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:

1. MetLife Insurance Limited v MX [2019] NSWCA 228
2. Hanna v Delta Electrical and Security Pty Ltd [2019] NSWSC 1127
3. Ziraki v The Australian Islamic House Liverpool Area [2019] NSWSC 1158
4. Shoalhaven City Council v Booth [2019] NSWWCCPD 47
5. Lachley Meats (Forbes) Pty Ltd and M C Meats (Lachley) Pty Ltd trading as Lachley Meats v Merritt [2019] NSWWCCPD 49
6. Batshon v Sydney Trains [2019] NSWWCCMA 130
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Court of Appeal Decisions

TPD claim - insurer declined claim twice and its second decision considered the first decision – whether insurer took into account irrelevant consideration and/or breached its contractual duty and/or acted reasonably and fairly in its consideration of the claim

MetLife Insurance Limited v MX [2019] NSWCA 228 – Meagher JA (Gleeson & Payne JJA agreeing) – 16 September 2019

The first respondent (an injured former police officer) claimed TPD benefits under an insurance policy that the applicant issued to FSS Trustee Corporation. The applicant's liability under the policy turned partially on it being satisfied that MX's incapacity rendered him unlikely ever to engage in any gainful profession, trade or occupation for which he was reasonably qualified by reason of education, training or experience (the ETE clause).

The applicant declined MX's claim on two occasions, having formed the opinion in 2014 (the first decision), and again on reconsideration of the claim in 2017 (the second decision), that it was not satisfied that MX's incapacity answered the description in the ETE clause.

On the determination of separate questions in the Supreme Court, ***Slattery J*** found that the applicant breached its obligations of utmost good faith and of acting reasonably in forming its opinion in 2014, and again in 2017: *MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2018] NSWSC 923. His Honour held that its first and second decisions were void and of no effect.

The applicant sought leave to appeal against that decision. On a concurrent hearing of the application for leave and the appeal, the principal issues raised were: (1) Whether the primary judge erred in finding that MX had breached its obligations of utmost good faith and of acting reasonably in forming its first opinion in 2014; (2) Whether the primary judge erred in finding that the applicant's process of consideration underlying its second decision in 2017 was unreasonable because it was made with reference to its first decision and that was an irrelevant consideration; and (3) Whether the primary judge erred in finding that the second decision was vitiated because the applicant failed to act reasonably and fairly in considering MX's claim.

The Court granted the applicant leave to appeal, but it dismissed the appeal with costs.

As to issue (1), the Court held that there was no error in the primary judge's finding that the applicant was in breach of its contractual duty to MX by failing to act fairly and reasonably in considering his claim in 2014. This was evident from its reasons, which did not explain the actual path of reasoning for arriving at its decision, and cited competing medical evidence without explaining why it preferred one medical opinion over the evidence of MX's treating psychiatrist: [154]-[162]. *Newling v FSS Trustee Corporation (No 2)* [2018] NSWSC 1405; *Ziogos v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2015] NSWSC 1385, referred to.

As to issue (2), the Court held that the first decision formed part of the relevant context to which the applicant was entitled to have regard in the process of reconsideration of its decision. Whether or not its second decision was a separate decision or merely confirmation of its opinion already formed, the second decision necessarily involved consideration of the first decision, which was not an irrelevant consideration.

As to issue (3), the Court held that there was no error in the primary judge's finding that the second decision was vitiated because the applicant was in breach of its contractual duty, had failed to act reasonably and fairly in its process of consideration of the material, including medical opinions, as to whether MX was totally and permanently disabled.

Supreme Court of NSW Decisions

Jurisdictional error

Hanna v Delta Electrical and Security Pty Ltd [2019] NSWSC 1127 – Harrison AsJ – 5 September 2019

On 21 January 2016, the plaintiff injured his right ankle and suffered a consequential injury to his cervical spine. He claimed compensation under s 66 *WCA* and that dispute was referred to an AMS. Dr Meakin issued a MAC which assessed 11% WPI, including an assessment of 0% WPI for the cervical spine.

The plaintiff appealed against the MAC under ss 327 (3) (c) and (d) W*IMA* and the respondent opposed the appeal. The MAP confirmed the MAC.

The plaintiff then applied to the Supreme Court of NSW for judicial review of the MAP's decision on the following grounds: (1) The MAP erred in point of law when it failed to properly consider whether the plaintiff did in fact satisfy the criteria for DRE II applying Table 15-5; (2) The MAP erred in point of law when it did not consider for itself whether there was evidence of a herniated disc; (3) The MAP erred in point of law when it failed to give reasons why the alternative criteria for DRE II were not met; and (4) The MAP erred in point of law when it failed to properly consider the argument made in support of the appeal.

Harrison AsJ decided to consider ground 2, followed by grounds 1 and 4 (together), and finally ground 3. She dismissed the summons and her reasons are summarised below.

Her Honour rejected ground (2). She held that the MAP accurately summarised the plaintiff's submissions at [13] of its reasons. It adopted the AMS' reasons at [32] and stated that Dr Tong's report did not establish that there was a herniated disc, stating that Dr Tong's reasons for attributing those changes at C7 were not clear, as she failed to specify the precise location of the sensory changes in the arm. The reasons squarely address whether there was evidence of a herniated disc. As the MAP noted that the report of Dr Tong did not provide such evidence, it did not fail to consider relevant material and made no error of law.

Her Honour also rejected grounds (1) and (4). She held that reading the decision as a whole and fairly, the MAP did not fail to properly consider the plaintiff's argument that he satisfied the alternate criteria for DRE Category II. At [32], it acknowledged that Dr Tong considered the plaintiff to have had radiculopathy in 2017. However, the alternate criteria also require an imaging study that demonstrated a herniated disc. The MAP did not consider that there was such evidence and, accordingly, there were no errors of law.

Her Honour rejected ground (3). She held that the MAP's reasons are not to be "minutely and finely construed", but rather fairly and as a whole: see *Martin* at [16]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] 185 CLR 1. In reading its reasons generally, and in particular its statement at [32], she considered that they are written to inform, and "not to be scrutinised upon overzealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed": see *Martin* [16]. The standard required of a written statement of reasons is that they reveal the actual path of reasoning by which the decision maker arrived at its opinion: see *Wingfoot* at [55]. On the whole and read in context, she held that the reasons meet this standard.

Accordingly, her Honour dismissed the summons with costs.

Jurisdictional error –Alleged failure to respond to substantial and clearly articulated arguments and to set out lawful reasons –MAP not required to re-examine the plaintiff

Ziraki v The Australian Islamic House Liverpool Area [2019] NSWSC 1158 – Harrison AsJ – 9 September 2019

On 15 December 2016, the plaintiff fractured his right arm due to a fall at work and suffered consequential carpal tunnel syndrome. He claimed compensation under s 66 *WCA.* On 3 August 2018, Dr Berry issued a MAC which assessed 11% WPI (right upper extremity).

The plaintiff appealed against the MAC and the Registrar of WCC referred the appeal to a MAP. However, the MAP confirmed the MAC.

The plaintiff applied to the Supreme Court for judicial review of that decision on the following grounds:

(a) The MAP misapplied, and misconstrued the operation of, p 495 of the AMA5 Guidelines and cl 2.9 of the PI Guidelines for the evaluation of permanent impairment in respect of the plaintiff's carpal tunnel syndrome. The third defendant failed to recognise that findings and reasons needed to be made and provided as to which of the three scenarios were to be applied, and then findings and reasons needed to be made under the scenario that was being applied. The third defendant was incorrect in concluding that scenario 1 applied only where there was "defined" median nerve dysfunction when p 495 did not define median nerve dysfunction, and the plaintiff had a positive clinical finding of median nerve dysfunction;

(b) The MAP should have determined that the AMS was in error:

(i) in applying scenario 2, and in failing to apply scenario 1, on p 495;

(ii) in failing to make any findings, and state legally sufficient reasons, as to why scenario 2, and not scenario 1, on p 495 was applied;

(iii) in failing to accord procedural fairness in failing to deal with the plaintiff's articulated case through the materials of Dr Endrey-Walder that scenario 1 on p 495 was the scenario that applied to the determination of permanent impairment;

(c) After it should have found error by the AMS, the MAP should have correctly applied p 495 by applying scenario 1;

(d) The MAP failed to make any findings, and state legally sufficient reasons, as to why scenario 2, and not scenario 1, on p 495 was applied;

(e) The MAP misunderstood Dr Endrey-Walder's medico-legal opinion. Dr Endrey-Walder applied scenario 1 on p 495 on the basis of the plaintiff's complaints and symptoms, and applied cl 2.9, and understood that the plaintiff had undergone only one operation; and

(f) The MAP failed to accord procedural fairness by failing to deal with the plaintiff's articulated case through the materials of Dr Endrey-Walder that scenario 1 on p 495 was the scenario that applied to the determination of permanent impairment.

Harrison AsJ decided to determine grounds (a), (c) and (d) together and grounds (b), (e) and (f) together. She dismissed the summons with costs for reasons summarised below.

