Bulletin

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

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Federal Court of Australia Decisions

Meaning of the word "day" in the calculation of the entitlement to paid personal/carer's leave under s 96 (1) of the Fair Work Act 2009 (Cth)

Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138 – Bromberg, Rangiah & O'Callaghan JJ – 21 August 2019

The applicant declarations regarding the manner of calculating the entitlement to paid personal/carer's leave under s 96 (1) of the *Fair Work Act 2009 (Cth) (the FWA),* which provides that, *"for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave."*

Under the relevant Enterprise Agreement, the applicant credited the second and third respondents with 96 hours of paid personal/carer's leave per year of service and when they took such leave for a single 12-hour shift, it deducted 12 hours from their accrued leave balance, such that over one year, the second and third respondents accrued leave sufficient to cover absence for 8 x 12-hour shifts.

The applicant argued that the entitlement under s 96 (1) of *the FWA* must be construed according to "the industrial meaning" of the word "day" and that it is a "notional day", consisting of the employee's average daily ordinary hours based on an assumed 5-day working work (the average weekly hours divided by 5). On that basis, all employees who work the same average weekly ordinary hours are entitled to receive the same number of hours of paid personal/carer's leave.

The Minister for Small and Family Business was granted leave to intervene in the proceedings and supported the applicant's construction of s 96 (1) of *the FWA*.

However, the second and third respondents opposed the application and argued that "day" has its ordinary meaning of "a calendar day" or a 24-hour period, and it allows every employee to be absent from work without loss of pay on 10 calendar days per year (i.e. 10 x paid 12-hour shifts per year of service).

The Full Court stated:

> 61 Section 96 (1) of *the FW Act* must be construed in order to determine how the "10 days entitlement to paid personal/carer's leave" is measured. The Union submits that the word "days" in s 96 (1) has its grammatical, or natural and ordinary, meaning. Mondelez and the Minister submit that, construed in light of the context and purpose of the provision, "days" has a different meaning—its "industrial meaning".
>
> 62 In *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, Gageler and Keane JJ discussed the relationship between grammatical meaning, context and purpose at [65]:
>
> > [65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning … But not always". Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

> [66] Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.

63 In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ emphasised that text, context and purpose must be construed together, saying at [14] :

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

64 The importance of considering text, context and purpose together is emphasised where the focus is upon the meaning of an ordinary word, capable of bearing different meanings in different statutory settings.

The Court considered the consequences of the competing constructions and cited *Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation* (1981) 147 CLR 297, in which Mason and Wilson JJ stated (at 321):

> If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

The Court held that it is impossible to avoid unequal outcomes between employees on either construction, but that is not to say that they are necessarily inequitable or unintended. An important starting point is its *"grammatical, or natural and ordinary, meaning"* and while the parties focussed on the meaning of the word "day", it is necessary to understand that word as part of the whole provision and to construe the provision as a whole. It noted that the Macquarie Dictionary defines "leave", relevantly, as "permission to be absent, as from duty". "Day" is not defined in the *Fair Work Act* and the Macquarie Dictionary defines it, relevantly, as: *"3. Astronomy a. the period during which the earth (or a heavenly body) makes one revolution on its axis; b. the average length of this interval, on earth the mean solar day of 24 hours; … 4. the portion of a day allotted to working: an eight-hour day; 5. a day as a point or unit of time, or on which something occurs."*

The Court held that "day" in s 96 of *the FWA* is used in the specific context of an authorised absence from work and in that context, its natural and ordinary meaning is not a bare 24 hour period, but the portion of a 24 hour period that would otherwise be allotted to working. That may conveniently be described as a "**working day**" and the natural and ordinary meaning of "10 days of paid personal/carer's leave" in s 96 (1) is authorised absence from work for 10 such "working days" for a reason set out in s 97. A "working day" would start when the employee taking personal/carer's leave would otherwise have commenced his or her hours of work.

The applicant relied upon the decision in Fair Work Commission in *Australian Municipal, Administrative, Clerical and Services Union v Hobson's Bay City Council* [2014] FWCFB 2823 (*Hobson's Bay city Council*), in which the Full Bench agreed with Commissioner Lee's statement in *Australian Rail, Bus and Tram Industry Union v QR LTD* (2012) 221 IR 132 at [86]:

> A day is a day and a week is a week and they should be given their ordinary meaning. An employee, even if they are a shift worker that "crams" their ordinary hours into less than five days in a week, is still entitled in accordance with the NES to be able to take a five week holiday or access 10 days of carer's leave.

The Full Court concluded (at [199]):

> (1) A "day" in s 96 (1) of the FW Act refers to the portion of a 24 hour period that would otherwise be allotted to work (a "working day").
>
> (2) A "day" of "paid personal/carer's leave" under s 96 (1) is an authorised absence from work for a working day for a reason set out in s 97.
>
> (3) Under s 96 (1), an employee accrues an entitlement to be absent from work for a reason set out in s 97 for ten such working days for each year of service.
>
> (4) The entitlement to paid personal/carer's leave under s 96(1) is not an entitlement to take such leave, which only arises when one of the conditions in s 97 is satisfied.
>
> (5) For every day of paid personal/carer's leave taken, a day is deducted from the employee's accrued leave balance.
>
> (6) Under s 96(1), the accrual is of part-days of paid personal/carer's leave, not only full days.
>
> (7) An employee may take a part-day of paid personal/carer's leave, and an equivalent part-day is deducted from the employee's leave balance.
>
> (8) The expression "ordinary hours of work" in ss 96(2) and 99 distinguishes ordinary hours from overtime hours.
>
> (9) The expression "ordinary hours of work" is used in s 96(2) to indicate that part-days of paid personal/carer's leave entitlement are calculated on the basis of ordinary hours.
>
> (10) The purpose of paid personal/carer's leave is as a form of income protection for employees during the periods of illness, injury or unexpected emergency described in s 97.
>
> (11) Paid personal/carer's leave accrues over the whole length of employee's employment with a particular employer, to the extent that it is not taken.
>
> (12) The amount of paid personal/carer's leave that may be taken in a year is limited to the amount that has been accrued, but is not otherwise limited.

Accordingly, the Court declined to make the declarations sought by the applicant.

District Court of NSW Decisions

Statement of Claim struck out as being materially different to the draft pleading attached to the Pre-Filing Statement

Petreski v The Ors Group Pty Ltd [2019] NSWDC 417 – Abadee DCJ – 9 August 2019

The plaintiff claimed damages for a psychiatric injury as a result of alleged persistent bullying and harassment and filed a Statement of Claim on 27 August 2018.

On 4 July 2019, the defendant applied to strike out the statement of claim under s 318 (1) (a) *WIMA,* on the basis that it was materially different from the proposed statement of claim that formed part of the plaintiff's pre-filing statement.

The plaintiff opposed the notice of motion. However, she did not seek leave from the Court under s 318 (2) *WIMA* to rely upon the statement of claim on the basis that the material concerned was not reasonably available to her when the pre-filing statement was served and failure to grant leave would substantially prejudice her case.

Judge Abadee noted that the plaintiff was not legally represented before the notice of motion was heard, but that Mr Baran of counsel appeared for her at that hearing under a pro-bono referral from the Bar Association of NSW. He also noted that both parties referred to the decision of Davies J in *Hall v Ecoline Pty Ltd t/as Treetop Adventure Park* [2018] NSWSC 1732, in which the Court struck out the plaintiff's statement of claim. In that matter, the cause of the injury that was alleged in the statement of claim was materially different to that identified in the pre-filing draft pleading. However, he stated that Davies J did not provide any lengthy of what he regarded as "generally material" and he therefore considered that decision as *"an impressionistic evaluation based upon the facts."*

His Honour held:

> 18 Whether something is 'material', in ordinary parlance, means something that is "important, essential or relevant" (Australian Concise Oxford Dictionary, 4th ed). However, the context in which the statutory provision appears is directed towards the content of a pleading.
>
> 19 In that context, I consider that some assistance may be obtained from the general rules as to the content of pleadings as contained in Part 14 of the Uniform Civil Procedure Rules and, to some extent, how they have been interpreted. Rule 14.7, for example, states that the pleader must state only a summary of the material facts on which the party relies and not be evidenced by which those facts are to be proved. Rule 14. 14(1) also stipulates that in a statement of claim, the plaintiff must plead specifically any matter that, if not pleaded specifically, may take the defendant by surprise.
>
> 20 These rules were considered by the Court of Appeal in *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135 (Hodgson JA, with whom Mason P and Handley JA agreed). At [20], Hodgson JA noted that although the rules do not expressly require the causes of action be stated in the pleadings (the express requirement being only to state the material facts), (1) the word "material" means those facts that are material to the claim, that is to the cause or causes of action that are relied upon; (2) that the requirement of a statement of material facts does not exclude the allegation of legal categories, such as duty of care, fiduciary duty, trust and contract and (3), the general requirement to avoid surprise means that material facts must be stated on or in such a way that a defendant can understand the materiality of the facts, that is, how they are material to a cause of action. His Honour then added, at [21] that where there is a danger of surprise, particularly where there is a lack of precision and clarity in the

pleading, it may be appropriate to require a plaintiff to explicitly relate the fact it pleads to specified courses of action.

