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:

Supreme Court of NSW Decisions

Amended Statement of Claim not materially different from that in the pre-filing statement – Application to strike out Amended Statement of Claim dismissed

Sohailee v City Projects & Developments Pty Ltd [2019] NSWSC 1452 – Cavanagh J – 18 October 2019

On 23 March 2015, the plaintiff was injured in a work site accident. On 13 August 2019, he filed an amended statement of claim that named 2 defendants (the first defendant was the alleged builder and developer and the second defendant was his employer). On 18 September 2019, the second defendant applied to strike out the amended statement of claim under r 14.28 of the *Uniform Civil Procedure Rules 2005* ("*UCPR*"), because the particulars of negligence pleaded against it were new, or materially different from the statement that was served with the pre-filing statement and it offended s 318 (1) *WIMA.* It also argued that the amended statement of claim disclosed no cause of action or other case appropriate to the nature of the pleading, or has a tendency to cause prejudice, embarrassment or delay in the proceedings or is otherwise an abuse of process of the Court.

Cavanagh J stated that the parties proceeded on the basis that the Court should determine whether the particular matters complained of offend s 318 *WIMA* at this time rather than just consider the application on the basis of an arguable case. His Honour felt that if he acceded to the application, the appropriate course would be to strike out only those particulars of which the second defendant complains. He considered s 318 *WIMA* and referred to authorities including *Petreski v The Ors Group Ltd* [2019] NSWDC 418, in which Abadee DCJ held that "*material*" means "*something that is important, essential or relevant*". However, he noted that regard must be had to the proper principles of statutory construction including applying the words according to the text used, interpreting the words in context and having regard to the purpose of the section: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28. He also noted that in *Hall v Ecoline Pty Ltd t/as Treetop Adventure Park* [2018] NSWSC 1732, Davies J considered s 318 *WIMA* with reference to the employer's assertion that the statement of claim relied upon in the Supreme Court was materially different from the proposed statement of claim that formed part of the pre-filing statement. He held that the alleged mechanism of injury set out in the proposed statement of claim was quite different from the mechanism of injury pleaded in the Supreme Court and that the statement of claim offended s 318 *WIMA.*

His Honour held that the purpose of s 318 *WIMA* is to ensure that the parties properly participate in the pre-filing process required by the Act; that is, the claimant is required to put the defendant on notice of the particulars of his claim and the evidence that the claimant will rely on in support of the claim before commencing a work injury damages claim in court. The expression "*materially different*" must be given its ordinary, natural meaning and must be interpreted in the context in which those words appear having regard to the overall purpose of s 318 (1) (a) *WIMA.* The difference must be material. Whether there is a material difference between the two documents must depend on the facts in each case. He stated:

> 24. There can be little doubt that a pleading of a different mechanism of injury or an accident occurring in substantially different circumstances would be a materially different pleading. A pleading of a different cause of action would be a materially different statement of claim. Further, raising a completely new allegation as to the conduct of the proposed defendant would be a materially different pleading. By that I mean that if the plaintiff asserted that the defendant did or failed to do something not raised at all, either generally or specifically, in the proposed statement of claim then that would be something which is materially different.

His Honour noted that the issue is "*more nuanced*" in this matter as the second defendant only complained that certain particulars of negligence of the amended statement of claim are materially different. He stated, relevantly:

> 26. It may be that in some circumstances new particulars of negligence could fall within the meaning of "*materially different*" in s 318 (1) of the *Workplace Injury Act.* In some circumstances, a comparison of just the particulars of negligence may lead to a finding of material difference. The issue cannot be determined merely with reference to the assertion that they are just particulars of negligence, not that Mr Sleight, who appeared on behalf of the plaintiff, made a submission in those terms.

The issue requires a consideration of the form of those paragraphs with reference back to the proposed statement of claim and then a consideration of whether there is a material difference. It could not be suggested that the second defendant was unaware of the proposition being advanced by the plaintiff from the outset, that is, as part of the pre-filing documents, that the second defendant should have ensured that the wall panels were safely secured. He agreed with the plaintiff's submission that any form of supervision necessarily involves instruction and that the adding of that word does not create a material difference.

His Honour held that the amended statement of claim is not materially different from that set out in the proposed statement of claim. He stated:

> 40. In *Road Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42, the Court emphasised the importance of proper identification of the risk of harm in any negligence pleading. It has been said that in some respects s 5B of the *Civil Liability Act* merely represents a restatement of common law principles.
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> 41. In my view it is always appropriate for a plaintiff to properly plead all of the aspects of negligence which include matters relating to foreseeability and risk of harm. In doing so the plaintiff has not filed a materially different proposed statement of claim. The plaintiff has merely filed a better and more proper form of pleading.

His Honour also held that s 318 *WIMA* does not require the plaintiff to file a statement of claim that is identical to the one filed as part of the pre-filing process, but it cannot be materially different. It may be that the pleader thought it appropriate to adopt the words used in s 5B of the *Civil Liability Act* and it may be that the second defendant viewed those paragraphs as making reference to the *Civil Liability Act* because they appear to come directly from s 5B and there is some reference to that Act in the correspondence. However, they do not create any material difference for the purposes of s 318 *WIMA.* Accordingly, he dismissed the second defendant's notice of motion with costs.

Section 60G of the Limitation Act 1969 (NSW) - Extension of time to commence common law proceedings granted because the plaintiff was unaware of the connection between the personal injury and the defendant's act or omission

Fitzgerald v State of New South Wales [2019] NSWSC 1439 – Harrison AsJ – 23 October 2019

The plaintiff was a Police Officer. On 4 October 2001 he was medically discharged due to diagnoses of PTSD and work-related injuries to the neck and back. From September 2004 to August 2015, he worked part-time as a courier driver, cashier and service officer, but in August 2016, it became too difficult for him to continue to work as his PTSD symptoms interfered with his job performance. He ceased work on medical advice.

On or about 24 July 2015, the plaintiff spoke with his current solicitor about a possible claim against the NSW Police Force ('NSWPF') with respect to his psychiatric injury. He had applied for Hurt on Duty benefits and victims compensation and his previous lawyers advised him that that no other benefits that were available to him. However, his current solicitor provided him with certain documents, including Task Force Alpha Report, Delaforce Report, Jan Westerink Report, Ombudman Report to Police and "Instruction 12", which outlined risks to policing and certain steps that might have been taken by NSWPF to mitigate or avoid injury to police officers. He was not previously aware of them. On 27 November 2015, he instructed his current solicitor to file a Statement of Claim, which alleged that he was exposed to trauma in 1983 (if not before) and repeatedly thereafter and that the NSWPF breached its duty of care to him by failing to implement a safe system of work that would prevent and/or reduce the risk of psychological/psychiatric injury.

The plaintiff alleged that his cause of action accrued from the NSWPF's acts or omissions (the particulars are not included in this report). However, he required an extension of time in which to commence proceedings.

Harrison AsJ noted that the plaintiff relied upon s 60I (1) (a) (ii) of the *Limitation Act 1969 (NSW)* and asserted that he was unaware of the nature or extent of the personal injury suffered, or upon s 60I (1) (a) (iii), and that he was unaware of the connection between the personal injury and the defendant's act or omission. She stated, relevantly:

> 50. Section 60I involves an examination of the plaintiff's knowledge of the three threshold factors set out in s 60I (1) (a), and in particular, that of which the plaintiff became aware last. The statement of claim was filed on 27 November 2015. In this case, the examination under s 60I will therefore focused on the plaintiff's state of knowledge as at 27 November 2012, and the date when the plaintiff became aware or ought to have become aware that he had suffered personal injury, its nature and extent, and its connection to the defendant's act or omission, whichever is the latter (see s 60I (1) (a) (ii) and (iii)). The onus of proof rests upon the applicant: see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; (1996) 139 ALR 1 ("*Taylor*").

The defendant argued that the plaintiff had not demonstrated a prima facie case regarding its alleged failure to devise, institute and maintain a safe system of work so as to avoid his injury and that he had not articulated or established how it could have protected him from the alleged injury. However, her Honour rejected those arguments and, for the purposes of the application, she accepted that the plaintiff has a viable cause of action.

Section 60I (1) (a) (ii)

Her Honour held that the plaintiff did not satisfy this provision, as he was aware of the nature and extent of his injuries by 4 October 2001. The test of knowledge posed by s 60I (1) (a) (ii) requires the Court to look at the plaintiff's actual awareness and neither the reasonableness of that awareness, nor constructive knowledge, is an element: see *Harris v Commercial Minerals Limited* (1996) 186 CLR 1; 135 ALR 353 ("*Harris*") at 359. The nature or extent of the injury must be determined as an objective fact as at the date of the hearing of the application. A plaintiff may be held to have been aware of the nature or extent of his injury within the relevant period if, during that period, he was aware of the effect that the injury was having upon him and of its likely future course (even though he may have been unaware of the precise pathology or medical diagnosis). If a plaintiff was aware that the injury would deteriorate, they she may be aware of the extent of the injury for the purpose of s 60I (1) (a) (ii) even though the injury developed particular consequences that the plaintiff did not precisely foresee. As long as the consequences are of a kind that a plaintiff expects, they will be considered to have been aware of the extent of the injury: see *Harris* at 359.

