 101
4. Hilder v The Secretary, NSW Department of Family and Community Services [2019] NSWWCCMA 102
5. Vinod v Boral Shared Business Services Pty Ltd [2019] NSWWCC 254
6. Wales v State of NSW (NSW Police Force) [2019] NSWWCC 257

WCC – Medical Appeal Panel Decisions

An AMS is not required to adopt any opinion of an IME

Fraser v Lingstar Pty Ltd [2019] NSWWCCMA 97 – Arbitrator Moore, Dr P Harvey-Sutton & Dr J B Stephenson – 22 July 2019

Background

The worker suffered an injury at work on 29 November 2013. On 11 April 2019, Dr Anderson (AMS) issued a MAC, which assessed 7% WPI (thoracic spine) and 0% WPI (lumbar spine). He stated that the T7 wedge fracturing occurred long before the injury on 29 November 2013, and that the 2013 aggravated those features. He assessed DRE thoracic category II (5% WPI) and allowed 2% for ADLs, but found no indications of continuing significant pathology and/or radiculopathy in the lumbar spine.

Appeal

On 8 May 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and alleged that the AMS erred in the assessment of the thoracic spine (he should have assessed DRE category III and not DRE category II) and in the assessment of the lumbar spine (because of "relevant evidence" that he had at the time of assessment).

The respondent opposed the appeal and argued that the AMS's assessment of the thoracic spine was correct because the fractures were longstanding and his assessment of the lumbar spine was consistent with the evidence.

The MAP held that overwhelming evidence is that the appellant had longstanding problems in his thoracic spine and that the compression fractures clearly pre-dated the 2013 injury. The AMS conducted a thorough and comprehensive examination of the appellant, and his conclusions regarding the thoracic spine were consistent with the evidence and AMA 5.

The MAP noted that the appellant's submissions regarding the lumbar spine were focussed principally on the "range of movement" (ROM) aspect of the assessment. The particular category of DRE is assessed according to clinical findings and the AMS noted that "Pain was located in the midline… all the way down into his lumbar spine." It held:

> 55. Ultimately, the AMS is not required to adopt any opinion of an IME. His or her task is to make an assessment on the day of examination. It is clear as we said that the AMS conducted a thorough examination and clearly and concisely recorded his findings.
>
> 56. He examined the spine from thoracic to lumbar, and although he observed a significantly reduced range of movement, he nonetheless concluded that "there was no indication of continuing significant lumbar pathology and also no indication of radiculopathy," a conclusion that was open to him on the whole of the evidence.

Accordingly, the MAP held that there was no error by the AMS and it confirmed the MAC.

Subsequent non-work injury does not prevent compensation for workplace injury

State of New South Wales v Worland [2019] NSWWCCMA 98 – Arbitrator Harris, Dr B Noll & Dr D Dixon – 24 July 2019

Background

On 23 February 2008, the worker injured her lumbar spine at work. She claimed compensation and the insurer accepted liability. She then claimed compensation under s 66 *WCA,* but the appellant disputed that claim and the dispute was referred to an AMS. On 17 April 2019, Dr Assem issued a MAC, which assessed 21% WPI (DRE lumbar category IV (20% WPI) + 1% for ADLs and + 3% for persisting radiculopathy - a 1/10 deduction under s 323 *WIMA.* He noted a prior history of back injury in 2006 and a further aggravation at home in mid-2011, after which radiological evidence indicated focal disc pathology at the L5 level and involvement of the left L5 nerve root. Treatment included nerve root blocks, epidural injections and, ultimately, lumbar fusion at the L4/5 level with good result.

Appeal

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. She asserted that there was a demonstrable error regarding the assessment of radiculopathy and that the AMS incorrectly assessed the worker as meeting the criteria for that assessment, because both Dr Powell and Dr Pillemer opined that sensation was intact. In the alternative, it argued that if radiculopathy was present, it resulted from the non-work injury in 2011.

After its preliminary review, the MAP noted that the appellant's submissions raised a ground of appeal that appeared inconsistent with the reasoning of Garling J in *Johnson v NSW Workers Compensation Commission* [2019] NSWSC 347 and it sought further submissions from the parties regarding the application of that decision to ground (3) of the

appeal (whether it should apportion permanent impairment between the work injury and the subsequent injury in 2011).