His Honour held that there was at least one material difference in that the statement of claim alleged that the employer was vicariously liable for the conduct of its servants and/or agents and the draft pleading identified a case of direct responsibility only. He stated:

> 22 … Although it might be said that to allege that liability is direct, rather than vicarious, is not a statement of material fact, for the reasons identified by Hodgson JA in *Kirby*, it is nevertheless, necessary, for the avoidance of surprise, for a claimant to identify the source of liability, when linked to the facts giving rise to it. This is a matter recognised by the plaintiff herself when, in her statement of claim, she inserted a reference to vicarious liability.
>
> 23 Section 318 (1) requires that in order for it to be relied upon in this proceeding, the case of vicarious liability should have been made (by itself, or even in the alternative to the direct liability case) in the pre-filing statement draft pleading.
>
> 24 Counsel for the plaintiff/respondent argues, in opposition to this view, that it is axiomatic that when a claimant brings a claim means that the claim against the employer specifically contemplates that it is made on the basis of vicarious liability. I disagree. The definition of 'work injury damages' in s 250(2) of the Act indicates that it is only an inclusive possibility that the claim against the employer may be one of vicarious liability. I agree with the submission of counsel for the defendant/applicant that s 250 does not seek to alter the nature or range of the potentially available causes of action against the employer. In my opinion there is a material difference between an action in direct liability and one of vicarious liability.

Accordingly, his Honour struck out the statement of claim. He reserved the issue of costs.

WCC - Presidential Decisions

President refuses appellant's applications: (1) to admit fresh evidence on appeal; (2) for reconsideration; (3) to re-open the matter; and (4) to state a case to the Supreme Court of NSW

Mahal v State of New South Wales (No 5) [2019] NSWWCCPD 42 – President Judge Phillips – 20 August 2019

Background

This matter has a lengthy history. Please refer to Bulletins numbered 21 and 23 for the background and reports of decisions numbered 4 and 5.

In the current proceedings, ***President Judge Phillips*** considered a further appeal by the appellant, in which she made the following multiple applications, including: an application to admit fresh evidence; an application for reconsideration of a MAC dated 16 September 2016; an application to re-open the entire matter in the light of a medical report from Dr Khan dated 14 March 2019 (which assessed her as having 30% WPI); an application to state a case to the Supreme Court and to the Court of Appeal regarding her constitutional question and her status as an exempt worker by virtue of being a police officer; and a claim for compensation under s 67 *WCA.* She also made general submissions that the *WIMA* is remedial and beneficial in nature and submissions in respect of "natural language and invasion of significant rights" raised issues regarding the constitutional validity of s 39 *WCA,* particularly in respect of the referral of such questions to the President to determine as a Judge of the District Court, and the invitation to SIRA to intervene under s 106 *WIMA.*

His Honour dismissed the appeal and the other applications made by the appellant. His Statement of Reasons comprises 305 paragraphs, which I have summarised below.

Arbitrator Harris issued 2 relevant COD's, dated 18 February 2019 and 16 April 2019, respectively. The former entered an award for the respondent in claim under s 67 *WCA* and set out the remaining matters in dispute, which referred to an email from Mr Buttar dated 29 November 2018. It noted agreement that the issues in dispute were limited to those set out in the Consent Orders and the email of 29 November 2018 (see paras [70] and [72] of his Honour's decision). The arbitrator declined to refer any question of law to the President under s 351 *WIMA* and he refused to grant any further relief to the appellant. The latter COD recorded that the appellant had no entitlement under s 67 *WCA.*

His Honour stated:

> 41. In his statement of reasons in the 18 February 2019 COD, the Arbitrator noted the Consent Orders made following the telephone conference of 4 December 2018 for the payment of s 66 compensation in accordance with Dr Marsh's MAC for the right and left legs and a general order for s 60 expenses…
>
> 42. In respect of the appellant's claim for s 67 benefits, in which the appellant sought to rely on her resolved 2003 claim as providing an exception to the 2012 amending Act, the Arbitrator referred to the Court of Appeal's decision in in *Cram Fluid Power Pty Ltd v Green*. *Cram Fluid* makes it clear that a resolved claim made prior to the 2012 amending Act does not come within the exception provided by clause 11 of the 2016 Regulations. The Arbitrator found that conclusion was sufficient to dispose of the applicant's claim for s 67 compensation. He also noted the decision of Keating P in *Woolworths Ltd v Wagg* did not assist the appellant. The Arbitrator further noted the appellant's reliance on *Matilda Cruises Pty Ltd v Sweeny* and *Brewster v Proline Pumping Pty Ltd* was misconceived in respect of a claim for s 67 benefits…
>
> 44. In respect of the appellant's assertion that s 39 of the 1987 Act contravenes s 109 of the Commonwealth Constitution, the Arbitrator referred to the Court of Appeal cases of *Orellana-Fuentes v Standard Kitting Mill Pty Ltd* and *Attorney-General for New South Wales v Gatsby* in considering whether the Commission was a court of the state for the purposes of *the Constitution* and *s 39 of the Judiciary Act 1903 (Cth)*. The Arbitrator noted the observations expressed by Leeming JA in Gatsby that a Tribunal could not form a determination on this question and only form an opinion. His Honour stated:
>
> > At best, all that NCAT could do was to form and express an opinion, in accordance with what Brennan J had said, sitting as President of the Administrative Appeals Tribunal, in Re Adams and the Tax Agents' Board (1976) 12 ALR 239 at 242.
>
> 45. As such, the Arbitrator confirmed that there was no merit in the applicant's submission that the issue of constitutional invalidity could be determined by the President of the Commission. The Arbitrator therefore declined to refer this or any question of law to the President. This decision was reiterated in the 16 April 2019 COD. The Arbitrator noted the appellant's comments in her Application that "His Hon. President may not decide the question of law by himself but to refer the constitutional issues to the Court of Appeal" and opined that this comment may be an acceptance that the President cannot decide the constitutional issue. The Arbitrator found the appellant's application for him to refer the question of law to the President futile because the President has no power to determine the issue or otherwise refer the question to the Court of Appeal. He further declined the application having already ruled on this matter in the 18 February 2019 COD.

46. The Arbitrator further found that given Snell DP had determined the appellant was not a police officer and therefore was subject to the *2012 amending Act* in *Mahal No 3*, he did not accept that the appellant's claim for compensation pursuant to s 39 of *the 1987 Act* was an issue before him.

47. In respect of the alleged *"human rights issues"* raised in Mr Buttar's 29 November 2018 email, which related to the alleged disadvantage suffered by the appellant as an unrepresented litigant, and alleged bias of Snell DP in *Mahal No 3* and *Mahal No 4*, the Arbitrator held he had no power to review a decision of a Presidential member. The fact that the applicant was unrepresented on any appeal does not impugn the determination. The Arbitrator noted that it was clear that the appellant was seeking to relitigate issues previously determined adversely to her interests and found the submissions relating to "human rights issues" had no merit.

As the appellant advanced a number of arguments, many of which were not raised before Arbitrator Harris, his Honour discussed the principles that apply appeals that Roche DP summarised in *Raulston v Toll Pty Ltd.* He also confirmed that an appellant must comply with Practice Direction No. 6. He stated, relevantly:

70. Subject to the Commission's power to allow "with leave" fresh evidence or additional evidence in the circumstances which are set out in s 352(6) of the 1998 Act, the parties will be bound by the presentation of their case at the arbitration hearing and on appeal neither party will be permitted to raise new issues. In this regard I should remark that whilst the appellant is in the appeal proceedings a litigant in person, she was represented by solicitors and counsel in the hearing before Arbitrator Harris on 7 February 2019 which, inter alia, involved the issuing of Consent Orders on 4 December 2018…

His Honour noted that the email from Mr Buttar dated 29 November 2018 (referred to in orders 4 and 5 of the February 2019 COD) stated, relevantly:

We note there are additional substantive issues which exist and which further complicate the matter before the Commission.

Firstly, our client raised an issue relating to her entitlement to weekly payments. Dr Khan in his report dated 9 July 2015 assessed Ms Mahal as having WPI of 26% on the basis on four different injuries. Ms Mahal had previously been advised she was not entitled to a further assessment of the degree of permanent impairment resulting from the aggregation of these injuries, for the purposes of Section 66 of the Workers Compensation Act (WCA). We submit the facts and issues raised in this matter fall parallel to those raised in the recent decision of *Matilda Cruises Pty Ltd v Sweeny* [2018] NSWWCCPD 37. Therefore in this regard we similarly conclude Section 39 will no longer operate to exclude Ms Mahal from entitlement to weekly payments and that weekly payments may continue after 260 weeks based on Dr Khan's assessment of 26% WPI.