Her Honour rejected grounds (a), (c) and (d). She noted that the plaintiff argued that p 495 of the AMA5 Guides conveys the "*primacy*" of clinical examination to an assessment of carpal tunnel syndrome and that the MAP should have conducted a re-assessment of the plaintiff in order to give effect to its instructions. However, she held that this ground - insofar as it concerned a failure to re-examine the plaintiff - was not articulated in the summons.

Her Honour held that a MAP's decision about whether or not to re-examine a worker is clinical and discretionary: see *Bukorovic v Registrar of the WCC* [2010] NSWSC 507 at [43], [57] (Harrison AsJ); *Vitaz v Westform (NSW) Pty Ltd* [2010] NSWSC 667 [99] (Johnson J). There is no requirement for a MAP to re-examine a plaintiff and in order to do so, it must first identify an error in the MAC, which it did not do in this matter: see *NSW Police Force v Registrar of the Workers Compensation Commission* [2013] NSWSC 1792 [30]-[33] (Davies J); *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Dickinson* [2016] NSWSC 101 [40]-[42] (Harrison AsJ); *Midson v Workers Compensation Commission* [2016] NSWSC 1352 [50]-[57] (N Adams J). Therefore, the MAP did not misconstrue its function or the AMA5 Guides or the Guidelines and there is no jurisdictional error.

The plaintiff also argued that the MAP erred by concluding that there was no evidence that he was suffering a median nerve dysfunction and that it failed to provide legally sufficient reasons by failing to provide its definition of *"positive clinical findings of median nerve dysfunction".*

Her Honour held that the standard to which a MAP must provide reasons is set out in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; 303 ALR 64 ("*Wingfoot*") at [55]:

> …The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law…

Further, in *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, McColl JA stated:

> [121] Where it is necessary for the Panel to make findings of primary fact, in order to reach a particular conclusion as to the existence, nature and extent of any physical impairment, it may be expected that the findings of material facts will be set out in its reasons. Where facts are in dispute, it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. More importantly, where more than one conclusion is open, it will be necessary for the Panel to give some explanation of its preference for one conclusion over another. That aspect may have particular significance in circumstances where the medical members of a Panel have made their own assessment of the applicant's condition and have come to a different conclusion from that reached by other medical practitioners, as set out in reports provided to the Panel.
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> [122] On the other hand, to fulfil a minimum legal standard, the reasons need not be extensive or provide detailed explanation of the criteria applied by medical specialists in reaching a professional judgment: see *Soulemezis* (at 273–274) (Mahoney JA) and (at 281–282) (McHugh JA). At least, that will be so where the medical science is not controversial: if it is, a more expansive explanation may be required.

Her Honour assessed the MAP's reasons based upon these principles, which require that they be read as whole and not with an eye "finely tuned for error": *McGinn v Ashfield Council* [2012] NSWCA 238 ("*Ashfield*") per McColl JA at [17] (Sackville AJA and Gzell J agreeing); *Walsh v Parramatta City Council* (2007) 161 LGERA 118; [2007] NSWLEC 255 at [67] per Preston CJ citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 ("*Wu Shan Liang*") at 291.

Her Honour held that the statement that there was "*no evidence*", when read fairly and as a whole, *"intends to convey that while there was evidence of abnormal latencies detected in the nerve conduction testing in the slowing of the median nerve, and of abnormal sensory latencies in the numbness complained of in plaintiff's fingers, neither that evidence nor any other which the Appeal Panel considered constituted evidence of median nerve dysfunction under scenario 1"*. While it may have been "preferable" for the MAP to provide more details, there was no jurisdictional error.

Her Honour also held that when read in this context, the MAP's reference to median nerve dysfunction *"as defined by alternative (1)"* may be read *"to refer simply to median nerve dysfunction as referred to, or used, in scenario 1"*. It communicates the MAP's finding that the AMS did not err by finding that there was no median nerve dysfunction for the purposes of scenario 1. Therefore, the MAP's reasons satisfy the standard set out in *Wingfoot.*

Her Honour also rejected grounds (b), (e) and (f). She noted that the plaintiff characterised the MAP's attitude towards Dr Endrey-Walder's report dated 30 August 2018, as "hostile" and argued that MAP's statement that the report *"simply seeks to cavil with the decision of the AMS, whose opinion is conclusively presumed to be correct"* reveals a misunderstanding of the operation of ss 327 and 328 *WIMA.* Those provisions do not enshrine an opinion of an AMS, but provide a mechanism by which a worker may challenge a decision when it is incorrect.

Her Honour noted that the Plaintiff and First Defendant agreed that the MAP's statutory task is two-staged, the first being to determine whether the AMS fell into error and the second is to review and correct that error: see *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116. She stated, relevantly:

> 102 In *Siddik*, the Court of Appeal had held that while an appeal panel is prima facie confined to the grounds the Registrar has allowed, it can consider other grounds capable of coming within one or other of the heads of review under section 327(3) of the *WIM Act,* reproduced at [16] of this judgment. However, following amendment which took effect in 2011, s 328 of the *WIM Act* now provides that an appeal of a MAC is limited to the grounds on which the appeal is made.
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> 103 In this case, when specifying the grounds of appeal in its application to appeal against the decision of the AMS, the plaintiff only ticked the boxes for "the assessment was made on the basis of incorrect criteria" and "the medical assessment certificate contains a demonstrable error" (s 327(3)(c)-(d)). However, at [2] of its decision, the Appeal Panel identified the appellant's grounds of appeal as including "availability of additional relevant information" (s 327(3)(b)). As [14] of its decision excerpted above, the Appeal Panel acknowledged that the plaintiff's failure to tick the box correlating with s 327(3)(b) seemed to have been an omission, and determined to address the content of the plaintiff's submissions in relation to the new report.
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> 104 The Appeal Panel's statements at [13]-[14] of its decision must also be understood in the context of s 328(3) of the *WIM Act*. The report of Dr Endrey-Walder to which the Appeal Panel refers at [14], dated 30 August 2018, was not before the AMS. Pursuant to s 328(3) of the *WIM Act*, the Appeal Panel could only receive such a report if it constituted *"new evidence"*, which is evidence *"not available to the party before the medical assessment"* and which *"could not reasonably have been obtained by the party before that medical assessment"*. In light of the statutory context, it is my view that read as a whole and fairly, the Appeal Panel's dismissal of the report does not reflect a general hostility towards medical opinions which differ to that of an AMS, but rather a restatement of its statutory duty to reject fresh reports which do not constitute new evidence for the purposes of an appeal.

Her Honour concluded that the MAP did not fail to engage with the plaintiff's articulated case through the materials of Dr Endrey-Walder (as alleged in grounds (e) and (f)). Further, it did not fail to afford the plaintiff procedural fairness (as alleged in ground (b)).

WCC - Presidential Decisions

Psychological injury – Employer's actions were not reasonable within the meaning of s 11A WCA

Shoalhaven City Council v Booth [2019] NSWWCCPD 47 – Acting Deputy President King SC – 9 September 2019

The worker was employed as a process control supervisor. On 15 November 2017, he had a telephone conversation with Ms AU, who was a trainee administration officer. The next day, Ms AU made a complaint about that conversation to her immediate supervisor in the nature of sexual harassment. The complaint was passed up the line of management and it was decided that the worker should be advised about it. A meeting was arranged with him for that purpose, but he was not offered the assistance of a support person or that assistance was available through the appellant's Employee Assistance Program.

The appellant did not dispute that the worker suffered a psychological injury, but if disputed the claim under s 11A *WCA.*

Arbitrator Dalley determined that the appellant did not discharge its onus of proving that the injury was caused by reasonable action that it took with respect to discipline. He cited the following passage from the judgment of Geraghty J in *Irwin:*

> The question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness....

The Arbitrator's findings included findings that it was not fair: (1) To call the worker to a meeting of the type involved without a support person; (2) To categorise the complaint as "sexual harassment" and a "serious matter" to the worker when there was no requirement to do other than inform him that a complaint had been made and inform him of the words complained of, and (3) To fail to draw the attention of the worker to assistance available through the Employee Assistance Program.

The appellant appealed on the following grounds: (1) In determining the reasonableness of the actions of the appellant, the Arbitrator failed to ask himself and in turn consider, the appropriate questions as to the reasonableness of the actions; (2) The Arbitrator failed to place due consideration or any weight on the employer's rights and responsibilities to ensure a safe work place; (3) The Arbitrator utilised hindsight reasoning in the course of considering the initial notification process, and in doing so placing undue weight on that hindsight interpretation; and (4) The Arbitrator erred in finding that the three factors (para [68] of his reasons) were not fair and in doing so he applied the incorrect test.

Acting Deputy President King SC dismissed the appeal.

King SC ADP rejected ground (1) and held that the substance of the Arbitrator's reasons show that he did not think that there was any legitimate criticism of the appellant except in relation to the issues of a support person and EAP.

King SC ADP also rejected ground (2) and noted that although the appellant argued that it followed its established policies, the detail of how the meeting on 16 November 2017 was found against the appellant by the Arbitrator "is not in any way vindicated by the policy document".

