Bulletin

MONTHLY
UPDATES
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CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. D'Ament v Allianz Australia Insurance Ltd [2019] NSWCA 201
2. Insurance Australia Group Services Pty Ltd v Outram [2019] NSWWCCPD 44
3. Renew God's Program Pty Ltd v Kim [2019] NSWWCCPD 45
4. Macarthur Group Training Ltd v Tahere [2019] NSWWCCPD 46
5. Fujitsu General Pty Ltd v Mendez [2019] NSWWCCMA 119
6. Melides v Meat Carter Pty Limited [2019] NSWWCCPD 48
7. Norton v Anambah constructions Pty Ltd [2019] NSWWCCMA 121
8. CSR Ltd v Ewins [2019] NSWWCCMA 123
9. Sydney Metro Taxis Fleet No 1 Pty Ltd v Khan [2019] NSWWCCMA 124
10. Duck v EB & DE Bunt Pty Ltd [2019] NSWWCC 279
11. Kato v City of Sydney [2019] NSWWCC 288

Court of Appeal Decisions

Jurisdictional error not established – A finding of fact for which there is no evidence does not necessarily constitute an error of law on the face of the record

D'Ament v Allianz Australia Insurance Ltd [2019] NSWCA 201 – Simpson AJA (Macfarlan & Leeming JJA agreeing)

On 18 November 2010 the appellant was involved in a MVA. The respondent was the insurer on risk and it accepted that the appellant injured her cervical and lumbar spines, but it disputed injuries to the thoracic spine and left shoulder. The appellant claimed

damages under s 131 of the *Motor Accidents Compensation Act 1999 (NSW)* ("*the MACA*") to which a threshold of *"at least 10% WPI"* applied and an assessor assessed 10% WPI.

The appellant unsuccessfully sought a review of that decision. She then successfully applied for another assessment based upon an additional medical report, but impairment was again assessed at 10% WPI. She unsuccessfully applied for a further assessment, but a third application succeeded and resulted in an assessment of 12% WPI. The respondent then sought a review of that assessment under s 63 *MACA* and a Medical Review Panel revoked it and assessed 10% WPI.

The appellant applied for judicial review by the Supreme Court of NSW, but the primary judge dismissed the Summons. She then appealed to the Court of Appeal and asserted that: (1) the Review Panel failed to address an argument that had properly been put before it; (2) the Review Panel directed its attention to the wrong question, whether she had suffered injury to the left shoulder in the MVA, when the correct question was whether she suffered "impairment", whether from direct injury or as a consequence of injury to her cervical spine; and (3) the review Panel's determination was based on findings of fact for which there was no evidence.

Simpson AJA (Macfarlan and Leeming JJA agreeing) observed that if grounds (1) and (2) were made out jurisdictional error would be established. If ground (3) was made out, error of law on the face of the record would be established. However, the Court dismissed the appeal with costs for reasons that are summarised below.

Ground (1) - The Review Panel did not fail to address the appellant's claim she suffered referred pain in her left shoulder as a consequence of the MVA and jurisdictional error was not made out. The Court referred to the decisions of *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088; *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; (2016) 77 MVR 348; *Nguyen v Motor Accidents Authority of New South Wales* [2011] NSWSC 351; (2011) 58 MVR 296.

Ground (2) - The Review Panel did not address the wrong question by focussing only on direct injury and jurisdictional error was not established. The Court referred to the decisions in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; [2001] HCA 22; and *Nguyen v Motor Accidents Authority of New South Wales* [2011] NSWSC 351; (2011) 58 MVR 296.

Ground (3) - A finding of fact for which there is no evidence does not necessarily constitute an error of law on the face of the record and no such error was established. The Court referred to the decisions in *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32; *Craig v The State of South Australia* (1995) 184 CLR 163; [1995] HCA 58; *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674; [2014] NSWCA 170; *Geftlic v Merhi* [2011] NSWCA 241; *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; (2016) 77 MVR 348. Simpson AJA stated, relevantly:

> 74. It may be accepted that a finding of fact for which there is no evidence constitutes an error of law: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32 at [90]. That is not the same as saying that such a finding constitutes an error of law on the face of the record. The parameters of "error of law on the face of the record" have not been authoritatively defined. There is no clear line that marks out an error of law as one that is "on the face of the record".
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> 75. While, by s 69 (4), "the record" includes the reasons for the decision in question, it is clear that "the record" does not include the transcript of the proceedings, the evidence, or the submissions: *Craig v The State of South Australia* (1995) 184 CLR

163 at 180 ff; [1995] HCA 58; *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674; [2014] NSWCA 170 at [29]-[30]; *Geftlic v Merhi* [2011] NSWCA 241.

76. The question was again adverted to in *McGiffen*. The Court said:

> 89. Further, whether any such error of law was one appearing 'on the face of the record' as required by s 69 of the Supreme Court Act was not explored by the parties on the appeal. The extent to which, when considering a 'no evidence' finding, it is open to consider material beyond the reasons of the review panel is unclear. It is true that s 69(4) of the Supreme Court Act makes the reasons part of the record, assuming, in the absence of argument to the contrary, that the review panel is a 'tribunal'. It is not, however, permissible to review the whole of the evidence before the review panel to discern whether there is an error of law on the face of the record.

77. The appellant's submissions trawled through the medical and physiotherapy evidence in order to establish the proposition that there had been complaints by the appellant of pain in the left shoulder prior to March 2011. The argument also required interpretation of that evidence – for example, the physiotherapy note of "left shoulder pain again" and of the pictogram in the notes. That exercise is beyond the scope of a determination of whether there has been "error of law on the face of the record". I am satisfied, however, that the error of law for which the appellant contends (even if it is error of law) falls on the wrong side of the divide referred to in [74] above. No error of law on the face of the record has been established.

WCC - Presidential Decisions

Demonstrable misunderstanding of relevant evidence: Montgomery v Lanarkshire Health Board [2015] UKSC 11 applied

Insurance Australia Group Services Pty Ltd v Outram [2019] NSWWCCPD 44 – Deputy President Wood – 23 August 2019

The worker was employed by the appellant as a Senior Case Manager from September 2010 to August 2017. In October 2015, he was seconded to a higher role as a Technical Adviser, initially for 12 months, but this was later extended to April 2017. The secondment ended because the appellant withdrew from providing workers compensation insurance services and the worker returned to his substantive role. After December 2016, and during his secondment, he reported to Ms Brennan (Branch Manager). However, after he resumed his substantive role he was supervised by Ms Strang.

The worker alleged that during a meeting in July 2017, Ms Strang assessed his annual performance and rated it as "solid", but Ms Brennan later assessed this as "inconsistent". He took umbrage at Ms Brennan's assessment and asked her to provide reasons. At a meeting on 17 August 2017, to address his request, he became agitated and spoke aggressively to Ms Brennan. He left the meeting, ceased work and claimed compensation for a psychological injury (deemed date: 17 August 2017) due to alleged bullying, harassment and unreasonable conduct by his manager. However, the appellant disputed the claim under s 11A (1) *WCA* ((transfer and performance appraisal).

On 15 March 2019, ***Arbitrator Douglas*** gave an oral decision. He determined that the injury was not wholly or predominantly caused by the transfer or performance appraisal and that the appellant's actions with respect to performance appraisal were not reasonable. He stated that the appellant should have been given the worker written reasons for the downgrade in his performance rating before the meeting with Ms Brennan, as if he was

properly prepared for that meeting he was less likely to become distressed and 'blind-sided' during it. The appellant should have foreseen that the way it conducted that aspect of the process was likely to cause an employee to become anxious and distressed. He also held that these actions were not whole or predominant cause of the injury.

Accordingly, the Arbitrator awarded the worker compensation under s 60 *WCA* and he remitted the s 66 dispute to the Registrar for referral to an AMS.

Deputy President Wood noted that the appellant appealed on 4 grounds, which were non-specific and did not comply with Practice Direction No. 6. However, she interpreted them as follows: (1) Error of fact in the Arbitrator's determination that the appellant's action in relation to the meeting on 17 August 2017 was not reasonable; (2) Error of law in the Arbitrator's determination that the appellant's action in relation to the meeting on 17 August 2017 was not reasonable; (3) Failure to give adequate reasons in dealing with the question of causation of the respondent's injury, and (4) Error of fact and law in dealing with the question of causation of the respondent's injury.

Wood DP considered that the Arbitrator's approach was *"rather unusual",* because he considered whether the appellant's actions in respect of the performance appraisal were reasonable before he determined what events caused the injury. Her reasons are summarised below.

Wood DP upheld ground (1) and held that it was not clear whether the Arbitrator's reference to what Ms Brennan said about the worker's performance followed from a misreading of her email, or an acceptance of what the worker alleged that it said without considering the email itself. In any event, the email did not say what the worker asserted it said or what the Arbitrator regarded as uncontradicted evidence of that assertion.

