Bulletin

MONTHLY
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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. Muriniti v King; Newell v Hemmings [2019] NSWCA 232
2. Ljubisavljevic v Workers Compensation Commission of New South Wales [2019] NSWSC 1358
3. Lismore City Council v Elliot [2019] NSWWCCMA 137
4. Westpac Banking Corporation v Perry [2019] NSWWCCMA 139
5. Ozcan v Macarthur Disability Services [2019] NSWWCC 310
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Court of Appeal Decisions

Leave to appeal against personal costs orders refused – Registrar ordered to refer the papers to the Legal Services Commissioner with a recommendation to investigate whether the conduct of the applicants & L C Muriniti & Associates amounts to either unsatisfactory professional conduct or professional misconduct

Muriniti v King; Newell v Hemmings [2019] NSWCA 232 – Court of Appeal (Payne & McCallum JJA & Simpson AJA) – 16 September 2019

Background

See Bulletin 19 for a detailed background. However, by way of summary, in *King v Muriniti* [2018] NSWCA 98, the Court of Appeal (Basten & Gleeson JJA & Emmett AJA) made indemnity costs orders against the applicants regarding 4 appeals that were brought by their clients. The issues considered were: (1) Whether it could rely on findings made in the four proceedings when determining whether costs should be ordered against the

respondent; (2). Whether a costs order should be made against the solicitor in respect of the four appeals; and (3). The appropriate form of any costs orders to be made.

In relation to (1), Basten JA (Gleeson JA agreeing) held that s 91 of the *Evidence Act 1995 (NSW)* does not prevent a court, exercising the jurisdiction conferred by s 99 of the *Civil Procedure Act 2005 (NSW) ("CPA")*, from having regard to findings in its principal judgment.

In relation to (2), Basten JA (Gleeson JA agreeing) held that the power under s 99 (2) (c) *CPA* is not limited to court-ordered costs, and extends to the contractual liability of a party to pay his or her own lawyers. An order can therefore be made, requiring that the solicitor indemnify the applicants in respect of costs payable by them to their lawyers in relation to the proceedings. Their honours also held that the findings made in the principal judgment warrant the drawing of the necessary inferences to order costs against the solicitor. Gleeson JA also stated that if it were necessary, the additional reasons given by Emmett AJA further engage the court's power to award personal costs against the respondent.

Emmett JA stated that the Court (both at first instance and on appeal) endeavoured to have the client's representatives clearly explain the allegations of fraud and that they failed to do so. He held that Mr & Mrs King's costs were incurred due to the serious incompetence and neglect of the solicitor and those employed by him and an order under s 99 *CPA* should be made: (at [101]).

In relation to (3), Basten JA (Gleeson JA agreeing) held that as Mr & Mrs King only sought payment of the amount of costs ordered to be paid by the solicitor's client, the costs order made in respect of the principal proceedings should be so limited: (see: [10], [11], [51]-[52]). However, Emmett AJA considered that the solicitor should pay the costs reasonably incurred by Mr & Mrs King in responding to the four appeals: (see: [101]).

Further developments

Lawcover filed a notice of intention to appeal against the personal costs orders on behalf of the applicants, but decided not to appeal. Mr Muriniti advised Lawcover's solicitors that he would be commencing proceedings against Lawcover and would appeal against the decision in *Young v King (No 11)*. Mr Newell also filed a notice of appeal.

Lawcover then sought interlocutory and final orders restraining the applicants from taking any steps to conduct or prosecute an appeal. ***Sackar J*** made an order restraining them from taking any steps to prosecute any such appeal (*Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557), which was based upon the terms of the professional indemnity insurance policy between Lawcover and L C Muriniti & Associates. He held that, viewed in context, the policy did not contemplate the insured being 'consulted' or asked to give permission to embark upon a decision-making process and that the appellants must be deemed to have consented to Lawcover's decision not to appeal. He also held that the appellant's allegations of bad faith on the part of Lawcover were without substance and that they were contractually prevented from conducting an appeal at their own cost.

On 16 February 2018, the applicants filed a notice of appeal against Sackar J's orders and the matter was listed for an expedited hearing on 19 June 2018. However, on 15 June 2018, they sought an adjournment until after the determination of their application for special leave to the High Court regarding the decision in *King v Muriniti* [2018] NSWCA 98.

Beazley P stated:

> 30 In brief summary, so far as is relevant to the adjournment application, the appellants' proposed argument on the appeal is that Lawcover's decision not to appeal from *Young v King (No 11)* was taken in breach of its obligation of utmost good faith. As I understand it, the appellants contend that the findings of Sheahan J

in *Young v King (No 6)* and *Young v King (No 11)*, that the various applications brought by Mrs Young, including the costs applications, were hopeless and that their conduct of those proceedings was unprofessional, incompetent and inappropriate, were wrong. On the adjournment application, Mr Newell submitted that this Court's decision in *King v Young* in relation to the operation of the *Evidence Act 1995 (NSW)*, s 91 meant that the appellants would not be able to challenge those findings. For that reason, Mr Newell submitted that the hearing of the appeal should abide the outcome of the special leave application.

Her Honour considered that there was a real question about whether the findings in the Land and Environment Court decisions would be facts in issue in the appeal. While Lawcover decided not to appeal based on those findings, what was in issue on the appeal is whether Lawcover breached its obligation of utmost good faith by relying upon them in deciding not to appeal from *Young v King (No 11).* She held that the proper application of s 91, as determined in *King v Muriniti,* is not an impediment to that argument being raised. Therefore, she refused the adjournment.

Current decision

On 16 September 2019, the Court of Appeal (***Payne JA (McCallum JA & Simpson AJA*** agreeing)) joined Lawcover as a respondent in the proceedings and dismissed both summonses. In the Muriniti proceedings, the Court ordered the applicant and his law firm to pay Lawcover's costs of its motion filed on 2 August 2019 and to pay all respondents' costs regarding the application for leave to appeal. In the Newell proceedings, it ordered the applicant to pay Lawcover's costs of its motion filed on 2 August 2019 and to pay all respondents' costs regarding the application for leave to appeal.

The Court held that that the evidence clearly indicated that it conclusively determined that Sackar J was correct to restrain the applicants from taking any steps to conduct or prosecute an appeal. Further, the applicants had consistently frustrated all of Lawcover's attempts to bring the applications for leave to appeal to an end and that their active non-cooperation "*persisted even after the High Court refused special leave in May 2019 and persists today*". They now sought to reagitate proceedings that had been conclusively determined between the parties.

The Court described the applicants' argument that their summonses could ever be prosecuted as "*hopeless*" in the face of: (1) the decision of Lawcover not to pursue an appeal from orders made in *Young v King (No 11)*; and (2) the conclusive determinations of Sackar J and this Court, from which the High Court refused special leave, that Lawcover was entitled so to conclude. It accepted Lawcover's argument that the appeal "*can never be progressed*" and it described Lawcover's conduct as "*proper and commendably restrained*". The Court stated, relevantly:

> 36 Given the extravagant and, on the evidence, baseless claims made by Mr Muriniti, L C Muriniti & Associates and Mr Newell about Lawcover's conduct I propose to deal with the rest of their submissions:
>
> > (1) First, there is no evidence or coherent argument advanced that Mr Muriniti, L C Muriniti & Associates and Mr Newell have any cause of action against Lawcover. If it existed, any suggested cause of action could and should have been identified in the evidence. It was not. I reject the submission that it is relevant to examine for this purpose whether or not any conspiracy allegation was pleaded or addressed in *Young v King (No 6).* The suggested breach of duty and/or contract by Lawcover "by reason of having elected to bring the appeal proceedings to an end without regard to their merits" cannot be correct

in the face of the conclusive finding by this Court that Lawcover was entitled not to appeal from orders made in *Young v King (No 11).*

(2) Secondly, there is no evidence or coherent argument advanced that had Lawcover nominated a solicitor to come on to the record to represent Mr Muriniti, L C Muriniti & Associates and Mr Newell that Lawcover would have faced any arguable conflict of interest. Much less was it demonstrated how, assuming contrary to the fact that Mr Muriniti, L C Muriniti & Associates and Mr Newell had co-operated to permit Lawcover's nominated solicitor to come on to the record, Lawcover would have been acting in breach of the duty of good faith by filing a notice of discontinuance.