Secondly, there are a number of human rights issues which have been also been [sic] raised in our appeal submissions filed with the Commission. These are particularised as follows:

(a) the worker was an unrepresented litigant who should not suffer unfair disadvantage;

(b) the issue with Deputy President bringing an impartial mind to this matter given he had already previously arrived to (sic) a conclusion on the very same matter;

(c) that the amendments made in the *2012 Amending Act* to section 39 of the *WCA* amount to direct and indirect disability discrimination within the meanings of sections 5 and 6 of the *Disability Discrimination Act*; and

(d) issues relating to statutory provisions and statutory interpretation with respect to the definition of 'police officer'." (emphasis added)

His Honour's findings in relation to the appellant's applications are summarised as follows:

(1) Application to admit fresh evidence

His Honour refused to admit the 'fresh evidence', which appeared to relate to an allegation that the appellant's condition has deteriorated since the MAC issued. The appellant asserted that this evidence could not reasonably have been obtained before the date of the AMS' examination. He held that the Court of Appeal considered s 352 (6) *WIMA* in *CHEP Australia Limited v Strickland*, in which Barrett JA said:

> In the s 352(6) context, there are two threshold questions. They arise as alternatives and are set out in the second sentence of the provision. The first goes to the issue of availability in advance of the proceedings. The second entails an assessment of whether continued unavailability of the evidence 'would cause substantial injustice in the case'. The discretion to admit becomes available to be exercised only if the Commission is satisfied as to one of the threshold matters…
>
> The Presidential member referred with approval to the decision in *Casey v Cullen Auto Group Pty Ltd* [2012] NSWWCCPD 7 where, in relation to the s 352(6) power to receive further evidence, reliance was placed on the following passage in the judgment of McHugh, Gummow and Callinan JJ in *CDJ v VAJ* [1998] HCA 67; (1998) 197 CLR 172 at [111]:
>
> > Ordinarily, where it is alleged that the admission of new evidence requires a new trial, justice will not be served unless the Full Court is satisfied that the further evidence would have produced a different result if it had been available at the trial. Without that condition being satisfied, it could seldom, if ever, be in the interests of justice to deprive the respondent of the benefit of the orders made by the trial judge and put that person to the expense, inconvenience and worry of a new trial.
>
> That statement is consistent with what was said by Dixon J in *Orr v Holmes* [1948] HCA 16; (1948) 76 CLR 632 at 642. But it is a statement about the significance of further evidence where the question is whether there should be a new trial. The present context is not of that kind. The question here is as to the reception of further evidence upon an appeal the scope of which is confined in the way stated in s 352(5) of the *Workplace Injury Management and Workers Compensation Act*:
>
> > An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing.
>
> The power of the appellate tribunal upon such an appeal is a narrow power to correct operative error of fact, law or discretion. The power of the Presidential member to admit further evidence (subject to satisfaction of one of the statutory pre-conditions) was therefore concerned with evidence which, if accepted, would have been likely to demonstrate that the decision appealed against was affected by such error: *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 at [66].

The appellant's submissions did not refer to s 352 (6) *WIMA* and failed to deal with the relevant principles. Except for the reports of Dr Khan in 2019, the evidence had long been in the appellant's possession and he considered the appellant's explanation about why she could not obtain that report from Dr Khan at an earlier time as being "*simply insufficient"* because Dr Khan had been her medicolegal doctor since at least 2015.

His Honour held that failure to admit this evidence would not cause a substantial injustice to the appellant because there was no evidence that the insurer accepted Dr Khan's assessments and they are not the assessments contemplated by s 39 (3) *WCA.* Consistent with Barrett JA's findings in *Strickland*, the result would not be different if he granted leave to admit Dr Khan's assessments because neither are determinative for s 39 purposes. The Arbitrator correctly held that the threshold requirement in s 39 is not satisfied by merely obtaining a medical assessment and the section cannot logically operate unless either the respondent accepts that assessment or the threshold dispute is determined by the Commission in accordance with Part 7 *WIMA.*

His Honour also stated, relevantly:

> 135. Finally, the appellant might assert that were I to grant some of the other relief that she seeks, namely a reconsideration or reopening her entire case or the reference to a further AMS, that such opinions from Dr Khan would be necessary for those purposes. This is incorrect. Were I to grant a reconsideration or a reopening of the appellant's case, she would in that circumstance be free to lead such evidence as she considered necessary. Likewise in the event that I ordered a fresh assessment by an AMS, the appellant would be able to furnish the AMS with such evidence as she deems fit.

(2) The reconsideration application

His Honour refused the applications for reconsideration of the MAC and the appeal decisions of Parker SC ADP *(Mahal No. 3)* and Snell ADP (*Mahal No. 4*). He stated:

> 143. The appellant requests a referral to obtain a second MAC to assess the deterioration of injuries to her cervical spine, both arms and shoulders and a request for an assessment of the referred injury to her alimentary canal. The appellant states that as a result of the decision of Harrison AsJ on 27 February 2019 in *Wentworth Community Housing Ltd v Brennan*, the law has changed and she therefore challenges the decision of the Registrar of the Commission dated 5 February 2017. The appellant submits that the Registrar ignored the facts and submissions by the appellant in the reconsideration application and that the Registrar further failed to accept the mistakes made by the AMS in his assessments ignoring relevant material and facts.

His Honour identified a number of manifest difficulties with this application, not the least of which is that if the appellant sought a referral *"to a second MAC"*, that has nothing to do with a reconsideration application. The principles relevant to reconsideration are set out in *Samuel,* but the appellant did not refer to them or otherwise state how they are satisfied in her case. He held, relevantly:

> 164. These matters have been dealt with in terms by Deputy President Parker SC in *Mahal No 1*. Deputy President Parker SC held that a Presidential member had no jurisdiction to review a decision of the Registrar under s 327 (4) of *the 1998 Act*. This position has not changed. There is nothing new in this application which would cause me to exercise the wide discretion that the Commission has in terms of reconsideration applications (principle 1 – *Samuel*). I have already ruled against the admission of fresh evidence so that aspect of *Samuel* (principle 5) does not arise.

Given the dearth of any submissions by the appellant on the *Samuel* principles and the need to exercise the discretion fairly (principle 3), I decline to exercise the discretion in the appellant's favour. Fairness also encompasses fairness to the respondent, who should not have to contest the same matter on repeated occasions. The appellant has through the litigation (identified above) been afforded every opportunity to conduct her case.

(3) Application to re-open the entire matter

His Honour dismissed this application. He noted that her submissions in reply, the appellant argued that common law principles in adversarial proceedings permit the re-opening of her case in certain circumstances and that her case should be re-opened in view of Dr Khan's report dated 14 March 2019, which assessed 30% WPI. She also argued that failure to grant her leave to re-open her matter will cause her a substantial injustice.

His Honour noted that the circumstances in which a case may be re-opened after judgment are very rare and the power to re-open must be exercised with great caution. He stated:

> 176. In *Wentworth v Woollahra Municipal Council*, Mason ACJ, Wilson and Brennan JJ said as follows:
>
> > The applicant, who now appears in person, seeks to argue a number of grounds in support of her application. However, as we had occasion to point out recently in *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29, the circumstances in which this Court will reopen a judgment which it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution. Generally speaking, it will not be exercised unless the applicant can show that by accident with 177. In Codelfa, Mason and Wilson JJ said as follows:
> >
> > > Nevertheless, it is a power to be exercised with great caution. There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in other cases it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional.
>
> 178. More recently, the High Court has returned to issues regarding applications to re-open cases. In *DJL v Central Authority* Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ say as follows:
>
> > In *CDJ v VAJ*, McHugh, Gummow and Callinan JJ said with respect to the provisions of Pt X (ss 93-96A) of the Family Law Act, which is headed 'APPEALS':
> >
> > > The operation of Pt X is to be contrasted with the procedures developed in the English common law courts which have influenced, if indeed they have not determined, the doctrinal foundation for the admission of new evidence after verdict. Appeal is not a common law remedy. It derives from the civil law. Exceptionally, in 1675 the House of Lords declared its right 'as the delegate of the Sovereign to receive and determine "appeals" from inferior Courts, "that there may be no failure of justice in the land"'. But, apart from this special jurisdiction of the House of Lords, in the absence of statute there was and still is no basis for an appeal from a verdict of the common law courts.

> It follows that where the right of appeal is conferred by statute, such as by s 93A of the *Family Law Act*, the terms of that statutory grant will determine the nature of the appeal and consequential matters. These matters include the right, if any, to adduce further evidence on the appeal and the susceptibility of orders, made by the court in its appellate jurisdiction, to re-opening after they have been entered.

179. In the same case, Kirby J says as follows:

> The law, for very good reason, places a high store on the finality of court judgments and orders. There would be little point in having courts to resolve disputes between parties according to law with settled remedies of judicial review and appeal, and within a hierarchical judicial system, if no ultimate finality could be reached. The judicial system would become discredited if 'final' orders were revealed as provisional or always subject to reconsideration and collateral challenge thus compounding costs, delays and the anxiety of submitting disputes to independent judicial determination.

His Honour doubted that there is any room for the operation of the common law within the NSW Statutory Scheme and he observed that the High Court said in *DJL*, that the statutory grant determines the nature of the appeal and consequential matters. He noted that the were submissions about why the consent orders made in 2016 and 2018 should be set aside and he held, relevantly:

> 184. As I have described above, the appellant has been an active litigant with respect to her work related injuries. There have been 13 decisions both at first instance and on appeal with respect to her various claims. Even if the common law principles with respect to the re-opening of cases applied to the appellant, which as I say above is doubtful, I would not be persuaded to exercise my discretion in her favour. The appellant's submissions are completely deficient in terms of addressing the principles that I have referred to above with regards to the power to re-open. As stated, it is a power rarely exercised and should be approached with great caution. There is nothing in the appellant's submissions which has convinced me that this is one of those rare cases where the interests of justice demand that the case be reopened. In fact the interests of justice in this case are to the contrary, that is maintaining the finality of litigation.