The Arbitrator clearly considered this fact, which had no evidentiary basis, in making his findings regarding reasonableness. She held that a demonstrable misunderstanding of relevant evidence constitutes an error on the part of the decision maker and that this error was material to the ultimate finding that the appellant's action was unreasonable. A finding of fact cannot be overturned merely because the Presidential member simply prefers a different outcome, but it may be overturned by showing that material facts were overlooked or given undue or too little weight in drawing the relevant inference.

Wood DP also upheld ground (2) and stated that in determining that the appellant should have provided the worker with written reasons about his performance rating before the meeting with Ms Brennan, the Arbitrator did not objectively weigh the rights of the worker against the actions of the appellant, whose objective was limited to providing reasons for the performance assessment as requested by the worker, as required by the principles enunciated in *Irwin.* This resulted in error.

Wood DP upheld ground (3). She held that while s 294 *WIMA* imposes a duty on an Arbitrator to provide reasons for a decision that are sufficient to enable a losing party to understand why it lost. She stated, relevantly:

> 169. …A useful summary of the principles enunciated in various authorities dealing with the obligation to give reasons was provided by McColl JA (with Ipp JA and Bryson AJA agreeing) in *Pollard v RRR Corporation Pty Ltd*, in which her Honour said as follows (citations omitted):
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> > The Court is conscious of not picking over an ex tempore judgment and, too, of giving due allowance for the pressures under which judges of the District Court are placed by the volume of cases coming before them. However a trial judge's reasons must, 'as a minimum ... be adequate for the exercise of a facility of appeal'. A superior court, 'considering the decision of an inferior

> tribunal, should not be left to speculate from collateral observations as to the basis of a particular finding'.
>
> The giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes 'a sense of grievance' and denies 'both the fact and the appearance of justice having been done', thus working a miscarriage of justice.
>
> The extent and content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties.
>
> The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted … it is necessary that the primary judge 'enter into' the issues canvassed and explain why one case is preferred over another'.

Wood DP noted that in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)*, Kirby J observed that where there is evidence in support of a party's case, that evidence must be considered in the reasoning process in a satisfactory way. She held that the fact that other incidents contributed to the injury is not sufficient to negate the possibility that certain actions, which the Arbitrator found had made a "major" contribution to the injury, could not be the predominant cause. She stated, relevantly:

> 171. …Whether an action is a predominant cause must be ascertained by weighing the evidence of the effect of each of those incidents on the respondent's psyche and the consequences that flowed from the incident. In many cases, medical evidence in respect of causation is required. As observed by Candy ADP in *ISS Property Services Pty Ltd v Milovanovic,* what is required is a comparison between all of the employment related contributions to the injury and those contributions that resulted from reasonable actions by the employer in respect of discipline, transfer, or other actions specified in s 11A (1). The Arbitrator did not undertake that exercise, either by comparing the effects of the actions taken in respect of performance appraisal or transfer with the other actions he considered to be causative, or by assessing whether the transfer, which he found to be reasonable, by itself, was predominantly causative…
>
> 174. There is nothing recorded in the transcript of proceedings which might have led the appellant to understand that the Arbitrator intended to reject the opinion of Dr Vickery, and the reasons for doing so. Where there is disputed expert evidence, the parties are entitled to an explanation by the judge as to why the judge prefers one case over the other. This is so, despite the fact that the decision and reasons were delivered orally on the day of the arbitration.

Wood DP held that it was not necessary to determine ground (4).

Accordingly, she revoked the COD and remitted the matter to another Arbitrator for re-determination of the issues of reasonableness and causation.

Section 9B WCA - Duty to give reasons

Renew God's Program Pty Ltd v Kim [2019] NSWWCCPD 45 – Deputy President Snell – 30 August 2019

The worker was the owner of the appellant business. On 26 July 2018, he suffered a cardiac incident and was admitted to Hospital from 31 July 2018 to 2 August 2018. He claimed weekly compensation and medical treatment expenses, but did not press the weekly payments claim.

Arbitrator Isaksen identified the issues for determination as being whether the worker suffered an 'injury' and whether the requirements of s 9B *WCA* were satisfied. He found for the worker on both issues and made an award under s 60 *WCA.* In doing so, he noted that in *State Transit Authority v El-Achi* [2015] NSWWCCPD 71 (*El-Achi),* Roche DP stated:

> That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.

The Arbitrator accepted the opinion of Associate Professor Haber and stated, relevantly:

> 50. It is clear from the opinion provided by A/Prof Haber that he concluded that the heavy work undertaken by the applicant on 26 July 2018 brought on the heart attack. There is no opinion to the contrary. I consider that it is implicit in this opinion that A/Prof Haber has engaged in a consideration of the comparison of the risk to which the nature of the employment concerned gave rise to and the risk had the worker not been employed in employment of that nature, because A/Prof Haber is categorical in his opinion that the heart attack has been brought on by the heavy work and does not identify any other factors or events or conditions that could have created such a risk.
>
> 51. A/Prof Haber is made aware that the applicant did suffer further chest pain after the day's work on 26 July 2018 and has read the clinical notes from Ryde Hospital which refer to further episodes of chest pain after the onset of chest pain at work, but remains of the opinion that the physical work undertaken by the applicant brought on the heart attack. Notwithstanding A/Prof Haber's failure or omission to provide an opinion which specifically uses the terminology required of section 9B there is from my reading of his opinion little doubt that his opinion is predicated on the risk of a heart attack being made significantly greater by the heavy work that was undertaken by the applicant on 26 July 2018.

While there was a discrepancy between the worker's evidence and the history in Ryde Hospital's notes about when the worker first experienced chest pain, the Arbitrator referred to authorities including *Nominal Defendant v Clancy* regarding the caution to be exercised when relying on clinical notes. He held that there was consistency in the histories recorded by Dr Sheriff, Associate Professor Haber and upon the worker's admission to hospital, that he suffered chest pain when undertaking heavy work with the employer. He held that this was compelling evidence that the heart attack most likely occurred on 26 July 2018, despite further episodes of chest pain occurring outside the workplace. He also noted Associate Professor Haber's opinion *that "it was the heavy work undertaken by the applicant upon a background of this pre-existing coronary artery disease which caused the applicant to suffer the heart attack".* He held that while A/Prof Haber did not use the specific wording required under section 4 (b) (ii), his opinion leads to a finding that the worker's employment on 26 July 2018, was the main contributing factor to the aggravation and acceleration of his coronary artery disease, which caused him to suffer a heart attack on that day.

On appeal, the appellant asserted that the Arbitrator: (1) erred in law in finding that the respondent had discharged his onus under s 9B *WCA*; (2) erred in law in finding that the opinion of Associate Professor Haber held that the nature of the employment gave rise to a significantly greater risk of a heart attack than had the worker not been employed in employment of that nature, when Associate Professor Haber gave no such opinion; and (3) failed to provide adequate reasons for his conclusions.

Deputy President Snell rejected grounds (1) and (2). He noted that the both parties referred to his decision as a Senior Arbitrator in *Da Silva,* about how to construe s 9B *WCA* and the process that ought to be undertaken when determining matters under it and the appellant argued that his decision should be given weight. He stated:

> 39. *De Silva* refers to the exercise under s 9B (1) involving a "comparison of the level of risk" The passage from De Silva quoted at [10] above describes the nature of the comparison. Neither party suggested it was inappropriate to apply the reasoning in *De Silva*. There was discussion in De Silva regarding the meaning of the phrase 'the employment concerned', where that phrase is used in s 9B(1). In *De Silva*, I concluded that phrase has the same meaning as when the same words are used in s 9A (1), being a reference to "what the worker in fact does in the employment that caused or contributed to the injury". That is, the reference is to "the particular employment in which a worker suffered injury", rather than to "a class or classification of employment". Neither party challenges that aspect of the reasoning in *De Silva* on this appeal.
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> 40. The test in s 9B requires that the relevant risk in the employment concerned be "significantly greater" than the risk "had the worker not been employed in employment of that nature". In *De Silva* I concluded that satisfaction of this test required a risk in the employment concerned that was greater, in a way that was "important; of consequence". This aspect of the reasoning in De Silva is not challenged on this appeal.

Snell DP noted that no medical evidence specifically addressed s 9B *WCA.* He held that the Arbitrator correctly relied upon the decision in *El-Achi,* that it is necessary to consider whether s 9B is satisfied on the whole of the evidence, and he correctly referred to the test. He stated, relevantly:

> 44. The Arbitrator accepted the opinion of Associate Professor Haber… From this opinion on causation, the Arbitrator reasoned there was *"little doubt that [Associate Professor Haber's] opinion is predicated on the risk of a heart attack being made significantly greater by the heavy work that was undertaken by the [worker] on 26 July 2018"*. The logic of this is straightforward. For the doctor to conclude that the work on 26 July 2018 caused the myocardial infarction, he must have held the opinion that there was a significant risk of it doing so, compared with a situation where the worker did not carry out such duties. On the evidence, there was another factor to be considered, the presence of "previously asymptomatic coronary artery disease". However, the doctor was aware of the presence of that disease and formed his view on causation, notwithstanding its presence.