In relation to ground (3), King SC ADP stated:

> 37. Ground 3 of the appellant's submissions criticises the Arbitrator for the use of hindsight in his consideration of the initial meeting in which the respondent was notified of Ms AU's complaint. In this regard I think two things may shortly be stated. First, any decision considering past events is employing hindsight. To do that is not to fall into error. Secondly, in a rough analogy to the approach necessary in a negligence action in which the decision maker must place himself or herself in the position of the defendant before the injury or damage is occasioned, and consider what reasonable foresight would require to avoid or minimise such adverse consequences, it may be accepted that in this case the appellant through its responsible officers ought to have looked at what might happen as a result of the meeting with the respondent on 16 November 2017 on the basis of how they intended to conduct it or how they were conducting it at the time. They certainly could not have had the benefit of some sort of deja vu as to what was to happen. But this is of no vital importance here. It may be accepted that Mr McVey had no intention to cause harm to the respondent and did not think he would do so. The critical point is that the Arbitrator held that there were other and better ways of going about what was undertaken which would have carried with them fairness, and that what was done was not reasonable. This is to look at what was going on as the events were unfolding, undoubtedly in 2019 rather than on 16 November 2017, but it is not impermissible use of hindsight.
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> 38. It was implicit in the appellant's submissions that since, according to Ms AU, he had himself used the expression "sexual harassment" at the conclusion of their telephone conversation, the use of that expression by Mr McVey had to be regarded as reasonable and that in any event, given that an enquiry into the complaint was necessary, it simply had to be embarked upon and the preliminary meeting was unavoidable. That was an indication of reasonableness. There is obvious substance in these considerations, but the circumstances of the meeting on 16 November 2017 were different from the telephone conversation the day before which impelled the meeting. The Arbitrator's conclusion, which can be taken from his reasoning and findings, that a preliminary meeting of a completely neutral kind was the reasonable approach, answers these considerations.

In relation to ground (4), King SC ADP observed that the appellant submitted, in effect, that the worker had knowledge of the EAP, that he left the workplace at his own instigation immediately after the meeting (so that there was no opportunity to advise him of it at that time) and that he was notified of it at the next available opportunity. He held:

> 40. Prior knowledge on the part of the respondent of the Employee Assistance Program was squarely dealt with by the Arbitrator and the way he did so is not engaged by the appellant's submissions in respect of this ground, which seem to me to be a re-run of its first instance submissions without more. Moreover the length of the meeting does not rationally seem to call into question the Arbitrator's findings. It is difficult to gainsay the proposition that the respondent could have been offered support before the meeting began and that immediately his distress was seen something could have been said before it was allowed to come to a close or before he left. In short I would not regard the appellant's grounds of appeal and written submissions in support thereof as seriously calling into question the Arbitrator's reasons.

King SC ADP held that the Arbitrator's decision was a factual one and, based upon the decision of Roche DP in *Raulston v Toll Pty Limited,* there was no error in it. While he acknowledged that the reasonableness of what the appellant did is something upon which minds could differ, and that another Arbitrator may have taken a different view, there is no basis for saying that this Arbitrator's particular view was wrong. It was fairly open and there was nothing in the evidence, as he evaluated it, that he failed to consider or take into account that could be said to have amounted to a factor or factors that must have displaced his evaluation. In other words, he felt no "actual persuasion" that the Arbitrator was wrong.

Construction of s 39 WCA – RSM Building Services Pty Ltd v Hochbaum & Technical and Further Education Commission t/as TAFE NSW v Whitton applied – No mention of Melides v Meat Carter Pty Limited

Lachley Meats (Forbes) Pty Ltd and M C Meats (Lachley) Pty Ltd trading as Lachley Meats v Merritt [2019] NSWWCCPD 49 – President Phillips DCJ – 12 September 2019

In/around 1993 and 1994, the worker injured her neck, left shoulder, right arm, low back and legs at work (deemed date of injury: 10 January 1994). She received weekly payments from 1 October 2012.

On 13 July 2017, Dr Bosanquet (the insurer's IME) assessed 19% WPI. On 25 September 2017, the insurer gave the worker notice that her weekly payments would cease on 25 December 2017, based upon that assessment.

Between 20 and 23 March 2018, the worker served a report of Dr Oates, which assessed 21% WPI, upon the insurer. However, on 23 March 2018, the insurer disputed the claim for weekly benefits under s 39 *WCA*. On 28 March 2018, the worker made a further claim under s 66 *WCA* and the insurer disputed that claim.

The s 66 dispute was referred to an AMS and on 1 November 2018, Dr Anderson issued a MAC, which assessed 24% WPI.

On 21 November 2018, the worker claimed weekly benefits from 26 December 2017 to 31 October 2018 from the insurer. However, the insurer reinstated payments from 1 November 2018. On 5 December 2018, a COD issued based upon the MAC.

On 16 January 2019, the worker filed a further ARD claiming weekly payments for the disputed period.

On 25 March 2019, ***Arbitrator Sweeney*** delivered an ex-tempore decision and stated, in effect, that he intend[ed] to follow [his] reasoning in *Kennewell* and the reasoning of Senior Arbitrator Bamber in *Hochbaum*.

The appellant appealed and asserted that the Arbitrator erred in his interpretation of s 39 *WCA,* as s 39 (2) *WCA* allows weekly payments to continue beyond an aggregate period of 260 weeks, but only on or from the date of such assessment. It relied upon President Phillips' decision in *Hochbaum* and argued that this matter is factually similar and should be decided accordingly.

SIRA intervened in the appeal and its submissions largely reflected those made in *Hochbaum* and *Whitton*. It outlined the four bases upon which the Arbitrator's decision was reached, namely: (1) the "totally emphatic" words "does not apply" in s 39 (2) mean that the limitation in s 39 (1) does not apply at all in cases where the worker has been certified as having a sufficient degree of permanent impairment; (2) it is not 'textually available" to describe s 39 as operating "in the present", even if it may have merit "if the language of the Act and the interrelationship of the various sections is only to be considered purposively"; (3) a consideration of s 60AA reinforced his view as to the proper construction of s 39 (1) and (2); and (4) the interpretation urged by the respondent (reading words into s 39).

In relation to (1), SIRA argued that the Arbitrator's approach paid insufficient regard to other textual considerations and failed to give effect to s 39 (3) in construing s 39 (2).

In relation to (2), SIRA argued that the Arbitrator's finding was contrary to President Phillips' finding in *Hochbaum* and *Whitton* in respect of the clear language, text and context of the provision: namely that s 39 operates in the present, the trigger and time at which s 39 (2) operates to restore the entitlement to weekly payments is when the worker's WPI has been assessed in accordance with s 65 at more than 20%.

In relation to (3), SIRA noted that it was not clear why the Arbitrator regarded the language of s 60AA as reinforcing his opinion as to the proper construction of s 39 (1) and (2).

In relation to (4), SIRA referred to the Presidential decisions in *Hochbaum* and *Whitton* and argued that the President's construction of the provision in those decisions, which should equally be applied here, does not "read words into" s 39 (2), but simply provides that s 39 (1) either operates or does not, depending on whether the degree of permanent impairment has been assessed in accordance with s 65 as being greater than 20%. This construction has the advantage of enabling s 39 to be applied according to its terms to the facts as they exist at any given point in time, with the associated benefit of certainty as to the operation of the law at any particular time, depending on the existence or otherwise of the relevant favourable assessment in accordance with s 65.

President Phillips DCJ held that this matter involves issues of principle, construction of facts that are very similar, if not identical, to those discussed in his decisions in *Hochbaum* and *Whitton,* but the arguments raised in this matter *"do have some slightly different emphasis being placed on particular issues than was the case in either Hochbaum or Whitton."* He stated, relevantly:

> 75. Clearly, as was acknowledged by Ms Merritt's representatives, my decisions in *Hochbaum* and *Whitton* represent significant, if not insurmountable, hurdles to Ms Merritt's defence of Arbitrator Sweeney's decision.
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> 76. In terms of the passages which I have outlined above from both the learned Arbitrator's decision and the arguments advanced on behalf of Ms Merritt, it is apparent that what has been asserted is that once the relevant criterion for the purposes of s 39 (2) has been achieved, s 39 "does not apply at all" (as found by the Arbitrator at page 6 of the transcript of reasons). A similar argument was advanced by counsel for Ms Whitton. I dealt with the argument of s 39 (1) not applying at all in Whitton at [131]–[141]. In Whitton I found that there was no permit to read the words "at all" into s 39 (1).[42] I adopt and affirm that reasoning in this matter.
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> 77. Indeed the submission which I have referred to above at [74], that the whole person impairment existed in all relevant periods, was characterised in the following manner by the intervener:
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> > The only point, your Honour, is effectively that my friend, for the respondent, is asking for a factual inference to be drawn in respect of the position before the MAC issued – that is, that the impairment was assessed subsequent to or at the point that the issue of the MAC – that that assessment wasn't one that necessarily indicated the state of the injury beforehand, but that, in my respectful submission, is not the process that section 39 contemplates – that is, that process of drawing inferences as to a state of affairs before the relevant assessment occurs – it is the assessment reaching that trigger point of greater than 20 per cent impairment that enlivens the operation of the section, and that is the section that then – well, that enlivens the operation of the removal of the exception that section 39 (2) provides, and that's precisely what your Honour

has found previously by finding that section 39 (2) and section 39 (3) should be read together ...[43]

78. I accept this submission. There is no warrant in either the text of s 39 or in the context, which I will shortly come to, which would lead to a view that once the MAC with an assessment of greater than 20% WPI has been issued, that it therefore applies "in all relevant periods" as is asserted by Ms Merritt, that is from the imposition of the s 39 (1) bar. The support for this position which particularly was relied upon by the learned Arbitrator are the words described as being "totally emphatic", namely the words "does not apply", found in s 39 (2). I have previously found in *Hochbaum* and *Whitton* that this approach pays insufficient attention to the balance of s 39 nor to the context of the provision. The key question, as I found in *Hochbaum*, is the point at which s 39 (1) does not apply.[44] As was discussed in *Hochbaum*, the critical statutory question as to whether or not a criterion was or was not met at a particular date has to be resolved in relation to whether or not the legislation had a temporal element.