Her Honour found that the plaintiff's symptoms of PTSD and depressive disorder began to manifest in 1999 and fluctuated in intensity. On 4 October 2001, they were determined to be so severe that they precluded him from continuing to work as a police officer and the NSWPF accepted his application for medical discharge. From November 1998 to July 1999, and then again from April 2001 to August 2004, the plaintiff says that he required about 50 hours assistance per week from his wife. From 2004 until August 2015, he plaintiff enjoyed a period of greater functionality and was able to work as a courier, cashier and service officer. However, in 2015 his condition intensified and it can then be said to have been aware of the effect the PTSD and depression was having upon him and of their cause, even though he did not foresee the likely consequences. If the consequences of the PTSD and depression are of a kind that the plaintiff expects, he is to be considered to have been aware of the extent of the injury: see *Harris* at 359.

Section 60I (1) (a) (iii)

Her Honour found that the plaintiff satisfied this provision and that she held that it was only after 24 July 2015, when he received the documents and legal advice from his current solicitor, that he became aware of the relevant connection between his injury and the defendant's failure to act to prevent it. Before then, he was not aware that he had a cause of action against NSWPF for breach of its duty of care to him. After receiving advice on 24

July 2015, he acted diligently in commencing his case by 27 November 2015, and that as the facts that arose to him in the 3 years before 27 November 2015 differ from those known to him on 4 October 2001, the Court should grant an extension of time. She noted that in *Gillett*, the Court of Appeal stated (at [84]):

> [84] In *Drayton Coal*, Gleeson CJ (Priestley and Meagher JJA agreeing) considered that questions of degree may be involved in determining whether a plaintiff was unaware of the connection between the personal injury and the defendant acts or omissions. His Honour stated, at 7:
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> > …a court may well be confronted with a situation where, before and at the relevant time, the plaintiff was aware of some act or omission on the part of the defendant, and the connection between those acts or omissions and the plaintiff's injury, but not of other acts or omissions upon which reliance will be placed at a trial. The mere fact that plaintiffs' lawyers can think up some act or omission, upon which they will wish to place some reliance at trial, which was not known to the plaintiff at the relevant time, does not automatically mean that the requirements of s 60I (1) (a) (iii) are satisfied. On the other hand, the decision in *Dedousis* establishes that unawareness of a material act or omission; which constitutes a substantial ground upon which reliance will be placed is sufficient to satisfy s 60I (1) (a) (iii).

Accordingly, her Honour held that it was in August 2015 at the earliest, but more likely in September 2015, that the plaintiff became aware of the connection between his PTSD and depression and the defendant's acts or omissions.

Section 60I (1) (b) – Ought to have become aware

Her Honour stated that s 60I (1) (b) of the *Limitation Act 1969 (NSW)* proscribes the Court from making an order under ss 60G or 60H unless it is satisfied that the application is made within three years after the plaintiff became aware, or ought to have become aware, of the three matters listed in s 60 I (1) (a).

The plaintiff argued that the relevant test is whether he took all such action reasonably necessary to find the knowledge: *Commonwealth of Australia v Shaw* (2006) NSWLR 66; [2006] NSWCA 209 ("*Shaw*") per Basten JA. He argued that the defendant ignored his requests for support when he was a police officer and kept him ignorant of the available resources that may have assisted him and his lack of awareness of the matters outlined in s 60I (1) (a) was directly affected by the defendant's failure to disclose this information. He brought his case when he knew to do so and argued that a reasonable man would not think to look beyond the advice of his lawyers, over many years, to ask what else he could do to claim in respect of his injuries.

However, the defendant relied upon the decision in *Pearce v Commonwealth of Australia* [2006] NSWCA 210, in which Basten JA (Handley & Ipp JJA agreeing) held (at [33]):

> [33] So much may be accepted: the critical question is by what criteria a normative judgment should be made as to whether he 'ought' to have taken steps through which he probably would have become aware of the fact that he had suffered an injury. As noted in *Shaw* at [32]-[33], there is some awkwardness in asking whether a person ought to have sought medical treatment, in order to be allowed to bring legal proceedings against the person who may have caused or contributed to the condition from which the person suffers, the relevant criterion being his own responsibility for his continuing ignorance. Factors which might make it inappropriate to conclude that the plaintiff 'ought' to have taken steps which would have resulted in him obtaining knowledge that he had suffered an injury may include, depending on the circumstances:

(i) any known link between the injury and the failure to take such steps;

(j) any conduct of the prospective defendant which may have discouraged the taking of such steps;

(k) particular characteristics of the plaintiff which may have discouraged the taking of such steps; and

(l) the likelihood, in the plaintiff's mind, that such steps would be appropriate for the purpose for which they were taken, which will probably be to obtain advice as to appropriate medical treatment.

The defendant argued that the plaintiff cannot demonstrate any of these factors.

Her Honour held that the plaintiff took all such steps that were reasonable and that he ought to have become aware of the connection between his injury and the acts and omissions of the defendant no earlier than August 2015. On 27 November 2015, the statement of claim was filed, well within the three year limitation period, and the plaintiff satisfied the requirements of s 60I of the *Limitation Act*. She stated, relevantly:

> 93. What steps would a reasonable person, standing in the shoes of the plaintiff, have done after he had been advised in 2001 that no other legal action was available to him? Would he have gone to other solicitors in the ensuing years in the hope that he may have further legal redress? From 2001 to 2015, the plaintiff was able to work and largely cope with the activities of daily living. In these circumstances, a reasonable person would have continued to work and live as he was. Unless there was something to alert such a reasonable person that he may have some further avenue of redress, he would not have any cause to seek legal advice. When the plaintiff's condition deteriorated and he could no longer work, he spoke to Nat. Nat's case was factually and legally different to that of the plaintiff's, and its judgment was handed down in 2012. In other words, Nat's case did not assist the plaintiff.

Section 60G – Just and reasonable

Her Honour held that the Court must consider whether it is just and reasonable to grant the extension of time. In *Taylor*, the High Court considered the nature of the discretion conferred by s 31 (2) of the Queensland Limitation of Actions Act 1974, which is almost identical to s 58 (2) of the *Limitation Act (NSW).* Toohey and Gaudron JJ stated (at [58]):

> The real question is whether the delay has made the chances of a fair trial unlikely. If it has not there is no reason why the discretion should not be exercised in favour of the respondent.

In *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128, Sheller JA summarised the decision in *Taylor* as follows at [119]:

> [119] In my opinion, the effect of the decision of the High Court in *Brisbane South Regional Health Authority* is that an application for an extension of time under limitation legislation should be refused if the effect of granting the extension would result in significant prejudice to the potential defendant.

Her Honour stated that the ultimate test in any such application is whether a fair trial can be conducted despite any delay. In weighing prejudice, its impact upon a fair trial is the primary focus: see *Sydney City Council v Zegarac* (1998) 43 NSWLR 195 at 199. She accepted that after 18 years, memories will have faded and the defendant will suffer some presumptive prejudice in defending the claim, but it has not provided any evidence to establish actual or significant prejudice.

Her Honour held that the plaintiff had provided a full and frank explanation regarding the circumstances that led him to allow the limitation period to expire. The documentary evidence of historical facts and relevant matters will originate from various available sources, including both parties, the insurer, the Superannuation Fund, and the public record, which includes victims compensation claims. There would also be documentary evidence of what occurred during and after the plaintiff performed his police duties and continuous medical records relating to his mental and physical health from 2000 to date and witnesses would be available for cross examination.

Accordingly, her Honour was satisfied that the parties would be afforded a fair trial and that it is just and reasonable to grant the extension of time up to and including 27 November 2015. However, she reserved the question of costs under s 60L of the *Limitation Act.*

WCC – Presidential Decisions

Alleged factual error – weight of evidence – judicial notice in the Commission – worker issues and the totality of the relationship – Hollis v Vabu Pty Ltd & Pitcher v Langford applied

Kekec v Turbo Exhaust Centre Pty Ltd [2019] NSWWCCPD 51 – Deputy President Snell – 22 October 2019

The appellant and Mr Kabaran (owner/director of the respondent) executed a document described as an '*employment contract*' dated 11 August 2014. On 15 August 2014, the Department of Immigration and Border Protection acknowledged the respondent's application for a subclass 457 visa for the appellant, with the respondent as the 'sponsoring employer'. The application described the appellant as having his own company in China, which was set up on 28 May 2009, operating in '*importing and exporting'*. The contract indicated that the appellant's earnings were $AUD98,400 and that his job title and occupation was "importer and exporter". On 30 September 2014, the Department approved the visa.