Snell DP accept the employer's submission (consistent with the decision in *De Silva*) that s 9B involves an evaluative task, applying the comparison that is inherent in the section. This involves an assessment of comparative risks and is not a test of true causation. Such issues in 'heart attack' cases are frequently multifactorial. While the simple logical extension of Associate Professor Haber's opinion on causation, to the issue of whether the test in s 9B was satisfied, will not be appropriate in all cases, he rejected the argument that the Arbitrator failed to undertake the evaluative task required under s 9B. He clearly turned

his mind to the nature of the test, and whether the evidence was sufficient to satisfy it. He concluded, in the circumstances of the particular case, that the opinion of Associate Professor Haber was sufficient to do so. The employer submits that Associate Professor Haber's report does not suggest that he had considered s 9B. This to some extent misses the point. The section does not require that there be medical evidence to some particular effect. Rather it was necessary, on all of the evidence, that the Arbitrator determine whether the test in s 9B was satisfied.

Snell DP noted that no other risk factors were raised in the medical evidence and he held that the Arbitrator's conclusion was open to him and did not involve error. Also, as the test under s 9B involves an evaluative judgment, the decision of Sackville AJA (Basten and Ward JJA agreeing) in *Northern NSW Local Health Network v Heggie* is relevant:

> 71… as Roche DP pointed out in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25, at [20], the observations of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2)* need to be borne in mind, particularly (I would add) where the challenge is to an evaluative judgment such as the reasonableness of actions by an employer with respect to discipline.

Snell DP rejected ground (3) and held that the Arbitrator's reasons were "quite adequate". He noted that McColl JA helpfully summarised a significant number of authorities dealing with the duty to give reasons in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 and he stated, relevantly:

> 62. …The extent and content of the requirement for reasons will depend on the particular case. As a minimum reasons must be sufficient for the exercise of a facility of appeal. It is necessary to expose the reasons for deciding a point critical to the contest between the parties. The reasons should be sufficient to enable the parties to understand the basis of the decision and why one case is preferred over another. The reasons for the decision under review are "not to be construed minutely and finely with an eye keenly attuned to the perception of error". It is necessary that the reasons be read as a whole…

Accordingly, Snell DP dismissed the appeal.

Aggravation of a disease under s 4 (b) (ii) WCA - Rail Services Australia v Dimovski & Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd discussed and applied

Macarthur Group Training Ltd v Tahere [2019] NSWWCCPD 46 – Deputy President Wood – 2 September 2019

On 4 March 2016 and 16 March 2017, the worker injured his back but he resumed pre-injury duties after each injury. He suffered further back symptoms in January 2018 and July 2018, in the course of his employment with JR Electrical Services Pty Ltd. He did not return to work after the last injury and he claimed compensation from the appellant for a recurrence of his back injury. The insurer disputed the claim. The worker filed an ARD and claimed continuing weekly payments from 30 July 2018 and medical treatment expenses from the appellant only. The insurer filed a Reply and argued that the injuries were disease injuries for the purposes of s 16 *WCA* and the last employer was liable.

Arbitrator Sweeney expressed concern that the last employer was not joined to the proceedings. However, he ultimately determined that the worker's incapacity resulted from the injury on 16 March 2017. He found that the worker he had no current work capacity from 30 July 2018 to 30 January 2019 and thereafter he was capable of suitable employment. He awarded weekly payments under s 37 *WCA* and made a general order for payment of s 60 expenses.

On appeal the appellant asserted that the Arbitrator: (1) erred in failing to find that the worker suffered from a disease of his lumbar spine, namely disc degeneration; (2) erred in failing to find that injury on 16 March 2017 aggravated and exacerbated the disease process in the worker's lumbar spine; (3) erred in failing to find that the respondent's employment with JR Electrical was a substantial contributing factor to the aggravation and exacerbation of the underlying, established degenerative condition in the worker's lumbar spine, and (4) erred in failing to apply the provisions of s 16 (1) (b) *WCA*.

Deputy President Wood determined the appeal on the papers.

Wood DP rejected ground (2) and stated that the Arbitrator referred to the Court of Appeal's decision in *Dimovski* and held that the worker's injury was not an injury that "consists" in the aggravation of a disease. In *Dimovski,* Hodgson JA stated:

> 68. Section 16 applies only if the injury 'consists in' the aggravation etc of a disease. If there is an event that satisfies paragraph (a) of the definition of injury, and if that is the injury relied on and proved, the circumstance that it aggravated the disease and thus could have supported a case under paragraph (b) (ii) does not mean that this injury 'consists in' the aggravation of a disease. …
>
> 70. In the present case, compensation is payable by Rail Services for incapacity resulting from two injuries, namely a nature and conditions injury and a frank injury on 28 May 1998. The former could possibly be considered an injury under paragraph (b) (ii) and falling within s.16 (1); but the latter could not.

Wood DP stated that the Arbitrator correctly held the injury on 16 March 2017 was a frank injury and as ss 15 and 16 *WCA* does not apply to an injury under s 4 (a) *WCA,* liability cannot rest entirely with the last employer.

Wood DP also rejected ground (4) and held that when there are two injuries, s 16 *WCA* does not apply where one is an injury under s 4 (a) *WCA* even if the second injury may satisfy s 4 (b) (ii) *WCA*.

Wood DP also rejected ground (1) and stated that the appellant's case was fundamentally flawed. She held that the Arbitrator was not required to make an explicit finding that the injury was an aggravation of a disease when it did not consist in the aggravation of a disease process. She stated, relevantly:

> 103. …The medical opinions clearly establish that the respondent suffered from degenerative disc disease. However, the injury did not constitute an injury pursuant to s 4 (b) of the 1987 Act, so the existing pathology is irrelevant to a consideration of whether liability for the injury rests with the appellant. The appellant has not identified error on the part of the Arbitrator of the kind required and ground one of the appeal also fails.

Wood DP also rejected ground (3). While the appellant asserted that the Arbitrator ought to have found JR Electrical liable, it was not a party and there was no evidence that the worker made a claim against it or that it had disputed a claim. In the absence of a dispute by that employer, the Arbitrator could not make such a determination. She also stated that while the appellant may be aggrieved at the outcome, the manner in which the worker's

case was presented, by electing not to include JR Electrical in these proceedings, was most unsatisfactory. The Arbitrator clearly identified to the respondent that there were risks associated with proceeding in such a fashion. However, she concluded:

> 110. It should be noted, however, that as the injury on 16 March 2017 was an injury within the definition of s 4 (a) of *the 1987 Act*, and it may be arguable that the work performed with JR Electrical constituted a further injury (either a s 4 (a) injury or an injury pursuant to s 4 (b) (ii) of *the 1987 Act*), the appellant might elect to bring proceedings against JR Electrical claiming apportionment of the liability to pay the compensation pursuant to s 22 of *the 1987 Act*. That is a matter that could have been dealt with expeditiously by the Arbitrator in the same proceedings, had the respondent proceeded in an acceptable manner against both parties. The substantial waste of the Commission's resources is unacceptable.

Accordingly, the appeal was dismissed.

Construction of s 38A WCA – Hee v State Transit Authority of New South Wales applied – RSM Building Services Pty Limited v Hochbaum [2019] NSWWCCPD 15 distinguished

Melides v Meat Carter Pty Limited [2019] NSWWCCPD 48 – Acting Deputy President Parker SC – 10 September 2019

The decision at first instance was reported in Bulletin no. 31. However, by way of summary, the appellant contracted Q-Fever and a secondary psychological condition. On 14 December 2015, he was awarded weekly payments under the previous ss 36 and 37 *WCA* and reasonably necessary s 60 expenses, but an award for the respondent was entered with respect to the claim for weekly payments from 14 December 2015.

On 9 June 2017, Dr Haber issued a MAC which assessed 60% WPI. The employer appealed against the MAC, but a MAP ultimately confirmed the MAC. On 21 September 2017, a COD awarded the appellant compensation under s 66 *WCA* based upon the MAC.

On 8 July 2018, the insurer commenced payments to the appellant under s 38A *WCA.* The Appellant sought these payments from 14 August 2017 to 7 July 2017, with credit to the insurer for payments made, based upon the decision of Senior Arbitrator Capel in *White v Vostok Industries Pty Limited.* However, the insurer disputed that there was an entitlement to payments under s 38A before the date on which he was *"confirmed as a worker with highest needs"*.