79. As I found in *Hochbaum* and *Whitton*, s 39 is a provision which speaks in the present tense…

85. Section 39 in its terms clearly reveals a similar cost saving intention as was discussed in *Cram Fluid*. For the first time, it brings to an end a worker's entitlement to compensation after 260 weeks. This provision is then subjected to an exception which is found in s 39 (2), which provision excepts from the bar the subset of those injured workers, namely, in the circumstances of this matter who are relevantly assessed as having a permanent impairment of greater than 20%. That s 39 reveals a cost saving intention could not be clearer. Once the 260 week period (in aggregate) is achieved, absent agreement with the insurer or a pre-existing MAC of greater than 20%, entitlement to compensation beyond the 260 week aggregate period depends upon the satisfaction of the criterion set out in s 39 (2), as assessed in accordance with s 39 (3). As I found in Hochbaum and Whitton, it is necessary to read s 39 (3) into s 39 (2) as subs 3 provides the definition of permanent impairment which is referred to in subs 2. Permanent impairment, as I found in Whitton, is not an everyday English phrase, rather it is a term of art with the particular meaning ascribed to it in s 39 (3).

86. In terms of that permanent impairment assessment, I dealt with this at length in *Hochbaum*.[52] Relevantly as I described in *Hochbaum,* s 322 of *the 1998 Act* provides that an 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 the Workers Compensation Guidelines. The Guidelines, which provide assistance to understanding the overall context of the legislative scheme, contemplate an assessment at the time of clinical presentation on the day the assessment takes place. This is unremarkable but is of assistance in understanding the context of the legislative scheme enacted by the Parliament in 2012, which included s 39.

87. Consequently, and bearing in mind the extract from Justice White's remarks in *Hee* regarding construction, this leads to the conclusion that the textual meaning that I have applied to s 39 is consistent with its context and purpose, which as I have found above is clearly cost saving. After 260 weeks payment of compensation in aggregate, the clear purpose of s 39 is to decrease the number of recipients of workers compensation to that smaller subset of injured workers who are assessed in accordance with the scheme set out in s 39(3) as having a greater than 20% WPI.

88. Additionally, counsel for Ms Merritt made much of the fact, which was not disputed, that Ms Merritt was totally incapacitated for work at all relevant times. This argument proceeds to rely upon this status so that once the relevant criterion is met, that is greater than 20% WPI, the lack of any capacity for work enlivens the entitlement to payments of weekly compensation during the entirety of the disputed period and not just from the attainment of the relevant criterion. A similar argument was conducted in *Hochbaum* which was to the effect of giving primacy of s 38 over s39. I dealt with this argument in *Hochbaum* at [160]–[162]. I adopt these findings from *Hochbaum* and would further record that the note in s 39 (2) provides as follows:

> Note. For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

89. That is unsurprising because the insurer can make successive work capacity decisions which dictate the injured worker's entitlement. All that happens once the s 39 bar has been lifted by attaining a greater than 20% WPI is that the injured worker is entitled to receive payments of weekly compensation beyond the 260 week limit, albeit subject to the operation of s 38. The fact that Ms Merritt in this case at all relevant times was held to be totally incapacitated for work by the insurer does not alter the approach to the construction of s 39.

President Phillips DCJ held that the Arbitrator erred in finding that once the *"greater than 20% WPI"* threshold was satisfied, the 260 week limitation *"does not apply at all"*. This incorrectly means that s 39 (1) never applied to the worker, which is contrary to the present tense of s 39. This construction also pays insufficient attention to the medical assessment scheme which Parliament enacted in s 39 (2) and s 39 (3), which operates to read s 39 (3) into s 39 (2). He concluded:

> 91.. This case, unlike *Hochbaum* and *Whitton*, did not assert that s 39 (2) was remedial or beneficial. I therefore do not need to deal with this particular submission, which I dealt with at length in both *Hochbaum* and *Whitton*. Indeed the learned Arbitrator, correctly in my view, properly characterised s 39 (2) as an "*exception*".

The President revoked orders 2 and 3 of the COD and entered an award for the appellant.

WCC – Medical Appeal Panel Decisions

Psychological injury – WPI assessment of treating psychiatrist differs markedly from that of AMS and IME's – MAC explained the actual path of reasoning – AMS correctly employed psychometric testing under Chapter 11.6 of the Guidelines

Batshon v Sydney Trains [2019] NSWWCCMA 130 – Arbitrator Sweeney, Dr J Parmegiani & Dr D Andrews – 30 August 2019

The appellant suffered a work-related psychological injury. Dr Smith (treating psychiatrist) diagnosed a major depressive disorder and assessed 24% WPI. However, on 10 November 2015, Dr Allnutt (qualified by his former solicitor) assessed 4% WPI and Dr Samuell (was qualified by the respondent) opined that there was no work-related psychological condition. The medical dispute was referred to an AMS and on 12 June 2018, Dr Hong issued a MAC that assessed 8% WPI.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and the Registrar referred the dispute to a MAP, which decided to determine the appeal on the papers and that no further medical examination was required.

The appellant argued that the AMS failed to comply with cl 11.4 of the Guidelines, which requires the impairment rating to be based upon a psychiatric diagnosis and that the AMS failed to provide any reasoning for preferring the diagnosis of Adjustment Disorder over Major depression. He also alleged that the AMS failed to give reasons or specify the diagnostic criteria upon which his diagnosis was made and that the AMS erred by carrying out psychometric tests, as cl 11.6 of the Guidelines provides that only psychometric testing performed by a qualified psychologist should be used in assessing the impairment rating.

The respondent argued that the AMS' diagnosis was open to him on the evidence and was based upon a detailed psychological history, the appellant's complaints, his findings on physical and cognitive examination and a consideration of the opinions of three psychiatrists. The AMS correctly discussed the differential diagnoses and applied his opinion as to which he preferred and, in any event, the diagnosis did not impact upon the extent of the assessment. Further, the AMS was appropriately qualified to undertake the limited psychometric testing that he carried out to assist in his assessment of impairment.

The MAP dismissed the appeal. In doing so, it discussed clauses 11.4 and 11.6 of the Guidelines and its role under s 328 (2) *WIMA.* It stated that in considering the appellant's submissions, it is necessary to consider the AMS' statutory obligation to provide reasons. Based on the reasoning of the High Court of Australia, in *Wingfoot Australia Partners Pty Limited v Kocak* 88 ALJR 52, it is only necessary for the MAC to explain the actual path of reasoning of the AMS in sufficient detail to enable a court or an appeal panel to determine whether there is error in its findings.

The MAP noted that in *Wingfoot*, the Court stated:

> The function of a medical panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

The MAP noted that the reasoning in *Wingfoot* has been applied to medical assessments under the workers compensation legislation: see, for example *El Masri v Woolworths Ltd* [2014] NSWSC 1344. It rejected the appellant's argument that the AMS failed to provide any reasons for preferring the diagnosis of Adjustment Disorder to that of Major Depressive Disorder. He did not reject the latter diagnosis, but opined that his preferred diagnosis was "equally valid". It stated, relevantly:

> 32. In attempting to establish a diagnosis the AMS took a careful history, carried out a physical and mental state examination, recorded the appellant's complaints and considered the medical evidence tendered by the parties, including the reports of three psychiatrists. On this foundation, the AMS expressed the opinion that the applicant suffered a recognisable psychiatric condition, which was best characterised as an adjustment disorder but which may also fit within the diagnostic criteria for Major Depressive Disorder.
>
> 33. To adopt the language of the High Court in *Kocak*, the "actual path" by which the AMS reached this conclusion is perfectly clear. He applied his knowledge and expertise as a psychiatrist to the information which he had obtained from the applicant and other sources and reached an opinion as to diagnosis. He expressed the opinion that the correct diagnosis sat between Adjustment Disorder and Major Depressive Disorder, although he preferred Adjustment Disorder with Depressed Mood.

> 34. Plainly, psychiatric diagnoses are not always capable of rigid classification. The diagnostic criteria overlap. This is the case here. Both diagnoses require the presence of significant depressive symptoms. In those circumstances, it was undoubtedly open to the AMS to reach one diagnosis but concede that another may be "equally valid".