(4) Applications to state a case to the Supreme Court and to the Court of Appeal

His Honour refused these applications. The appellant did make any submissions as to why such a case should be stated and he doubted that the Commission has the power to state such a case, which depends upon the existence of a statutorily conferred right. He held:

> 196. As no such right exists in the workers compensation legislation (that is the 1987 and 1998 Acts) it can be concluded that there is no capacity for a case to be stated from the Workers Compensation Commission to the Supreme Court. Rather, the Parliament has adopted a different process under s 351 which can then be subject to an appeal to a Presidential member and a further appeal to the Court of Appeal.
>
> 197. There is no merit in this aspect of the relief sought by the appellant. Given that this is raised for the first time on appeal, there is no power for the matter to be considered by a Presidential member. In any event for the reasons I have described earlier, there is no power to state a case under the Workers Compensation Acts.

(5) Appellant's general submissions

The appellant argued that any interpretation of *WIMA* should be remedial and beneficial and thus resolved in her favour. However, his Honour held that the Commission's approach to interpretation involving submissions that a provision should be interpreted beneficially, is that a beneficial purpose or interpretation cannot lead to a different result from that provided by the proper construction of the text.

The appellant made complaints about the effect of s 39 and the fact that she was not found to be a police officer, which are 2 aspects of the 2012 amendments. Section 39 in its terms clearly reveals a similar cost savings intention, as discussed in *Cram Fluid,* and it brings to an end a worker's entitlement to compensation after 260 weeks. Likewise the exception of a police officer from the effects of the 2012 amendments represented a clear Parliamentary intention that the 2012 amending Act would be ameliorated in certain circumstances. Since the appellant has been found not to be a police officer (*Mahal No 3*) it is clear that the intention of the 2012 amendments was patently non-beneficial to workers in the class to which the appellant belongs and that this was the clear intention.

His Honour also held that the appellant's submissions regarding natural language and the invasion of significant rights, and that reliance should be placed upon the decision is *Buck*, are not correct. This was an apparent reference to the principle of legality, which governs the relationship between the 3 arms of government (the legislature, executive and the judiciary). It is the presumption that Parliament does not intend to affect fundamental common law rights, freedoms or principles except by clear and unambiguous language. In other words, common law rights will not be taken by courts (or tribunals) to have been displaced by statute unless Parliament's intention to do so *"is expressed with irresistible clearness"*.

His Honour noted that in *Elliott v Minister administering Fisheries Management Act 1994*, Basten JA stated:

> The general requirement that effect must be given to the text of the statute, read in context and having regard to its apparent purpose remains the principal focus of statutory construction.

His Honour held, relevantly:

> 221. Applying Elliott to the workers compensation legislation, it can be seen that the rights entitling an injured worker to weekly payments of compensation are conferred by statute. These are statutory rights which are inherently liable to alteration by the legislature, they are not vested common law rights.
>
> 222. In any event the principle of legality relied upon by the appellant does not override the usual exercise of statutory construction by reference to text, context and purpose.
>
> 223. This submission appears to be directed to the previous finding in *Mahal No 3* which was to the effect that the appellant did not satisfy the definition of a police officer. How this is related to the submission regarding the principle of legality is not set out in terms by the appellant.

(6) Claim for benefits under s 67 WCA

His Honour held that the appellant has no right to compensation under s 67 *WCA.* In the proceedings before Arbitrator Harris, the appellant conceded that she did not make any further claim under s 66 *WCA* until 16 July 2015, which after the commencement of the 2012 amendments to *WCA.* He held that the appellant's submissions are based upon a

superficial and incorrect review of the authorities and *Wagg* in particular and the arbitrator did not err in his approach to these matters.

(7) The Constitutional issue

His Honour dismissed this ground of appeal. He noted that the appellant sought to impugn the validity of s 39 *WCA.* She argued that the Arbitrator ought to have reached an opinion about the constitutional argument and if that opinion was to the effect that there was "unconstitutionality", he should have declined to exercise the statutory provision found to be unconstitutional. She also asserted that as the President of the Commission, his Honour was "acting as a judge of the District Court" and not in [his] personal capacity, and that he is a State Court, or his actions are those of a State Court, for the purposes of the Constitution.

His Honour stated:

> 258. The assertion advanced by the appellant is that because of my appointment as a judge of the District Court and as President of the Workers Compensation Commission that I am therefore empowered to determine the constitutional question which relates to alleged invalidity of aspects of the workers compensation legislation. The question as to whether the Workers Compensation Commission is a court has been authoritatively determined by the Court of Appeal. In Orellana-Fuentes the Court of Appeal relevantly found as follows:
>
> > In *The Commonwealth of Australia v The Hospital Contribution Fund* [1982] HCA 13; (1982) 150 CLR 49 it was held that a 'court of a State' in s 77(iii) of the Constitution and 'courts of a State' in s 39(2) of the Judiciary Act mean courts as institutions and not the persons of which they are composed. All relevant factors have to be considered in determining whether a particular institution is a court. Amongst such factors are the persons of which the institution is composed, as they form part of the institution.
> >
> > Undoubtedly, the Commission does exercise judicial powers, but this does not necessarily make it a court. There are many institutions that exercise judicial powers but are well recognised not to be courts. (emphasis added)
>
> 259. His Honour Justice Ipp then examined the various attributes of the Commission before concluding that while the Commission had some of the powers and trappings of a court, it was not a court.
>
> 260. Additionally, I would remark that as a District Court judge, if I was sitting in that court, I would have no jurisdiction over matters pertaining to the Workers Compensation Acts. Section 44 of the *District Court Act 1973* describes the Court's general jurisdiction. In particular s 44 (1) (d1) vests the court with jurisdiction to hear and dispose of a work injury damages claim. That is not the case being pursued by the appellant in this matter. Under s 4 of *the 1998 Act*, the workers compensation legislation is defined relevantly to include the 1998 and 1987 Acts together with instruments made under both Acts…

His Honour found that the appellant's submissions are without merit. Whether or not a body is a court depends upon a review of the body as an institution and not its individuals. The fact that some of the individuals may be judges is a factor to be taken into account, although in relation to the Commission, he is the only judge appointed to it. His appointment as a judge is therefore not determinative. He also stated:

> 265. I have also been asked by the appellant to consider the appeal "as a referral by the Arbitrator on all the constitutional issues". This is an invitation to treat the appeal

as if it had been referred as a question of law pursuant to s 351 *of the 1998 Act*. This submission, which has not been developed, is misconceived. The appellant has filed an appeal and my powers in relation to appeals rest upon the establishment of an error of fact, law or discretion. I have found no error in the Arbitrator's approach with respect to the constitutional question which has been advanced by the appellant. The referral of such an argument to me would yield no different result than has been provided in clear and succinct terms by Arbitrator Harris.

(8) Alleged failure to exercise a discretion to refer issues regarding constitutional invalidity to the President

His Honour dismissed this ground of appeal. While the appellant argued that the arbitrator erred by failing to refer these issues to the President under s 351 *WIMA* and by exercising President's power to decide the constitutional invalidity issue, the language of s 351 *WIMA* is not mandatory and that the arbitrator has a discretion as to whether or not to refer a question of law. Rule 16.1 deals with the procedure for referral of questions of law and the appellant's legal representatives did not follow it. He also identified a number of problems with the appellant's submissions and held, relevantly:

> 279. The fact that the appellant and her advisers failed to comply with r 16.1 at all with respect to the referral of a question of law, particularly in circumstances where it was known to those advisers well before the hearing that this point was going to be taken, is in fact a powerful discretionary reason to decline this application. The Arbitrator dealt with these issues between [39] and [66] of his Reasons. Through these paragraphs of his decision, the Arbitrator is setting out the basis, both factual and legal, for his ultimate finding at [66] which is as follows:
>
> > My clear view is that there is no merit in the applicant's submission that the issue of constitutional invalidity can be determined by the President of the Commission. I decline to refer this or any question of law to the President.
>
> 280. This finding was well within the exercise of the Arbitrator's discretion and was done without the benefit of the appellant having complied with the 2011 Rules in terms of the formulation of the question and the arguments supporting it.

(9) The arbitrator failed to invite SIRA to intervene in the proceedings

His Honour rejected this ground of appeal. He noted that the appellant asserted that the Arbitrator's failure to invite, involve and hear SIRA was *"illogical and immature"* and *"procedurally unfair"* and that the interests of justice were not met and the Arbitrator misdirected himself regarding his powers and discretions. However, he held that under s 106 *WIMA,* the discretion as to whether or not to intervene in any proceedings resides with SIRA and the Arbitrator did not err in dealing with this matter.

10. The arbitrator's decision in relation to the intervention of SIRA and his denial of a referral under s 351 is "unreasonable if there is no evident, transparent and intelligible justification for it within the decision making process. Similarly, a decision is unreasonable according to the Court in Li because it is arbitrary, capricious and without common sense.

His Honour dismissed this ground of appeal and held that neither this ground of appeal nor the arguments in support of it make any legal sense.