Arbitrator Scarcella rejected the appellant's argument that the entitlement under s 38A *WCA* vests when the injury occurs and he stated, relevantly:

> 96. Implementing the principles of statutory interpretation set out in *Wilson* as summarised by Deputy President Roche in *Hesami* and confirmed by *SZTAL*, I have interpreted and construed the words in sub-paragraph (a) of the section 32A definition of worker with highest needs having regard to their legal and historical context, giving close attention to the text and structure of the Acts. There was a medical dispute between Mr Melides and the respondent within the meaning of section 319 of *the 1998 Act*. The dispute followed the relevant processes referred to in Part 7 of the 1998 Act. A proper reading of sub-paragraph (a) of the section 32A definition of worker with highest needs results in the conclusion that the entitlement to weekly compensation at the section 38A rates, as adjusted, commences at the time the worker "has been assessed" with a permanent impairment in excess of 30% whole person impairment. In this case, that occurred once Mr Melides had been

assessed by AMS Associate Professor Haber and the Medical Assessment Certificate issued. Pursuant to section 326 (1) of *the 1998 Act,* the Medical Assessment Certificate of AMS Associate Professor Haber dated 9 June 2017 is conclusively presumed to be correct…

100. Whilst in both *O'Donnell* and *Hee No 1* the reasoning relating to the commencement date of payments pursuant to s 38A of *the 1987 Act* were obiter and not binding on me, for the reasons referred to above, I agree with Senior Arbitrator McDonald's reasoning in *O'Donnell*, which was subsequently supported by Senior Arbitrator Capel in *Hee No 1*.

Accordingly, he held that the entitlement under s 38A *WCA* began on 9 June 2017.

As to the question of the Commission's jurisdiction, the Arbitrator held that the principles discussed in *Lee* were confirmed by President Keating in *Paterson v Paterson Panel Workz Pty Limited* and by the Court of Appeal in and *Sabanayagam v St George Bank Limited* and *Jaffarie v Quality Castings Pty Ltd*. The "clear and unambiguous language" used in s 38 (2) WCA confirms that the insurer is responsible for assessing a worker's capacity after the second entitlement period. However, there was no evidence that the insurer had made a work capacity decision and the Commission did not have jurisdiction to order the payment of weekly compensation under s 38A *WCA* from 9 June 2017 to 7 July 2017. Nevertheless, he opined that the insurer has an obligation to make these payments under the cl 3.2 of the *Model Litigant Policy for Civil Litigation (NSW).*

On appeal, the appellant asserted that the Arbitrator erred: (1) when he found that the entitlement pursuant to s 38A did not commence until the date of the issue of the Medical Assessment Certificate; (2) when he considered that the requirements of paragraph (a) of the definition of worker with highest needs was satisfied when there had been an assessment by an Approved Medical Specialist on referral from the Commission; (3) when he declined to infer that the respondent had made an assessment of the worker's capacity in circumstances where it had continued to pay weekly compensation; and (4) when he failed to make an order for the payment of compensation.

Acting Deputy President Parker SC determined the appeal on the papers.

Parker ADP upheld ground (1). He noted that in *Adco Constructions v Goudappel* the High Court said when construing a regulation that that the appropriate enquiry should be directed to the "text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the construction that, according to the established rules of interpretation, best serves the statutory purpose. He opined that a similar approach to the construction of s 38A is appropriate.

In relation to the context of s 38A *WCA,* Parker ADP stated, relevantly:

42. Before turning to the text of s 38A the following points may be made:

(a) Sections 36, 37, 38, 39 and 40, each make explicit reference to a temporal component. The Act is quite specific in defining that temporality. Section 38A does not contain any explicit temporal element.

(b) Section 38A is placed after the sections that define the amount of weekly payments to be made.

(c) It is followed by s 39(1), which provides that weekly compensation shall not be paid after 260 weeks. An exception is made where s 39(2) is satisfied.

(d) Sections 40 to 42 contain provisions whereby weekly payments may be adjusted to accommodate particular circumstances of the recipient. …

47. The purpose of s 38A is to provide that in the case of a worker with highest needs the rate of weekly benefit payable is adjusted so that it does not fall below the prescribed minimum.

48. Section 38A is premised on the "determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision".8

49. Pursuant to the Direction issued on 13 August 2019, the appellant submitted that whilst the Court of Appeal decision in *Hee No 3* did not directly consider the matters in issue in this appeal, the majority decisions are consistent with the proposition that the entitlement to the benefit of s 38A commences prior to any assessment of Whole Person Impairment by an Approved Medical Specialist. The respondent submitted that although the Court of Appeal considered s 38A, the decision is not on point in the current appeal because the Court was concerned with the issues of the construction and application of the phrases "current work capacity" in s 37 and the "amount of weekly payments under s 38A".

Parker ADP opined that *Hee No 3* provides *"considerable guidance to the correct construction of s 38A",* in which Meagher JA said:

[31] The structure and terms of s 38A (1) confirm that it only operates in circumstances where there is an entitlement to an amount of weekly compensation, determined in accordance with ss 36, 37 or 38 (6) or (7), and irrespective of whether that amount is zero, or less than zero. If the condition enlivening the 'special provision' is satisfied, that provision is to be made by treating the amount which is the outcome of that earlier and necessary 'determination' as being the specified mount, initially $788.32. Section 38A does not in terms provide that a worker with highest needs with partial incapacity for work is entitled to weekly compensation at the specified or any other rate. It applies if there is an entitlement to an 'amount' determined in accordance with one of the earlier provisions, and then only to specify a minimum amount which is to be payable. …

[32] The 'determination' describes the outcome of the calculation of the rate of weekly payments to which an injured worker is entitled under one of the relevant provisions. The use of the word 'payable' in s 38A (1) confirms that outcome is the weekly payment to which the injured worker is otherwise entitled under Pt 3 Div 2. As Giles JA observed (Allsop P and Hodgson JA agreeing) in *Speirs v Industrial Relations Commission of New South Wales* [2011] 81 NSWLR 348; [2011] NSWCA 206 at [76], in this context 'an employer's liability to pay compensation and a worker's entitlement to receive compensation each express compensation being payable.'

[33] All of this is consistent with the language of s 33 and the scheme of Pt 3, Div 2. The general provision in s 9 makes clear that the injured worker is entitled to compensation 'in accordance with this Act'. Section 33 does not provide for the calculation of any 'weekly payments' to which the worker is entitled for partial or total incapacity. It is the other provisions of Div 2, Subdiv 2 that do so. That is confirmed by the language of s 35(1) which defines the integers to be used in those calculations and in doing so describes the operative sections – ss 36, 37 and 38 – as 'the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week'. Accordingly, the reference to a 'weekly payment' in s 33 is to a payment determined in accordance with those operative sections. In that context s 38A applies to a 'worker with highest needs' entitled to a determination of a weekly payment amount, even if the amount determined is zero.

Parker ADP held that s 38A operates in the context of the determination made under ss 36, 37 and 38, which calculate the entitlement to weekly payments, and the special payment under s 38A is substituted for the amount determined under those provisions. ***Therefore, the entitlement to the special payment for workers with highest needs arises at the same time as the entitlement to weekly compensation under ss 36, 37 or 38 is determined*** (emphasis added). He held:

> 52. In my view, dating the payment of the special benefit to commence from the date of injury accords with the purpose of s 38A to provide that workers with highest needs should receive a prescribed minimum payment. This purpose is not advanced by limiting the payment to a date after the medical assessment declares the worker to be a worker with "highest needs". In the majority of cases a "worker with highest needs" is likely to have qualified as such from the date of injury even if the formal assessment of same does not occur until a later point of time.

Parker ADP provided additional reasons with respect to the respondent's submissions concerning retrospectivity and the decision of the President in *RSM Building Services v Hochbaum.* In relation to retrospectivity, he stated, relevantly:

> 56. I have set out above the transitional provision for s 38A and the 2016 Regulation. Section 38A operates from 4 December 2015.
>
> 57. In my view cl 9 (1) of Pt 19I of Sch 6 to the 1987 Act is clear in its terms. It says that s 38A "extends" to the determination of compensation payable "in respect of any incapacity occurring before the commencement" of the section. The period 14 August 2014 to 4 December 2015 is such a period.
>
> 58. Any argument about retrospectivity derived from the common law must give way to express statutory provision.
>
> 59. Even if contrary to my view the transitional provision does not in express terms cover the present matter, I am against the respondent's submission that the above construction gives a retrospective operation to s 38A for the following reasons.
>
> 60. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation: DC Pearce and RS Geddes *Statutory Interpretation in Australia* 7th ed at page 323.
>
> 61. Section 38A does not operate in this manner. As discussed above, s 38A in my view operates on the determination made under ss 36, 37 or 38. Section 38A does not operate retrospectively to alter rights and obligations. The worker's right to receive compensation and the employer's obligation to pay arise at the "moment of happening of the 'jurisdictional fact' of injury. Quantification and precise calculation may take time. But the right is then 'accrued and vested'".
>
> 62. In *Ogden Industries* the death was a necessary precondition to crystallise the entitlement. Compensation was paid for the loss to the dependants' consequent on the death. The dependants' rights and the death are separate from the injury to the worker and his rights under the Act. The compensable event is the death combined with the injury in the course of employment. There were two jurisdictional facts namely (1) injury to the worker; and (2) death leaving dependants.
>
> 63. In the present matter the singular jurisdictional fact is the occurrence of the injury. Determination of the worker as a worker with highest needs was merely a quantification of the entitlement that accrued and vested on the happening of the injury.