The MAP rejected ground (1). It noted that the appellant disputed the AMS' finding that there was sensory loss and held that the AMS' finding of "slight diminution of sensation" is a clear clinical finding. It held, relevantly:

> 84. The absence of sufficient pathology on the scans at the L5/S1 level means that the probable explanation in this situation is that the S1 nerve roots were compromised by surgical scarring at the L4/5 level.
>
> 85. Table 15-2 and Figure 15-1 of AMA 5 clearly support the medical opinion set out above on the loss of sensation from the various dermatomes.
>
> 86. The AP, through its medical expertise, states that there are clear medical explanations for the differences in the findings by the AMS on sensation and those expressed by Drs Pillemer and Powell sometime prior to the examination. First, sensory loss is not always present and can vary on a daily basis.
>
> 87. Secondly, and more likely, as Dr Powell acknowledged, the respondent's prognosis was guarded because the biomechanics of the lumbar spine had been irreversibly altered having undergone a spinal fusion. Dr Powell noted that the respondent was at risk of adjacent segment disease and the lower back was likely to represent a source of intermittent symptoms into the future. The respondent's condition could easily have deteriorated over this time period due to the spinal fusion affecting the biomechanics of the lumbar spine and the effects from the scarring associated with such a procedure…

While appellant sought to set aside the AMS' clinical findings as not constituting sufficient evidence, the AMS was satisfied that radiculopathy was present based upon the clinical findings of radiculopathy as defined in paragraph 4.27 of the Guidelines. These findings were clearly open to the AMS and there was no error.

The MAP rejected ground (2), which concerned the s 323 deduction. The appellant complained that the 1/10 deduction was inadequate because of the existence of pre-existing degenerative pathology. The MAP held:

> 110. The radiological evidence shows only minor changes that pre-existed the injury. In these circumstances, the AP accepts that the AMS was entitled to form the view that the proviso in s 323 (2) of the 1998 Act applied and that it is appropriate to make a one-tenth deduction…

The MAP also rejected ground (3). It noted that the appellant alleged that the AMS failed to address the effect of the 2011 injury a number of alleged subsequent injuries/aggravations in 2012, 2014, 2015 and 2016, which were significant. It argued that the 2011 incident severed the causal chain. Therefore, the decision in *Johnson* is distinguishable and impairment should be apportioned between the various injuries and based upon the decision of *Nicol v Macquarie University*, the deduction should be more than 1/10. However, the MAP held that the medical evidence did not support any allegation of injury to the lumbar spine due to any incident after 2011 and it stated:

> 160. The relevance of a subsequent as opposed to previous injury or condition was recently discussed by Garling J in *Johnson.* In that case the worker suffered a compensable injury and a subsequent non-compensable injury. The Appeal Panel held that both injuries contributed to the overall impairment and then made an apportionment between the two incidents. The Court quashed the decision of the Appeal Panel. In the course of his reasons, Garling J stated:

> 66. It is significant that the Panel did not conclude that the later injury was of a kind or nature that severed the causal chain between the NSW Education injury and the plaintiff's impairment. If it had come to such a conclusion, then it was obliged to find that there was no impairment as a result of the NSW Education injury. However, to the contrary, it concluded that the plaintiff's impairment resulted from the NSW Education injury and the later Hostels injury.
>
> 67. The task required by ss 9 and 9A of the 1987 Act is for a determination to be made about whether the relevant employment was a substantial contributing factor to the injury. If it was, then the AMS or the Panel is to assess the permanent impairment, by a clinical assessment of the claimant, as they present on the day of the assessment having regard to the matters set out in Clause 1.6 of the Guidelines. That task does not involve any process of apportionment between injuries.
>
> 68.Section 323 of the 1998 Act provides an exception to that general approach, but only in the limited circumstances which that provision contemplates. Here those provisions did not apply.

The MAP also noted that Roche DP discussed the relevant causal connection in the context of a claim for s 60 expenses in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 and held:

> Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> Ms Murphy only has to establish, applying the common-sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40] – [55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716).