11. The arbitrator failed to determine her application for a second MAC.

His Honour rejected this ground of appeal. He noted that the appellant argued that by virtue of the decision of Snell DP in *Matilda Cruises*, she is entitled to a second MAC assessment

as she is an existing recipient of weekly payments. However, the arbitrator clearly dealt with this issue. He stated:

> 303. There is no challenge to those reasons in ground five. Ground five suffers from the deficiency that whilst it alleges that the Arbitrator's failure to address the request for referral to a second MAC, which is incorrect, is an error of law and fact, but the appellant's submissions then do not proceed to identify how the error is said to have arisen. This appeal ground fails to comply with Practice Direction No 6 and in particular [17] thereof. This ground also breaches [18] of Practice Direction No 6. I consider that the appellant has had ample opportunity in the voluminous submissions which have been served both in chief and in reply to advance such arguments as she wishes to pursue consistent with the Act and its Practice Directions. She has failed to do so.

His Honour held that this was *"a collateral attempt to re-agitate the decision of Acting Deputy President Parker SC in Mahal No 1".* The decision in *Matilda Cruises* does not assist the appellant in this regard and the arbitrator was correct to dismiss this application.

Accordingly, his Honour confirmed the COD dated 18 February 2019.

Application to extend time for an application to refer a question of law to the President is refused

Mahal v State of New South Wales (No 6) [2019] NSWWCCPD 43 – President Judge Phillips – 21 August 2019

After the appellant lodged her previous appeal against Arbitrator Harris' decision (see *Mahal No. 5 above)*, she lodged an application to refer the following question of law to the President:

> Section 39 and Schedule 6, Part 19H, clause 25 of the *Workers Compensation Act 1987 (NSW)* ('*WCA*') are invalid by virtue of s 109 of *the Constitution* due to their inconsistency with provisions of the *Disability Discrimination Act 1992 (Cth)* ('*DDA*')

On 16 April 2019, ***Arbitrator Harris*** refused the application. He referred to the COD dated 18 February 2019, in which he found that the Commission and the President of the Commission cannot determine constitutional questions and that the application was futile because the President has no power to otherwise refer the question to the Court of Appeal.

The appellant appealed against that decision and she relied upon the grounds raised in *Mahal No. 5.* The respondent opposed the appeal.

President Judge Phillips noted that the appeal was lodged 2 days late, which required a grant of leave under r 16.2 (1) of the *WCC Rules*. He stated that the principles governing an extension of time were discussed by McHugh J in *Gallo v* Dawson, and were summarised by Roche DP in *Allen v Roads and Maritime Services.* They require regard to be had to the following matters: (a) the history of the proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences for the parties of the grant or refusal of the application for the extension of time; (e) the prospects of the applicant succeeding in the appeal, and (f) upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for extension of time is granted.

In *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd*, the Court of Appeal said:

> The primary considerations on an application for leave to extend time within which to appeal are:
>
> (a) the extent of the delay and the reasons therefor;
>
> (b) the prejudice to the applicant if the application were to be refused;
>
> (c) the prejudice to the defendant from the delay if the application were to be granted;
>
> (d) the prospects of success on the proposed appeal.

A Presidential member dealing with an application under r 16.2 (12) is required to consider the presence of "exceptional circumstances" as a matter within jurisdiction (as opposed to a precondition). In *Yacoub v Pilkington (Australia) Ltd*, Campbell JA held:

> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [1999] UKHL 4; [2000] 1 QB 198 (at 208).
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] EWCA Crim 1; [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
>
> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).
>
> (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

His Honour stated, relevantly:

> 56. Campbell JA in *Yacoub* said that in deciding whether 'exceptional circumstances' were present, it was necessary to bear in mind the statement of objectives in ss 56–59 of the *Civil Procedure Act 2005*. Similarly, I have held that where the phrase appears in r 16.2(12) of the *Commission's Rules*, it is appropriate to consider the phrase in the context of the '*System objectives*' and '*Procedure before the Commission'*, described in ss 3 and 354 respectively, of *the 1998 Act*.
>
> 57. Applying these principles to the present case, the following becomes evident:
>
> (a) As described by the appellant, the grounds of this appeal are *"common and identical with the earlier appeal".* I have decided the earlier appeal in *Mahal No 5*. It is true that in Mahal No 5 the issues which the appellant seeks to agitate in this matter have been dealt with at length. There is therefore no prejudice to the appellant as she has had the matters that she wished to be determined in this appeal considered and determined in *Mahal No 5*.
>
> (b) There is nothing in the conduct of the parties or the nature of the litigation, save and except for what I will say in one regard, which is out of the ordinary or unusual.

> The one exception however is this. The appellant in her submission of 16 May 2019 set out three matters which she asserts ought be taken into account in explaining the delay. Whilst I might accept that the appellant is a self-represented litigant, the exchange which I have set out above at length between the appellant and the Registry shows that the appellant is quite familiar with and aware of the procedural requirements and formalities to file an appeal. I do not accept the appellant's assertion that she "lacks knowledge of technical, procedural requirements and formalities to file an appeal". The day after Arbitrator Harris' decision, the appellant emailed the Commission indicating her preparedness to appeal against this decision, properly identifying those provisions in the Act and the Rules that she would rely upon. Tellingly, the appellant said as follows: "I can file the appeal within 28 days from the date of decision made by the arbitrator." Clearly the day after the offending decision was delivered, the appellant was aware of the provisions of the Act and the Rules that were relevant and the requisite appeal period of 28 days. By 3 May 2019, the appellant was indicating in a letter forwarded to the Commission that she had "decided not to file a formal appeal". This was well within the expiry of the appeal period. Thereafter the Commission advised the appellant that the Commission would dispense with formal requirements under the Rules provided she complied with Practice Direction No 6. I consider this to be a proper and appropriate concession to have made to an unrepresented litigant and is consistent with the approach the Commission is to take to matters as described in s 354. Namely that:
>
> > Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.
>
> Thereafter the appellant then questioned how the appeal could proceed absent the filing of a Form 9, which communication reveals a sound working knowledge of the Commission's processes on appeal.
>
> (c) Next, the extent of the delay is not great and as the respondent has acknowledged, it will suffer no prejudice should leave be granted.

His Honour held that nothing that has been submitted by the appellant would satisfy the requirement of "exceptional circumstances" as referred to by Campbell JA in *Yacoub.* The three reasons that she raised are insufficient, either individually or collectively, to meet those requirements. Rather, she knew what was required of her the day after the decision was delivered and simply failed to file the appeal within the specified time limit.

However, his Honour also held that the appeal had no prospect of succeeding. He stated, relevantly:

> 59… As the appellant herself has noted, this appeal is *"common and identical with the earlier appeal".* I have dismissed that appeal in *Mahal No 5* for the reasons stated therein. Consequently this matter, which raises nothing different to that which I have decided in *Mahal No 5*, is also without merit. No injustice to the appellant arises as all these issues have been dealt with in *Mahal No 5*.
>
> 60. Not only does the respondent have a vested right to retain the judgment of Arbitrator Harris of 16 April 2019, it should not be put to the further cost and inconvenience of defending an appeal which is doomed to fail, having regard to what I have found in *Mahal No 5*.

Accordingly, his Honour refused the application for an extension of time to appeal.

WCC – Medical Appeal Panel Decisions

MAP satisfied that there was ample evidence of prior injuries to the right shoulder and that a deduction is required even though the pre-existing condition was previously asymptomatic - Vitaz applied

Martinez v Paraplegic & Quadriplegic Association of NSW [2019] NSWWCCMA 111 – Arbitrator Moore, Dr T Mastroianni & Dr B Noll – 13 August 2019

The appellant was employed by the respondent as a personal carer. On 22 November 2015, she injured her right shoulder in a fall at work. On 20 April 2016, she underwent surgery (arthroscopic rotator cuff repair), after which she began to suffer symptoms in her left shoulder and arm. An MRI scan indicated a partial tear of the rotator cuff. She also complained of neck pain.

On 29 May 2019, Dr Negus (AMS) issued a MAC, which assessed 10% WPI as a result of the 2015 injuries. The AMS noted a prior history of injury to the beck and right shoulder on 8 November 2011, and an aggravation of pain in both shoulders as a result of a slip and fall in an Aldi supermarket on 21 January 2018, and he applied a deductible of 50% under s 323 *WIMA.* He stated, relevantly:

> I can find no evidence of a brachial plexus injury. She has features more consistent with a frozen shoulder on the right and a partial tear of her rotator cuff on the left shoulder.
>
> The range of motion of her right shoulder during my examination was significantly less than found at the examination of her treating surgeon in the months following the surgery or by Dr Pillemer. Professor Miniter found her unable to move the shoulder in any meaningful way that he could measure.
>
> I am therefore of the opinion that either the fall in 2018 has aggravated her right shoulder and left her with a frozen shoulder or it is not a physical pathology causing this lack of shoulder movement.
>
> She was consistent throughout the examination holding her right arm in a protected attitude close to her body with minimal rotation or abduction. She needed help for dressing and undressing and was consistent with this throughout the examination. Her abilities as described and demonstrated in the examination were not consistent with driving a car safely.

On 19 June 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. She asserted that the AMS: failed to provide any or any adequate reasons as to why he assessed 19% WPI but assessed only 10% WPI due to the injury in 2015; failed to consider all the medical opinions provided; failed to identify the assessment by the 'treating surgeon' that he relied upon in forming his opinion; erred as the fall at Aldi in 2018 pre-dated Dr Pillemer's assessment; failed to indicate why the deterioration following the injury and surgery did not account for her symptoms; failed to refer to the opinion of Dr Duckworth, who noted that she had developed a post-surgical stiff shoulder' and the opinion of Dr Vrancic; and assumed, incorrectly, that the only two possible causes for her condition was deterioration after the fall at Aldi or that the lack of shoulder movement was not caused by physical pathology.