64. The passage from *Goudappel* at [26] referred to by the respondent was to the effect that characterisation of the clause there being considered as "retrospective" was a distraction. The High Court directed attention to the proper construction of the *Workers Compensation Regulation 2010*.

65. I reject the respondent's submission that the operation of s 38A contended for by the appellant, with which I agree, is precluded by the principle against retrospective operation of legislation.

In relation to the President's decision in *Hochbaum,* Parker ADP noted that the respondent argued that the appellant's construction is inconsistent with the President's approach to the proper construction of s 39 of *the 1987 Act* in *Hochbaum* at [123] to [125]. He rejected that submission for the following reasons:

68. The President held:

> [147] Where the worker ceases to be paid weekly payments of compensation due to s 39 (1), it is only if a worker has been assessed, for the purpose of s 65, to have a degree of permanent impairment of greater than 20%, that s 39 (2) is engaged to determine whether the worker's entitlement to weekly payments of compensation may be restored. The worker having undertaken the process of an assessment of permanent impairment as defined in s 39 (3) and having achieved the criterion set out in s 39 (2) is then relieved of the bar provided for in s 39 (1). The bar is lifted at the point in time of the assessment of permanent impairment of greater than 20%. The phrase '[t]his section shall not apply' set out in s 39 (2) is dependent upon the completion of this process and the achievement of the criterion. The operation of s 39 (2) is subject to the existence of an assessment of the degree of permanent impairment, as set out in s 39 (2) when read with s 39 (3). A worker's entitlement to weekly compensation, beyond the aggregate period of 260 weeks remains dependent on satisfying the preconditions for payment of weekly compensation pursuant to s 38 of *the 1987 Act*. This is confirmed by the note to s 39 (2). …
>
> 151. Clearly the overall parliamentary intention in introducing s 39 was to bring an end to compensation payments after an aggregate period of 260 weeks. An exception is provided for a subset of workers who achieve a greater than 20% permanent impairment assessment (as defined and provided for). Looked at in this way, if section 39 (2) is truly an excepting provision, it does not warrant a beneficial interpretation.

69. Because s 39 (1) is a disentitling provision, the worker requires an assessment of a permanent impairment in excess of 20% to become entitled to further weekly compensation. Absent such an assessment the bar imposed by s 39 (1) remains in position. An assessment in excess of 20% is an essential precondition to continuing entitlement.

70. Section 38A is different. It is not a disentitling provision. Indeed, it depends on the worker having a determination that s/he is entitled to compensation under ss 36, 37 or 38 as the case may be. All s 38A does for a worker with highest needs is adjust the rate so that the weekly benefit paid does not fall below the prescribed minimum.

71. Section 38A proceeds on the premise that the worker has a "determination of the amount of weekly payments of compensation" to which he is entitled pursuant to ss 36, 37 and 38. In relation to that determination s 38A operates. When he became a worker with highest needs is of no concern. The only issue is whether or not he is in fact a worker with highest needs as defined by s 32A.

72. Section 39 provides that the worker is not entitled to further payments after 260 weeks unless and until s 39 (2) is satisfied following the operation of s 39 (3). The default position under s 39 (1) is that no weekly payments of compensation are payable whilst the bar remains in position. The default position under s 38A is that weekly compensation is payable but it may need to be adjusted having regard to the s 38A requirement that the weekly payment not fall below the prescribed minimum.

73. The focus of s 38A is on the amount of weekly payments to be made. The focus of s 39 is whether any payments are to be made.

74. Unlike s 39 (2) and (3), s 38A (2) is an indexation provision. Section 38A fulfils the purpose of providing a special payment in relation to weekly compensation payable to workers with highest needs.

75. The construction of s 38A contended for by the appellant is correct. That construction is not inconsistent with the conclusions expressed by the President in Hochbaum.

However, Parker ADP concluded that he did not need to express a conclusion on ground (2) in order to dispose of the appeal.

Parker ADP rejected ground (3) and held that there is evidence upon which to draw an inference that the insurer made a work capacity decision with respect to the period from 9 February 2017 to 9 June 2017.

Parker ADP also upheld ground (4), based upon his reasons in relation to ground (1).

Parker ADP concluded that the Arbitrator's construction of s 38A, that the entitlement to the special payment "commences at the time the worker 'has been assessed' with a permanent impairment in excess of 30% whole person impairment", is affected by error of law and requires correction.

Accordingly, he revoked COD dated 26 February 2019 and ordered the respondent to pay weekly compensation under s 38A *WCA* from 14 August 2014 to 8 July 2017, with credit to the respondent for payments made.

One point of interest arising is that at paragraph 86 the ADP delivered the following *obiter dicta* concerning the effect of the repeal of the former section 43(3), which had noted that the WCC lacked jurisdiction to review work capacity decisions of insurers:

> 86.The amendment to repeal section 43(3) removes the privative clause that deprived the Workers Compensation Commission of jurisdiction to review work capacity decisions made by insurers. Such an amendment does not confer on the Workers Compensation Commission a jurisdiction to make the assessment required by s 38.

It must follow that the power to make work capacity assessments and decisions under sections 36 and 37 also remains wholly with the insurer.

WCC – Medical Appeal Panel Decisions

Calculation of ADL's and assessment of a deductible under s 323 WIMA

Fujitsu General Pty Ltd v Mendez [2019] NSWWCCMA 119 – Arbitrator Egan, Dr R Pillemer & Dr G McGroder – 21 August 2019

On 19 February 2013, the worker injured his lumbar spine at work. However, he had a prior history of complaints of low back pain on 11 November 2010, on 14 November 2011, and as a result of a MVA during 2012. On 8 August 2016, he underwent spinal fusion surgery

at the L5/S1 level. On 6 November 2018, he claimed compensation for 24% WPI under s 66 *WCA* based upon an assessment from Dr Stephenson. The insurer qualified Dr Miniter, who assessed 16% WPI (21% WPI less a ¼ deduction under s 323 *WIMA*). The medical dispute was then referred to an AMS.

On 17 May 2019, Dr Mellick issued a MAC, which assessed 25% WPI (comprising DRE lumbar category IV = 20% + 3% for ADLs + 3% for persistent radiculopathy), but he did not apply a deductible under s 323 *WIMA.*

On 13 June 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and asserted that the AMS erred in assessing 3% for ADLs and by failing to apply a deductible under s 323 *WIMA.*

Following a preliminary review, the MAP identified a demonstrable error and decided that the worker should be re-examined by Dr Pillemer. He noted that the worker "could not remember" his attendances for treatment for his low back after the MVA in 2010. He assessed 19% WPI (comprising DRE lumbar Category IV = 20% + 2% for ADL's + 3% for persistent radiculopathy – a deductible of 1/5 under s 323 *WIMA*).

The MAP adopted Dr Pillemer's findings and assessments. It revoked the MAC and issued a new MAC, which assessed 19% WPI due to the injury.

Demonstrable error due to AMS' failure to give proper reasons, but MAP has no power to correct errors that are not the subject of the appeal where the MAC is confirmed

Norton v Anambah constructions Pty Ltd [2019] NSWWCCMA 121 – Arbitrator Wynyard, Dr D Dixon & Dr B Noll – 22 August 2019

On 12 September 2011, the appellant injured his lumbar spine at work. He underwent surgeries in February 2012, February 2013 and November 2017. He claimed compensation under s 66 *WCA* and the medical dispute was referred to an AMS. On 7 May 2019, Dr Kuru issued a MAC, which assessed 16% WPI (comprising DRE Lumbar Category III = 10% + 2% ADLs + 3% for residual symptoms + 3% for revision surgery = 20% - 1/10 deduction under s 323 *WIMA* and 0% WPI for scarring).

On 20 May 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. He asserted that the AMS erred by applying a deductible under s 323 *WIMA* and that he incorrectly applied the Guides regarding the assessment of the lumbar spine (including an alleged failure to assess peripheral nerve disorders) and scarring.

Following a preliminary review, the MAP noted that the AMS failed to describe the scar, which was a demonstrable error, and it required the worker to be re-examined by Dr Noll. It described the appellant's submissions as being *"somewhat discursive and imprecise"*, but they appeared to amount to an alleged failure to give adequate reasons for applying Chapter 14.6 of the Guides.