(3) Thirdly, there was no evidence or coherent argument advanced that Mr Muriniti, L C Muriniti & Associates and Mr Newell will suffer any relevant prejudice if orders are made joining Lawcover to the applications for leave to appeal and dismissing the summonses. The position is clear; Mr Muriniti, L C Muriniti & Associates and Mr Newell cannot progress the appeal proceedings and Lawcover has made abundantly clear it has no intention of progressing the appeal proceedings…

38 The present applications for leave to appeal by Mr Muriniti, L C Muriniti & Associates and Mr Newell can never be progressed. In proceedings in the Supreme Court which have been litigated all the way to the High Court, Mr Muriniti, L C Muriniti & Associates and Mr Newell have been found to have consented to Lawcover's decision not to pursue an appeal from orders made in *Young v King (No 11).* It has also been conclusively determined that Mr Muriniti, L C Muriniti & Associates and Mr Newell should be permanently restrained from taking any steps to conduct or prosecute any appeal from the orders made in *Young v King (No 11)*, including proceedings [2017/109337] and [2017/201727] in this Court. As I have said, the submission that there is any relevant difference between the conclusive determination that Lawcover was entitled not to appeal from *Young v King (No 11)* and a determination that Lawcover was entitled to bring an end to an appeal commenced in breach of contract did not identify any meaningful difference.

The Court held that it was prejudicial to the respondents that the proceedings be allowed to continue to moulder in the Court's lists with no prospect that they will ever be determined. The delays and costs already involved in the matter are unacceptable and should be brought to an end. Further, unless the Court intervenes, Mr Muriniti, L C Muriniti & Associates and Mr Newell will continue to frustrate Lawcover's reasonable and proper attempts to bring these applications for leave to appeal to an end.

The Court also held that "*a good deal of the conduct of Mr Muriniti, L C Muriniti & Associates and Mr Newell*" gave it cause for concern, particularly because one view of the evidence appears to indicate that over a number of years in relation to this litigation:

(1) Mr Muriniti, L C Muriniti & Associates and Mr Newell have each been found by Sheahan J to have behaved incompetently, unprofessionally, inappropriately and against the true interests of their client. Each has embarked on futile litigious activities and incurred considerable unnecessary costs liabilities;

(2) Mr Muriniti, L C Muriniti & Associates and Mr Newell have commenced appeal proceedings from personal costs orders in breach of contract and have frustrated Lawcover's reasonable and proper attempts to bring those proceedings to an end by, inter alia, making serious allegations amounting to fraud with no apparent proper basis; and

(3) Mr Muriniti, L C Muriniti & Associates and Mr Newell have sought needlessly to prolong these proceedings on the basis of even more outlandish allegations made in correspondence and repeated in this Court with no apparent basis.

Accordingly, the Court ordered the Registrar to forward the papers in both matters to the Legal Services Commissioner with a recommendation that he investigate whether the conduct of Mr Muriniti, L C Muriniti & Associates and/or Mr Newell disclosed therein amounts to either unsatisfactory professional conduct or professional misconduct.

Supreme Court of NSW Decisions

Judicial review – request for re-examination by MAP – MAP not bound to examine worker – COD entered before application for review of MAP's decision – Arbitrator refused to rescind COD –MAP did not fail to engage with plaintiff's arguments

Ljubisavljevic v Workers Compensation Commission of New South Wales [2019] NSWSC 1358 – McCallum J – 9 October 2019

On 29 April 2015, the plaintiff injured her neck and left shoulder at work and suffered consequential injuries to her right shoulder and digestive system. She claimed lump sum compensation under s 66 *WCA* for 25% WPI, but the insurer disputed the claim under s 66 (1) *WCA.*

The dispute was referred to an AMS and Dr Kumar issued a MAC, which certified 14% WPI, comprising 0% WPI for the digestive system, 7% WPI for the cervical spine, 8% WPI for the left shoulder and 0% WPI for the right shoulder.

The plaintiff appealed against the assessments for the digestive system and right shoulder under ss 327 (3) (c) and (d) *WIMA* and she also complained about the manner in which the AMS conducted his examination and requested re-examination by the MAP. However, on 6 October 2017, the MAP declined that request. It upheld the MAC and rejected the allegations of "*coercion*" by the AMS and that the AMS' actions were "*unethical, unprofessional or inconsiderate*".

On 20 October 2017, the Plaintiff's solicitor advised the Commission that he was instructed to lodge an application for reconsideration or an application for judicial review and he asked that a COD not be issued based upon the MAP's decision. However, he took no further steps before the COD was issued on 10 November 2017.

The plaintiff then applied for reconsideration of the MAP's decision under s 378 *WIMA.* However, the Commission determined that this course of action was precluded by the issue of the COD, as s 350 (1) *WIMA* provides that it is taken to be final and binding on the parties and not subject to appeal or review.

On 13 March 2018, the plaintiff applied to have the COD rescinded under s 350 (3) *WIMA.* She argued that without conducting its own physical examination the MAP was unable to obtain the correct information and it should reconsider the matter because there was "*evidence of incomplete history and undue persuasion, both physical and verbal…which rendered the assessment unreliable*".

On 8 June 2018, an Arbitrator refused the application for reconsideration. The Arbitrator referred to the principles stated by Roche DP in *Samuel v Sebel Furniture Ltd* [2006] NSWWCCPD 141 and did not accept that there was a satisfactory explanation for the plaintiff's failure to challenge the MAP's decision before the COD was issued. The Arbitrator also held that the matters raised in support of the application were not new and were not likely to have led to a different result.

The plaintiff sought judicial review of each of those 4 decisions by the Supreme Court. However, during the hearing she conceded that the Court did not have power to review the AMS' decision where there had been an appeal to a MAP: see *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254, per Basten & McColl JJA & Handley AJA. She alleged the following errors:

> (a) The Arbitrator mischaracterised the plaintiff's case as to delay by ascribing it as a "mistake" or an "oversight" (reasons at [30]) and thereby failed to understand the nature of the proper exercise of her power;
>
> (b) The Arbitrator wrongly dismissed the fresh evidence of the plaintiff as "not new" when in fact it was new and the substance of it that was put before the Panel had been entirely disregarded by the Panel. Again, the Arbitrator thereby failed to understand the nature of the proper exercise of her power;
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> (c) The Arbitrator determined that the plaintiff was "simply dissatisfied" with the outcome of the Panel where there was no evidence for such a finding and the finding was crucial to her determination;
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> (d) The Arbitrator failed to engage with substantial aspects of the plaintiff's submissions and evidence and accordingly, the Arbitrator failed to afford the plaintiff procedural fairness;
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> (e) The Arbitrator failed to set out her actual path of reasoning or reasons such that would permit a court to identify whether she has fallen into error; and/or
>
> (f) The AMS decision, the Panel decision and/or the COD decision were unlawful and the validity of the Arbitrator's decision depended on their lawfulness.

McCallum J held that the Arbitrator did not dismiss the application for reconsideration without engaging with or giving proper or lawful consideration to any of the substantive grounds and stated that the Arbitrator engaged with the plaintiff's submissions, but did not accept them. The MAP rejected the plaintiff's complaints about the manner in which the AMS conducted his examination because there was no evidence to support them and there was no error in that approach.

The Plaintiff complained that the Arbitrator failed to make a positive finding of fact regarding "*delay*", in circumstances where this was a relevant factor, and she sought to rely upon the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Yussuf* (2001) 206 CLR 323; [2001] HCA 30. However, her Honour stated that this decision establishes that the extent of a decision-maker's obligation to make findings of fact must begin with a consideration of the relevant statutory scheme as a whole. Delay is a matter that the Arbitrator clearly considered and upon which she made her position clear. She considered the period allowed by the Commission between the determination of the Appeal Panel and the issue of the COD as adequate and regarded explanation for the failure to seek reconsideration or judicial review within that period as "*inadequate*".

The plaintiff also complained that the Arbitrator failed to give adequate reasons so as to enable her (and the Court) to understand "*…why the delay was such as to shut her out from a consideration of the substantive issues raised in support of her application for reconsideration.*" However, her Honour held that the Arbitrator's reasoning was sufficient to allow the plaintiff to understand why her application failed.

The plaintiff complained about the Arbitrator's remark that "*a mistake or oversight by a legal advisor will not give grounds for a grant of reconsideration*". Her Honour considered that both parties' submissions on this issue "*reflected a measure of confusion*", but noted that the remark "*reflects one of the principles stated in the decision in Samuel".* She stated:

45 In light of the submission that had been put, it seems possible if not likely that the Arbitrator's reference to the principle concerning mistake or oversight by a legal advisor was a reference to the absence of evidence before the Appeal Panel. However, in this Court, Pascoes submitted that the Arbitrator's remark was directed to the issue of delay, the point being that, if the delay fell at the feet of the plaintiff's legal advisers, that was not a ground for reconsideration.