The MAP decided to determine the appeal on the papers and that no further medical examination was required. It held that there was ample evidence of prior right shoulder injuries and that the incident in 2015 appeared to be relatively minor in nature. The MRI scan performed seven weeks after the injury indicated severe supraspinatus tendinosis and an extensive bursal surface tear and other degenerative changes, which evidences a

significant pre-existing rotator cuff disorder. The MAP held that the rotator cuff tear would not have occurred without the pre-existing disorder. It held:

> 40. If a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury.(*Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254).
>
> 41. In summary, having carefully considered all of the evidence, we are of the view that the pre-existing condition was a contributing factor causing permanent impairment, and a deduction of one-fifth is appropriate.

The MAP considered that the AMS based his conclusion regarding impairment resulting from the 2015 injury solely upon the range of motion noted upon examination. It held that this of itself is not a satisfactory explanation or reason for his assessment of 10% due to the work injury and it also ignores a number of other medical opinions that the AMS appears to have not considered. It noted that Dr Vrancic opinion that the chronicity of the appellant's symptoms and overall condition would be explained by physiological factors and held that there was insufficient evidence to conclude that the fall at Aldo had caused any structural damage or pathology. It concluded that there was no reason not to accept the AMS' clinical findings and his assessment of 19% WPI.

The MAP revoked the MAC and issued a MAC that assessed 15% WPI (19% - 1/5).

An AMS' failure to assess permanent impairment as a result of a referred injury is a demonstrable error

Fard v Sash Transport Pty Ltd [2019] NSWWCCMA 114 – Arbitrator Rimmer, Dr M Burns & Dr T Mastroianni – 15 August 2019

On 17 March 2017, the appellant injured his left lower extremity and suffered a consequential condition in his lumbar spine as a result of a fall at work. He claimed compensation under s 66 *WCA* and the dispute was referred to an AMS for assessment of permanent impairment of the left lower extremity, lumbar spine and scarring.

On 19 March 2019, Dr Anderson (AMS) issued a MAC, which assessed 8% WPI (7% for the lumbar spine and 1% for scarring), but he stated that the left lower extremity was *"not assessible".*

On 14 March 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The Registrar referred the appeal to a MAP, which decided that there was an error in the MAC and that the appellant should be examined by Dr Mastroianni on 18 July 2019.

The appellant argued that by failing to assess permanent impairment for the left lower extremity, the AMS applied incorrect criteria. *Bukorovic v The Registrar of the Workers Compensation Commission (Bukorovic)* is authority for the proposition that once the AMS decided that the condition had stabilised, he had to make a whole person assessment as a percentage. In *Bukorovic,* the AMS did not assess permanent impairment because of inconsistencies that were noted on examination. However, the MAP determined that regardless of perceived inconsistencies, it was an error not to assess WPI in the referred body part. An AMS cannot merely opine that inconsistencies render the relevant body part "not accessible". He also argued that there was a demonstrable error because the AMS did not provide sufficient reasons for his conclusions and particularly regarding the scarring.

The Respondent argued that the AMS' comments regarding inconsistencies was an expression of clinical judgment and that his conclusions were no doubt reached partly on

an intuitive basis (*Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 per Basten JA) and he concluded that permanent impairment of the left lower extremity was not assessible despite para 1.32 of the Guidelines. These are conclusions that the AMS was entitled to reach and the appellant should not be allowed to cavil with matters of clinical judgment. It also argued that the AMS failed to provide reasons why he did not apply a deductible under s 323 *WIMA* and, at the very least, a deduction of 1/10 should have been applied.

The MAP determined that the AMS' failure to assess permanent impairment of the left lower extremity and to provide sufficient reasons for his assessment of scarring were demonstrable errors.

Dr Mastroianni assessed 7% WPI with respect to the lumbar spine. He assessed 10% WPI with respect to the left lower extremity. He assessed 1% WPI with respect to scarring. His combined assessment was 17% WPI. The MAP adopted his assessments. It noted that the respondent did not appeal against the MAC, but it reviewed the evidence regarding a possible deductible under s 323 *WIMA* and concluded that no deductible was appropriate.

Accordingly, the MAP issued a fresh MAC, which assessed 17% WPI.

AMS erred in attributing scarring to a subsequent injury

The Australian Jockey Club t/as The Australian Turf club v Agnew [2019] NSWWCCMA 113 – Arbitrator Bell, Dr T Mastroianni & Dr R Pillemer – 15 August 2019

In July 2005, the worker was injured while he was track riding. He suffered a crush fracture of the L1 vertebra. Ultimately, he was able to return to return to track work and to ride and race. However, on 21 November 2009, he fell from a horse while racing and suffered an injury to the right knee and pain in his neck and back. He ceased riding in 2010 and underwent spinal fusion surgery in September 2011. He was unable to return to work following that surgery.

On 30 April 2019, Dr Ivers (AMS) issued a MAC, but the MAP's decision does not expressly refer to the assessments contained in it. On 22 May 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The Registrar referred the appeal to a MAP.

The appellant argued that the AMS erred in failing to take account of an agreement between the parties that the worker suffered 11% WPI due to the injury on 21 November 2009, based upon the assessment of Dr Bodel, which was "final and binding" on them.

It also argued that the AMS erred in failing to apply a deductible under s 323 *WIMA* based upon radiological evidence of degenerative changes in 2005. Therefore, the MAC should be revoked and the assessment of the thoracic spine should be reduced by 11% due to the injury in 2009, leaving an assessment of 10% WPI, which should then be reduced by between 10% and 25% under s 323 *WIMA.*

The worker argued that there is an obvious error regarding scarring, which should be corrected, but that the MAC should otherwise be confirmed.

The MAP decided to determine the matter on the papers and that no further medical examination is required. Its findings and reasons are summarised below.

- *Deduction to assessment of spine due to subsequent injury on 21 November 2009*

The MAP held that the evidence establishes that the injury on 21 November 2009, was not just an exacerbation of pain without a change in pathology as after that fall the worker was unable to ride. In 2011, the decision was made to proceed to a laminectomy and the 2009 injury caused a significant deterioration in the pathology in the thoraco-lumbar junction.

Therefore, the impairment was greater than it otherwise would have been and there should be a reduction in the assessed impairment to exclude the later element. However, the AMS did not address the evidence in detail and this is a demonstrable error.

- *Section 323 WIMA*

The MAP rejected this ground of appeal as there was no evidence that any pre-existing element contributed to the assessment of the thoraco-lumbar spine.

- *Scarring*

The MAP noted that this was referred for assessment and that the parties agreed in submissions that the AMS erred in giving a date of injury to the scarring of "September 2011". However, this was a slip that would be corrected in its MAC. It held that the injury on 21 November 2009, was a permanent aggravation of that on 21 July 2005.

The MAP revoked the MAC and issued a fresh MAC, which assessed 20% WPI, comprising: 19% of the thoracic spine (21% + 1% ADL – 2%) and 1% for scarring).

AMS did not fail to consider relevant material – Social media report is irrelevant to the AMS' task – MAP satisfied that the report would not have had any effect on the AMS' clinical judgment

Vishal Meta Bay of India v Han [2019] NSWWCCMA 115 – Arbitrator Egan, Dr P Morris & Professor N Glozier – 15 August 2019

The worker was employed by the appellant as a kitchen hand. On 30 October 2014, he provided a report to Police regarding an altercation with the chef on 17 October 2014, during which he was stabbed in his left side.

On 25 October 2018, the worker claimed compensation under s 66 *WCA* for 17% WPI based upon an assessment from Dr Lee. The respondent qualified Dr Vickery, who opined that maximum medical improvement had not been reached and the insurer disputed the claim on that basis. Neither specialist commented on the social media report.

On 20 May 2019, Dr Ng (AMS) issued a MAC, in which he diagnosed PTSD and Major depressive episode, chronic – both of moderate severity. He certified that maximum medical improvement has been reached and assessed 15% WPI.

According to the Statement of Reasons, on 17 June 2019, ***"Fujitsu General Pty Ltd (the appellant and/or the employer)"*** **(sic)** appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. The Registrar referred the appeal to a MAP, which decided that it should be determined on the papers without any further medical examination.

The appellant relied upon a Social Media report dated 4 January 2019, which attached an online advertisement posted on 4 April 2018, which included the worker's phone number. It was served on the worker with the dispute notice dated 13 March 2019, and its text referred to *"two girls new 50 one hour massag just arrived this afternoon 28. Age: 28" [sic]*. The location was Newcastle and the product was clearly escort/sex services. The post read, *"we only stay in Newcastle one day"*.

In his statement, the worker alleged that he is unable to concentrate on a task for more than 5-10 minutes before intrusive thoughts of people wanting to hurt him come into his head and he begins to suffer headaches. He struggled to continue University nursing studies as be could not deal with being in hospitals or around sharp objects. He is scared of crowds. He is doing a Bachelor of Architecture at the University of Newcastle and has failed 2 examinations. He suffers continuing nightmares and stays in bed for the next day. However, he did not comment on the Social Media report.

The MAP noted that the appellant's submissions did not address the descriptors of the relevant PIRS categories or identify how the worker's alleged involvement in the advertisement would establish either the application of incorrect assessment criteria or a demonstrable error.