Accordingly, the AMS sufficiently complied with his obligation under Ch 11.42 of the Guidelines to establish a psychiatric diagnosis. The diagnostic criteria upon which the diagnosis was based is set out in the body of the MAC. In any event, the diagnosis did not influence the assessment of permanent impairment as the classifications recorded in Table 11.8 would have been the same irrespective of the accepted diagnosis. Placing the appellant in a particular PIRS category does not depend on the diagnosis.

The MAP also held that the appellant misunderstood Ch 11.6, which does not preclude a psychiatrist from carrying out a cognitive assessment. It permits the AMS to consider a wide range of standardised tests at his discretion and does not prohibit a psychiatrist from performing tests that are relevant to his speciality. A psychiatrist may be trained to carry out psychometric testing and is trained to carry out basic cognitive testing. However, Ch 11.6 may preclude him from relying on psychometric testing carried out by a person other than a qualified psychiatrist (sic).

Demonstrable error – Injury to left shoulder - AMS wrongly determined that the right shoulder was normal and incorrectly used it as a baseline for assessment

Trieu v Georges Apparel Pty Limited [2019] NSWWCCMA 128 – Arbitrator Dalley, Dr T Mastroianni & Dr R Pillemer – 4 September 2019

The worker suffered pain in her neck, left elbow and both shoulders as a result of the nature and conditions of her employment (deemed date of injury: 10 July 2014) and suffered aggravations as a result of a MVA in October 2014. She claimed compensation for 24% WPI under s 66 WCA based upon assessments from Dr Ellis (15% WPI for the cervical spine + 1% ADLs + 10% WPI for the left upper extremity). However, the respondent disputed the claim based on an assessment of 0% WPI from Dr Breit.

The Registrar referred the dispute to an AMS and on 15 May 2019, Dr Berry issued a MAC which assessed 9% WPI (5% for the cervical spine + 2% ADLs + 2% left upper extremity).

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The MAP decided to determine the appeal on the papers and that no further medical examination was required.

The appellant argued that the AMS has erred by assigning 1% upper extremity impairment for the measured external and internal rotation of the left shoulder and that the appropriate upper extremity impairment under figure 16-46 of AMA 5 assigns is 2%. The respondent accepted that submission and agrees that the total left upper extremity impairment should be 12%. The parties agree that the same error has been made with respect to assessment of the right upper extremity impairment.

The appellant also argued that the AMS erred by applying Clause 2.20 of the Guidelines. He assessed the right shoulder as having a reduced range of motion, which he adopted as a baseline for assessment of the extent of impairment in the left upper extremity by subtracting the upper extremity impairment in respect of the right shoulder from the upper extremity impairment of the subject left shoulder. The Guidelines provide that this method of assessment requires that the baseline contralateral joint be "normal/uninjured" when this in fact was not the case. However, the respondent argued that the AMS correctly applied

Clause 2.20 of the Guidelines based upon evidence that established that the right shoulder was appropriately regarded as "normal/uninjured".

The MAP noted that the correct assessment in relation to internal and external rotation of the right shoulder is 8% and not 7% and that if cl 2.20 is correctly applied the difference between the shoulder impairments remains at 4%. It held that it was not open on the evidence before the AMS to find that the right shoulder was "normal/uninjured" and it could therefore not appropriate to be used as a baseline under Clause 2.20 of the Guidelines.

Accordingly, the MAP was satisfied that there was a demonstrable error with respect to the calculation of upper extremity impairment based upon measurement of external and internal rotation and the adoption of the right shoulder as a baseline for assessment of the left shoulder as the right shoulder could not be considered "normal". It held that the MVA in October 2014 did not contribute to the impairment as the evidence supports a finding that any aggravation had resolved before the AMS' assessment.

The MAP held that the appellant was appropriately assessed as having 12% upper extremity impairment which Table 16-3 of AMA 5 converts to 7% whole person impairment and that she was appropriately assessed as having 7% WPI with respect to the cervical spine (DRE category II = 5% + 2% ADLs). Accordingly, it revoked the MAC and issued a new MAC, which assessed 14% WPI. It declined to apply a deductible under s 323 *WIMA.*

MAP declines to reconsider its decision - The Guidelines do not require an AMS to reference the relevant differentiators when allocating a worker to a DRE category

Vasilic v Boral Transport Limited [2019] NSWWCCMA 129 – Arbitrator Rimmer, Dr J Ashwell & Dr M Gibson – 4 September 2019

On 7 July 2016, the appellant injured his left knee, left hip, left ankle and lower back and he alleged that he suffered consequential injuries to his neck, back, left shoulder and right knee. He claimed lump sum compensation under s 66 *WCA* and work injury damages.

On 30 October 2018, ***Arbitrator Beilby*** issued a COD, which entered an award for the respondent regarding to the frank injury to the lumbar spine on 7 July 2016, but determined that the appellant suffered consequential injuries to the right knee, cervical spine, left shoulder and lumbar spine. She remitted the s 66 dispute to the Registrar for referral to an AMS.

On 1 March 2019, Dr Berry issued a MAC which assessed 12% WPI, comprising: 3% WPI (left lower extremity/ankle), 0% WPI (right lower extremity/ankle), 0% WPI (cervical spine), 2% WPI (left upper extremity/shoulder) and 7% WPI (lumbar spine).

The appellant appealed against the assessment for the cervical spine under ss 327 (3) (b), (c) and (d) *WIMA.* He essentially argued that the AMS failed to undertake a full and proper assessment of the cervical spine in order to put himself in a position to be able to determine which DRE category applied. He requested a re-examination by an AMS-member of the MAP and an oral hearing of the appeal. However, the respondent opposed the appeal.

The MAP determined that an oral hearing was not required, but gave the appellant an opportunity to file any supplementary submissions on the issue. In response, the appellant's solicitor argued that the Commission should provide reasons as to why the MAP declined the request for an oral hearing. The Commission responded as follows:

> The Medical Appeal Panel was responsible for determining whether or not an 'on the papers review' is to be adopted. In this case the Medical Appeal Panel has determined that this appeal is capable of determination on the papers. This is not a

decision as to whether or not the appeal is successful; rather it is a decision as to the procedure to be adopted in determining the appeal.

The appellant declined to file further submissions and the MAP decided that a further medical examination was not required. On 31 May 2019, it confirmed the MAC.

However, the appellant applied for reconsideration of that decision under s 329 *WIMA* and argued that the discretion to reconsider should be exercised based upon extensive reasons that are set out in MAP's decision. The respondent opposed reconsideration.

The MAP noted that in *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 141 (*Samuel*), Roche ADP stated that it is relevant to bear in mind the flexible nature of proceedings before the Commission and that the Commission should exercise discretion in a beneficial manner without undue emphasis on technicalities and consistent with s 354 *WIMA.* He listed nine principles relevant to the reconsideration power in s 350 *WIMA*:

(1) The section gives the Commission a wide discretion to reconsider its previous decisions (*Hardaker v. Wright & Bruce Pty Ltd* (1962) 62 SR (NSW) 244);

(2) While the word 'decision' is not defined in s 350, it is defined for the purposes of s352 to include 'an award, order, determination, ruling and direction'. In Roche A-DP's view 'decision' in s 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;

(3) While the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration (*Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413);

(4) One of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely (*Hilliger v. Hilliger* (1952) 52 SR (NSW) 105);

(5) Reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained during the first proceeding is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result (*Maksoudian v J Robins & Sons Pty Ltd* [1993] NSWCC 36; (1993) 9 NSWCCR 642); 129

(6) Given the broad power of 'review' in s 352 (which was not universally available in the Compensation Court of New South Wales) the reconsideration provision in s 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

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

(8) A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration (*Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] WCR 29); and

(9) The Commission has a duty to do justice between the parties according to the substantial merits of the case (*Hilliger v Hilliger* (1952) 52 SR (NSW) 105 and s 354 (3) of the 1998 Act).

The MAP noted that the appellant did not refer to the *Samuel* principles or state how they are satisfied in this matter, but it accepted that its decision dated 31 May 2019 requires

amendment, to correctly indicate the Registrar's decision that a ground of appeal under *s 327 (3) (c)* was made out. It also noted that no new evidence was lodged in support of the application.

The appellant referred to the decision of *Crnobrnja v Motor Accidents Authority* [2010] NSW SC 633 (*Crnobrnja*), in which Hulme J stated by way of reference to the DRE descriptors in the 4th Edition AMA Guides, that *"when allocating the injured person to a DRE Category the assessor must reference the relevant differentiators and/or structural inclusions"*. However, while the MAA's Permanent Impairment Guidelines for the Assessment of the degree of permanent impairment (MAA Guidelines) provide at 4.20 that: *"When allocating the injured person to a DRE category the assessor must reference the relevant differentiators and/or structural inclusions",* there is no equivalent provision in the SIRA Guidelines. Therefore, the Guidelines do not require an AMS to reference the relevant differentiators and/or structural inclusions when allocating a DRE Category.