46 Ms Ljubisavljevic's complaint in this Court did not engage with either point. She made three submissions concerning the Arbitrator's remark, as follows:

> (a) There was no evidence before [the Arbitrator] of any mistake or any oversight by any legal advisor before the Arbitrator and there is no evidence to support this finding of fact: Azzopardi v Tasman UEB Industries Limited (1985) 4 NSWLR 139.
>
> (b) Secondly, the observation that a mistake or oversight had been made by legal advisor is an irrelevant consideration giving rise to jurisdictional error.
>
> (c) Third, if the Arbitrator had understood the plaintiff's claim for reconsideration to be based on mistake or oversight by a legal advisor the Arbitrator has so misunderstood the plaintiff's case that she has filed to exercise her power in respect of the plaintiff's true case.

Her Honour held that no error was established and it was open to the Arbitrator to characterise the failure to seek a review before a COD issued as "*mistake or oversight by a legal advisor*", which was a relevant consideration.

The plaintiff complained about the Arbitrator's findings that she was "*simply dissatisfied with the MAP's findings and sought to re-state her evidence in pursuit of a finding of 15% WPI in order to pursue a work injury damages claim*", and that "*mere dissatisfaction with an outcome is not a proper basis for reconsideration*". She argued that there was no evidence to support findings of fact to that effect and that as the decision was based upon a finding that was not open to the Arbitrator, it was made without jurisdiction: see *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139. However, her Honour found that this complaint was "*misconceived*" as the remark was not a finding of fact; but was the Arbitrator's assessment of the nature of the point. It was "*not the kind of remark that can be impugned on a no evidence ground*".

The plaintiff also argued that s 350 *WIMA* only applies to a "*decision*" and that if the MAP's decision is vitiated by error, the COD is a nullity and the Arbitrator's decision (made purportedly in respect of that decision) is made without jurisdiction and is also a nullity. The defendant supported this approach and accepted that, on any analysis, the Court would have to address the grounds of the MAP's decision.

Her Honour noted that the plaintiff's principal challenge to the MAP's decision was that it refused to re-examine her in circumstances where she was allegedly denied procedural fairness by the AMS. The plaintiff argued that the decision in *Boyce v Allianz Australia Insurance Ltd* (2018) 96 NSWLR 356; [2018] NSWCA 22, is authority for the proposition that, "*in circumstances where the plaintiff complained of a denial of procedural fairness by reason of the approved medical specialist having failed to examine her, the failure of the Appeal Panel to examine the plaintiff is either a constructive failure to exercise jurisdiction or a breach of procedural fairness itself, or both*". However, her Honour noted that *Boyce* involved an application for review of a medical assessment under the *Motor Accidents Compensation Act 1999* (NSW).

In *Boyce,* SIRA wrote to the plaintiff notifying her of the proposed review and inviting her to indicate whether she objected to the Review Panel proceeding without re-examining her.

The plaintiff objected, but due to administrative oversight, the Review Panel was not made aware of her objection and it determined the review adversely to her without re-examining her. The plaintiff sought judicial review of that decision and there was evidence that if her solicitor had been notified of the Review Panel's intention to proceed on that basis, the solicitor would have provided further documentary evidence to the Review Panel to assist with their determination.

Her Honour held, relevantly:

> 56 The decision acknowledges the discretion of a review panel to determine whether or not to conduct a fresh examination; the vice of the decision not to do so in that case was that it was reached on a false premise (that the plaintiff did not object to that course): at [58] per Basten JA; Macfarlan JA agreeing at [101].
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> 57 Ms Ljubisavljevic submitted that, in *Boyce*, the Court held "by majority" (apparently a reference to the judgment of Basten JA and the concurring judgment of Macfarlan JA) that whole person impairment assessment should include an interview and clinical examination "*wherever possible*" and that a decision not to examine and interview an appellant was a step in the (comparable) assessment process.
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> 58 The primary judgment in *Boyce* was given by Basten JA. His Honour noted that the permanent impairment guidelines provide that an interview and a clinical examination is to be conducted as a part of the process "wherever possible": at [21]. At [49], his Honour accepted that the question as to the need for "re-examination" was a factual issue for the Review Panel (and not a matter for the reviewing court to determine). His Honour gave two reasons for concluding that the Review Panel's decision not to conduct a re-examination was not a proper exercise of the function conferred on it in that case. First, he considered that the decision to conduct or not conduct an interview and clinical examination is a material or critical step in the review process, akin to the process of allowing a claimant to give his or her account in person in a migration case. Secondly, the Panel had inadequate information including information as to whether the appellant agreed that the description of the initial assessing doctor reflected the seriousness of her condition.

Her Honour rejected the plaintiff's argument that while *Boyce* concerned a different statutory scheme, the same principles would apply to a claim under s 66 *WCA. She noted at* least two significant differences between the statutory schemes, namely:

(1) Under s 63 (2) of the *Motor Accidents Compensation Act*, a medical assessment could be referred to a review panel only on the grounds that the assessment was incorrect in a material respect. That is to be contrasted with the grounds on which review by an appeal panel under the *Workers Compensation Act*, which are directed to error in the process or demonstrable error rather than incorrectness of the assessment itself; and

(2) Section 63 (3A) expressly provided that the review of a medical assessment was to be by way of "a new assessment of all the matters with which the medical assessment is concerned". It was in that context that the decision whether to conduct the examination was regarded as a critical step in the review process. By contrast, s 324 (3) *WIMA* provides that an approved medical specialist who is a member of the Appeal Panel has all the powers of an approved medical specialist making an initial assessment but does not, in terms, impose a requirement to undertake a new assessment.

Further, *Boyce* was decided in circumstances where, a practice note in the relevant statutory regime provided that if the appellant objected to the review being conducted on the papers, the Review Panel would "*generally*" conduct a re-examination: at [130]. Sackville AJA (with whom Macfarlan JA agreed) held that, in those circumstances, the authority's failure to inform the Review Panel that the appellant insisted on a re-

examination resulted in practical injustice: at [132] and [101]. Also, the Review Panel was (due to oversight) not made aware of the plaintiff's request for an examination. That was said to have resulted in two kinds of error: (a) constructive failure to exercise jurisdiction; and (b) a breach of procedural fairness.

In *Boyce* the Court was satisfied that there was a constructive failure to exercise jurisdiction because the Review Panel could not have validly exercised its discretion about whether or not to undertake an examination on a false premise (that the plaintiff did not seek it). However, in this matter, the MAP was aware of the request for re-examination but decided that there was no established basis for acceding to it.

Her Honour noted that the Court of Appeal considered "*demonstrable error*" within the meaning of s 327 *WIMA* in *Vannini v Worldwide Demolitions Pty Ltd* [2018] NSWCA 324, in which Gleeson JA (Macfarlan JA and Barrett AJA agreeing) stated (at [77]):

> The effect of the statutory scheme outlined above is that the Panel had to determine the appeal brought from the medical specialist's assessment, in accordance with the limitations imposed upon it by that scheme. Commencing with the text, there are two significant limitations for present purposes. First, although the expression 'demonstrable error' is not defined in the Management Act, the use of the qualifying word 'demonstrable' in a gateway provision such as s 327 may be taken as intended to convey the degree of strictness of scrutiny to which the decision of the approved medical specialist may be subjected. In this regard it has been said that error alone is not sufficient and that such an error must be 'material'. Both of those statements accord with the context of the limited right of appeal under s 327.

Her Honour noted that Gleeson JA (at [78]) held that s 327 (3) (d) requires that the error be "*contained*" in the MAC, but stated that there is no express limitation on the material that a MAP can consider when assessing whether the MAC "*contains*" a demonstrable error. His Honour likened the MAP's function in undertaking administrative review by way of rehearing to that undertaken in an appeal by way of rehearing before an appellate court and held that the reasoning and finding of the medical specialist attracts the correctness standard of review by a MAP.

Her Honour concluded that it was open to the MAP to accept what was said in the MAC rather than the unsupported assertions set out in the plaintiff's submissions and that the plaintiff's complaint did not fall within the kind of error that a MAP could correct.

Accordingly, McCallum J dismissed the summons with costs.

WCC – Medical Appeal Panel Decisions

No estoppel in a changing situation – AMS did not err by applying a deduction of 1/10 under s 323 WIMA contrary to the terms of a prior Complying Agreement

Lismore City Council v Elliot [2019] NSWWCCMA 137 – Arbitrator Harris, Dr D Dixon & Dr B Noll – 25 September 2019

The worker injured various parts of his body in the course of his employment with the appellant on 19 May 2003 and 29 November 2005. By way of a Complying Agreement dated 18 March 2008, the worker received compensation under s 66 *WCA* as follows: (1) Injury on 19 May 2003 – 2% WPI (right upper extremity), 5% WPI (cervical spine) and 1.5% WPI (lumbar spine); and (2) Injury on 29 November 2005 – 1.5% WPI (lumbar spine) and 2% WPI (right upper extremity).