Section 323 WIMA deductible

The MAP upheld the 1/10 deduction under s 323 *WIMA* and stated that *Vitaz v Westform NSW Pty Ltd* is authority for the proposition that an asymptomatic pre-existing condition can be a contributing factor, depending on the facts of the situation. It noted that in *Ryder v Sundance Bakehouse*, Campbell J stated:

> 45. What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if

> that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of degree of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the degree of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to pre-existing abnormality. To put it another way, the Panel must be satisfied that but for the pre-existing abnormality, the degree of impairment resulting from the work injury would not have been as great.

The MAP considered that the 2011 injury is consistent with the aggravation of pre-existing spondylosis and held that but for the presence of the advanced osteoarthritis, the degree of permanent impairment would not have been as great.

Peripheral nerve disorders

The appellant argued that there was material before the AMS containing clear evidence of radicular signs at the L4/5 level, including foot drop and calf atrophy and that the AMS erred by not awarding additional WPI under Chapter 17 of AMA5 and particularly Tables 17.6 and/or 17.37.

However, the MAP noted that this Chapter of AMA5 is entitled *"The Lower Extremities"* and that Tables 17.6 and 17.37 refer to impairment due to leg muscle atrophy and nerve deficits in lower extremity impairment, respectively. It stated, relevantly:

> 46. Doing the best we can with these submissions, it may be that the gravamen of Mr Norton's complaint was that he was suffering from the effects of radiculopathy following the last bout of surgery. The reference to foot drop and muscle atrophy would indicate that was the real purpose of the submission, in which case the relevant Guideline is to be found at Chapter 4.27 of the Guides. Pursuant to Table 4.213 of the Guides, a further 3% WPI can be added if residual symptoms and radiculopathy, as defined, continue following spinal surgery. This amount was credited to Mr Norton by the AMS, but, following Dr Noll's re-examination, would have been disallowed by the Panel, had the Panel been empowered to do so, as no signs of radiculopathy were found. This aspect is discussed below.

Calculation of WPI

While the appellant's solicitors argued that the AMS should have assessed 13% WPI *"as his starting point"* under Table 15-3 of AMA5 (at page 384), the MAP held that they misconceived the basis on which entitlements under that Table are calculated and the AMS correctly applied the Guidelines.

Based upon the criteria in Table 1.1 of the Guides, the assessment for scarring is correct. Dr Noll noted that the appellant is unaware of the scar on his lower back, it does not trouble him and it has not required any specific treatment. He described the scar as being relatively fine, not visible with the usual clothing and relatively unobtrusive, without obvious staple or suture marks, without significant contour defect and not requiring any treatment.

In relation to the lumbar spine, the MAP stated that it was not satisfied that the AMS was necessarily correct in allowing the 3% WPI available where a person has residual symptoms of radiculopathy following spinal surgery and that the appellant would consequently be entitled to 14% WPI. However, although it has power to correct errors that have not been the subject of appeal where it determines to set aside a MAC, that power is not available where a MAC is confirmed: *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053.

Accordingly, the MAP confirmed the MAC.

CSR Ltd v Ewins [2019] NSWWCCMA 123 – Arbitrator Egan, Dr J Parmegiani & Dr D Andrews – 27 August 2019

This matter has previously been reported in Bulletins numbered 27 and 29, respectively. However, by way of summary the worker claimed compensation under s 66 *WCA* for 17% WPI. The self-insurer disputed the claim and the dispute was referred to an AMS. On 24 April 2019, Dr Mason issued a MAC, which assessed 17% WPI. He did not apply a deductible under s 323 *WIMA* and stated that *"there was no requirement to do so"*. On 16 May 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The worker opposed the appeal.

However, on 7 June 2019, the appellant sought to amend the grounds of appeal to include reliance on s 327 (3) (b) *WIMA* and, on 20 June 2019, it sought to adduce fresh evidence in the form of a surveillance report dated 30 May 2019. It also lodged submissions in support of the proposed amended ground of appeal and in reply to the worker's submissions.

The appellant sought an oral hearing and that the worker be re-examined by a member of the MAP. The worker opposed both applications and the MAP decided to determine the appeal on the papers and stated that no further medical examination was warranted.

Fresh evidence – ss 327 (3) (b) and 328 (3) WIMA

The MAP noted that the appellant made no submissions as to why it should be permitted to rely upon material gathered well after the AMS' examination and the MAC and that it seemed to assume that there is a right for it to adduce the material merely by recitation of the ground under s 327 (3) (b) *WIMA.* It rejected that assumption.

The MAP held that s 328 (3) *WIMA* is also relevant and that this prevents it from receiving fresh evidence, or evidence in addition to, or substitution for, the evidence received in relation to the medical assessment appealed against, '**unless the evidence was not available to the appellant before the medical assessment, or could not reasonably have been obtained by the appellant before the medical** assessment' (emphasis in original).

The MAP noted that in *Wollongong Corporation v Cowan* [1955] HCA 16; (1955) 93 CLR 435 (*Cowan*), Dixon CJ (Williams, Webb, Kitto and Taylor JJ concurring) stated, at p 444 :

> …The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial.

Further, Fleming DP considered the relevant principles in *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCC PD7 (*Ross*) and stated:

> The relevant tests are firstly, that the evidence which is sought to be admitted on appeal was not available to the Appellant at the time of the original proceedings or could not have been discovered at that time with reasonable diligence, and secondly that the evidence is of such probative value that it is reasonably clear that it would change the outcome of the case (*Wollongong Corporation v Cowan* (1955) 93 CLR 435; *McCann v Parsons* (1954) 93 CLR 418; *Orr v Holmes* (1948) 76 CLR 632). These tests are addressed to the underlying principle of the need for finality in

> litigation and the importance of the ability of the successful party to rely on the outcome of the litigation. They are also addressed the fundamental demands of fairness and justice in the instant case.

Also, in *Commonwealth Bank of Australia v Quade* (1991) 170 CLR 134, the High Court considered *Cowan* and stated, relevantly at p134:

> 8. … **While it is not necessary that the appellate court be persuaded in such a case that it is "almost certain" or "reasonably clear" that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.** (emphasis in original).

In *Workers Compensation Nominal Insurer v Bui* [2014] NSWSC 832 (*Bui*), McCallum J made a number of observations concerning post-MAC surveillance:

> 45. The surveillance evidence sought to be relied upon by the insurer was plainly fresh evidence (if it was anything), the period of surveillance having been after the date on which Dr Gertler assessed Ms Bui…

In *Bui*, the MAP admitted the further surveillance (thought to be "perhaps generous to the insurer") but it did not give proper reasons for finding that it did not affect the AMS' assessment within certain PIRS categories, when it *"was plainly capable of informing at least two of the other PIRS categories"* (at [77]).

In *State of New South Wales v Ali* [2018] NSWSC 1783 (21 November 2018), Harrison J held that information contained in later surveillance reports was neither additional nor relevant as properly understood. His Honour stated, *"…As a matter of plain language, that does not mean or refer to something that could not have been obtained simply because it came later in time. Everything that occurs later than an earlier event is by definition additional in a temporal sense…"* His Honour referred to the decision of Hoeben J (as he then was) at in *Petrovic v BC Serv No 14 Pty Ltd & Ors* [2007] NSWSC 1156 as follows:

> [31] In my opinion the words "availability of additional relevant information" qualify the words in parentheses in s 327 (3) (b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327 (2) which identifies the matters which are appealable. They are restricted to the matters referred to in s 326 as to which a MAC is conclusively taken to be correct. In other words, 'additional relevant information' for the purposes of s 327 (3) (b) is information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by s 327 (3) (c) and (d) but they do not come within subs 327 (3) (b)…

His Honour was not satisfied that the information could not reasonably have been obtained by the plaintiff before the medical assessment appealed against…The fact that the plaintiff contends that the latest surveillance material suggests or supports a different degree of permanent impairment does not mean that it was also not available or could not reasonably have been obtained before the impugned assessment was made: at [37]. He also held:

> 38. …'Additional relevant information' is not the same thing as the (potential) availability of an argument in support of a different forensic outcome.
>
> 39. Finally, the whole structure and wording of s 327 are concerned with appeals. With the exception of s 327 (3) (a), the section proceeds upon the basis that a party

> aggrieved by the challenged assessment should be given a limited opportunity to establish, if it be the case, that not all relevant information available at the time was taken into account. Section 327 (3)(b) limits that right of appeal to circumstances where additional relevant information is available but only if the additional information was not available to, and could not reasonably have been obtained by, the plaintiff before the medical assessment appealed against. That clearly anticipates the existence of a provable state of affairs at the time the decision is made. Section 327 (3) (b) cannot be read in any other way: it deals with the circumstances in which an appeal will lie from an assessment that was allegedly made without the benefit of information that existed at the time. It is not concerned with offering an aggrieved party the chance to run the assessment again because circumstances have since changed. It may be contrasted with s 327 (3) (a), which contemplates an appeal when circumstances have actually changed, although limited to cases of an increase in the degree of permanent impairment and not the opposite. That limitation suggests, as a matter of ordinary statutory construction, that an appeal with respect to an alleged reduction in the degree of permanent impairment is neither contemplated by the words of s 327 in general nor provided by s 327 (3) (b) in particular.