On 20 June 2015, at around 11:30 pm, the appellant was present in premises occupied by the respondent when an explosion occurred and he suffered serious injuries. The insurer commissioned a factual investigation and the report was issued on 10 July 2015. On 1 September 2015, the appellant claimed compensation from the respondent and described himself as "*working under 457 visa*" and that his usual employment was "*electronics engineer*". However, on 1 October 2015, the insurer disputed the claim under ss 4 and 9A *WCA* and it also denied that the appellant was a worker or deemed worker. It maintained that dispute in a further dispute notice dated 30 October 2015.

On 5 February 2019, ***Arbitrator Isaksen*** entered an award for the respondent. He was not satisfied that the appellant was working under a contract of service for the respondent in regard to any import/export work, notwithstanding that there existed a contract of employment that states that the respondent employed him as an "importer/exporter". He stated:

> 204. In decisions such as *Stevens* and *Connelly* the balance of indicia that was considered for and against a finding of worker proceeded very much on agreed facts regarding the arrangements between the person claiming to be the worker and who that person named as the employer. That has not been the case in this dispute where there are marked differences in the evidence between the applicant and Mr Kabaran regarding what the applicant did at the direction and control of the respondent. I have endeavoured to determine the dispute on what Gleeson CJ, Gummow and Kirby JJ referred to in *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31] "*on the basis of contemporary materials, objectively established facts and the apparent logic of events.*"

205. There is an established fact that weighs against a finding of worker and that is in respect of the first indicia identified by Mason J in *Stevens*, being "*the mode of remuneration*."…

225. I am therefore not satisfied that late on the night of 20 June 2015, when an explosion occurred at 42 Chifley Street Smithfield, the applicant was undertaking work as a worker for the respondent or that he was using his vapour recovery unit to transfer gas from a large gas bottle to a small gas bottle. I find that the applicant did not sustain an injury in the course of employment with the respondent because from my review of the evidence I am not satisfied that, notwithstanding a contract of employment that was entered into between the applicant and respondent, the applicant had entered into or worked under a contract of service with the respondent during the eight months he had been in Australia pursuant to a 457 visa.

The appellant appealed on eighteen grounds of appeal, namely:

(1) The Arbitrator mistook the evidence and erred on the facts by finding that *'I am therefore not satisfied that late on the night of 20 June 2015, when an explosion occurred at 42 Chifley Street Smithfield, the [appellant] …was using his vapour recovery unit to transfer gas from a large gas bottle to a small gas bottle';*

(2) In making the finding complained of in ground 1 the Arbitrator erred on the facts by relying at [143], [144] and [185] upon two entries recorded in RNSH clinical notes by Ms Kathy Leader:

(a) '*On the night of the accident he says he was in his office in the factory ... He says he was preparing his fishing tackle, his wife in the adjoining kitchen when he heard 'bang' – then remembers nothing after that. He says he does not know what caused the accident & neither does his friend*.'(Entry by Ms Leader on 7 July 2015, quoted at [143].)

(b) *'He maintains that he was working on his tackle box when the accident occurred & not working on any equipment. Aware police will come to visit him next week.*' (Entry on 9 July 2015 by Ms Leader, quoted at [144].)"

(3) The Arbitrator made an error of fact in not accepting the contents of the Ambulance Service Retrieval Record.

(4) In making the finding complained of in ground 1 the Arbitrator erred at [220] by:

(a) relying on the fact that SafeWork NSW reported that it could not determine the precise cause of the Conix CS5 vapour recovery unit explosion; and

(b) failing to pay due regard to the clear evidence that the explosion occurred to the Conix unit in the course of transfer of inflammable gas between two acetylene cylinders using the vapour recovery unit equipment set up by the appellant in that part of the factory where the respondent's vehicle exhaust business was normally conducted.

(5) The Arbitrator erred on the facts by failing to take into account the overwhelming evidence, and inferences arising from that evidence, that the explosion occurred while the appellant was quite close to and checking or adjusting the vapour recovery unit which the appellant had set up as the route for transfer of inflammable gas from a large fixed gas bottle to a small empty movement gas bottle, both bottles being equipment used within the respondent's work area in the factory only in the respondent's car exhaust business and not used in the appellant's electronics/LED word [sic, work].

(6) The Arbitrator erred on the facts by failing to find that the objective evidence as to how and where the explosion occurred established that the following version of events on that subject given by the appellant, or else recorded by investigating officers as being given by the appellant, as to where he was and what he was doing when the explosion occurred, his memory of events and his understanding as to how the explosion occurred, were neither true nor accurate:

(a) the appellant's first statement dated 24 July 2015 (quoted at [19]);

(b) the appellant's reported statement to SafeWork NSW investigators on 6 August 2015 (quoted at [44];

(c) the police report dated 20 August 2015 (quoted at [52]);

(d) the appellant's second statement dated 13 October 2015 (quoted at [23]).

(7) The Arbitrator erred on the facts by failing to find that the objective facts as to how the explosion occurred established that the following versions of events given by the respondent, or else recorded by investigators as being given by the respondent, were not true or accurate:

(a) the respondent's statement in respect of the main workshop area that it was not an area that the appellant was permitted to use (respondent's first statement dated 31 July 2015, quoted by the Arbitrator at [90]);

(b) the appellant only worked in his own area and in his own business (respondent's second statement dated 24 July 2018, quoted by the Arbitrator at [92]).

(8) The Arbitrator erred at [48] by disregarding and failing to adequately consider the evidence recorded by the ambulance service (quoted by the Arbitrator at [48] that '*Working with oxy-acetylene gear & one of the bottles exploded'*, and the report by Julie Coggins of Fire & Rescue NSW dated 16 July 2015 (quoted by the Arbitrator at [49]) that '*The woman on site stated he had been swapping gasses but could not provide any further info*.', particularly as the appellant's wife (Ms Shenglan Liu) also confirmed this in her written statement (ARD 439–440). (emphasis in original)

(9) The Arbitrator erred in his consideration of the facts at [175]–[177] by:

(a) concluding, in effect, that the credibility of Mr Kabaran was established or enhanced by the fact that Mr Kabaran co-operated with SafeWork NSW and the police in the investigation; and

(b) by then concluding that because he had so co-operated with the relevant authorities, there would '*therefore appear to be no adequate reason for Mr Kabaran to threaten or compel the [appellant] not to tell the truth and concoct a false version of events to the investigating authorities and the workers compensation insurer*.' (emphasis in original)

(10) When considering whether Mr Kabaran had any motive to persuade the appellant not to tell the truth and concoct a false version of events as to how the appellant suffered injury the Arbitrator erred by failing to have due regard to the statements made by the appellant's wife (quoted by the Arbitrator at [67]–[69]), Mr Akca (quoted by the Arbitrator at [58]–[60]), Mr Gencturk (quoted by the Arbitrator at [61]–[62]) and Mr Yilmaz (quoted by the Arbitrator at [63]–[64], all of which corroborated the appellant's eventual version of events as to how Mr Kabaran had persuaded him to not tell the truth and to concoct his earlier false versions of events.

(11) The Arbitrator erred at [181]–[184] in his further consideration of the evidence of Mr Akca, Mr Gencturk and Mr Yilmaz, and the reasons he gave for disregarding their evidence that Mr Kabaran made various statements at RNSH, in that the Arbitrator placed excessive reliance upon the unrelated question of whether the appellant did or did not have sufficient cognition on 30 June 2015 for these matters to be stated at any stage by Mr Kabaran at RNSH.

(12) The Arbitrator erred in failing adequately to consider:

(a) whether the appellant did give a false version of events as to how the accident happened; and

(b) whether the most likely reason for him doing so was that Mr Kabaran had requested him to do so.

(13) The Arbitrator erred in law by failing to give due effect to the written contract of employment dated 11 August 2014 entered into between the appellant and the respondent and by instead focussing unduly on the traditional indicia that a contract to perform work is a contract of service entered into by an employee, with an employer, rather than a contract for services made between an independent contractor and a principal.

(14) The Arbitrator erred in law by holding at [196] that notwithstanding there being a written contract of employment entered into between the appellant and the respondent, the appellant had not entered or worked under a contract of service with the respondent.

(15) The Arbitrator erred on the facts by failing to hold that:

(a) the appellant's injuries arose in the course of his employment because he was undertaking work for the respondent and at the direction or request of Mr Kabaran, performing work in respect of the respondent's equipment and for the benefit of the respondent; and

(b) the appellant's injuries arose out of his employment as he was injured as a result of being exposed to a risk of injury from an explosion caused by a mishap in the transfer at the respondent's factory of equipment of inflammable gas used in the respondent's business.

(16) When considering whether the appellant was at the time he was injured working pursuant to a contract of employment and in the course of his employment, the Arbitrator erred:

(a) in failing to recognise that it was part of the contract of employment that the appellant would conduct his business for the benefit of his employer, the respondent;

(b) by failing to take into account the unusual 'hybrid' nature of the contractual relationship between the appellant and the respondent, which involved the appellant continuing to perform work in his business for the benefit of both the appellant and the respondent but nevertheless concurrently performing work either concurrently or from time to time as contemplated by the written terms of the contract of employment;

(c) by failing to take into account the operation of the Migration Act 1958 (Cth) and Migration Regulations 1994 (Cth) and the documented requirements imposed by the Department of Immigration in respect of the written contract of employment under which the appellant entered and remained in Australia, and

particularly the respondent's legally binding obligations (out of which the respondent could not lawfully opt) as 'sponsor';

(d) by failing to consider and take fully into account the fact that clause 4 of the written Contract of Employment dated 11 August 2014 expressly provided that 'the employee will agree to reasonable changes in the employee's duties'.