Further, Roche DP made similar observations in *McCarthy v Department of Corrective Services* [2010] NSWWCCPD 27, regarding the applicable test to establish an entitlement to weekly payments. The MAP stated:

> 165. It is settled law through various superior Court decisions, referred to in the above passages, that a subsequent non-work injury does not prevent a worker's entitlement to either weekly compensation or medical expenses provided the work injury was causative of the entitlement.
>
> 166. The appellant's initial submissions accepted that the work injury was responsible for a significant proportion of the lumbar spine impairment but sought a contribution by the subsequent incidents. That submission is inconsistent with the reasoning in *Johnson*. It is otherwise inconsistent with the relevant statutory test that must be applied, that is, the assessment of the degree of permanent impairment is "as a result of an injury". …

The MAP held that it was bound by the reasoning in *Johnson* and the decision in *Nicol,* concerning the subsequent incident not severing the causal chain, is entirely consistent with *Johnson*. Therefore, the decision in *Nico*l does not support the appellant. It also held:

> 185. The appellant otherwise submitted that there was an increase in impairment due to the subsequent injury and therefore this established that there should also be an apportionment and/or that the causal chain was severed.
>
> 186. There are at least three major errors with respect to this submission. The first is that the AMS is obliged to assess permanent impairment as the worker presents on the day of the assessment.
>
> 187. Secondly, it is the view of the AP that the respondent's subsequent need for spinal fusion as assessed by the AMS was caused and materially contributed by the 2008 work injury.
>
> 188. Thirdly, the appellant is repeating the incorrect legal test. The relevant test for consideration by the AMS (and the Panel) under s 326 of the 1998 Act is to identify the impairment "as a result of any injury". Whilst expressing an opinion on that matter necessarily involves examining subsequent events, the determination is based on the causative effect of the work injury. That conclusion is not negated because there is a subsequent non-work event which is also a contributing factor to the impairment. This analysis is consistent with the discussion by the High Court in *Calman. …*

The MAP concluded that there was no *novus actus* and the causal chain between the workplace injury and the need for surgery and/or the current condition was not severed. Accordingly, it confirmed the MAC.

AMS did not err in applying 1/5 s 323 deductible – "one slip in one paragraph did not amount to demonstrable error"

Fabik v State of New South Wales [2019] NSWWCCMA 101 – Arbitrator Dalley, Dr J Bodel & Dr M Burns – 30 July 2019

Background

The appellant commenced employment with NSW Department of Education as a teacher in 1993 and he began teaching manual arts in 1999. In 2008, he injured his low back in a MVA, after which he resumed work on permanently modified duties. On 9 September 2013, he further injured his low back while handling supplies of timber at work. He suffered another aggravation at work on 25 August 2014 and ceased work. He claimed compensation and the insurer accepted the claim.

On 10 December 2018, the worker claimed compensation under s 66 *WCA* for 26% WPI based upon an assessment from Dr New, which included 15% WPI for gait derangement. However, the insurer disputed the claim based upon an opinion from Dr Vote that maximum medical improvement had not been reached.

The worker filed and ARD and on 7 February 2019, the parties agreed at a teleconference that the dispute should be referred to an AMS to assess the degree of permanent impairment of the lumbar spine as a result of the injury in 2013. On 18 March 2019, Dr M Gibson (AMS) issued a MAC that assessed 13% WPI, but she deducted 2/5 for pre-existing impairment under s 323 *WIMA* and assessed 8% WPI as a result of the 2013 injury.

Appeal

The appellant appealed and asserted that the MAC contained a demonstrable error. He argued that the AMS expressly agreed with Dr New's impairment assessment of 26%, but stated that a deduction needed to be made under s 323, but that para 11 of the MAC indicates that a "nil" deductible was appropriate. The AMS then assessed 13% WPI and not 26% WPI and applied a deductible of 40%. If a deductible was required, it should not exceed 10% under s 323 (2) *WIMA.*

The MAP held that the AMS assessed the medical dispute in accordance with the referral, which was limited to the lumbar spine and did not include any additional body part or system comprehended by Dr New's assessment for "gait derangement" (which only applies to the lower extremities). It stated:

> 34. The Panel accepts that, in agreeing with Dr New's impairment assessment, the AMS was intending to refer to the specific assessment of the lumbar spine and interference with activities of daily living. The AMS had not been called upon to address gait derangement.
>
> 35. The consent award and the referral are both clearly limited to consideration of the lumbar spine. The assessment of that body part incorporates interference with activities of daily living by operation of the Guidelines but does not permit assessment of gait impairment.
>
> 36. The latter was not the subject of referral and the AMS would have fallen into error had she made an assessment pursuant to Table 17-5 of AMA 5 or otherwise in respect of gait derangement.