The MAP declined to admit the fresh evidence. It also held that if a worker is to be prevented from challenging the history recorded by an AMS (as in *Petrovic v BC Serv No 14 Pty Ltd & Ors* [2007] NSWSC 1156), there seems to be no reason that the employer should be permitted to continue digging for evidence to undermine the recorded history in the MAC, absent special circumstances.

Section 323 deductible

The MAP rejected this ground of appeal. While the AMS erred in stating his reasons for not making a deduction, he reviewed and questioned the worker about the matters noted in the clinical records and he followed cl 11.10 of the Guidelines. He assessed the worker on the day and reviewed the clinical notes, which did not reflect a pre-existing condition at any time proximate to the injury, but at most suggested a possible pre-disposition. That is insufficient for a deduction: *Cullen.*

Other PIRS grounds

The MAP held that if it is wrong regarding s 323 *WIMA*, and the MAC must be set aside, there is an issue about whether all categories must be reassessed: *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053. It held that for more abundant caution the reasons should be read in the context of both the absence of error in the MAC and reasons for reassessment. In any event, it rejected these grounds of appeal.

In relation to the category of *"Employability",* the MAP stated:

> 159. It must be kept in mind that the PIRS descriptors are examples only, and the full picture must be assessed to arrive at the rating…
>
> 160. The PIRS descriptors relate to everyday employment situations. The worker's situation in 2018 was significantly different and adapted, to an extent, to the psychological deficits she describes. The AMS has explained the history upon which he bases his impairment rating, including all the symptoms and deficits. Accordingly, even though the AMS as incorrectly assumed the worker worked only 10 to 12 hours per week, there is no error established in the AMS's final assessment of Class 4, severe impairment, and this ground of appeal is dismissed

Accordingly, the MAP confirmed the MAC.

Injury to one eye – AMS did not err in assessing impairment of both eyes because the correct approach required a deduction for the extent to which a pre-existing condition contributed to permanent impairment

Sydney Metro Taxis Fleet No 1 Pty Ltd v Khan [2019] NSWWCCMA 124 – Arbitrator Douglas, Dr I Weschler & Dr M Delaney – 27 August 2019

On 27 February 2015, the worker suffered extensive burns (including a burn to his left eye). He claimed compensation under s 66 *WCA* for impairment of his skin and visual system. The parties agreed that the Registrar should refer a medical dispute regarding the visual system and skin disorder and the medical dispute was referred to Dr Meares (Lead Assessor) to assess the skin and to Dr Steiner to assess the visual system.

On 24 May 2019, Dr Steiner issued a MAC, which assessed 63% WPI. He stated:

> The left eye which is the main subject of this report has 100% impairment. There is also an addition to be made to the whole person impairment for the unsightly appearance of the eye and the ptosis of the left upper lid. On the right there is 86% loss of visual field and as the eye is pseudophakia there is 54% impairment due to the visual acuity. Using the Combined Values Chart there is 94% impairment of the right eye and 100% impairment of the left which results, using the Combined Values Chart, in 96% impairment of the visual system which equates to 85% whole person impairment. Using Paragraph 8.5 I would combine this with a further 8% impairment for the unsightly appearance of the eye and the ptosis of the left upper lid which gives an overall whole person impairment of 86%. The condition of right eye would, be regarded as pre-existing or other and there is 24% permanent impairment of the visual system equating to 23% whole person impairment which overall gives 63% impairment of the visual system due to the accident.

Dr Meares assessed 7% WPI (skin) and, as Lead Assessor, he issued a MAC which certified a combined assessment of 66% WPI.

On 7 June 2019, the appellant appealed against Dr Steiner's MAC under s 327 (3) (d) *WIMA* and it asserted that the AMS erred by assessing impairment in both eyes, when the worker did not injure his right eye, and that he "*added more non-work-related impairment than he has deducted"* and should have excluded the right eye from the assessment.

The MAP rejected this ground of appeal. It held that the AMS was required to assess the degree of permanent impairment resulting from the injury to the visual system, which includes both eyes. Chapter 8 of AMA4 provides instructions to the assessor and Dr Steiner rightly adopted that approach in making his initial assessment of 86% WPI. He then applied a deductible under s 323 *WIMA*. It held, relevantly:

> 34. This is all the more so when one considers the gravity of the consequences to the respondent that his injury to his left eye has had. The respondent had limited vision in his uninjured right eye and, in the Appeal Panel's view, his impairment arising from the injury to his left eye is much more-grave than what would have been the case had he had normal vision in his right eye. The injury has resulted in his losing his only good eye and has resulted in his, in effect, being essentially blind.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Absence of expert evidence to discharge worker's onus of proof regarding injury – Luxton v Flounders applied

Duck v EB & DE Bunt Pty Ltd [2019] NSWWCC 279 – Arbitrator Egan – 21 August 2019

The worker claimed compensation under s 60 *WCA* for bilateral carpal tunnel syndrome, which allegedly resulted from a fall at work in August 2017. The employer did not dispute that the worker suffered injuries in a fall, but it disputed that he injured his wrists, the median nerves and/or carpal tunnels.

Arbitrator Egan conducted an arbitration hearing, during which the worker gave oral evidence. He stated that in August 2017, he fell forward onto his upper limbs while he was holding a 68 kilo ramp and placing it onto one end of the truck tray. He said that he struck his right elbow, but his right hand and injured both hands.

Mr Bunt stated that on the afternoon of the incident, the worker told him that he had slipped and hurt his elbow, but he did not mention his hands and he did not see any evidence of injury to his hands. He continued to work as normal over the following weeks, but he arrived late for work one Monday morning and, when questioned about this he disclosed that he had been using a cherry picker to scrub mould off walls of his house (which he was renovating).

Ms Bunt stated that she was unaware of the alleged injury until she was handed a "normal" medical certificate about 7 or 8 weeks later and that the worker was put off work in January 2018, because of a downturn in business.

The Arbitrator noted that on 21 September 2017, the treating GP took a history that the worker fell and injured his right elbow 2 months ago. On 17 October 2017, he reported that an injection helped to relieve right elbow pain and on 19 December 2017, he noted further improvement after another injection on 12 December 2017. However, on 23 January 2018, he noted "Doing well over Xmas – arm flared up with lawn". He also noted that Dr Marshall (treating surgeon) referred to epicondylitis in the right elbow and reported that an injection into the elbow "helped a lot". He recommended a repeat MRI scan and then possible nerve conduction tests for a possible radial tunnel syndrome. However, on 16 May 2018, nerve conduction studies indicated moderate median neuropathy causing bilateral carpal tunnel syndrome. This was the first reference to median nerve involvement.

The Arbitrator held, relevantly:

> 53. The Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (Nguyen) summarised the approach as follows:
>
> > (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
> >
> > (2) Where on the whole of the evidence such a feeling of actual persuasion is so induced, so that the fact finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
> >
> > (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and

(4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.

54. In *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 (*Kumar*), Mr Kumar's employer submitted that a finding of a consequential back condition by the Arbitrator was *"not supported by reasoned opinion or change in pathology"*. Roche DP (at [55]) held that it was not necessary to establish that there was *"significant pathology"* in his shoulder, only that the proposed surgery was reasonably necessary as a result of the back injury on 19 March 2009. However, in Kumar, there was a relevant injury.

The Arbitrator accepted that in certain cases a fact finder may find a causal connection in the absence of medical evidence (*Fernandez v Tubemakers of Australia* (1975) 2 NSWLR 190, Glass JA, at 197; *MMI Workers Compensation (NSW) v Kennedy* (1993) 9 NSWCCR 482 (Kennedy)) and that the Commission has 'expert' status in certain areas, but this proposition has its limits. He cited the decision of Spigelman CJ (Giles and Ipp JJA agreeing) in *Australian Security and Investments Commission v Rich* [2005] NSWCA 152 at [170], that, *"[a]n expert frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, that it is not able to be articulated"*.

However, the Arbitrator also held that expertise can only be used to interpret and draw inferences from acceptable evidence and it cannot be used to create evidence: *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; *Conargo Shire Council v Quor* [2007] NSWWCCPD 245; *Rodger W Harrison and Peter L Siepen t/as Harrison and Siepen v Craig* [2014] NSWWCCPD 48. Findings must be based on the evidence, or reasonable inferences open to be drawn from the evidence and not on the judge's knowledge (*Strinic v Singh* [2009] NSWCA 15 at [60]).