(17) The Arbitrator erred by placing undue reliance on the fact that the appellant did not seek or demand to receive payment of $8,200 per month in that:

(a) the Arbitrator concentrated unduly at [207]–[211] on what the average Anglo-Saxon worker or any other worker would usually expect to receive at specified dates in a conventional employer-employee relationship;

(b) the Arbitrator failed to take into account factors such as the 'contra' or 'off-setting' benefits received by the appellant from Mr Kabaran (on behalf of the respondent) and vice versa, the close friendship between the parties, the appellant's economic vulnerability and dependency on the respondent's continuing goodwill, the power imbalance between the parties, the flexibility with which the parties varied the remuneration arrangements, the below expectations level of their joint import/export activities, the adjustments of work duties and hours tailored to business needs and opportunities, and the temporary cashflow shortage experienced by both parties;

(c) the Arbitrator failed to deal with and accept the appellant's arguments that after the written contract of employment was entered into on 11 August 2014 it was capable of being varied by the parties, and alternatively that it was open to the parties to proceed amicably on the basis that various provisions thereof for the time being would be waived, would not be given effect to, or else not strictly enforced according to their terms.

(18) The Arbitrator erred at [195] in placing excessive reliance upon the fact that the appellant did not provide particulars of any invoices that were provided between October 2014 and 20 June 2015.

Deputy President Snell stated that the parties' cases were in stark contrast to each other. Each accused the other of dishonesty and of having a financial motivation for this. He summarised the cases as follows.

The appellant alleged that Mr Kabaran instructed him to use his own Cornix vapour recovery unit to transfer gas from a large bottle to a smaller one, due to the smaller bottle being out of date, and a bottle having a wrong fitting, so that it could not be exchanged in the normal way. While doing so there was an explosion that seriously injured him. Mr Kabaran then pressured himself and his wife into providing false information to those bodies with a duty to investigate what happened. In dealing with investigations into the incident and when he brought his compensation claim, Mr Kabaran dishonestly denied any knowledge of what had happened and having ever employed him and he was motivated by the fear of the financial consequences of the explosion, due to possibly not having an appropriate insurance policy that would respond, the possibility of prosecution under industrial safety legislation or the possibility of difficulties with the migration or other authorities. He alleged that Mr Kabaran withheld information from SafeWork NSW and the police, and induced the appellant to adopt and stick to a concocted story.

However, the respondent argued that the appellant's allegations require satisfaction on the standard in *Briginshaw v Briginshaw*. It asserted that the appellant entered into an arrangement with it in order to obtain a visa to reside in Australia and, having obtained a visa, he at no time carried out work for it consistent with the employment contract that was

the basis of the sponsorship arrangement that led to the grant of a visa. The appellant persistently denied being aware of the cause of the explosion, but then changed his story about the circumstances long after the explosion occurred, in order to seek financial gain from the workers compensation system.

Snell DP stated that the Arbitrator approached the fact-finding task before him with a stated awareness of the principles in *Fox v Percy*. He specifically referred to a submission by the appellant's senior counsel, that there were "*two cardinal principles*" to be considered in determining the matter. These were looking closely at "*spontaneous statements made at the scene of the accident*", and that findings could not be made that were "*inconsistent with incontrovertible facts*". The Arbitrator stated that he:

> …endeavoured to determine the dispute on what Gleeson CJ, Gummow and Kirby JJ referred to in *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31] '*on the basis of contemporary materials, objectively established facts and the apparent logic of events.'*

Snell SP rejected grounds (1) to (4) (inclusive). He held that the appellant had not demonstrated that the Arbitrator's findings, relating to what he was doing when the explosion occurred, were inconsistent with incontrovertible facts. He had not demonstrated that the Arbitrator's findings on this issue were glaringly improbable or contrary to compelling inferences. He stated, relevantly:

> 235. …The explosion occurred at about 11.30 pm on a Saturday night. It involved the Cornix device, owned by the appellant, who was on his own in the workshop at the time of the explosion, his wife being in another room. The appellant and his wife were living in the premises at the time. The appellant, when shown a brochure depicting the Cornix device and a photograph of its remnants, denied having seen anything like it before (see [48] above). This must have been untrue. That does not establish the contrary, that the Cornix device was being used in the way alleged in later statements, to transfer gas between two oxyacetylene bottles. The Arbitrator's findings were consistent with multiple versions given by the appellant, prior to 22 June 2017, but contrary to his later versions. The appellant seeks to explain away these earlier versions on the basis that the appellant was subject to pressure from Mr Kabaran to be untruthful, an allegation denied by Mr Kabaran. Some of these earlier versions were given to investigating bodies. The statement dated 13 October 2015 was made to assist in a workers compensation claim then being brought by the appellant in respect of injuries suffered during the explosion.

Snell DP held that the statements of the other lay witnesses stopped well short of establishing an allegation that Mr Kabaran applied pressure to the appellant to withhold information from, and make false statements to, authorities investigating the circumstances of the explosion, or to the insurer when a claim was made in September 2015. He noted that the appellant was critical of the Arbitrator's treatment of the lay evidence, which focussed on the date 30 June 2015, and asserted that there were opportunities other than 30 June 2015 when discussion could have occurred during which Mr Kabaran requested him to "*adopt a certain version of events which would best protect Mr Kabaran*". He held that the Arbitrator dealt with the level of the appellant's cognition on 30 June 2015, being a date when the clinical notes described the appellant as having five visitors, and he found that a submission by his senior counsel that this entry was consistent with the appellant's claim that Mr Kabaran visited him and told him what to say, was "*pure speculation*". This explains why the Arbitrator focussed on that date and he did not suggest there were no other occasions when such a conversation could have occurred.

Snell DP also held that the technical evidence from SafeWork NSW does not assist in in identifying "*the precise circumstances that would cause the compressor to explode", nor "give any indication as to the cause of the explosion*" (see [51] above). There was little objective evidence, to establish what the appellant was doing on the night of the explosion, or the circumstances in which the explosion occurred. The SafeWork Incident Notification Report stated *"[Injured Person] was in the workshop area. It is not clear what he was doing given the time*". Acceptance of the appellant's case regarding what he was doing at the time of the explosion, allegedly transferring gas between bottles using the Cornix device, depends on acceptance of the appellant's evidence on this topic. This version first appeared in his statement dated 22 June 2017, and may be contrasted with multiple earlier contrary statements. He stated, relevantly:

> 239. It was open to the Arbitrator to form the view that he did, preferring the evidence in the "*initial statements*", to the later statements dating from 22 June 2017... This discrepancy in the history recorded by Ms Leader is not inconsistent with the Arbitrator's reasoning process, nor with his conclusion regarding whether the appellant had established the facts on which his case, as ultimately presented, was made out. To approach the Arbitrator's conclusions on the basis described in *Raulston*, I am not persuaded that the probabilities so outweigh the conclusion at which the Arbitrator arrived, that his conclusion has been shown to be wrong.

Snell DP rejected ground (6), which was "*effectively a restatement of the proposition (addressed in reasons dealing with Grounds Nos 1 to 4) that the appellant's version of events, in his last three statements, should have been preferred to his multiple earlier versions*." He noted that the appellant raised the effects of medical treatment, and whether these may have made it unlikely that he would readily answer questions asked of him by the police. He referred to the effects of Ketamine and rapid sequence intubation, together with the effects of possible airway burns and argued that judicial notice can be taken that Ketamine is "*a powerful sedative*" that when a patient is intubated "*he cannot readily answer questions*". He stated:

> 259. In *Holland v Jones* the High Court, dealing with judicial notice, said:
>
> > The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not 'general' but 'particular' facts.
>
> 260. In *Malone v Smith* Owen J, on a stated case, said there was judicial notice, on the part of a magistrate sitting at Boorowa, that Boorowa was at least five miles from Sydney. His Honour said:
>
> > I think the general principle is that a court may take judicial notice of a fact that is so notorious that proof of it is unnecessary and the Court is therefore '*justified by general considerations in assuming the truth of the proposition without requiring evidence from the party'*: Wigmore on Evidence, para 2565.
>
> 261. An issue in *Pugsley v Hunter* was whether judicial notice could be applied to a medical issue, being the extent to which a defendant's blood alcohol reading was attributable to alcohol ingested voluntarily, as opposed to accidently through a laced drink. Lord Widgery CJ said:
>
> > …where the facts are not obvious to a layman in the medical sense, it will be necessary for the defendant to call medical evidence in order to discharge the onus of proof which rests upon him.