While the MAP accepted the appellant's argument that the "nil" deductible indicated in para 11 of the MAC is at odds with the deductible of 40%, it considered this as a "slip" because the AMS clearly opined that there was a pre-existing condition. It held:

> 42. When read as a whole the AMS's reasons clearly establish that the answers provided by the AMS in paragraph 11 do not accurately express her view as to possible deduction pursuant to section 323. Taken as a whole the report of the AMS clearly provides an assessment of pre-existing condition which contributes to the level of impairment assessed. The AMS provides clear reasons for her view.
>
> 43. The AMS also provides reasons why she regards a deduction of one tenth as "at odds with the available evidence" (s 323(2)).

Accordingly, the MAP confirmed the MAC.

AMS erred in assessing s 323 WIMA deduction contrary to referral

Hilder v The Secretary, NSW Department of Family and Community Services [2019] NSWWCCMA 102 – Arbitrator Dalley, Dr M Gibson & Dr J Ashwell – 30 July 2019

Background

On 20 May 2017, the appellant suffered sudden low back pain while at work. She claimed compensation and the insurer accepted the claim. On 10 October 2018, she claimed compensation under s 66 WCA for 12% WPI, based upon an assessment from Dr Guirgis. However, the insurer disputed the claim based upon an assessment from Dr Deshpande (5% WPI).

The worker then filed an ARD that alleged "personal injury and aggravation, acceleration, exacerbation or deterioration of a disease" and asserted that the date of injury was 20 May 2017. At a teleconference on 7 March 2019, the parties consented to the matter being remitted to the Registrar for referral to an AMS to assess WPI of the lumbar spine due to injury on 20 May 2017 (deemed).

On 17 April 2019, Dr Assem (AMS) issued a MAC that assessed 12% WPI, but he applied a deductible of ½ under s 323 WIMA.

Appeal

The appellant appealed under ss 327(3)(c) and (d) *WIMA.* She asserted that the injury that was referred to the AMS for assessment was "a disease injury" that was acquired over years of employment commencing on/before 1994 and there is no evidence of any condition or abnormality immediately before the commencement of employment and work tasks that gave rise to the injury. However, the AMS had assessed impairment on the basis of a personal injury on 20 May 2017.

The respondent argued that the dispute that was referred for assessment was intended to be a frank injury and the AMS had correctly assessed impairment and made an appropriate deduction for a pre-existing condition or abnormality. It also sought reconsideration of the COD – Consent Orders issued following the teleconference on 7 May 2019, on the basis that the description of the date of injury as "deemed" was not appropriate and should not have been agreed to by the solicitor that participated in the teleconference on its behalf.

The MAP held that s 328 *WIMA* does not empower it to reconsider either the COD or the Referral to the AMS, as stated by Mc Coll JA (Mason P & Giles JA agreeing) in *Siddik v WorkCover Authority of New South Wales:*

> Although the appeal was 'by way of review of the original medical assessment', if the Appeal Panel did not confirm that MAC, its only power was to revoke it and 'issue a new certificate as to the matters concerned'. 'The matters concerned' were not expressly identified, but contextually their apparent subject was the 'matter' the subject of the appeal identified by the appellant in accordance with s 327(1).

The MAP accepted the appellant's argument that the referral was made in respect of an injury caused by the work tasks that she performed throughout the period of her employment with the respondent and the allegation of injury in the ARD clearly indicated "personal injury and aggravation, acceleration, exacerbation or deterioration of a disease". It held that the AMS misunderstood the extent of the injury to the lumbar spine that he was to assess. The injury referred was the pathology in the lumbar spine resulting from the work tasks that the appellant performed in the course of her employment going back to 1992 or 1994, which was deemed to have occurred on 20 May 2017. It held:

> 43. As pointed out by Beech-Jones J in *Cullen v Woodbrae Holdings Pty Ltd* it is necessary for an AMS to consider the point in time at which the existence of a previous injury or pre-existing condition or abnormality which contributes to the overall level of impairment is to be considered.