The MAP stated, relevantly:

> 38. The Panel noted that in *Crnobrnja*, Hume J considered a similar argument and held that asymmetry would be quite inconsistent with normal movement to which the assessor had adverted. The Panel does not accept that a reference to a full range of movement cannot be a reference to a full range of movement on all planes of motion unless those planes are specifically referred to by the AMS.
>
> 39. The request for reconsideration in this matter was based on allegations of error of law and denial of natural justice. The appellant submitted that the Appeal Panel has fallen into error when it stated that it was satisfied that the AMS had obtained a valid history of symptoms which enabled him to determine whether there was non-verifiable radicular complaints. The appellant also argued that a failure to disclose with some certainty that an examination has been conducted fully and properly resulted in a breach of procedural fairness towards the appellant. There is a failure by the doctor to reveal what his examination involved and as such, a reasonable person simply cannot respond to any adverse determination and this constituted a breach of procedural fairness towards the appellant.

The MAP held that an allegation of error of law or denial of natural justice against a determination of an Arbitrator should be dealt with by way of appeal, not reconsideration (*Woodbury v Peter Miles and Annie Miles (No 2)* [2008] NSWWCCPD 97. It found no evidence of non-verifiable radicular complaint (thumb symptoms). After considering the nine principles outlined in *Samuel*, it stated, relevantly:

> 47. As noted above, there is nothing new in this application which would cause the Appeal Panel to exercise the wide discretion that the Commission has in terms of reconsideration applications. The Appeal Panel considered all the issues raised in the Application for Reconsideration in its decision of 31 May 2019 and sees no basis upon which it should exercise its discretion to reconsider these particular matters.
>
> 48. There is no fresh evidence so that aspect of *Samuel* does not arise. Given the lack of submissions by the appellant on the *Samuel* principles and the need to exercise the discretion fairly, the Appeal Panel declines 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 another occasion.

Accordingly, the MAP amended its decision dated 31 May 2019, to correctly refer to s 327 (3) (c) *WIMA*, but it declined the application for reconsideration.

Demonstrable error – worker failed to disclose prior injury to AMS – Degenerative changes indicated in pre-injury CT scan justify deductible under s 323 WIMA

SAI Global Ltd v Sefin [2019] NSWWCCMA 132 – Senior Arbitrator Capel, Dr R Pillemer & Dr M Burns – 5 September 2019

On 4 February 2009, the worker injured his back at work. The insurer accepted liability and on 9 March 2011, the parties entered into a Complying Agreement, which awarded the worker compensation for 6% WPI under s 66 *WCA.*

On 12 December 2018, the worker made a claim for 21% WPI under s 66 *WCA,* for injuries to his lumbar and thoracic spines, based upon assessments from Dr Guirgis. However, the insurer disputed the claim. On 28 December 2018, it ceased making weekly payment under s 39 *WCA.*

On 29 April 2019, during a WCC teleconference, the worker withdrew the claim for the thoracic spine. The dispute under s 66 *WCA* was then remitted to the Registrar for referral to an AMS and on 28 May 2019, Dr Assem issued a MAC, which assessed 15% WPI.

The appellant appealed against the MAC under s 327 (3) (d) *WIMA.* It argued that the AMS made a demonstrable error by failing to apply a deductible under s 323 *WIMA.* It noted that the AMS took a history of nil previous accidents, injuries or complaints regarding the lower back, but the medical evidence clearly indicated that the worker was treated for chronic back and neck pain on 13 September 2007 and the referral to Dr Guirgis recorded a history of back pain since 2006 and that he was prescribed anti-inflammatory medication for that condition. It relied upon the decision in *Wentworth Community Housing Ltd v Brennan* [2019] NSWSC 152 and argued that a 1/10 deductible should be applied and that the final assessment should be 14% WPI.

The worker opposed the appeal. The MAP decided to determine the appeal on the papers and that no further medical examination was required.

The MAP noted that the principles regarding deductions under s 323 *WIMA* have been discussed in a number of Supreme Court and Court of Appeal decisions, which *"warrant some comment"*, as follows:

> 54. In *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284, Giles JA (Mason P and Powell JA agreeing) stated:
>
> > The background to the original s68A, in the decisions referred to in the passage next set out, was explained in *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unreported). In that case the appellant had pre-existing degenerative changes to her back, although they were asymptomatic. It was argued that a pre-existing condition which was asymptomatic and had not resulted in any prior impairment in the sense of physical disability or incapacity was insufficient to attract s68A. Cole JA, with whom Handley JA and Cohen AJA agreed, said -
> >
> > > The terms of s68A(1) are in my judgment tolerably clear. The employer who is liable in respect of an injury causing permanent impairment of the back, neck or pelvis is not liable in respect of "any proportion of the loss that is due to" the factors referred to in (a) and (b). The circumstances referred to in (a) are those in respect of which compensation has been paid or is payable under Division 4. The approach of the courts in *Rodios v Trefel* [(1937) 11 WCR NSW 285], *King v Hayward* [(1943) 67 CLR 488] and *TAFE v Pitt* [(1993) 9 NSWLR CCR 309] is negated. However, the

> legislature went further by enacting (b). Prior non-compensable injuries, pre-existing conditions or abnormalities result in a deductable [sic] proportion being determined for which the employer liable in respect of the injury causing the permanent impairment of the back, neck or pelvis is not to be responsible. The words "any pre-existing condition" in my view include a degenerated back caused by the advent of age. Insofar as the permanent impairment of the back as found is due to that pre-existing condition, an appropriate deduction for the effects of the pre-existing condition is to be made. In the circumstances mentioned in subs (8), it is 10%.'

In *Government Cleaning Service v Ellul* (1996) 13 NSW CCR 344 at 349 it had been said that s68A(1) was not concerned with any pre-existing condition or abnormality which was not causing any permanent impairment. Cole JA went on in D'Aleo v Ambulance Service of New South Wales to explain that, read in context, this meant that unless the pre-existing condition was a contributing factor causing permanent impairment, s68A(1)(b) had no application; so read, it was consistent with the view his Honour had earlier stated. In the result, therefore, it did not matter that the pre-existing condition had been asymptomatic, provided that the permanent impairment of the back as found was to some extent due to the pre-existing condition.

The same, in my view, must be said as to the current s68A(1). It does not matter that the pre-existing condition was asymptomatic, and if the loss is to some extent due to the pre-existing condition there must be deduction of the deductible proportion for that loss. But it is necessary that the pre-existing condition was a contributing factor causing the loss. And, of course, it is necessary that there was a pre-existing condition.

55. In *Cole v Wenaline Pty Limited* [2010] NSWSC 78, Schmidt J stated:

> Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence.

56. In *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254, Basten JA discussed the principles regarding deductions pursuant to s 323 of the 1998 Act when reviewing the submissions made to the Appeal Panel in that matter and he stated:

> The appeal to the Appeal Panel did not expressly identify an erroneous failure to give reasons. Rather, the submissions on the appeal, which appear to set out the grounds of challenge, complained that there can be no deduction under s 323, as a matter of law, in the absence of a pre-existing physical impairment. It was further submitted, by reference to the opinion of three medical commentators in a local publication:

> > If a worker develops permanent pain and symptoms due to work consistent with spondylosis (sic) in the neck region, that condition might be assessed at DRE II. Although the spondylosis (sic) is likely to have been degenerative, if there were no symptoms in the period prior to the work-related complaint, then there was no rateable impairment at that time. So, nothing would be subtracted from the current impairment.
>
> That opinion contained a legal assumption which is inconsistent with the approach adopted by this Court in, for example, *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [30]-[32] and, more recently, by Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [13]). The resulting principle is that 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…

57. This principle was confirmed in *Ryder*, where Campbell J was called upon to review a MAC and the decision of a Medical Appeal Panel confirming the AMS's deduction of 10% pursuant to s 323 of the 1998 Act.

58. His Honour confirmed that whether there was a pre-existing condition that contributed to the post injury impairment was a question of fact. Further, it was inappropriate to assume that if there was a pre-existing condition or injury, it must contribute to the impairment. He continued:

> ……. Where the issue is whether any proportion of the permanent impairment resulting from the work injury is due to a pre-existing condition, it is not necessary that the condition, pre-injury, of itself, would have given rise to a rateable percentage impairment by application of the diagnosis related evaluation of impairment prescribed by the WorkCover Guides.
>
> In the present context, the critical question is the causation question which, expressed by adapting the terms of the statute is whether a portion of the 15 per cent whole person impairment Ms Ryder suffered as a result of her work injury was due to a pre-existing condition or abnormality i.e. degenerative disc disease. The argument advanced on behalf of Ms Ryder is effectively that the proportion must be capable of assessment in accordance with the WorkCover Guides for s 323(1) to be satisfied. With respect, this overlooks the requirement that the section must be read as a whole and in its legislative context. Although s 323(2) does not use the word 'proportion' it addresses the idea that in some, perhaps many, if not most, cases it may be 'difficult or costly to determine' the relevant proportion. In that event, a rule of thumb ('assumption') of 10 per cent is to be adopted.
>
> I acknowledge that the express words of s 323(1) require that some definite part, even if it is difficult or costly to assess in precise terms, of the impairment has been caused by, in this case, a pre-existing condition. But the interpretation adopted by the Court of Appeal is that the section is engaged if the pre-existing condition, or previous injury where applicable, is a concurrent necessary condition, with the work injury, of the degree of permanent impairment.