In relation to *"social and recreational activities, social functioning and employability/adaptability",* the MAP noted that the appellant argued in effect that the AMS should have disbelieved the worker's denial of his involvement in the advertisement, or at the least noted it in the MAC. However, the first option was not available to the AMS and the second option would make no difference to the AMS' conclusions. It held:

> 70. Even if the AMS (or this Panel) accepted that the worker had some involvement with the services offered in the advertisement, it was 13 months prior to the AMS's examination. Clause 1.6 of *the Guidelines* makes the required approach clear that: *"clinical assessment of the claimant as they present on the day of assessment"* is required. There is no suggestion that the AMS has not done that. Further, there is no suggestion that the AMS has not complied with cl 1.6, by taking into account *"the claimant's relevant medical history and all available relevant medical information"*, in his reasoning.
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> 71. Further still, even if the AMS (or this Panel) were to disbelieve the worker's denial of any involvement with the escort service, it is accepted that there is no implication available from the post to suggest the worker was involved in anything but receiving phone calls. The appellant makes no submissions to the contrary, and is probably unable to do so because the evidence is unlikely to support any such contention. The information in the advertisement does not contradict the AMS PIRS reasoning of the worker being able to *"go out for university and for errands"* in Social and Recreational Activities, that *"he is able to rely on friends and flat-mates"* in Social Functioning, and he can *"work in some type of casual employment by himself at an erratic pace"* in Employability.

The MAP held that while the failure to openly consider relevant information may be an error (*Brennan*), the information must be material, such that it would, or could, affect the outcome. It was not satisfied that the advertisement would have any effect on an assessor's clinical judgement regarding the worker's presentation: *Golijan.*

The MAP also held that even if this information could have affected such judgment, and it is assumed that the AMS should have considered it explicitly in the MAC, it would be obliged to revoke the MAC and to conclude that there were *"cogent reasons to reject the (information)"*: *De Gelder (No 2)*. The post does not imply that the worker has less impairment than that otherwise assessed.

Accordingly, the MAP dismissed the appeal.

MAP finds demonstrable error as AMS did not set out the path of reason for assessment of scarring, but re-assessed the scarring as 0% - MAC revoked and WPI assessment was reduced from 13% to 11%

Ryan v Gault [2019] NSWWCCMA 118 – Arbitrator Douglas, Dr R Crane & Dr M Gibson – 16 August 2019

On 16 August 2016, the appellant suffered a complex fracture dislocation of her left ankle, which required surgery to reduce and internally fix it and, subsequently to remove a broken screw.

The appellant claimed compensation under s 66 *WCA,* but the insurer disputed that maximum medical improvement had been reached and/or the degree of permanent impairment. The Registrar then referred the dispute to an AMS to assess permanent impairment of the left lower extremity (including the left foot) and scarring.

On 1 April 2019, Dr Kumar (AMS) issued a MAC that assessed 13% WPI, comprising 12% for ankle and hindfoot impairments(combined) and 1% for scarring.

On 16 April 2019, the appellant appealed against the MAC under ss 327 (3) (c) & (d) *WIMA.* The Registrar referred the appeal to a MAP.

The appellant argued that the AMS did not provide any explanation for choosing "range of motion" as the method of assessment of the left ankle and that he did not consider all parameters for measuring the restricted range of motion and he did not consider flexion contraction, varus and valgus. He did not measure, and therefore did not consider, whether there was any leg length discrepancy and when assessing her impairment for scarring, he did not consider criteria for location, contour, ADL/treatment or adherence.

However, the respondent argued that the AMS adopted the most appropriate methodology for assessing permanent impairment. He considered sufficient criteria to enable an assessment to be made with respect to the scarring and applied the correct criteria and the MAC does not contain a demonstrable error.

The MAP decided that there was a demonstrable error, because the AMS did not record his findings for each of the criteria set out in Table 14.1 of the Guidelines and that the appellant should be reassessed by Dr Crane on 22 July 2019. It adopted his clinical findings regarding scarring as the basis for its assessment, as follows:

> 23. …In terms of the criteria specified in Table 14.1 of the Guidelines, the Appeal Panel notes, based on Dr Crane's findings, that the appellant was conscious of her scars and was able to locate her scars. However, she has not required and will not require any treatment for her scars. Her scars do not affect her activities of daily living. There is no adherence and no staple or suture marks and no topic changes and no colour contrast with surrounding skin. Further, the locations of her scars were not such that they would be clearly visible with her usual clothing.

The MAP held that Dr Crane's 'best fit' with the criteria in Table 14.1 is 0% WPI and noted that the scarring was uncomplicated and standard for the surgeries.

In relation to the left ankle noted that Dr Crane's clinical findings provided for a combined assessment of 7% WPI. However, it decided to adopt the AMS's findings because: (1) it could not discern any fault in either the manner of his examination or his clinical findings; (2) the respondent did not make any complaint about those matters and (3) the AMS' findings attract a higher assessment. It stated:

> 30. The Appeal Panel notes that in her submissions the appellant challenged the manner in which the AMS examined her left ankle in that the appellant suggested that the AMS did not consider all parameters for measuring range of motion of her left ankle. However, in the view of the Appeal Panel that is not correct. The AMS found that the appellant was able to extend her left ankle to 50 degrees. Given that, there was no flexion contracture of her left ankle. In other words, the AMS, by examining the extension of the appellant's ankle and finding it was 50, considered the parameter of flexion contracture. Further, because her ankle was internally fixed, there could not have been varus or valgus deformity.

Accordingly, the MAP held the AMS wrongly calculated permanent impairment of the left ankle as being 12%, when it should have been 11%, because he failed to subtract impairment due to the right hind foot from the left hind foot so as to establish the degree of permanent impairment due to that injury. It also held:

> 35. The Appeal Panel also notes that the appellant challenged the AMS's assessment because, according to her, he did not consider other methods for assessing her permanent impairment, and specifically did not consider osteoarthritis or limb length discrepancy. In terms of using the criteria for osteoarthritis to assess the degree of her permanent impairment, the appellant did not present any plain x-ray films, and specifically weight bearing films, to enable the cartilage loss in her joint to be measured properly. Absent such films, her impairment cannot be assessed based on arthritis.
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> 36. With respect to her limb length discrepancy, the Appeal Panel notes that the AMS correctly did not use that as a measure to assess her permanent impairment because, it seems to the Appeal Panel, it is apparent from the MAC, when considered as a whole, that the appellant's medial malleolus had been fixed in surgery in an anatomical position. The limb length is measured from the anterior-superior iliac spine to the medial malleolus. Given that the medial malleolus was fixed in surgery in an anatomic position there could therefore be no limb discrepancy.
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> 37. In any event, Dr Crane when he examined the appellant measured the anterior superior iliac spine to the medial malleolus of both lower extremities and found them to be 81 cm on each side. In other words, there is no limb length discrepancy.

The MAP revoked the MAC and issued a MAC that assessed 11% WPI.

WCC – Arbitrator Decisions

Arbitrator finds a MAC issued by an AMS was a nullity

Lang v Davcote Pty Ltd [2019] NSWWCC 275 – Arbitrator Douglas – 14 August 2019

On 23 December 2013, the fractured his right arm, left leg and injured both rotator cuffs and he later developed plantar fasciitis. The insurer accepted liability for those injuries. However, the worker then alleged a frank injury to his thoracic spine, a consequential injury to his thoracic spine and a frank injury to is left knee, but the insurer disputed liability for those injuries.

In 2017, the worker filed an ARD claiming compensation under s 66 *WCA* for 22% WPI. However, on 9 August 2017, he discontinued those proceedings before the WCC determined the disputed claim. Before he discontinued those proceedings, a delegate of the Registrar referred a medical dispute to an AMS, Dr Lewington, to assess the degree of permanent impairment resulting from injuries suffered on 23 December 2013. On 2 June 2017, a MAC assessed 10% WPI. That MAC issued before the proceedings were discontinued.

In the current proceedings, the worker argued that the referral to Dr Lewington was not validly made. The referral required the AMS to assess permanent impairment of both upper extremities and both lower extremities. On 27 April 2017, the Registrar's delegate provided a copy of the referral to both parties' legal representatives and invited them to lodge any objection, but neither did so. However, the referral did not require assessment of the thoracic spine.

The worker argued that the MAC is a nullity because the referral to the AMS is invalid for 2 reasons: (1) it did not include the thoracic spine, for which he claimed compensation in

the proceedings; and (2) before the MAC issued a dispute arose between the parties as to whether there was an injury to the left knee on 23 December 2013. As a result, the delegate was prevented by s 321 (4) (a) *WIMA* from referring the medical dispute to an AMS until the Commission had determined the dispute.

The worker argued that the Registrar can refer the current medical dispute to an AMS. Alternatively, if the prior referral was valid and the MAC stands, the Commission has a discretion under s 329 (1) (b) *WIMA* to refer the medical dispute for further assessment so that permanent impairment of the thoracic spine can be assessed and he asked it to exercise that discretion. However, before any further referral occurs, the disputes regarding injuries to the thoracic spine and left knee must be determined by the Commission.

The respondent argued that the referral to Dr Lewington was valid and that his MAC is valid and the assessment is conclusively presumed to be correct and binds the parties in the current proceedings. As a result, the Commission is prevented by s 322A *WIMA* from referring the matter again to an AMS to assess permanent impairment of the thoracic spine. However, it conceded that if the prior referral was invalid, that MAC is a nullity and the medical dispute would have to be referred to an AMS to assess after the disputes regarding injury had been determined.