In consent orders dated 24 April 2019, the worker discontinued: the allegations of injury to both lower extremities and the left shoulder on 19 May 2003 and 29 November 2005; the allegations of injury on 13 December 2005, and from 1 November 2006 to 1 February 2008; and the claim s 60 *WCA*. The dispute under s 66 *WCA* was remitted to the Registrar for referral to an AMS to determine the degree of WPI of the cervical spine, lumbar spine and right upper extremity (shoulder) as a result of the 2003 and 2005 incidents.

On 17 June 2019, Dr English issued a MAC, which assessed 32% WPI for injuries in 2005 and 0% WPI for injuries in 2003. However, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.*

The appellant argued that the MAC contained a demonstrable error and/or that the AMS applied incorrect assessment criteria because he failed to accept the assessments in the Complying Agreement. It argued that the impairment is '*permanent'* and that the complying agreement and payment of compensation constitutes an estoppel by agreement: *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWWCCPD 7. Further, the complying agreement "*finally and for all time determined the worker's lump-sum compensation entitlement for permanent impairment of the cervical spine, lumbar spine and right upper extremity (shoulder) impairment resulting from the 19 May 2003 injury*": *Di Paolo v Constructions (NSW) Pty Ltd* [2013] NSWWCCPD 8. Therefore, the AMS was obliged to accept the assessments in the complying agreement.

However, the worker argued that the appellant ignored critical parts of the decision in *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWWCCPD 7 (*Roche*), where Roche DP held that the doctrine of estoppel does not apply to a changing position and that the complying agreement cannot apply as the AMS made the determination in 2019.

The MAP rejected the appellant's arguments, which were "*directly contradicted*" by portions of the decision in *Roche.* It stated (citations excluded):

> 25. In *Abou-Haidar v Consolidated Wire Pty Limited* (*Abou-Haidar*) Deputy President Roche stated:
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> > The last point to note (though it was not argued by Consolidated, but may be relevant to future claims) is that there is no estoppel in a changing situation (The Doctrine of Res Judicata by Spencer Bower, Turner and Handley, 3rd edn, 1996, at page 102; *O'Donel v Commissioner for Road Transport & Tramways* [1938] HCA 15; 59 CLR 744; *Dimovski; Hamersley Iron Pty Ltd v The National Competition Council* [2008] FCA 598 at [114] to [116]; *Prisk v Department of Ageing, Disability and Home Care (No 2)* [2009] NSWWCCPD 13 at [55]). A claim for additional lump sum compensation is such a situation.
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> 26. The comments of Deputy President Roche in *Abou-Haidar* were cited and approved by Harrison AsJ in *Railcorp NSW v Registrar of the WCC of NSW*.

The MAP held that the submission that the complying agreement was "*final*" is inconsistent with the High Court's decision in *O'Donel v Commissioner for Road Transport & Tramways* and the Court of Appeal's decision in *Rail Services Australia v Dimovski*. While it accepted that prior agreements "*cannot be ignored*", this does not mean that the AMS is obliged to determine impairment based upon prior awards or that it is otherwise bound by them. That argument is contrary to the express statutory power of the AMS to assess the degree of permanent impairment as a result of an injury under s *326 WIMA.* The AMS correctly noted the prior awards and gave reasons why his opinion differed and there was no error solely because he formed a different conclusion to that contained in the complying agreement.

In any event, the MAP held that the complying agreement did not *"finally and for all time determine the worker's lump-sum compensation entitlement for permanent cervical spine,*

lumbar spine and right upper extremity resulting from the 19 May 2003 injury". A MAP is not bound by the decision in *Di Paolo v Cazac Constructions Pty Ltd* and the nature of the estoppel from that decision is unclear and is not entirely consistent with other Presidential decisions.

Accordingly, the MAP upheld the MAC.

Challenge to AMS' assessments in 3 PIRS categories – Ferguson applied & ground dismissed as "cavilling with ratings" – Employer estopped from denying liability and there was no evidence of a subsequent "novus actus" – Appeal dismissed

Westpac Banking Corporation v Perry [2019] NSWWCCMA 139 – Arbitrator Wynyard, Dr J Parmegiani & Dr P Morris – 30 September 2019

The worker suffered a psychological injury as a result of bullying and harassment at work.

On 14 May 2019, Dr McClure issued a MAC which assessed 22% WPI.

On 11 June 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and it sought to have the worker re-examined by the MAP. It alleged that the AMS erred: (1) in applying the PIRS scale regarding self-care and personal hygiene, social and recreational activities and employability; and (2) by failing to address both a pre-existing condition or alleged subsequent injuries and by failing to consider whether the latter broke the relevant chain of connection between the injury and the assessed impairment.

In relation to ground (1), the MAP held that it was necessary for it to be satisfied that the AMS' assessment was erroneous in one of the ways (to use the reference by Campbell J in *Ferguson v State of New South Wales [2017] NSWSC 887 (Ferguson), namely:* (a) if the categorisation was glaringly improbable; (b) if it could be demonstrated that the AMS was unaware of significant factual matters; (c) if a clear misunderstanding could be demonstrated; or (d) if an unsupportable reasoning process could be made out.

The MAP noted an assumption in the appellant's submissions that findings of fact by an AMS require corroboration by way of evidence or inference. In *Jones v Registrar Workers Compensation Commission* [2010] NSWSC 481, James J stated (at [37]):

> I do not accept that there is a close parallel between the position of an AMS and the position of an expert witness or of a judge deciding which expert evidence he should prefer. An AMS is not a judge or even a lawyer and he acts as both an expert and as the decision-maker.

The MAP held, relevantly:

> 54. It is accordingly erroneous to approach the content of a MAC as if it were a judicial decision. We have already referred to the authorities regarding the task of an AMS. It is a matter for his/her clinical judgement, based on the assessment process that determines the impairment rating awarded. None of the matters referred to in [40] above have been demonstrated in these submissions.

In relation to "*self-care and personal hygiene*", the MAP held that it could not infer that the worker was capable of caring for herself because she was caring for her son's dog. The evidence referred to by the AMS underscored the fact that she was not capable of looking after the dog, as he referred twice to the fact that canine excreta were so offensive that the neighbours were complaining about its presence on the verandah. The AMS also specifically referred to the worker's self-reporting that she did little cooking and relied on her sons or her partner to do the shopping and the evidence showed that she had regular support and that her partner visits over several nights a week to help out. It stated:

> 57. The submissions by the appellant employer amount to no more than a disagreement about the level of impairment assessed in this category. Although it was submitted that the AMS had failed to set out his reasons for the assessment, his reasoning process was clear and well explained, and made in the context of his assessment of Ms Perry in person.

In relation to "*social and recreational activities*", the appellant asserted that the fact that the worker does out to lunch with her partner once a week and visited her father in his care facility meant that the AMS had fallen into error. It also argued that her inability to engage in physical activity was due to a physical condition and that there was no corroboration for the AMS' conclusions.

The MAP rejected the appellant's arguments and held that there was no evidence that the worker engaged in any of the activities unaccompanied and in the context of the behavioural consequences described by the AMS and other medical specialists, there was no suggestion that the worker's psychological condition was independent of her inability to partake in her former physical activity. It also held that the AMS had been "most thorough" in considering the evidence before him and that he went to some trouble to explain his opinion.

In relation to "*employability*", the AMS found that the worker was totally impaired. The MAP stated:

> 71. The appellant employer conflated the term "presently unemployable" with the ability of Ms Perry to obtain employment "on the open labour market." We are with respect unable to understand the purpose of this submission. There did not appear to be any relationship between the comments by the AMS and employment on the open labour market. The comments by the AMS were unambiguous that Ms Perry is presently unemployable, either in paid work in voluntary employment.
>
> 72. The appellant employer also submitted that the AMS had fallen into error in not directing his reasons to the contrast in Ms Perry's employability up to at least 14 June 2017 whilst still suffering from the effects of the current injury, and her current status.
>
> 73. It was further submitted that the failure by the AMS to address that subject when Ms Perry has not been exposed to the continuing stress of her work was a failure to provide adequate reasons.
>
> 74. These submissions are also rejected. They appear to cast a blind eye to the evidence which shows a steady deterioration in Ms Perry's condition, consistent with the description by the AMS in his summary that the applicant's symptoms of anxiety and depression with constant worry, headaches, muscle aches and tension, rumination and panic attacks have been progressive in their development.

In any event, Ch 1.6a requires that a worker be assessed as they present on the day of assessment taking into account relevant medical history and all available medical information. The AMS opined that as she presented on 30 April 2019, the worker was totally unemployable and that was the assessment required under the guidelines. Further, the steady deterioration in the worker's condition has been well documented in the evidence that was before the AMS.