262. In courts, s 144 of the Evidence Act 1995 now applies. In *Gattellaro v Westpac Banking Corporation* the plurality said:

> In New South Wales there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment of the Evidence Act 1995 (NSW), s 144.

263. The Commission is not bound by the rules of evidence: s 354 (2) of the 1998 Act. The Commission is subject to s 354 of the 1998 Act and r 15.2 of the Workers Compensation Commission Rules 2011, which provide:

> 15.2 Principles of procedure
>
> When informing itself on any matter, the Commission is to bear in mind the following principles:
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> (1) evidence should be logical and probative,
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> (2) evidence should be relevant to the facts in issue and the issues in dispute,
>
> (3) evidence based on speculation or unsubstantiated assumptions is unacceptable,
>
> (4) unqualified opinions are unacceptable.

264. Consistent with the above provisions, the Commission is obliged to apply rules of law in arriving at its decisions, and its procedures are not governed by the rules of evidence or matters of technicality or legal form. Evidence before the Commission must be "*logical and probative*" and "*unqualified opinions are unacceptable*". It is necessary to be alert to the fact that "*the rules of evidence, excluded by statute, [should not be allowed] to 'creep back through a domestic procedural rule'*.

265. The medical effects of Ketamine and rapid sequence intubation, on which the appellant submits, are matters that would ordinarily fall within the scope of expert evidence, typically from a medical practitioner. I do not see that these matters can be appropriately established by reliance on principles of judicial notice. Section 144 of the *Evidence Act* does not assist the appellant, as it does not apply. Even if common law principles governing judicial notice had application, this would not permit the Commission to make findings consistent with the appellant's submissions dealing with these medical matters. The matters put do not fall within "*a class that is so generally known as to give rise to the presumption that all persons are aware of*". They are not facts "*so notorious*" that proof is unnecessary. They are "*not obvious to a layman in the medical sense*". For the Commission to simply accept these medical propositions, in the absence of appropriate evidence, would be inconsistent with r 15.2; in the absence of supporting evidence they would represent unsubstantiated assumptions and unqualified opinions.

266. The appellant submits that due to the Ketamine sedative and intubation, together with the presence of airways burns, the police were "*unlikely to be seeking answers to their questions*". To the contrary, it appears the police were seeking answers to questions. Police present at the scene engaged in sufficient interaction with the appellant that they formed and recorded a view regarding whether he was lucid, there would be little point in asking him questions if he was not. Having concluded that he was lucid, the passage indicated that they asked the appellant questions regarding what had occurred, which the appellant could not explain. It follows from the above that the appellant's submissions on these matters, with a view to explaining the appellant's failure to answer questions from the police and explain what occurred, are not accepted.

267. It should be noted that the appellant's senior counsel, before the Arbitrator, submitted that according to the Ambulance Service Retrieval Record the appellant's Glasgow Coma Score was 11/15, indicating (in the appellant's submission) "*sufficient cognition to be able to explain the cause of the explosion but not design some personal injury claim at that time*".

268. The appellant also, in respect of this passage in the police narrative, correctly submits it is not clear what questions were asked, and that the passage represents the police officer's "*impression of the appellant's mental state*". This submission goes to the weight to be given to this evidence. It has been said:

> Questions of the weight of evidence are peculiarly matters within the province of the trial judge, unless it can be said that a finding was so against the weight of evidence that some error must have been involved.

269. The Arbitrator dealt with significant credit and factual issues between the parties. There was a large amount of evidence from the appellant, consistent with the proposition that he did not know what caused the explosion. There was other later evidence that he did know what had occurred, and his own earlier statements were false. The evidence regarding the attempts by the police, at the scene, to record a version from the appellant about what had happened, were not to be considered in isolation. They formed part of a larger body of evidence. They were recorded by an apparently reliable source. The Arbitrator was entitled to place weight on this contemporaneous evidence, which he did. The Arbitrator dealt with this evidence from the police as part of the larger body of evidence overall, involving multiple statements made by the appellant after the explosion. This was inherent in the way his factual finding in the reasons at [224] was expressed.

Snell DP rejected ground (7). He stated that the appellant's submissions assumed the correctness and acceptance of his later statements, that on 20 June 2015 Mr Kabaran directed him to carry out duties involving the transfer of gases between two bottles using the Cornix device. It is inherent in the submission that Mr Kabaran allegedly had a power of control, which would be consistent with him being able to give such a direction. This was disputed, as was whether Mr Kabaran requested him to perform such a function. He held:

> 275… The Arbitrator referred to two statements of Mr Kabaran in the reasons at [189]. He said Mr Kabaran was "*adamant that there was a clear separation between the LED sign business being undertaken by the [appellant] and his own exhaust business*". The Arbitrator referred to evidence, which he accepted, that was consistent with the appellant being given a separate part of the factory premises in which to operate his own business. The sources of this evidence included the appellant's statement dated 24 July 2015, the statement recorded by SafeWork NSW, the statement recorded by the police, and the notes recorded by Ms Leader on 7 July 2015. It was clearly open to the Arbitrator to accept this evidence, which was consistent with his preference for the earlier statements, to those dated on and after 22 June 2017. The Arbitrator accepted that Mr Kabaran occasionally assisted the appellant with installations of LED signs. The Arbitrator said:
>
> > The occasional assistance provided by Mr Kabaran falls a long way short of proof that the installation of LED signs had become part of the respondent's business and that the [appellant] was under the control and direction of Mr Kabaran or the respondent in undertaking that work.

> 276. The Arbitrator made findings relevant to the 'worker' issue in the reasons at [190], [196], [198], and [202] to [207]. He made an ultimate finding at [225] that on the night of 20 June 2015 the appellant was not undertaking work as a worker for the respondent, using the vapour recovery unit to transfer gas from a large bottle to a small one. This undercuts the submission made on this ground, that on 20 June 2015 Mr Kabaran "directed" the appellant to undertake work in "Mr Kabaran's part of the factory". For reasons given above dealing with Grounds Nos. 1 to 4 and 6, the Arbitrator's factual findings regarding these matters were open to him, and were not in error…

Snell DP also rejected ground (8) for the reasons provided in relation to ground (7).

Snell DP rejected ground (9). He stated that this ground essentially went to the weight of the evidence and the factual conclusion drawn by the Arbitrator regarding the acceptability (or lack of it) of the version of events in the appellant's last three statements. He stated that there was no indication that the insurer intended to deny indemnity to the respondent and that there appeared to be no adequate reason for Mr Kabaran to threaten or compel the appellant not to tell the truth and concoct a false version of events. He held, relevantly:

> 285. This enquiry, regarding whether Mr Kabaran had a motive for encouraging the appellant to lie to authorities, was a legitimate factor to consider. The appellant made submissions to the effect that there was such a motive, based on alleged fear of the insurer refusing indemnity, or possibly other factors. The Arbitrator did not say that Mr Kabaran's credit was established or enhanced by his co-operation with SafeWork NSW and the police. His conclusion was that it was difficult to identify evidence that compelled the credit finding that Mr Kabaran induced the appellant to provide a false story, and that there was no adequate reason for Mr Kabaran to have compelled the appellant to concoct a false version.
>
> 286. The appellant's submissions do not identify any specific basis on which the Arbitrator erred in how he dealt with this issue, save to assert that by withholding information and inducing the appellant to stick to a concocted story, Mr Kabaran was not really assisting. This submission depends on an acceptance of the appellant's case, that Mr Kabaran put pressure on the appellant to be untruthful. It is a circular argument. The Arbitrator's approach relied rather on objective evidence regarding what Mr Kabaran did in dealing with the authorities, and whether, in those circumstances he had a motive to behave in the dishonest way alleged by the appellant. The weight of Mr Kabaran's evidence was essentially a matter for the Arbitrator, providing the assessment of weight was not "so against the weight of evidence that some error must have been involved" (see [268] above). The appellant has not established error on that basis…

Snell DP also rejected ground (10) for the reasons provided in relation to grounds (1) to (4) and (9) and he rejected ground (11) for the reasons stated in relation to ground (10).

Snell DP rejected ground (12). He noted that the appellant made no further submissions in support of this ground and that it is apparent from the Arbitrator's reasons, that he preferred the appellant's version of events contained in the Police report and the consistent statements that he made in the months immediately after the explosion occurred.

Snell DP stated that grounds numbered (13), (14), (15), (16), (17) and (18) deal with the relationship between the parties and the application of the written contract and that it is appropriate to consider them together.

Snell DP rejected grounds (14), (15), (16) (a) and (b) and (17). He held that the various matters that the appellant described in relation to ground (17) do not explain why, if the employment contract between the parties remained on foot at that time, he was not remunerated under it at any stage. These matters were essentially "first instance submissions, going to the weight to be attached to the evidence about the lack of remuneration." He stated that weight is peculiarly a matter for the first instance decision maker, unless a finding is so against the weight of the evidence that some error must have been involved. The Arbitrator did not place undue reliance on the evidence regarding the failure of the parties to comply with the provisions in the written contract regarding remuneration. It was evidence that was relevant to an assessment of the totality of the relationship, and properly taken into account.