Arbitrator Douglas determined the issues and his findings are summarised below:

- *Was the referral valid?*

The Arbitrator held that the medical dispute that the Registrar was required to refer to an AMS included the thoracic spine. However, the correct medical dispute was not referred to the AMS and the referral to the AMS was not validly made. Accordingly, the MAC is a nullity.

- *Did s 321 (4) (a) prevent the registrar referring the medical dispute to the AMS?*

The Arbitrator held that the respondent first mentioned the dispute notice regarding the left knee injury in its solicitors' email the Commission dated 3 July 2017, which was after the MAC issued, and he inferred that neither party had referred that dispute to the Registrar under s 288 (1) *WIMA* to enable the Commission to determine it. He referred to the decision of Bellew J in *Favetti Bricklaying Pty Ltd v Benedek & Anor* (*Favetti*), in which his Honour said that the prohibition *"necessarily presupposes that the Commission has jurisdiction to resolve"* the liability issue. However, that requires one of the parties to refer the dispute to the Registrar under s 288 *WIMA.* As neither party did this, the Registrar was able to refer the medical dispute to the AMS to assess regardless of the existence of the dispute.

- *Section 329*

The Arbitrator noted that this issue would only arise if the referral was validly made and the MAC was valid. He stated:

> 38. Section 322A (1) stipulates that only one assessment may be made for the degree of permanent impairment of an injured worker. Section 322A (3) clarifies that a medical dispute about the degree of permanent impairment of a worker as the result of an injury cannot be referred or be the subject of further assessment if a medical dispute about the matter has already been the subject of an assessment and a medical assessment certificate.
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> 39. In obiter in *O'Callaghan v Energy World Corporation Ltd* Deputy President Roche held, without expressing a concluded view, that the reconsideration power of the Commission under s329 cannot work with s 322A which is the dominant provision. To my mind that is correct insofar as it relates a medical dispute about the degree of permanent impairment of a worker. In other words, because of s322A, the

> Commission no longer has power to refer back to an AMS for further assessment a medical dispute about the degree of permanent impairment of a worker resulting from an injury. That does not mean that section 329(1)(b) has been rendered otiose by s322A, because the Commission could refer back to an AMS for further assessment any medical dispute that is not a dispute about the degree of permanent impairment of an injured worker from an injury, being those disputes identified in s319 (a), (b), (e), (f) and (g) of the 1998 Act. In other words, the two sections work harmoniously together. There is no inconsistency between them.

He held that if the MAC was valid, then s 329 could not have been invoked to allow a referral to the AMS to assess the degree of permanent impairment of the thoracic spine.

- *Consequential condition of thoracic spine*

The Arbitrator noted that this claim require the worker to prove that, more likely than not, the injuries that he suffered on 23 December 2013 or alternatively the treatment he received for those injuries, or both, have materially contributed to the conditions he now alleges in his thoracic spine. He discussed the medical evidence and held, relevantly:

> 53. Having regard to Dr Bodel's opinion, as expressed in his report of 5 March 2018, insofar as he says that the symptoms are due to the effects of the injury Mr Lang suffered and the recovery from the fractures of his wrist and the stiffness in his shoulders, and having regard to what Mr Mahon said in his report to the GP on 20 February 2014, which is to the same effect as what Dr Bodel has said, I am satisfied that, in all likelihood, the injuries Mr Lang suffered on 23 December 2013 , insofar as they resulted in the fracture of his wrist and bursitis and pain in his shoulders, have materially contributed to the condition he has in his thoracic spine in the form of pain and altered motion.

- *Injury to left knee*

The Arbitrator noted that Dr Bodel has identified a particular physiological disturbance that the worker attributed to the incident on 23 December 2013. He held that Dr Bodel's opinion accords with common sense noting that the incident involved the worker falling directly on to his hands and knees from a height of 4 metres. He found for the worker on this issue.

Accordingly, the Arbitrator remitted the matter to the Registrar for referral to an AMS to assess the degree of permanent impairment with respect to both upper extremities, both lower extremities and the thoracic spine as a result of the injuries suffered on 23 December 2013.

Uninsured employer – Arbitrator determines the amount of compensation payable to the worker "in accordance with" the WCA

Kennedy v Icare Workers Insurance & Giddens [2019] NSWWCC 274 – Senior Arbitrator Bamber – 14 August 2019

In a COD dated 8 May 2019, the Senior Arbitrator determined that the second respondent injured her left knee on 1 March 2018 in the course of her employment with the applicant. The applicant operated a café business and did not hold workers compensation insurance.

During the arbitration hearing, the applicant's solicitor (Mr Macken) sought to make submissions regarding the extent of the payments made by the first respondent. This issue was not previously raised, but the Senior Arbitrator allowed him to raise it and she made directions for the filing and service of further evidence and submissions by the parties.

The applicant argued that: the second respondent had capacity for some employment from 7 May 2018 to 26 July 2018; PIAWE is $864.74 per week; the second respondent was able to earn at least $560 per week ($35 per hour) during that period; and the second respondent should have been paid weekly benefits of $300 per week.

The first respondent argued that the applicant had not filed any evidence in support of those submissions. It also argued that it could not have reduced the rate of weekly payments before 28 May 2018, because this would have required it to make a work capacity decision and a notice period applied under s 80 *WIMA* applies. Further, the second respondent was waiting to undergo surgery during the relevant period and it questioned whether it was appropriate to make a work capacity decision at that time.

The Senior Arbitrator stated, relevantly:

> 26. Mr Kennedy has disputed the payments in the period 7 May 2018 to 26 July 2018 on the basis that her doctor had certified her having some capacity in this period. However, given that Ms Giddens in fact had the surgery to her left knee on 11 July 2018 and thereafter could not weight bear, I find the period from 11 July 2018 to 26 July 2018 was correctly and appropriately paid as the evidence supports a finding of no capacity for employment in this period.
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> 27. In the matter of *Ballantyne v WorkCover Authority of NSW* the Court of Appeal considered the relevant considerations to be taken into account by the Commission when making an order under section 145 of the *Workers Compensation Act 1987* (*the 1987 Act*). At [83] Justice Basten referred to the decision in *Raniere Nominees Pty Ltd v Daley* (*Raniere Nominees (No. 1*)) wherein Tobias JA (with whom Hodgson JA and Stein AJA agreed) stated:
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> > 45. In my opinion, these provisions make clear that an employer upon whom a notice is served is entitled to apply to the Compensation Court for a determination as to its liability in respect of any payment made by the Authority to an injured worker under the Scheme. It must follow that that liability relates to that of the employer to pay compensation to the injured worker under the Act. ... That liability, if not otherwise conceded by the employer, is to be determined by the Compensation Court pursuant to s 145(4). 46. That the employer's liability to reimburse the Fund in respect of the amount of any payment made to the injured worker under the Scheme is a reference to its liability to pay the injured worker compensation under the Act is, in my opinion, confirmed by the terms of s 145(5).
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> 28. At [106] Basten JA added,
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> > As already discussed, the person's 'liability' will depend, in broad terms, on the following factors: (a) was the person properly served with a notice under sub-s (1); (b) did the notice require payment of an amount not exceeding the payment made by the Authority; (c) was the person served the employer or an insurer of the employer of the injured worker; (d) was the payment made by the Authority a payment of 'compensation in accordance with this Act'.
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> 29. The issue in dispute to be presently determined involves the last of the above points, was the payment made by the Nominal Insurer a payment of compensation in accordance with the Act. The Nominal Insurer has explained why having received the certificate of capacity issued on 9 May 2018 (certifying that Ms Giddens had some capacity for employment) it could not have immediately reduced her weekly compensation payments, because it had to comply with the provisions in the legislation. Section 80 of the 1998 Act provides that an insurer must not reduce the

amount of weekly compensation to a worker unless the required period of notice has been given to the worker.

30. In order to determine if particular payments made to a worker were payments of compensation in accordance with the Act, I find that not only must I consider the medical evidence and the applications of sections 36, 37 and 32A, but also the procedural sections, such as section 80.

31. However, section 80 (2) of *the 1987 Act* states that the section applies to a worker only if the worker has received weekly payments for a continuous period of at least 12 weeks.

32. According to the first respondent's submissions Ms Giddens payments of weekly compensation commenced on 5 March 2018 and so she would not have received 12 weeks of weekly compensation on 10 May 2018 when the Nominal Insurer received the certificate of capacity. The 12 weeks would not have been reached until 28 May 2018. So that means as at the relevant date section 80 did not apply and there would have been no notice provision to be complied with in order to reduce the weekly payments.

The Arbitrator held that the second respondent had capacity for some work for 16 hours per week from 7 May 2018 to 10 July 2018. She adopted the minimum wage of $23.66 per hour to assess her ability to earn and determined this as being $378.56 per week. As a result, for the period from 10 May 2018 to 10 July 2018, the weekly payments needed to be reduced by a total of $3,217.76 (8.5 weeks x $378.56 per week). However, she held that the second respondent had no current capacity for employment from 11 July 2018 to 26 July 2018.

Accordingly, the Senior Arbitrator ordered the applicant to pay the Nominal Insurer the sum of $32,340.38.

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