The MAP held that the appropriate time to consider whether it was appropriate to make a deduction under s 323 *WIMA* is the date that the appellant commenced employment and as there is no evidence of any previous injury or condition or abnormality, the AMS erred in applying a deductible. Accordingly, it revoked the MAC and issued a new MAC that assessed 12% WPI.

Arbitrator Decisions

Section 11A defence established – reasonable action with respect to transfer, discipline and/or performance appraisal

Vinod v Boral Shared Business Services Pty Ltd [2019] NSWWCC 254 – Arbitrator Burge – 25 July 2019

The worker alleged that he suffered a psychological injury under s 4 (a) *WCA* and an aggravation, acceleration, exacerbation or deterioration as a result of the nature and conditions of employment, with a deemed date of injury of 6 February 2017 (his last date of employment with the respondent).

The worker claimed compensation and the insurer paid weekly payments until 21 September 2017, but it then disputed the claim under ss 11A, 33 & 60 *WCA.*

The worker alleged that he was subjected to poor management, workplace bullying and stress from a manager from around May 2015. He complained that his manager was "micromanaging… and over-bearing" and that his management style made him feel "threatened and intimidated" and that the detail that he required in timesheets for every 6 minutes "was unreasonable and unachievable unless I did that task in my own personal hours". He felt singled-out and bullied in relation to his timesheets.

However, the respondent argued that the worker was not asked to do more than other employees regarding the completion of timesheets, which was an essential requirement of his employment. It arranged a number of meetings with him to discuss completing them in an appropriate manner, including meetings on 13 December 2016 and 12 January 2017. A final meeting was scheduled on 6 February 2017, but the worker did not attend and he subsequently resigned effective from that date. The worker's refusal to complete and submit timesheets was a fundamental disavowal of a requirement of his employment and it acted reasonably in trying to get him to do so and attempting to assist him to complete that task. Its decision to terminate his employment was made after months of attempting to assist the worker to complete his timesheets and, at he resigned at the same time that his employment was terminated. The test for reasonableness under s 11A *WCA* is objective: Northern NSW Local Health Network v *Heggie*, and it had established that its actions were reasonable in relation to both performance appraisal and discipline of the worker. It also argued that the worker has current capacity to either work normal hours in his old employment or the same hours with another employer and if there was a finding of incapacity, it did not reflect any economic loss.

Arbitrator Burge conducted an Arbitration hearing on 3 June 2019 (although the published decision states "3 June 2017". In relation to the s 11A defence, he stated, relevantly:

> 67. In *Hamad*, Deputy President Snell at [88] said:
>
> > … There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s.11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the applicant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s.11A(1), were the whole or predominate cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with

respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience.

68. In accordance with Deputy President Snell's decision in *Hamad*, medical evidence in a case such as the present one is required which addresses those relative causative contributions before a finding as to whether the reasonable actions of a respondent "wholly or predominantly" caused the injury at issue…

75. In *Heggie*, Sackville JA set out the following statements of principle regarding section 11A:

59. The following propositions are consistent both with the statutory language and the authorities that have construed section 11A (1) of the WC Act:

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

(ii) Nonetheless, for section 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.

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

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

(v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.

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

(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.

The Arbitrator held that the injury was predominantly caused by the respondent's actions in relation to transfer to Ms Rea's team and discipline about his failure to complete timesheets in the manner requested of him from 1 November 2016. As Sackville J noted in *Heggie*, a broad view is to be taken regarding the meaning of "disciplinary action", which includes the entire process undertaken, not just the ultimate outcome. He also found that the respondent's actions were reasonable as was the requirement to complete timesheets in the manner that the respondent requested. Further, when it became aware of the worker's issues regarding the timesheets, the respondent began a careful, measured and considered approach to try to assist him to complete the timesheets as required.

The Arbitrator held that the respondent acted appropriately in undertaking an investigation about whether the requirements of the worker's role were too onerous and following its completion, it took appropriate steps by way of discipline and performance management

to try to have the worker comply with its directives. Also, when the worker complained to management about Ms Baker's handling of his issues, she reacted in a reasonable manner by referring the complaint to the National Director of Human Resources. He held:

> 202. In finding the actions of the respondent were reasonable, I have considered not only the specific actions taken, but also what transpired before and after the specific actions of the respondent. Having done so, I am satisfied on the balance of probabilities that the respondent's actions in all the circumstances were fair, and as such, can be said to be reasonable.