In relation to ground (2), the MAP noted that the appellant alleged an error by the AMS regarding causation and asserted that the AMS should have made a deduction under s 323 *WIMA* and should also have found that the worker's subsequent employment had such an effect on her psychological condition that it constituted a novus actus interveniens.

The MAP rejected this ground of appeal and stated, relevantly:

> 89. In the preamble to its grounds of appeal, the appellant employer noted that the proceedings in the Workers Compensation Commission were resolved on 14 June 2017 where it was accepted that Ms Perry had suffered a psychological injury in the course of her employment.
>
> 90. It related that a claim for s 66 compensation was then made, which was disputed in a s 74 notice dated 22 August 2018 which alleged that the psychological condition suffered by Ms Perry was entirely attributable to her pre-existing non-compensable condition, adopting Dr Vickery's opinion.
>
> 91. This assertion was an allegation denying liability. That allegation does not sit well in the face of the contents of the referral we have reproduced above, which as a matter of practice is distributed to the parties prior to the medical assessment. There was no evidence of any objections made by the appellant employer to the matter proceeding and it must accordingly be accepted that the appellant employer is now estopped from claiming that it was not liable.
>
> 92. There was no evidence that the appellant employer had sought to revisit its acceptance of liability of 14 June 2017.
>
> 93. We do not, with respect, regard the opinion of Mr Lai as having any weight. In the first place, he made no comment as to whether the background which he was describing was a relevant prior condition. Secondly, he gave no opinion as to whether, if he found in the affirmative, that prior condition contributed to Ms Perry's current impairment. Thirdly, even if he had, he did not possess the qualifications to make such an assessment.
>
> 94. It is correct that Dr Vickery assessed a 100% reduction pursuant to s 323, but the "prior condition" which was responsible he considered was the systemic disorder of fibromyalgia. The effect of his finding within the context of his opinion as to causation is that there never was an injury caused by Ms Perry's employment history.
>
> 95. The only qualified expert who gave a considered opinion was Dr Canaris, who found there was no relevant prior condition. The AMS concurred. We find no error in him having done so.
>
> 96. We also reject the submission that there had been a subsequent novus actus. No particulars were given regarding the evidentiary base for that assertion. As indicated, the AMS considered that proposition at paragraph 8g of the MAC and we find no error in his finding that there was no subsequent injury that contributed to the assessed impairment.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Claim for aggregation of 3 injuries assessed by AMS on the basis that the first injury materially contributed to the later 2 injuries – AMS directed to apportion between the 3 injuries – Argument rejected & award for the respondent entered

Ozcan v Macarthur Disability Services [2019] NSWWCC 310 – Arbitrator Wynyard – 23 September 2019

The worker claimed lump sum compensation for permanent impairment of her lumbar spine, thoracic spine, cervical spine, right upper extremity and a consequential gastrointestinal disorder as a result of injuries on 14 November 2011, 3 May 2012 and 26 September 2012.

On 15 May 2013, the insurer disputed the claims for compensation for injury to the cervical and lumbar spines on 3 May 2012 and on 21 July 2016, it also disputed a claim for injury to the back (thoracic spine) on 3 May 2012. On 12 February 2019, it disputed the allegations of injury to the cervical and lumbar spines and right upper extremity (shoulder) on 14 November 2011, 3 May 2012 and 26 September 2012, and asserted that the assessments of permanent impairment could not be aggregated under s 322 *WIMA.*

Arbitrator Burge conducted an arbitration hearing on 17 April 2019. He issued a COD, which remitted the dispute to an AMS to determine the degree of whole person impairment as follows: (1) Injury on 14 November 2011 – lumbar, thoracic and cervical spines, right upper extremity (shoulder) and upper digestive tract; (2) Injury on 3 May 2012 – lumbar and thoracic spines and upper digestive tract; and (3) Injury on 26 September 2012 – lumbar and thoracic spines and upper digestive tract. The AMS was also directed to apportion the impairment with respect to the lumbar and thoracic spines and upper digestive tract between the 3 dates of injury.

On 7 June 2019, Dr Berry issued a MAC that assessed combined 15% WPI. The matter was then referred to ***Arbitrator Wynyard,*** to make final orders and determine the claims for weekly payments and s 60 expenses.

The insurer disputed that the worker was entitled to compensation under s 66 *WCA* based upon the combined WPI assessment and the Arbitrator conducted further hearings regarding this dispute.

On 19 August 2019, ***Arbitrator Wynyard*** issued consent orders for weekly compensation and made a general order under s 60 *WCA.* In relation to permanent impairment, he stated:

> 18. The AMS found there was no impairment caused by injury to the cervical spine or to the upper digestive tract. He explained his assessment as follows:
>
> > …The right shoulder injury occurred in the first accident and was not contributed to by the second two accidents which is 3% and the 12% for the two back injuries is apportioned in all three accidents giving the claimant 7% for the first injury and 4% for the second injury and 4% for the injury.
>
> 19. The formal Medical Assessment Certificate was that there had been 3% WPI caused by injury to the right shoulder, 5% WPI to the thoracic spine and 7% WPI in relation to the lumbar spine.
>
> 20. In relation to the spinal injuries, the AMS divided the impairment equally between the three dates of injury, so that 4% was ascribed to the injury of 14 November 2011, 4% to the injury of 3 May 2012 and 4% to 26 September 2012.

The worker argued that the MAC conclusively presumed that she was suffering from 15% WPI and that when s 322 *WIMA* is properly applied, the degree of permanent impairment can be seen to have resulted from the injury on 14 November 2011. Section 322 (2) *WIMA* allows impairments to be assessed together when they result from the same injury, but s 322 (3) provides for impairments that resulted from more than one injury to be assessed together where the injuries arise out of the same incident. The worker argued that the injurious event on 14 November 2011 involved the thoracic spine, the lumbar spine and the right upper extremity and that "*the same incident"* could also be determined as meaning "*the injurious event*". The later incidents also contributed to the injury and it could not be asserted that either of the later injuries were '*novus actus interveniens*'. Further, there was no conflict with the principles concerning aggregation in *Department of Juvenile Justice v Edmed,* because they applied in circumstances to which s 322 (2) *WIMA* were directed, and the circumstances in this matter are governed by s 322 (3) *WIMA:* see *Aboushadi.*

However, the respondent argued that this is not a causation case and that as the evidence indicates that there was no injury to the spine in 2011, combining the subsequent incidents with that event was not possible. In relation to *Edmed,* there could be no aggregation because the pathologies differed. Further, the AMS was not asked to combine the impairments and he acted beyond power in so doing so. Therefore, the provisions of s 326 *WIMA* do not apply to the combined total of 15% WPI.

The Arbitrator stated, relevantly:

> 69. However, whilst the principle of material contribution will establish a causal connection between two injurious events, it is not concerned with the calculation of whole person impairment itself. In both *Johnson* and *Nicol* there was no dispute as to the pathology involved, namely a psychological/psychiatric condition, so there was no need to discuss the application of s 322…
>
> 71. The provisions of Part 7 of Chapter 7 of the 1998 Act are concerned only with the medical assessment of whole person impairment for the purposes of the application of the 1987 Act regarding payment of lump sum. Under s 326 (2) an opinion by an AMS on issues not defined under s 326 (1) is not binding.

The Arbitrator held that there are some practical difficulties standing in the path of the worker's approach. Firstly, an AMS is bound by the terms of his referral. As can be seen, he was not asked to combine the assessments he made in respect of each matter that was referred to him. Secondly, each matter was described as an "injury." Thirdly, each matter was described as: Date of Injury 1 - 14 November 2011, Date of Injury 2 - 3 May 2012 and Date of Injury 3 - 26 September 2012. Fourthly, the AMS was "directed" to apportion the impairment resulting from the "three separate dates of injury." Therefore, the AMS' opinion regarding the combined value was beyond his remit and it is not a binding opinion and does not reflect the parties' intention when consent orders were made on 17 April 2019.

The Arbitrator stated that the MAC conclusively proves that on 21 May 2019, the worker was suffering from the following WPI: 3% in respect of the injury to the right upper extremity; 5% in respect of the thoracic spine; and 7% in respect of the lumbar spine. He was also satisfied that the AMS' finding that each date of injury contributed to the WPI regarding the thoracic and lumbar spine, in the proportion of 4%, or one third, must conclusively be presumed correct. He held, relevantly:

> 80. The MAC is conclusively presumed to be correct as to the degree of permanent impairment of the worker as the result of "an injury" pursuant to s 326 (1) (a). Pursuant to the terms of the referral, the AMS was obliged to assess the degree of permanent impairment of the worker as a result of three injuries, 14 November 2011, 3 May 2012 and 26 September 2012.

81. Those are the limits of the presumption that the assessment is conclusively correct. Those then are the assessments that have to be the subject of my orders.