Snell DP also rejected grounds 16 (c) and (d). He stated, relevantly:

> 368. There is no developed submission by the appellant, drawn from the *Migration Act and Regulations*, to the effect that it was not legally possible for a contract of employment, like that in the current matter, associated with the issue of a 457 visa, to be ended. There were matters that pointed in a contrary direction. The employment contract was submitted to the Department in support of the application for a visa for the appellant, which was then issued. The contract itself clearly envisaged it could be ended by the parties. There was provision in cll 33 to 37 for termination of employment. The employer could dismiss the employee without notice if the employee breached a material term or engaged in gross misconduct. Either party could terminate the employment by giving appropriate notice, described in cll 35 to 37. The Visa Grant Notice, issued to the appellant by the Department, advised the appellant what his options were if he stopped working for the respondent (see [365] above). It may be that other consequences would potentially flow if there was breach by a party or parties of their sponsorship obligations, although this is not clearly spelled out in the submissions. I do not accept the appellant's argument, made in general terms in subparagraph (c) of Ground No. 16, that the respondent could not lawfully opt out of the employment contract (see [361] above).
>
> 369. Subparagraph (d) of Ground No. 16 asserts the Arbitrator did not consider and take fully into account cl 4 of the employment contract, which provided that "*the employee will agree to reasonable changes in the employee's duties*". The Arbitrator rejected the appellant's later statements, from 22 June 2017 and subsequently, and accepted Mr Kabaran's evidence that the appellant's "*LED signs*" business was the business of the appellant alone (see [358] above). The Arbitrator specifically dealt with the issue of whether the appellant's "*LED signs*" business had become part of the business of the respondent, and concluded that it had not (see [354] above). It followed that the work of the appellant in the "*LED signs*" did not constitute reasonable change in the appellant's duties. Rather, it was an activity of the appellant that was not for the benefit of the respondent or Mr Kabaran, that represented the activities of the appellant, in developing his own business. The evidence which the Arbitrator accepted supported this conclusion. For the reasons given above dealing with the balance of the grounds numbered 13 to 17, and these further reasons, the argument made in respect of subparagraph (d) of Ground No. 16 fails.

Snell DP also rejected ground (18). He stated, relevantly:

> 372. In a case where there was little common ground between the appellant and Mr Kabaran, evidence of the invoices associated with goods imported into Australia, by or with the assistance of the appellant, had the capacity to provide corroborative evidence of the appellant's work as an Importer/Exporter. The appellant addressed the Arbitrator on this basis.

373. The Arbitrator considered the invoices, in the reasons at [192] to [194]. The Arbitrator reasoned that the appellant would likely have been able to access material dealing with such transactions on his computer. He also said there was no complaint from the appellant that he was unable to access material on any computer in the respondent's possession, that could have evidenced transactions between October 2014 and the date of the explosion. He also noted the appellant had not adduced evidence from his bank account in China, through which money was said to have been forwarded to pay for invoices. The Arbitrator dealt with the documentation, and concluded that there were no invoices from when the appellant came to Australia to live in October 2014, until the explosion occurred on 20 June 2015. This was notwithstanding his assertion that there were "*many others*". The factual correctness of this conclusion is not challenged on this appeal. The inference drawn by the Arbitrator, regarding the appellant using his own computer for "any import work being undertaken", also is not challenged. The Arbitrator further noted the appellant had "*not provided any particulars of what goods or items he claims were imported by him at the direction of the respondent between October 2014 and 20 June 2015*".

374. When read in context, it is apparent that the passage in the reasons at [195] related to the failure by the appellant to adduce corroborative evidence of these alleged transactions, in circumstances where it could reasonably be inferred that it was within his capacity to do so. The finding in the reasons at [195] is not appropriately trivialised as a finding on "*whether or not the appellant could provide all copies of all invoices*". The finding at [196] of the reasons was essentially a finding that the appellant had not discharged his onus on this issue:

> I am therefore not convinced that the [appellant] was working under a contract of service for the respondent in regard to any import/export work notwithstanding that there exists a contract of employment which states that the respondent employs the [appellant] as an '*Importer/Exporter.*'

Snell DP rejected ground (19) for reasons stated in relation to the other grounds.

Accordingly, Snell DP confirmed the COD.

WCC - Medical Appeal Panel Decisions

Section 323 WIMA – AMS erred by assuming that asymptomatic pre-existing degenerative changes did not contribute to permanent impairment – MAC revoked

A Nobile & Son Limited v Naylor [2019] NSWWCCMA 144 – Arbitrator Douglas, Dr D Dixon & Dr D Crocker – 11 October 2019

On 19 October 2012, the worker injured both knees. In 2013 and 2014, he underwent three arthroscopies. In 2016, he underwent right total knee replacement, which was revised in 2017, and in 2018, he underwent left total knee replacement. He claimed compensation under s 66 *WCA,* but the insurer disputed the degree of permanent impairment.

On 25 June 2019, a MAC certified that the worker had suffered combined 44% WPI, but the AMS did not apply a deductible under s 323 *WIMA.* However, the appellant appealed against the MAC and asserted that it contained a demonstrable error.

The appellant argued that the AMS failed to give any reason for not applying a deductible and that Dr Patrick (qualified by the worker) applied a deductibles of 1/5 (right knee) and ½ (left knee) and Dr Miniter (qualified by the appellant) applied a ½ deductible for each knee. However, the worker argued that the AMS was not required to accept other specialists' assessments and that there was no demonstrable error in the MAC.

The MAP stated that s 323 (1) *WIMA* firstly requires the level of a worker's impairment to be determined as at the time of assessment. Secondly, a prior injury or pre-existing condition or abnormality must be identified. Thirdly, it must be determined whether a proportion of the worker's post-injury impairment is due to that prior injury or pre-existing condition. If so, then lastly, the extent to which the worker's post-injury impairment is due to the prior injury or pre-existing condition or abnormality must be determined. Stages three and four cannot be done based on assumption or hypothesis. That is to say, it cannot be assumed from the fact that a worker has a pre-existing condition or has had a previous injury that a proportion of the worker's impairment is due to that pre-existing condition or prior injury. Similarly, a pre-existing condition that is asymptomatic at the time a worker suffers injury may still contribute to an impairment a worker has from an injury, and so it cannot be assumed from the fact that the pre-existing condition is asymptomatic that it does not contribute to the worker's impairment from the injury. As was held in *Ryder v Sundance Bakehouse* [2015] NSWSC 526, the pre-existing condition that a worker has or the worker's prior injury must make a difference to the outcome in order for a worker's impairment to be due to it. If it makes a difference then, to the extent that it does, a deduction must be made.

The MAP held that there was clear evidence of degeneration in both knees when the work injury occurred (the left knee worse than the right) and it could not assume from the fact that these were asymptomatic at that time that they did not contribute to the permanent impairment. What is relevant is whether, on the evidence, it can be concluded that the pre-existing degeneration contributes to the permanent impairment in terms of making a difference to the outcome. The permanent impairment relates to total knee replacements, which were required due to a combination of the pre-existing degeneration and aggravation due to the work injury and physiotherapy that was required in order to treat it, and the pre-existing condition was a material and contributing factor to the need for total knee replacements and it contributed to the permanent impairment. Accordingly, the AMS erred by finding that there were no relevant previous injuries, pre-existing conditions or abnormalities and the MAC contains a demonstrable error.

The MAP revoked the MAC and re-assessed the medical dispute based upon the AMS' clinical findings and assessed 20% WPI (right knee) and 30% WPI (left knee).

However, in assessing the deductible under s 323 *WIMA,* the MAP's reasons wrongly refer to the right knee assessment as 30% (the assessment for the left knee) and it applied a deductible of ½. It also wrongly referred to the left knee assessment as 20% (the assessment for the right knee) and it applied a deductible of 1/10. However, the percentages set out in the MAP's MAC are accurate and it certifies a combined 34% WPI due to the work injury.

AMS erred by not applying a deductible under s 323 WIMA – Trivial internal haemorrhoids assessed as 0% WPI

ICM Services v Dabic [2019] NSWWCCMA 146 – Arbitrator Moore, Dr J Garvey & Dr M Burns – 14 October 2019

The worker suffered pain in his neck and both shoulders as a result of the nature and conditions of his employment as a cleaner. On 9 May 2011, he suffered increased pain in his right shoulder and neck, and to a lesser extent his left shoulder. In 2012, he underwent arthroscopic surgery to his right shoulder and in 2014, he had surgery on his left shoulder, which required revision. He suffered epigastric pain and underwent an endoscopy. He claimed compensation under s 66 *WCA* for permanent impairment of both upper extremities, the cervical spine, the upper and lower gastrointestinal tracts and anus (deemed date of injury: 21 July 2011).