The Arbitrator held that it was appropriate to consider the issue of incapacity and he found that the worker has had an incapacity for employment since the date of commencement of the claim. He assessed the worker as having an ability to earn $650 per week and noted that as the worker claimed $1,301.34 per week, he had "a continuing incapacity" from 12 September 2018 to date of $651.34 per week. However, he entered an award for the respondent in relation to the claims for weekly payments and s 60 expenses.

Application for reconsideration of medical assessment for alleged demonstrable error in relation to assessment of PIRS categories – mistake by worker's legal representatives in not appealing a MAC is not a ground to set aside the COD – reconsideration refused

Wales v State of NSW (NSW Police Force) [2019] NSWWCC 257 – Arbitrator McDonald – 29 July 2019

On 16 December 2014, the worker suffered a psychological in the course of his employment. He claimed compensation under s 66 *WCA* and the dispute was referred to an AMS. On 23 August 2018, the AMS issued a MAC that assessed 6% WPI and on 28 September 2018, the Commission issued a COD, which determined that the worker had no entitlement to compensation under s 66 *WCA.*

Out of time, the worker sought to appeal against the MAC. On 31 March 2019, his current solicitor sought reconsideration of the COD and asserted that while the previous solicitor had sent the worker copy of the MAC, the worker was not advised that a 28-day time limit applied to an appeal. The current solicitor made a further request for reconsideration on 26 April 2019, accompanied by submissions that also sought an extension of time under "s 357 (5) *WIMA".* However, the Arbitrator presumed that the solicitor meant to refer to s 327 (5) *WIMA.* The insurer filed a Notice of Opposition and asserted that no special circumstances existed and that as a COD was issued, s 327 (7) precluded an appeal.

Arbitrator McDonald stated that neither parties' submissions grappled with the applications to reconsider and set aside the COD. The Commission's power to reconsider is discretionary and the principles that apply to its exercise were summarised by Roche DP in *Samuel v Sebel Furniture Limited,* as follows:

> 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('Hardaker');
>
> 2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include "an award, order, determination, ruling and direction". In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('Schipp');

4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('Hilliger');

5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('Maksoudian');…

7. depending on the facts of the particular case the principles enunciated by the High Court in Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; (1981) 147 CLR 589 ('Anshun') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('Anshun');

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('Hurst'), and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('Hilliger' and section 354(3) of the 1998 Act).

The Arbitrator that if the failure to file a medical appeal was an error by the worker's former solicitors, that is not a ground for setting aside the COD. However, it was necessary to consider the merits of the application by reference to the general principles regarding medical assessments and appeals. She noted that the substance of the proposed appeal is that a different assessment is more appropriate and held stated:

52. *Parker v Select Civil Pty Limited* (*Parker*) was an application for judicial review which overturned a decision of a Medical Appeal Panel. The parties were referred to the decision at the telephone conference but the submissions filed do not refer to it.

53. The appeal panel in *Parker* had set aside a MAC on the application of the employer where the grounds of appeal concerned the application of the PIRS categories. On the worker's application for judicial review, Harrison As J said:

> The Appeal Panel identified the 'error' by stating that the AMS had erred in assessing Class 3 because on the proper application of the criteria an assessment of Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence. ([27]). (My emphasis).
>
> However, it is important to appreciate that the descriptors, or examples, describing Class 2 and Class 3 of impairment for self-care and hygiene are ' examples only': see Jenkins. These descriptors are not intended to be exclusive and are subject to the variables that accompany a person seeking psychiatric help such as age, sex and cultural norms: see *Ferguson…*
>
> To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.
>
> The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the

findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ.

Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene. There is an error of law on the face of the record. I am satisfied that the plaintiff has made out a case for an order in the nature of certiorari.

Applying these principles, the Arbitrator held that the prospects of the proposed appeal *"appear not to be strong".* She was not persuaded that the COD should be set aside under s 350 (3) *WIMA* and she declined the application for reconsideration.

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