82. There is no conclusive evidence before me that the combined value of the three assessments is binding, as s 325 (1) requires an AMS to give a MAC "as to the matters referred for assessment." The AMS was not asked in the referral to assess the combined value of the three injuries referred to him…

86. The difficulty with Mr McManamey's argument that the principles of aggregation in *Edmed* were concerned only in situations where s 322 (2) applied, is that in *Edmed* itself, the ratio decidendi is not that restricted.

87. Whilst the interpretation by DP Roche of section 322 (3) accepted that impairments resulting from the same injury could be assessed together regardless of whether they arose from the same incident or separate incidents, nonetheless, applying the learned DP's definition to the word "injury" of "pathology", impairments can only be assessed together that result from the same "pathology" in situations where, as in this case, they arise from separate incidents.

88. The reasons given by the AMS for the apportionment of the spinal injuries were perfunctory and without explanation. It may be that a further examination of the evidence would justify a reassessment. However, that is not a matter for me, as the provisions of section 326 (1) compel me to apply the assessment certified.

Accordingly, the MAC conclusively proves that:

(a) For the injury on 14 November 2011, the worker suffered 3% WPI in relation to the right shoulder and 4% in relation to the thoracic and lumbar areas of the spine. These pathologies arose out of the same incident and can be assessed together pursuant to s 322 (3), giving an entitlement of 7% WPI;

(b) For the injury on 3 May 2012, the worker suffered a 4% WPI in relation to the thoracic and lumbar areas of the spine; and

(c) For the injury on 26 September 2012, the worker suffered a 4% WPI in relation to the thoracic and lumbar areas of the spine.

The Arbitrator held that he could not determine the nature of the injury to the thoracic spine on 14 November 2011, and that he could not make any determination regarding aggregation. As entitlements resulting from the different dates of injury could not be assessed together, the worker failed to meet the threshold under s 66 *WCA.* He therefore entered an award for the respondent in relation to the claim under s 66 *WCA* and made a general order for payment of s 60 expenses.

The Applicant (a contestant on a reality TV show) suffered a psychological injury due to deteriorating relationships within the alleged workplace and the way that the respondent portrayed her on social media - Held: the applicant was a worker (and/or a deemed worker) and her employment was both the main contributing factor and substantial contributing factor to the injury.

Prince v Seven Network (Operations) Limited [2019] NSWWCC 313 – Arbitrator Burge – 25 September 2019

The worker claimed weekly payments, s 60 expenses and lump sum compensation for permanent psychological impairment as a result of an injury (deemed date: 17 May 2017). However, she discontinued the weekly payments claim at the arbitration hearing.

On 11 September 2016, the worker and Fiona Taylor applied as contestants for the respondent's TV program – "House Rules". Over the next 2 to 3 weeks, they filmed some pieces to camera, had promotional photos taken, attended a physical and psychological assessment and were advised that they had been selected for the show. In early November 2016, they attended a briefing in Sydney with all of the other teams. She signed an agreement and release that was prepared by the respondent, under which she was to be paid $500 per week with a further allowance of $500 per week during her time as a contestant on the show.

The worker alleged that she was fit and healthy when she commenced on the show, but that she injured her lower back, right hip and left leg as a result of a fall while filming. However, she did not pursue these physical injuries in the WCC proceedings.

On 23 November 2016, the respondent advised the worker and Ms Taylor that they would be moving to Ararat for the night. They arrived at the location and advised the respondent that the Motel was dirty and mouldy and that Ms Taylor has an anaphylactic allergy to mould. They asked to be moved and they were moved, but were told that this would not happen again.

On 26 November 2016, the contestants moved to Sydney and they arrived on set on 1 December 2016. They were isolated from the other couples. The worker said that she felt harassed and bullied during the filming and this continued throughout all of the renovations. It was not only condoned by the producer, but it was aggravated even encouraged by them. During every camera interview both herself and Fiona complained on film that they were being subjected to isolation, bullying and harassment by the other teams. On one occasion, she witnessed Fiona being physically assaulted and when she complained to Channel Seven, she was threatened that she and Fiona would be portrayed negatively. True to their threats, Channel Seven portrayed them as bullies in the episode (edited by Channel Seven) featuring their team that went to air on or around 17 April 2017. After that episode was aired, she was subjected to online abuse on the Channel Seven Facebook page, including receiving threats of serious physical assault and she had feared for her safety ever since. Since then, she had been unable to obtain work and had been informed that this was due to how she was portrayed as a bully. She is no longer offered interviews for jobs and work, but before her work injury she did not have any trouble obtaining interviews and successfully getting work. She felt devastated and worthless about the loss of her career and working life. Following the airing of that episode, she wanted to kill herself and she started drinking more alcohol in an attempt to self-medicate.

The worker stated that she feels anxious about leaving her home for fear of being recognised by people and that has regular incidents of negative reactions from complete strangers. She experiences flashbacks of the workplace conflict and is also concerned about exposure to asbestos during the renovation in New South Wales, which was part of the production and program. She felt nauseous when faced with reminders of the show. She also stated:

> As soon as Fiona and I entered the studio for the scoring of the teams' work we could see and feel the hatred from the other teams. We did not understand where all of it was coming from. We discovered months later that the "reveal footage" that was shown to the other teams only contained our negative comments about their renovation work and none of the positive things that we had said. They later told us that they had felt hurt and upset that we didn't seem to care how hard they had worked, and they thought we were the nastiest people on the planet.

The worker alleged that the respondent's portrayal of her continued with the media releases. They were required to do phone interviews and she was once interviewed by New Idea and was asked why they gave other teams such low scores. She replied that they did not do so and that all of their scores - except one - were the same or higher than those of the judges, but New Idea printed that they had been mean and scored all of the other teams low.

On 5 May 2017, the worker gave notice of her psychological injury to the respondent, but it disputed the claim and alleged that she was not a worker or deemed worker, she did not suffer a psychological injury arising out of or in the course of employment and that employment was not a substantial contributing factor to any alleged injury.

Arbitrator Burge held that the contract between the parties provided that the worker would engage in home renovations, which were the basis for the TV program, and in doing so she not only gave up her time, but had to relinquish her other vocation and even to relocate to where the respondent directed her during the course of filming. It was therefore necessary to consider whether the contract was "one or service", which would make her "a worker", or "one for services", which would make her a contractor.

The Arbitrator identified 4 essential features of a contract of employment, namely:

> (1) There can be no employment without a contract (*Lister v Romford Ice & Cold Storage Co Ltd* [1956] UKHL 6; [1957] AC 555 at 587);
>
> (2) The contract must involve work done by a person in performance of a contractual obligation to a second person (*Abdalla v Viewdaze* (2003) 122 IR 215 at [23]). That is because the essence of a contract of service is the supply of the work and skill of the worker;
>
> (3) There must be a wage or other remuneration, otherwise there will be no consideration (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515); and
>
> (4) There must be an obligation on one party to provide, and on the other party to undertake, work. The obligation required to constitute a contract of employment is that:
>
> > … the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and that the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active. (*Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573; (2004) 144 IR 1 at [91]; see also *Wilton v Coal & Allied Operations Pty Ltd* [2007] FCA 725; (2007) 161 FCR 300 at [162]).

The Arbitrator stated, relevantly:

> 102. The principal criterion remains the employer's right of control of the person engaged but it is not the sole determinant. In more recent times, the courts have favoured looking at a variety of criteria. As Ipp JA said in *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8:
>
> > The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (*Stevens*) (at 36):
> >
> > > [I]t remains the surest guide to whether a person is contracting independently or serving as an employee. (at [54])

The Arbitrator noted that in *Stevens*, the High Court set out a number of relevant indicia that include, but are not limited to: (a) The mode of remuneration; (b) The provision and maintenance of equipment; (c) The obligation to work; (d) The timetable of work and provision for holidays; (e) The deduction of income tax; (f) The right to delegate work; (g) The right to dismiss the person; (h) The right to dictate the hours of work, place of work and the like, and (i) The right to the exclusive services of the person engaged. He stated that the task of identifying who is a "worker" by applying the indicia is not always straightforward.