The Arbitrator held that a personal injury under s 4 (1) *WCA* was not established because:

- the medical evidence did not support the causal connection between the fall and the diagnosis of bilateral carpal tunnel syndrome with sufficient clarity;
- where there is genuine dispute about the worker's recollection regarding the onset of his symptoms and the link of any such symptoms to the accident, contemporaneous evidence may become important: *Department of Education & Training v Ireland* [2008] NSWWCCPD 134. That is not to say that corroboration is necessary for the worker to succeed: *Chanaa v Zarour* [2011] NSWCA 199 at [86].
- The worker did not present for any medical treatment for a considerable time after the injuries alleged in August 2017 and for many months thereafter, he did not complain of any symptoms in his hands or wrists. Early medical evidence suggested radial tunnel syndrome and while Dr Marshall somewhat belatedly connects the carpal tunnel syndrome to the fall, (especially on the right side), he does not explain with sufficient clarity what the clinical picture was at any time during his care. He did not explain why, based on the electrical studies only, he is able to rely upon the worker's hand symptoms as confirming a diagnosis of bilateral carpal tunnel syndrome, when the median nerve had not been mentioned beforehand.

The Arbitrator concluded:

77. This, in my view, is a matter for expert evidence and the applicant has not gathered that evidence to present to the Commission. Although the Commission is an expert Tribunal, it is not for me to declare knowledge of, or investigate the symptoms and signs relevant to Radial Tunnel Syndrome, and compare that with

similarly self-sourced symptoms and signs for Carpal Tunnel Syndrome. It is also not for me, even if I were to do that, to compare and contrast the clinical signs for each pathology in order to explain Dr Marshall's apparent oversight of the carpal tunnel presentation from early on. Because that presentation is a matter upon which Dr Marshall heavily relies, I am unable to accept his retrospective explanation of the causal chain.

78. I consider each of the following equally plausible: the applicant suffered carpal tunnel injury in the incident (albeit, with delayed onset of symptoms); he developed the condition due to events after the injury, or as a consequence of the injury to the elbow; or he simply developed the condition idiopathically. That is insufficient to discharge the onus*: Luxton; Flounders.*

Accordingly, the Arbitrator entered an award for the respondent.

Psychological injury - Arbitrator allows surveillance reports to be included in the referral to the AMS

Moston v Goldenfields Water County Council [2019] NSWWCC 282 – Arbitrator Burge – 27 August 2019

The worker suffered a psychological injury (deemed date of injury: 3 July 2015) due to the nature and conditions of his employment with the respondent. On 5 December 2018, he claimed compensation under s 66 *WCA* for 25% WPI. The respondent did not dispute injury, but it asserted that the degree of permanent impairment was less than 15% WPI and that the worker was not entitled to recover compensation.

On 15 July 2019, ***Arbitrator Burge*** conducted an arbitration hearing to determine whether the respondent's surveillance evidence, factual investigation reports and a supplementary report from Dr Ingram (the respondent's IME) should be forwarded to the AMS.

The worker opposed this and argued that there are no exceptional circumstances that warrant the inclusion of this material in the referral to the AMS. However, the respondent argued that "exceptional circumstances" should be given its ordinary meaning, of "unusual" or "outside the normal" and the issue is whether there are unusual circumstances in this matter. If so, the material should be referred to the AMS. It argued that if the material was not put before the AMS, the worker's history that he had lost his friends and stopped cycling, which was contradicted by the material, would be before the AMS. However, its inclusion would provide the AMS with a proper basis upon which to form their opinion.

The Arbitrator noted that in *Erskine v Cowzine Pty Ltd* [2018] NSWWCCPD 9, Snell DP considered the meaning of "exceptional circumstances" in the context of r 16.2 of the Rules and he held:

> The presence of 'exceptional circumstances' is to be considered by the Presidential member as a matter within jurisdiction as opposed to a precondition: *Bryce v Department of Corrective Services.* The meaning of 'exceptional circumstances' was considered in *Yacoub v Pilkington (Australia) Ltd.* These principles have been frequently applied in the Commission, in Presidential decisions dealing with r 16.2 (12). It is appropriate also, in exercising the discretion, to have regard to the judgment of McHugh J in *Gallo v Dawson*.

In *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 (Yacoub), Campbell JA dealt with the meaning of the phrase "exceptional circumstances" in the context of the Uniform Civil Procedure Rules 2005 (UCPR). His Honour said:

(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).

The Arbitrator stated, relevantly:

46. In *The Estate of the Late John Koutsomihalis v Coles Supermarkets Australia Pty Ltd* [2013] NSWWCC369 (*Koutsomihalis*), Arbitrator Sweeney dealt directly with the question of the status of the Guidelines in an identical context to this matter, where a respondent was asking the Commission to allow surveillance film to be placed before an AMS. At paragraph 10, Arbitrator Sweeney noted *the 1998 Act* expressly empowered the then equivalent of the State Insurance Regulatory Authority to issue guidelines with respect to the assessment of the degree of permanent impairment. An analogous provision is found at section 376 of *the 1998 Act.* The Arbitrator then noted section 322 (1) of *the 1998 Act*, which provides:

> The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.

Relevantly, that provision has not changed since Arbitrator Sweeney's decision.

The Arbitrator held that as the Guidelines are delegated legislation, which are part of the fabric of laws that govern practice and procedure in the Commission, it is not open to him to direct the referral of evidence to an AMS contrary to them.

However, he rejected the respondent's argument that the "video surveillance material" includes the investigator's reports on the film. He found that the circumstances in which the footage was obtained are not exceptional and as most of the footage was obtained well before the worker first saw Dr Ingram, it could easily have been sent to him for consideration, and if anything concerned the doctor, those matters could be squarely put to the worker and he could respond to them. He considered that the respondent chose to hold back the footage from Dr Ingram until after he had examined the worker for forensic reasons. Also, as the investigator is a lay person, his opinions carry little weight.

However, as the further evidence was filed with the Reply, and the worker had responded to it in his supplementary statements, he was not prejudiced by that material being sent to the AMS. He so ordered.

Arbitrator awards compensation under s 66 WCA without referral to an AMS as there was no evidence to contradict the assessment made by the worker's IME

Kato v City of Sydney [2019] NSWWCC 288 – Arbitrator Homan – 2 September 2019

The worker was employed by the respondent as a truck driver. She suffered a gradual onset of low back pain that culminated in a significant flare-up on 14 February 2016.

On 23 January 2019, she claimed compensation under s 66 *WCA* for 16% WPI, based upon assessments of the lumbar spine and skin from Dr Lai. On 5 March 2019, the respondent advised the worker that it had requested a WPI assessment from Dr Darwish (her treating neurosurgeon). However, it did not further respond to the claim.

On 1 August 2019, the worker filed an ARD claiming compensation under s 66 *WCA* for 16% WPI (lumbar spine and skin) inclusive of 5% uplift for the lumbar spine.

During a teleconference on 30 August 2019, ***Arbitrator Homan*** noted that the only issue in dispute was the degree of permanent impairment. The respondent sought referral to an AMS, but the worker objected to this and asked the Arbitrator to determine the dispute based upon Dr Lai's assessment. The Arbitrator directed the parties to file and serve written submissions and stated that she would then determine the dispute on the papers.

The Arbitrator determined that it was not appropriate to refer the dispute to an AMS and stated, relevantly:

> 18. I informed the respondent that my preliminary view was that there did not appear to be any indication that Dr Lai's assessment was not an appropriate or reliable assessment of WPI. Given the additional cost and delay associated with a referral to an AMS and in the absence of any evidence to contradict Dr Lai's assessment, I was minded to exercise my discretion by determining the matter myself on the basis of Dr Lai's assessment. The respondent was asked whether any additional time was required to make submissions on the issue.
>
> 19. The respondent declined the opportunity to make further submissions but asked whether time could be allowed to enable the respondent to arrange an Independent Medical Examination (IME) for the purposes of assessing WPI. I indicated that I would be disinclined to adjourn the proceedings to enable an IME given that the claim was made some eight months ago. It was not apparent that the respondent had taken any steps to arrange an IME at any time other than the approach to Dr Darwish in March. This failure was not explained and the statutory timeframe for determining the claim had expired. In the circumstances, to allow additional time for purpose of arranging an IME would appear to result in an unreasonable and unjustifiable delay in the proceedings. The respondent declined to make any further submissions and the application for adjournment was declined.

The Arbitrator noted that the respondent did not suggest that Dr Lai's report does not comply with the Guidelines or that there is anything other than a fair climate for the acceptance of his assessment. The Arbitrator was therefore satisfied that this assessment *"provides an appropriate and reliable basis on which to determine the applicant's entitlement to lump sum compensation"* under s 66 *WCA.* He assessed 15% WPI with

respect to the lumbar spine and also assessed 1% WPI for scarring (TEMSKI). However, there appears to be a typographical error in the Statement of Reasons, which provide:

> [24] … Dr Lai concluded:
>
> > The total whole person impairment of your client from the work injury on 14 February 2016 is a combination of the above figures of 15% + 1% = 15% whole person impairment (Combined Values Chart, page 604, AMA5).

The Arbitrator awarded the worker compensation of $38,992.81 under s 66 WCA for 16% WPI (inclusive of 5% uplift for the spine).

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