The dispute was referred to an AMS and on 13 June 2019, Dr Berry issued a MAC, which assessed: 0% WPI (cervical spine), 8% WPI (right upper extremity), 9% WPI (left upper extremity), 0% WPI (upper digestive tract), 0% WPI (lower digestive tract) and 1% WPI (anus). He did not apply a deductible under s 323 *WIMA.*

The appellant appealed against the MAC and asserted that it contained a demonstrable error, as the AMS failed to consider whether a deductible under s 323 *WIMA* should be applied to the assessments of both shoulders and he inappropriately assessed 1% WPI for "*anal disease*" (internal haemorrhoids). However, the worker argued that there was no demonstrable error.

The MAP adopted the decision of Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78, that s 323 *WIMA* does not permit an assessment to be made based upon an assumption or hypothesis and 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 actual consequences of the earlier injury, pre-existing condition or abnormality. However, *Vitaz v Westform Pty Ltd* [2011] NSWCA 254 is authority for the proposition that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though it was asymptomatic before the injury.

The MAP applied a deductible of 1/10 under s 323 *WIMA* to the upper extremities.

In relation to the assessment for '*anal disease*', the appellant argued that internal haemorrhoids are not a permanent impairment, and are treatable with surgery. Further, the AMS opined that the haemorrhoids were "*potentially" aggravated by medication intake*, but he did not find a definitive causal connection and it is not clear whether there were pre-existing internal haemorrhoids that were aggravated by medication intake.

The MAP held that the internal haemorrhoids are not permanent, and that an assessment of 0% WPI is appropriate.

Accordingly, the MAP revoked the MAC and issued a MAC that certified 14% WPI.

Worker's appeal against MAC under ss 327 (3) (b), (c) & (d) WIMA failed

Baxter v State of New South Wales [2019] NSWWCCMA 145 – Arbitrator Dalley, Dr J Parmegiani & Professor N Glozier – 14 October 2019

The appellant was a police officer. In February 2017, he was medically discharged from the Police Force due to a psychological condition. He claimed compensation under ss 66 and 67 *WCA* and the dispute was referred to an AMS to determine the degree of permanent impairment resulting from the psychological injury suffered on 14 December 2015 (deemed).

On 24 May 2019, a MAC assessed 9% WPI (inclusive of 2% for treatment effect) on the basis that the appellant suffered PTSD (chronic), Major Depressive Disorder (chronic) and Alcohol Use Disorder (currently in partial remission).

The appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) *WIMA.* He sought re-examination by the MAP, but the MAP rejected that request as it found no appealable error on the face of the record. It determined the appeal on the papers.

Fresh evidence

The appellant sought to rely upon a statement from his wife dated 7 June 2019 and a further report from Dr Scurrah dated 17 June 2019. He argued that this was relevant to the issue of whether the AMS correctly recorded and/or applied evidence relating to the behavioural consequences of his psychiatric disorder.

The appellant also argued that this evidence was not, and could not reasonably have been available before the AMS' assessment as they only came into being as a result of it and it is of such probative value that it is reasonably clear that it would change the outcome of the case: *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCCPD 7. However, the respondent objected to the admission of fresh evidence.

However, the MAP held that this evidence did not provide any additional relevant information that was unavailable, and could not have been obtained, before the AMS' assessment. It stated:

> 25. In *State of New South Wales v Ali* (*Ali*), Harrison J said:
>
> > [32] First, the information contained in the later surveillance reports is neither additional nor relevant as properly understood. The expression '*additional relevant information*' contemplates or anticipates a qualitative addition to the information otherwise previously available. It is not concerned with the information being merely quantitatively different, in the sense that there is more of the same. That is made plain by the words in parentheses, which emphasise that the additional relevant information must also qualify as information that could not reasonably have been obtained before the medical assessment appealed against. As a matter of plain language, that does not mean or refer to something that could not have been obtained simply because it came later in time. Everything that occurs later than an earlier event is by definition additional in a temporal sense. That is obviously so in the present case, in which the so-called additional relevant information consists of the investigation reports, which uncontroversially "*could not reasonably have been obtained ... before*".
>
> 26. In *Lukacevic v Coates Hire Operations Pty Limited* Handley AJA said:
>
> > [97] The threshold questions are whether the new evidence fell within s 328 (3), and if so whether the Panel had a discretion to reject that evidence, and whether its exercise of that discretion was vitiated by patent legal error, or was irrational. That was how Lord Diplock characterised Wednesbury unreasonableness in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411.
> >
> > [98] The applicant's statement contains lengthy details of his activities and habits before and after his work injury. In so far as this adds to the history and his statement of 2 April 2008, or the histories in the medical reports before the AMS, it was available and could reasonably have been obtained before the assessment and was not admissible.
> >
> > [99] In so far as the statement repeats information in the earlier statement or in the medical reports it was not evidence '*in addition to ... the evidence received in relation to the medical assessment'*, and was not admissible.

Accordingly, the MAP declined to admit the fresh evidence, but it considered Dr Scurrah's comments as forming part of the appellant's submissions.

Incorrect assessment criteria and Demonstrable error

The MAP stated, relevantly:

> 52. In *Glen William Parker v Select Civil Pty Limited* (*Parker*) Harrison AsJ said.
>
> > [33] In terms of what is to be determined as "*incorrect criteria*" the Minister for Police, who moved the second reading of the Bill (NSW Legislative Assembly, Hansard, 19 June 2001, p 14772) indicated that:

> It should also be noted that the appeal on the grounds of incorrect criteria does not allow appeals to challenge or overturn the guidelines. It is designed to cover circumstances where the guides themselves have been incorrectly applied.

[34] In *Campbelltown City Council v Vegan* [2004] NSWSC 1129, Wood CJ at CL adopted the above passage. At [59] his Honour stated:

> Although the highlighted passage is somewhat oblique, it tends to suggest that the "criteria" upon which assessment is to be based are to be found in any relevant guides, including guides issued by Workcover which have been issued for the assessment of impairment and that appeal lies where they have been incorrectly applied.

[35] As to what is meant by '*demonstrable error'* has been discussed in cases such as *Merza v Registrar of the Workers Compensation Commission* , where Hoeben J said at [39]:

> 39 I do not propose to, nor is it necessary, that I define what is "*demonstrable error*" for the purposes of s 327 of *the Act* in an exhaustive way. It is sufficient for the purposes of this matter that I conclude that "*demonstrable error*" is an error which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment.

The MAP reviewed the evidence and assessment regarding each area of function under PIRS and noted that in *Parker*, Harrison AsJ stated (at [65]-[66]):

> [65] In *Ferguson v State of New South Wales* [2017] NSWSC 887 (Ferguson) at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 ('*Wark'*), where it is stated at [33]:
>
> > ...the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. ...
>
> [66] In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24]). (Her Honour went on to discuss the Appeal Panel's findings and reasoning).

Self-Care and Personal Hygiene

The MAP held that it was open to the AMS to conclude that the appellant suffered a minor deficit compatible with normal variation in the general population. There was no demonstrable error or the adoption of incorrect assessment criteria.

Social and Recreational Activities

The MAP stated that, accepting that the appellant is able to go out and meet with friends, and participate regularly in sporting events, it was open to the AMS to assess class 2 and his comment that he "*erred on the side of caution*" is not an admission that he erred.

Travel

The MAP held that the class 1 assessment was open to the AMS.

Concentration, Persistence and Pace

The MAP stated, relevantly:

> 84. The comments of Justice Campbell in *Ferguson* noted above as to the importance of clinical observation are taken into account. Based on the history recorded by the AMS, which is not contradicted by any of the evidence that was available to him in the material supplied, it was open to the AMS to assess Mr Baxter as falling within Class 2 in respect of the area of concentration, persistence and pace.
>
> 85. No error or adoption of incorrect criteria has been made out in respect of this area of function.

Employability

The MAP was satisfied that the AMS' assessment was open to him on the evidence and that there was no demonstrable error or application of incorrect assessment criteria.

Other grounds

The appellant argued that the AMS failed to give reasons for disagreeing with Dr Scurrah's opinion, but the MAP held that the AMS clearly relied upon the history that he obtained and his examination and came to a different view to that of Dr Scurrah. He was entitled to rely upon his own examination and the history he obtained. In *State of New South Wales (Department of Education) v Kaur,* Campbell J said at [25]:

> My reasons for concluding that the Approved Medical Specialist did not fall into the error of law in this regard are slightly different to those expressed by the Panel. In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480, the High Court of Australia dealt with the nature of the jurisdiction exercised by a medical panel under cognate Victorian legislation. The legislation is not entirely the same but it is broadly similar in purpose. Allowing for some differences, the High Court said at page 498 [47]:
>
> > The material supplied to a medical panel may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on the medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the functions of the panel as being either to decide a dispute or to make up its mind by reference to completing contentions or competing medical opinions. The function of a medical panel is neither arbitral or 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 perform and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.
>
> [26] Not all of this, as I have said, is apposite in the context of the New South Wales legislation. In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in *Wingfoot Australia*. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise. It is sufficient, as their Honours pointed out at [55], that:

> The statement of reasons... explain the actual path of reasoning in sufficient detail to enable the Court to see whether the opinion does or does not involve any error of law.
>
> [27] Bearing that requirement in mind, the Medical Appeal Panel were correct to decide that the Approved Medical Specialist's statement of his reasons for the certificate he provided disclosed no error of fact or of law.