The Arbitrator referred to the matter of *Hollis v Vabu Pty Ltd,* in which the High Court upheld the worker's claim and found that too much weight had been placed on the fact that bicycle couriers (such as Mr Hollis) owned their own bicycles. They had little control over the manner of performing their work and, looking at the relationship as a whole, it should properly be characterised as one of employment. He stated, relevantly:

> 108. A decision which usefully explains the process of balancing the indicia is *Gerob Investments Ballina Pty Ltd t/as Beach Life Homes v Compton* [2007] NSWWCCPD 180. Mr Compton was a qualified carpenter. For about 35 years he was in partnership with his wife under the name "I L & L S Compton". For 34 of those years he worked exclusively for Beach Life Homes. He did not advertise his services elsewhere, and Beach Life Homes delegated work by way of a purchase order, which set out the nature of the job and a fixed price. That company also supplied all materials (except nails which Mr Compton bought and for which he was later reimbursed). At the conclusion of the job, Mr Compton submitted an invoice that included GST. He paid his own tax and had his own ABN…
>
> 111. Specific findings made by the Arbitrator and confirmed on appeal were:
>
> > (a) The right to set the commencement date and finish date for a project and to set remuneration for a project was evidence of ultimate control being vested in the appellant employer;
> >
> > (b) Mr Compton's relationship with the taxation office was not determinative of the employment relationship;
> >
> > (c) When looked at in the totality of the arrangement and particularly the evidence that the Beach Life Homes saw the relationship as being with Mr Compton personally, the fact that Mr Compton was in partnership with his wife should be disregarded as an indicator of the form or nature of the employment relationship, and
> >
> > (d) Control alone was not determinative but when taken together with the long-term nature of the relationship and the provision of a uniform, the factors in favour of finding an employment contract outweighed those in favour of an independent contractor relationship.
>
> 112. Whether a contractor is a "worker" requires consideration of all the indicia referred to above. An independent contractor is a person who carries on a business of his own and works under a contract for services. The following are some examples of cases where claimants have been found to be independent contractors, rather than workers.

The Arbitrator also referred to the decision in *Malivanek v Ring Group Pty Ltd* [2014] NSWWCCPD 4 (*Malivanek*), which extensively discussed the law regarding "worker". Roche DP held that Mr Malivanek was not a worker, but that he was a deemed worker. In doing so, he referred to the decision of Broomberg J in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (at [208]):

> That focal point has been elsewhere expressed as the 'ultimate question' posed by the totality approach: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at [34] (referred to with approval by Crispin P and Gray J in *Yaraka Holdings Pty Ltd v Gilgevic* (2006) 149 IR 339 at [303]); and see *Sappideen C, O'Grady P and Warburton G, Macken's Law of Employment*, (6th ed, Lawbook Co., 2009), at [2.80]. As Wilson and Dawson J in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 observed at 35 'the ultimate question' was posed by Windeyer J in Marshall v Whittaker's Building Supply Co Ltd [1963] HCA 26; (1963) 109 CLR 210 at 217, in a passage which the majority in Hollis strongly endorsed at [40]. The majority in Hollis (citing Windeyer J) said, the distinction between an employee and an independent contractor is 'rooted fundamentally' in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee: *Hollis* [39], [40], [47], and [57] and see *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 161 at [30]-[32]. The English courts have taken a similar approach. There the 'entrepreneur test' seems to be the dominating feature: *Selwyn NM, Laws of Employment* (2006) Oxford University Press at [2.34].
>
> Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:
>
> Viewed as a 'practical matter':
>
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee. (at [183]).

The Arbitrator found that there was an employment relationship between the parties based upon eleven criteria. However, he also held that that the worker would qualify as a deemed worker under Sch 1 *WIMA* – "Other contractors", as she earned more than $10 per week and the work she carried out for the respondent was not incidental to a trade or business that she normally carried on.

The Arbitrator accepted that the worker was placed in a hostile and adversarial environment in the course of her employment with the respondent. There was conflict between the worker and Ms Taylor on the one part and the other contestants and he accepted that there was editing of footage from the program *"in such a selective manner as to portray them in a certain negative light*". He found that the respondent had the power to edit and control the content of and comments to its social media platforms and that the worker drew the respondent's attention to the comments posted on those pages. He stated:

> 124. I find it extraordinary, in circumstances where the respondent was made aware by the applicant of hateful comments posted on its social media platforms, that it did not take steps to either remove those comments or to close the comments on its own posts. The failure to do so represents, in my view, a factor to which the applicant has reacted and which has contributed to her injury…

126. In summary, there is nothing contained within the lay evidence of the respondent which suggests the conflict and tension in the workplace to which the applicant refers did not take place, or that it was in anyway not real. Regardless of any notion of fault on the part of the respondent (or indeed any other party), the breakdown in the applicant's relationship with other contestants, together with the impact of her portrayal on television and social media, in my view explains the onset of her psychological injury.

127. In my opinion, the respondent's lay evidence that the other contestants regarded the applicant as a bully is itself indicative of the break down in the relationships on the set of the show which I accept were, along with the editing of the program and social media posts, the main contributing factor to the onset of the applicant's injury.

The Arbitrator concluded that the worker's employment with the respondent was a substantial contributing factor and the main contributing factor to the injury. He made a general order for payment of s 60 expenses and remitted the s 66 dispute to the Registrar for referral to an AMS.

Multiple back injuries with same employer (before and after 1 January 2002) – Parties consented to a referral to an AMS to assess WPI for 2 injuries after 1 January 2002 and that the injuries were to be assessed together – AMS assessed only one impairment – Dispute concerning calculation of the s 66 entitlement Held: s 66 entitlement must be calculated by reference to the maximum figure at the later date of injury applying the two-step process in Sutherland Shire Council and liability for the payment must be apportioned between the injuries.

Alphenaar v Wollongong City Council [2019] NSWWCC 311 – Arbitrator Dalley – 25 September 2019

The worker received compensation under s 66 *WCA* for injuries to his back on 29 April 1996 and 25 May 1999. He suffered a further injuries to his lumbar spine in 2003 (he received compensation for 3.5% WPI) and on 16 March 2016. On 11 November 2016, he underwent spinal fusion at the L5/S1 level.

On 28 August 2017, Associate-Professor Hope assessed 25% WPI (lumbar spine), but after deductions for the pre-2002 injuries, he assessed 12% WPI for the 2003 injury and 5% WPI for the 2016 injury. The insurer disputed the claim under s 66 *WCA* based upon assessments from Dr Wilcox and the dispute was referred to an AMS for assessment of WPI regarding the injuries in 2003 and 2016. The parties agreed that the impairments could be assessed together.

However, Dr Noll issued a MAC that assessed 18% WPI, comprising 22% WPI less a deduction of 1/5 under s 323 *WIMA.*

The respondent sought a determination of liability with respect to the 2003 and 2016 injuries under s 22 *WCA* and argued that the appropriate award under s 66 *WCA* must be made based upon that apportionment. However, the worker argued that he was entitled to compensation as if the impairment resulted from the 2016 injury.

Arbitrator Dalley noted that in *Department of Juvenile Justice v Edmed*, Roche DP held that "*the same injury*" in s 322 (2) *WIMA* refers to the pathology resulting from separate injurious events and that this interpretation has been accepted in a number of Presidential decisions. He also noted that the parties agreed that an assessment of 18% WPI for injury on 16 March 2016 would, prima facie, entitle the worker to $45,213 under s 66 *WCA.*

The worker argued that he is entitled to an award of $40,838 ($45,213 - $4,375 (previous award for the 2003 injury)).

However, the respondent argued that the award should be apportioned between the 2003 and 2016 injuries, by determining the degree of WPI applicable to both injuries, calculating the appropriate payment under the Guidelines at their respective dates and then adding those awards to determine the appropriate payment. Alternatively, it argued that the total impairment should be apportioned between the injuries based upon the evidence. If its first approach is adopted, the appropriate apportionment would be determined based upon Associate-Professor Hope's opinion (12% WPI for the 2003 injury and 5% WPI for the 2016 injury). Based upon its second approach, and adopting that opinion, liability would be apportioned 12/17 to the 2003 injury and 5/17 to the 2016 injury and payment would be calculated for the resulting impairments based upon the dates of injury, with an appropriate adjustment for the payment already made.