The MAP noted that the AMS recorded an incorrect history about previous injury and it was satisfied that the pathology shown in a CT scan in February 2009 and an MRI scan dated 25 March 2009, was "sufficient to play a causative role in the ultimate degree of whole

person impairment" and that a minimum deduction of 1/10 was warranted under s 232 (2) *WIMA.* Accordingly, it revoked the MAC and issued new MAC, which certified 14% WPI.

WCC – Arbitrator Decisions

Proof of injury on the balance of probabilities – Arbitrator not satisfied that the worker suffered an injury to his neck or an exacerbation of a cervical spine lesion

Graham v tristate Produce Merchants Pty Ltd [2019] NSWWCC 295 – Arbitrator Sweeney – 10 September 2019

On 12 January 2016, the worker was involved in an argument with a colleague, during which he was assaulted and suffered physical, and possibly, psychological injury. He claimed compensation under s 66 *WCA* with respect to his cervical spine. However, the insurer disputed the allegation of injury to his neck. The dispute was complicated by a later incident on 18 August 2015, when the worker was run over by a forklift at work.

Arbitrator Sweeney conducted an arbitration hearing on 23 August 2019. He noted that the worker relied upon the decisions of the Court of Appeal in *Davis v Wagga Wagga Council* [2004] NSWCA 34 and *Fitzgibbons v the Waterways Authority & Ors* [2003] NSWCA 294, and argued that Dr Teychenne's opinion should not be disregarded or discounted because of inconsistencies in the clinical evidence relating to the injury. He also placed considerable weight on the CCTV footage of the incident, which was viewed during the hearing.

Dr Teychenne opined that the vertigo experienced by the worker immediately after the incident on 18 August 205 was consistent with a traumatic brain injury and a spinal cord injury. He stated that the headaches described by the worker are *"quite typical of the type of headache that I have frequently seen in patients with incomplete spinal cord lesions…"* He suspected *"a potential exacerbation of his cervical spine lesion"* following the assault on 12 January 2016.

The Arbitrator referred to the decision of Roche DP in *Jaffarie v Quality Castings Pty Limited* [2014] NSWWCCPD 79, that whether the injury is transient or permanent, whether it results in whole permanent impairment, or the proportion of that impairment, which is die to a pre-existing condition are exclusively matters for the AMS. He noted that the diametrically opposed histories and findings of the neurologists must be considered in the context of all of the evidence regarding the issue of injury and that the worker's evidence was "of very limited assistance on the issue". He stated, relevantly:

> 44. Obviously, the applicant suffered a significant neck injury in August 2015. The extent of the injury and whether it caused a spinal cord lesion is disputed. But the uncontroverted history of both neurologists is that there was a neck injury at that time.
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> 45. In his statement, the applicant merely says that he was "run over by the forklift". There is no clear account of the symptoms experienced by the applicant as a consequence of the accident. There is no account of the symptoms which the applicant suffered in his neck immediately before the assault. It is difficult to attribute symptoms to an injury by way of exacerbation or aggravation, as Dr Teychenne suggests, when the evidence of the worker does not address the extent of the symptomatology before the injury.

46. In some cases, it may be feasible to adopt the history taken by one or more medical practitioners and make findings of fact consistent with it. The history is evidence of the fact by analogy with section 60 of the *Evidence Act 1995*, as explained in *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 (22 February 2001). Obviously, it is not appropriate to take this approach when, as here, there are diametrically opposed histories as to the injuries suffered by the applicant on 12 January 2016. I would be reluctant to accept without reservation the history taken by Dr Teychenne for this reason. It is, therefore, necessary to consider the medical evidence which I have summarised under the heading contemporaneous medical evidence…

52. There is some uncertainty whether the reasoning of Hodgson JA *Ho v Powell* [2001] NSWCA 168 (13 June 2001) (Ho) is the correct approach to establishing proof on the balance of probabilities in a civil case. His Honour expressed the view that in making findings of fact the court could consider the evidence that was not called by a party, as well as the evidence before the court. It was unsatisfactory to determine issues on meagre evidence when there was other evidence available. This was one aspect of the principle enunciated by Lord Mansfield in *Blatch v Archer* [1774] EngR 2.

53. The reasoning in Ho was discussed by the High Court in *Australian Securities and Investments Commission v Hellicar* and others [2012] HCA 17 (3 May 2012). It was made clear that the failure to call a witness in a civil case does not derogate from the cogency of the evidence actually called by a party in a case.

54. But where the evidence tendered by a party from a treating doctor is inadequate or ambiguous, as may be the case with the evidence of Dr Yang or Dr Geevasinga, it is difficult to put to one side the obvious fact that it was open to the party to adduce a comprehensive report from the doctor addressing the issue in dispute.

55. Mr Brown put to me that the CCTV footage went a large part of the way to establishing that the applicant suffered a neck injury. I unreservedly accept that the incident may have caused the applicant to suffer a neck injury. Whether it did, however, is another matter altogether. Certainly, Dr O'Sullivan preferred to approach the question of whether it did cause a neck injury on the basis of a consideration of the history following the event and the clinical findings. It is difficult to argue with this approach.

The Arbitrator rejected Dr Teychenne's evidence as the worker's evidence did not provide a sound basis for accepting his history and opinion. He was therefore not satisfied that the worker injured his neck or suffered an exacerbation of a cervical cord lesion in the incident of 12 January 2015 (sic). He entered an award for the respondent.

Alleged consequential injury to the right shoulder - Whether res judicata, issue estoppel or Anshun estoppel apply – Whether referral to an AMS is barred by s 66 (1A) WCA – Held: there is no res judicata, issue estoppel or Anshun estoppel and s 66 (1A) does not apply

Van Nguyen v Pasarela Pty Ltd (External Administration) [2019] NSWWCC 297 – Arbitrator Burge – 11 September 2019

On 7 October 2015, the worker injured his left wrist and lumbar spine and he also alleged a consequential injury to his right shoulder (due to overuse) and a secondary psychological injury. He claimed weekly payments and lump sum compensation under s 66 *WCA,* initially for alleged frank injuries to his left wrist, lumbar spine and right shoulder. However, the insurer disputed the claims for the back and right shoulder under ss 4 and 9A *WCA.* He

commenced WCC proceedings and claimed compensation under s 66 WCA for all alleged frank injuries.

On 16 May 2018, ***Arbitrator Wynyard*** delivered an ex-tempore decision and entered an award for the respondent with respect to the disputed injuries. He also noted that based on the worker's medical evidence, the s 66 threshold was not satisfied with respect to the left wrist.

In 2019, the worker commenced further the current WCC proceedings, but these were discontinued at a hearing on 3 March 2019.

On 8 May 2019, the worker commenced the current proceedings, in which he alleged that his right shoulder injury is consequential to the accepted left wrist injury. However, the respondent disputed the claim and asserted that the worker is estopped from having any entitlement to compensation for any alleged injury or consequential condition of his lumbar spine and right shoulder due to Arbitrator Wynyard's decision. The worker claimed weekly payments and compensation under s 66 *WCA*, but he discontinued the weekly payments claim during the teleconference.

Arbitrator Burge identified the issues as follows: (1) whether the worker is estopped from bringing a claim in respect of either injury or consequential condition relating to the lumbar spine and/or the right shoulder?; (2) whether further referral to an AMS is barred by virtue of the operation of s 66 (1A) WCA?; and (3) In the event that the worker is neither estopped nor a further referral is barred, did the worker suffer a consequential injury to his right upper extremity. He noted that the s 66 claim relates only to the left upper extremity (wrist) and right upper extremity (shoulder).

The respondent's defence was based on the doctrine of estoppel, as follows: (1) Res judicata (the matters between the parties have been determined); (2) if there is no res judicata, the right shoulder injury has clearly been determined and an issue estoppel arises; and (3) the existence of the consequential condition must have been known to the worker before the decision of Arbitrator Wynyard, and the failure to present the consequential condition in the earlier proceedings gives rise to an Anshun estoppel.

The respondent referred to the decision of President Phillips DCJ in *Fourmeninapub Pty Ltd v Booth* [2019] NSWWCCPD 25 (*Booth*), which set out the criteria for res judicata as follows: (a) a judicial decision has been pronounced; (b) a COD has been issued; (c) there is no dispute as to the jurisdiction of the Commission in making the decision; (d) the decision is final and on its merits; and (e) the previous proceedings determined the same question (in this matter, the entitlement to lump sum compensation).

The respondent argued that there is an issue of estoppel regarding the injuries to the right shoulder and lumbar spine, which were determined by Arbitrator Wynyard in the previous proceedings, because based upon *Booth*, the three indicia for the issue of estoppel are: (a) the same question has been decided; (b) the decision was final; and (c) the parties in both sets of proceedings are the same.

In relation to Anshun estoppel, the respondent argued that satisfied its obligations to provide precise reasons for disputing a claim in s 74 notices dated 19 March 2017 and 2 January 2018 and s 78 Notices dated 13 December 2018 and 18 April 2019. It argued that there was no explanation as to why the alternative allegation of a consequential condition was not raised in the first WCC proceedings and that the worker was clearly on notice of the dispute regarding the alleged injuries to the lumbar spine and right shoulder before he commenced them, and he decided not to press the question of a consequential injury at that time.

In relation to the application of s 66 (1A) *WCA*, the respondent conceded that the worker's medical evidence now satisfies the relevant threshold, but the worker has already had one claim in relation to the left wrist injury and is not entitled to request that this injury be referred to an AMS. It relied upon the decision of *Cram Fluid Power Pty Ltd v Green* [2014] NSWWCCPD 84.

However, the worker argued that there is no res judicata estoppel in this matter as there was no determination on the merits regarding a consequential condition in the first proceedings and that the same argument applies to issue estoppel. In relation to Anshun estoppel, the worker noted that the decision in *Booth* related to an allegation of a psychological injury (PTSD and a finding of bipolar disorder) and that *Booth* could be distinguished from this matter as it concerned a disease rather than a consequential condition. The worker was now pleading a consequential injury for the first time. He relied on the decision in *Booth*, as follows:

> 90 Issue estoppel may arise as a consequence of a state or fact of the law being determined, which would prevent a party from bringing, or defending, a claim in relation to a different benefit. In *Thompson v George Weston Foods* [1990] NSWCC 18, Chief Judge McGrath observed:
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> > It is clear that issue estoppel can arise as a consequence of an adjudication on a particular issue, which would prevent a party bringing, or defending, a claim in relation to a different benefit. I do not consider that there is any rule which would prevent a worker bringing an action claiming one type of benefit, and living another type of benefit for a time, or other, adjudication. In doing this he may in some cases risk being penalised in costs, or risk failing on an issue which would debar the other claim. If he was on the issue of injury he could not succeed in gaining compensation for a consequential benefit, whether it was included in the original Application, or not.

The worker argued that the paragraph from *Thompson* clearly demonstrates that there is no need for a worker to explain why they have changed from pleading a frank injury under s 4 *WCA* to a consequential condition, and it is also authority for the proposition that it has never been the case that a worker is precluded from coming back and raising a consequential condition.

In relation to s 66 (1A) *WCA,* the worker argued that a completed claim is one where compensation has been paid: see Roche DP in *Woolworths Ltd v Stafford* [2015] NSWWCCPD 36. However, in this matter, the claim under s 66 *WCA* for the left wrist has not been determined as that claim was not the subject of an assessment by an AMS. On that basis, the circumstances were similar to those in *Gilliana v Souvenir World (Airport) Pty Ltd* [2018] NSWWCC 116, where Senior Arbitrator Capel dealt with questions of a number of claims that he held were amended.

Arbitrator Burge stated, relevantly:

> 45. It follows that if one of the estoppels raised by the respondent is successful, then the applicant's claim will fail. If, however, none of the estoppels apply, then the Commission will need to determine the applicability of section 66 (1A). Should that section apply, the applicant's claim would likewise fail, however, in the event that section is not applicable to this matter, the Commission will then have to make a determination as to whether the applicant suffered a consequential condition to his right upper extremity (shoulder). If the Commission finds against the applicant on the consequential condition, then only his claim in relation to the left wrist will be referred

to an AMS. Should a finding be made in favour of the applicant on the question of consequential condition, then both the left wrist and right shoulder injuries will be referred to an AMS for assessment of permanent impairment.

The Arbitrator held that there was no *res judicata* as the previous proceedings did not determine the same question. He stated, relevantly:

> 56. Where a question has been decided by a tribunal or court in proceedings between particular parties (the prior proceedings), one of those parties will only be able to assert res judicata estoppel in subsequent proceedings if a question to be decided in those subsequent proceedings is identical to that decided in the prior proceedings. According to Browne LJ in *Turner v London Transport* [1977] ICR 952 (Court of Appeal) it is for the party who seeks to rely on the estoppel to establish the relevant identity of the question previously decided, and to be decided in the subsequent proceedings. In this matter, the respondent sought to categorize that question as the applicant's entitlement to lump sum compensation. For the following reasons, I disagree with that categorization…
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> 61. The authorities disclose that determining whether an applicant has suffered an injury to a given body part requires the Commission to address different considerations to those which it must address if an applicant pleads they have suffered a consequential condition. In the latter case, all that is required to be shown is that an applicant's symptoms and restrictions in the body part at issue have resulted from an accepted injury…

In the previous proceedings, the Commission finally determined the worker's rights with respect to alleged frank injuries to his right upper extremity and lumbar spine, but it did not determine whether he had suffered a consequential condition.

The Arbitrator also held that there is no issue estoppel arising from the previous proceedings and that a state or fact of law in the current proceedings was not a matter that was necessarily decided by Arbitrator Wynyard. That Arbitrator was not concerned with whether the alleged injuries to the right upper extremity and lumbar spine were consequential.

In relation to Anshun estoppel, the Arbitrator stated, relevantly:

> 80. Whilst it is the case that the respondent's section 74 notice dated 2 January 2018 denied liability based on consequential injury, there was no medical report available to the applicant at that time which grounded a basis for a consequential condition claim. As President Phillips noted in *Booth* at [136]:
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> > I do not accept the appellant's submissions that to succeed on the bipolar condition claim under one iteration of the concept of injury in the second proceedings (before Arbitrator Edwards), having failed in the first (before Arbitrator O'Moore), is an affront to the administration of justice. Firstly, that is because, for the reasons discussed above, there was no evidence available at that time to support a s 4 (b) (ii) claim and because Arbitrator O'Moore did not make factual findings pursuant to s 4 (b) (ii). Secondly, it is because Arbitrator Edwards' decision on s 4 (b) (ii) and Arbitrator O'Moore's decision are not inconsistent in respect of the same transaction. Thirdly, the mere fact that the two proceedings are closely related is insufficient to find *Anshun* estoppel. Accordingly, having regard to the subject matter of the earlier proceedings and the evidence available at that point in time, it was not unreasonable for Ms Booth not to bring a claim for s 4 (b) (ii) in the earlier proceedings.

The Arbitrator considered the current matter to be analogous to *Booth* and he was not satisfied that the respondent had discharged its onus of proving, on the balance of probabilities, that it would have been unreasonable for the applicant not to rely upon a consequential condition to the right shoulder in the previous proceedings.

The Arbitrator also held that s 66 (1A) *WCA* does not apply and he stated, relevantly:

> 83. … In the previous proceedings, liability for the left wrist was accepted, however, at that time the applicant's degree of permanent impairment was not assessed, as on his own case at that time he did not meet the threshold pursuant to section 66 of the 1987 Act. In Woolworths Ltd v Stafford [2015] NSWWCCPD 36, the Commission held that "claim" is not to be interpreted narrowly to mean any "demand" for lump sum compensation. At [68], the Commission noted that there is no justification in the legislation for a worker who makes any demand for lump sum compensation, no matter how defective, from being permanently barred from recovering such compensation. In my view, absent a determination by an AMS of the applicant's whole person impairment arising from his accepted left wrist injury, there is no bar to that body part being referred to an AMS, now the applicant has medical evidence which supports a claim for whole person impairment which exceeds the threshold under section 66.
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> 84. I accept the applicant's submissions that the circumstances of this case are analogous to those in *Gilliana v Souvenir World (Airport) Pty Ltd* [2018] NSWWCC116, in which it was held that a further letter of claim referrable to a previous injury serves as an amendment to a previous claim, rather than a new claim, and that given there has been no finding as to the level of impairment to the applicant's left wrist, section 66(1A) does not apply.

After discussing the relevant case law at length, the Arbitrator held that the worker had suffered a "consequential condition" in his right shoulder. He noted that a common sense test of causation applies. He accepted the respondent's submission that the worker made no mention of his alleged right shoulder injury before November 2016 and he held that the worker's evidence should be treated with caution and not accepted unless it is corroborated in relation to the onset of symptoms and stated, relevantly:

> 114. Notwithstanding my stated caution with regards to the applicant's own evidence, in my view the preponderance of the medical evidence supports a finding of consequential condition in the right shoulder. There is no question the applicant's left wrist fracture is serious and has required him to modify his activities of daily living by limiting the use of his left arm and hand. There are a number of Medical Certificates which specifically limit the applicant's lifting to his right arm only. The fact he has had to predominantly use his right arm for an extended period is, adopting a common sense approach, consistent with the development of a consequential condition arising from overuse.
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> 115. It is noteworthy that the applicant told ProCare of his fear of over compensating with his right hand as a result of his left wrist injury, and in my view the fact there is no record of complaint to the right shoulder until late 2016 is actually supportive of the development of a consequential condition caused by overuse. In so finding, I have had regard to the contemporaneous material, which reveals the applicant complaining in approximately November 2016 of shoulder symptoms, and the presence of right shoulder pathology by February 2017 against a background of complaints of pain to his new treating general practitioner.

Accordingly, the Arbitrator remitted the dispute under s 66 *WCA* to the Registrar for referral to an AMS to determine the degree of permanent impairment of the left upper extremity (wrist) and right upper extremity (shoulder) as a result of an injury suffered on 7 October 2015.

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