The Arbitrator stated:

> 23. For the reasons set out by Neilson J in *Sidiropoulos v Able Placements Pty Ltd* (*Sidiropoulos*) I accept the submission of the applicant that section 322 of the 1998 Act and section 22 (1) of the 1987 Act create a single impairment and the applicant is entitled to be compensated pursuant to section 66 at the date when the final injury to the affected body part occurs…
>
> 25. Neilson J referred to the decision of the Court of Appeal in *Sutherland Shire Council v Baltica General Insurance Co Ltd (Sutherland Shire Council)* where Clark JA said (Priestley JA and Hunter A-JA concurring);
>
> > Liability here to pay compensation for death or incapacity is, relevantly, created by ss25 and 33. It arises when incapacity results from an injury or from more than one injury. It is not expressed to arise when incapacity partly results from an injury. Yet s22A(2) speaks of a liability to pay compensation arising from more than one injury and, by virtue of the extended definition, that must include the situation where incapacity results partly from one, and partly from another injury. In this way, the terms of s22A(2) may be thought to widen the tests in ss25 and 33. I do not think that they do. No amendment was made to either s25 or s 33. The test of causation "results from" has not been altered in those sections and it is inconceivable that the legislature intended that it be altered. The better view, in my opinion, is that the test of causation remains as it was and s22(1A) is limited in its operation to the widening of the meaning of the expression "results from more than one injury" where it is found in the Act. Where that expression appears in s22A(2), it is to be understood in the wider sense so that apportionment may be carried out in cases of deemed incapacity. The subsection does not, however, qualify the test of causation in ss25 and 33. It follows that I agree with Burke CCJ's conclusion that a trial judge's initial task is to determine the liability of an employer or employers to pay compensation to a worker. If the worker satisfies the test in the case where are a number of work injuries and apportionment is sought, the trial judge is then to apply the s22 test and that test will be satisfied if the incapacity resulted partly from one injury (presumably the injury which led to the finding under s 33) and partly from another or other injuries. While, therefore, I disagree with Burke CCJ in his description of the primary test of causation, I do agree with his view that there is a two-stage process when apportionment is sought.

The Arbitrator held that neither the amendments to *the WCA* nor the introduction of the *WIMA* has altered that position with respect to the facts in the current matter. A further claim in respect of the 2003 injury is permitted by the *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015* and aggregation of the respective impairments is permitted by s 322 *WIMA*.

The Arbitrator held that the worker suffered a single impairment to the lumbar spine as a result of the injuries in 2003 and 2016 and that s 322 *WIMA* and s 22 *WCA "…require the Commission to determine the payment by reference to the degree of impairment established in respect of multiple injuries applied to the relevant maximum sum available as at the last date of injury, that is when the later of the two causative events has occurred and the assessed aggregated level of impairment is reached."* It follows from the decision of Clark JA in *Sutherland Shire Council* that "*the Initial task is to determine the liability of an employer or employers to pay compensation to a worker.*" No apportionment is involved in arriving at the amount of compensation to be paid. Apportionment is the second step in the process of applying s 22 and it does not alter the quantum of the payment, which is determined by reference to the last date of injury.

The Arbitrator concluded that the issue of apportionment must be considered based upon the whole of the evidence. He determined that 1/3 of the total 18% WPI was due to the 2003 injury and 2/3 was due to the 2016 injury and he awarded the worker $40,838 under s 66 *WCA,* comprising $45,213 less the previous award of $4,375.

WCC is not a Court of a State and due to s 75 of the Constitution it does not have jurisdiction to hear an action between individuals who are residents of different states – Leave granted to the applicant to substitute the Workers Compensation Nominal Insurer as the respondent

Khalil Bilal v Joseph Haidar [2019] NSWWCC 312 – Arbitrator Harris – 25 September 2019

The applicant alleges that on 29 July 2006, he suffered an injury while employed by the named respondent. He filed an ARD claiming weekly payments, s 60 expenses and lump sum compensation under s 66 *WCA.*

The respondent denied liability and quantum and issued notices under ss 74 and 78 *WIMA*, respectively, on grounds that included that the claim was not made within the time limits proscribed by ss 254 and 261 *WIMA* and that the applicant was not a worker.

On 23 August 2019, the Commission issued a direction to the parties, noting that the ARD indicated that the parties may be residents of different states and requesting that the legal representatives address the following matters at the teleconference:

> 1. Whether any determination by the Commission would be in breach of s 75(iv) of the *Commonwealth of Australia Constitution Act, 1900* (see *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254) as the Commission is not a Court (see *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* [2003] NSWCA 146).
>
> 2. Whether it is appropriate in these circumstances to join the insurer as a respondent to the proceedings: see *Civil Liability (Third Party Claims Against Insurers) Act, 2017 (NSW).*

During the teleconference, the parties agreed that they were "natural" persons who resided in different states of the Commonwealth and that the Nominal Insurer should be substituted as the respondent. The Arbitrator stated that this was necessary because s 71 of *the Constitution* provides that the judicial power of the Commonwealth shall be vested in the High Court, such other federal courts created by Parliament and in such other courts invested with federal jurisdiction. Section 75 of *the Constitution* is headed "Original Jurisdiction of the High Court" and provides:

In all matters:

…(iv) between states, or between residents of different states, or between s State and a resident of another state;

… the High Court shall have original jurisdiction.

Further, s 77 of *the Constitution* provides:

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

Section 39 (2) of the *Judiciary Act, 1903 (Judiciary Act)* provides that courts of a State are invested with federal jurisdiction in some matters in which the High Court has exclusive jurisdiction. The matters in which the High Court retains exclusive jurisdiction is not relevant to the facts of this case. By reason of s 39 (2) of the *Judiciary Act,* courts of a State may determine matters between residents of different States.

However, the Commission is not a court*: Orellana-Fuentes v Standard Knitting Mills Pty Ltd; Mahal v State of New South Wales (No 5)* and as a member of a tribunal, the Arbitrator cannot make a determination of issues of interpretation of the Constitution: *Attorney-General of New South Wales v Gatsby (Gatsby)*. The Arbitrator stated, relevantly:

19. "Residents" in s 75 (iv) of *the Constitution* has been interpreted by the High Court to mean an individual and not a corporation: *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe*.

20. "Matters" as defined in s 75 (iv) of *the Constitution* means the determination of legal disputes between residents of different States: *Burns v Corbett (Burns).*

21. As the plurality stated in *Burns*:

> The effect of these provisions of the *Judiciary Act* is that the exercise by a State court of adjudicative authority in respect of any of the matters listed in ss 75 and 76 of *the Constitution*, including matters between residents of different States, is an exercise of federal jurisdiction. As was explained in *Baxter v Commissioners of Taxation (NSW):*
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> > The result is that the jurisdiction of the State Courts is now derived from a new source, with all the incidents of jurisdiction derived from that new source, one of which is an appeal in all cases to the High Court.

22. Accordingly, a tribunal which is not a "court of a State" within the meaning of s 77 (iii) of *the Constitution* cannot exercise the judicial power of the Commonwealth: *R v Kirby; Ex parte Boilermakers' Society of Australia*.

23. For these reasons, there is no doubt that the issue raised in *Gatsby* is similar if not identical to any matter before the Commission where the parties are both natural persons and residents of different States.

24. The question of absence of jurisdiction in this limited circumstance has not previously been argued in the Commission. However, there is no reason why the principles articulated in Gatsby do not apply to matters before the Commission where the dispute is between individuals, who are residents of different States. Whilst s 105 of *the 1998 Act* provides that the Commission otherwise has exclusive jurisdiction to

determine all matters arising under *the 1987 Act* and *the 1998 Act*, the exclusive jurisdiction provided under an Act of the New South Wales Parliament cannot override the express limitation in s 75 of *the Constitution*.

As to whether the Nominal Insurer can be substituted for the respondent, the Arbitrator held that the clear purpose from the broad power provided by s 4 of the *Civil Liability Act* (*the CL Act*) is to provide a simple mechanism for recovery directly against insurers. The express terms in s 11 specify that the *CL Act* is in addition to powers exercisable under *the 1987 Act*. However, the *CL Act* repealed and replaced s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946, which* was described by Kirby P (as his Honour then was) in *Oswald v Bailey* as an "*unusual statutory provision*" which its "*very uniqueness … speaks against a narrow construction*." In my view the provisions of the *CL Act* warrant a similar description. He stated:

> 44. The provisions of the *CL Act*, based on the text, context and purpose, clearly establish that the Commission may grant leave to substitute an insurer and allow the worker, if otherwise entitled to compensation under the *1987 Act* and/or the *1998 Act*, to recover directly against the insurer.
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> 45. It is appropriate and necessary to grant leave to the applicant to substitute the Nominal Insurer as the respondent. Absent such leave, the Commission does not have jurisdiction to determine the issue and the resolution of the applicant's entitlements cannot be determined in any other tribunal or court.
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> 46. In addition, paragraphs 5 and 11 of Schedule 3 of the *2016 Regulation* provide a further basis in which proceedings can be brought directly against the insurer.
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> 47. In *Burns* the High Court held the provisions of an Act which purported to provide a tribunal with powers of a court are invalid to "the extent that they purport to confer State judicial power with respect to subject matters identified in ss 75 and 76 of *the Constitution*."
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> 48. The *CL Act* and the *2016 Regulation* do not provide the Commission with judicial power on the subject matters identified in ss 75 and 76 of *the Constitution*. They allow an action to be brought for recovery directly against an insurer. Rather than providing judicial power to a tribunal contrary to the Constitution, these provisions provide a means of recovery directly against a corporate insurer.
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> 49. For these reasons, I do not believe that the grant of leave substituting the Nominal Insurer, offends the provisions of the Constitution.

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