The MAP stated that the '*medical panel'* referred to in *Wingfoot* performs more or less the same function as an AMS and it did not accept that the lack of express reasons for arriving at a different conclusion to Dr Scurrah constitutes demonstrable error or adoption of incorrect criteria.

The appellant argued that the AMS erred because his alcohol use was not in partial remission. However, the MAP noted that the AMS took a history that the appellant's alcohol consumption had reduced from six to eight beers per night to three to four vodkas or beers per night. Further, Dr Scurrah reported that the alcohol abuse was intermittent and it was therefore open to the AMS to conclude that it was currently in partial remission. In any event, this does not bear upon the ultimate assessment of impairment as neither travel, social and recreational activities nor social functioning are said to be affected by alcohol. It did not accept that the AMS' opinion represents demonstrable error or the adoption of incorrect criteria.

The appellant also argued that the AMS erred by stating that he had "*suicidal ideas, but nothing serious*", as any suicidal ideation is serious, but the MAP stated that the significance of this argument was unclear as it does not bear on the assessment under the Guidelines. It did not consider that this was either a demonstrable error or the application of inappropriate criteria.

The appellant also argued that the AMS failed to consider all of the relevant evidence, which resulted in a practical injustice and undermined the integrity of the assessment, which was an appealable error. The MAP held:

> 106. The allegation of "*failure to consider*" was considered by the Court of Appeal in *Allianz Australia Insurance Limited v Cervantes* in the context of a case concerning damages for personal injury arising out of the motor accident. Basten JA (with whom McColl and McFarlane JJA agreed) said:
>
> > [15] Because the precise nature of the ground was not adequately spelled out, the submissions tended to elide a number of key concepts. First, to describe evidence as 'relevant' to the case of one party is not to identify a '*relevant consideration*' for judicial review purposes. All evidence is (or should be) '*relevant*' in the broad sense identified in s 55 of the Evidence Act 1995 (NSW), namely that, if accepted, it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue. (It is of no consequence for present purposes that the Evidence Act did not apply to the assessment in its own terms and was expressly not adopted: Motor Accident Authority of NSW Claims Assessment Guidelines, as amended on 1 October 2009, ('the Guidelines') par 16.1.) The reference to a '*relevant consideration*' in judicial review is a reference to a factor which, by law, the decision-maker is bound to take into account: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 39 (Mason J). This ground required that the appellant identify the legal obligation on which it relied to identify what were mandatory factors to be taken into account for the purposes of the assessment.

> [16] Secondly, the obligation is, as stated in *Peko-Wallsend*, to take a consideration '*into account*'. How it is to be taken into account and what weight it is to be accorded in all the circumstances are matters within the authority of the decisionmaker. Thus, assuming for present purposes that the assessor was bound to take into account the particular statement set out above, he could do so by dismissing it, by giving it little weight, or by giving it decisive weight.
>
> [17] Thirdly, the appellant needed to establish on the balance of probabilities that the assessor did not take the identified material into account.

The MAP held that it could not identify any relevant aspect of the evidence that the AMS did not consider and no demonstrable error was established. It confirmed the MAC.

WCC – Arbitrator Decisions

New motor vehicle held to be a "curative apparatus" under s 59 WCA *because it was required to transport the mobility aids needed by the worker*

Dries v CGA Glass & Aluminium Pty Ltd [2019] NSWWCC 329 – Arbitrator Peacock – 14 October 2019

In February 2014, the worker injured his spine at work and in May 2016, he had multi-level spinal fusion surgery. He applied for a replacement motor vehicle (Hyundai Imax including the cost of ramp fit-out, less the trade in value of his old vehicle) under s 60 *WCA,* because his old vehicle was inadequate to the task of conveying his mobility aids. The respondent disputed that this vehicle was reasonably necessary as a result of the work injury.

Arbitrator Peacock noted that the respondent's principal argument was that the proposed replacement motor vehicle was not a curative apparatus within the meaning of section 59 *WCA,* because the worker no longer drives and his wife (now his carer) will be the person driving the motor vehicle. It argued that there the proposed replacement vehicle will not confer any direct benefit upon the injured worker and it would directly benefit his wife, who is not entitled to be compensated. It also argued that if the worker's wife cannot transport the mobility aids, she should not be his care, and that alternative mobility aids should be proposed.

The respondent relied upon the decision of Truss CCJ in *Coomber v Red Funnel Fisheries Newcastle Pty Ltd* [1998] NSWCC 27 ('*Coomber*'), in which the worker injured his back at work and required spinal fusion surgery. He had a car with manual transmission and no power steering and struggled with those two aspects of his car following the surgery. He purchased a second-hand vehicle with automatic transmission and power steering and traded in his old vehicle. The respondent paid him the equivalent cost of converting his manual transmission of his old vehicle to automatic, but the worker claimed the difference up to the purchase price of his new vehicle. He relied upon the decision of the Court of Appeal in *Bresmac Pty Ltd v Starr* (1992) NSWWWC 601. Truss CCJ stated:

> For the applicant to succeed it is necessary that he establish that as a result of the injury it is reasonably necessary that any medical or related treatment be given. He relies upon par (g) of the definition of 'medical and related treatment' in s 59 which is expressed to include '*the modification of a worker's home or vehicle directed by a medical practitioner having regard to the nature of the worker's incapacity*'.

Truss J reviewed the authorities and ultimately held, on the evidence before her, that the worker was not entitled to the replacement cost of the new vehicle as follows:

The paragraph of the definition relied upon refers to '*modification of a vehicle'*. The Macquarie Dictionary defines 'modify' as 'to change somewhat from the form or qualities of' and one of the definitions of 'modification' is 'partial alteration'. Counsel for the applicant relied upon the Court of Appeal authority of *Bresmac Pty Ltd v Starr* (1992) 8 NSWCCR 601. In that case the trial Judge had awarded the worker, a quadriplegic, the cost of purchasing a new vehicle on two bases: firstly, it fell within the meaning of 'medical or related treatment' and secondly, it was a curative apparatus within par(e) of the definition. The Court of Appeal considered that his Honour's decision was correct on the second ground at least so that it was unnecessary to come to any decision on the first.

10. In my view, the decision in *Starr* does not entitle a worker to ask the Court to ignore the specific and clear wording of par(g) and to seek the cost of a new car. Each case depends upon its facts. In *Starr*, the worker was a quadriplegic and the trial Judge had concluded that the car was of therapeutic assistance to him and his entitlement was determined pursuant to par(e) of the definition and not to par (g).

11. The applicant also relied upon a statement by Judge Neilson in *Woollahra Council v Beck* (1996) 14 NSWCCR 179. In that case the worker, who was a double amputee, was awarded the cost of taxi travel as a curative apparatus within par (e) of the definition. The statement relied upon by the applicant, which is obiter, appears at 181 where his Honour said:

> The employer would probably also be liable to supply and modify a motor vehicle as a curative apparatus within par (e) as decided in *Bresmac Pty Ltd v Starr* but the worker does not want one.

12. Having regard to the evidence as to the significant problems which the applicant has with his left leg resulting in a consent award for 20 per cent loss, in my view it was clearly reasonably necessary that the respondent pay the cost of converting his manual car to one with automatic transmission. Whilst I accept that the Camry is more satisfactory for the applicant from the viewpoint of increased size and greater height from the ground, in my view the evidence in this case falls well short of that which would entitle the Court to impose upon the respondent a liability on the basis that the Camry constituted a curative apparatus within par (e).

13. For these reasons, I have come to the conclusion that the respondent has discharged its liability under s60 in respect of the applicant's motor vehicle and there will be an award for the respondent.

The Arbitrator held that each matter will turn on its own facts, but that a new vehicle can be a curative apparatus even if it confers a benefit on someone other than the injured worker. However, if the benefit accrues only to the other person and there is no benefit to the worker, the item would be neither a curative apparatus nor reasonably necessary. She stated that the evidence set out the very clear benefit to the worker, namely that the proposed van with ramp fit out would enable his mobility equipment to be transported with greater ease. The current vehicle was inadequate to the task of transporting the mobility aids that Mr Dries requires in order to mobilise safely and with greater ease. There is also clear evidence about the therapeutic impact of being the worker being able to mobilise outside the home with the assistance of the mobility aids that have been assessed by the rehabilitation provider as necessary for him. She stated:

> 69. As Armitage CJJ stated in *Harbison* (as quoted by Deputy President Byron In *Grant*):

> What I glean from this case [*Thomas*] is that apparatus may be 'curative' even if it does not 'cure' the condition suffered by an injured worker, in the sense of alleviating it totally, and that it may still be so if it assists in the 'continual war with disease, atrophy of the muscles by lack of use, and even psychological decay by reason of lack of something to do'. Those last remarks seem to me to have particular application to the equipment sought in this case, and indeed to fit it perfectly. *Thomas* also seems to indicate that if something is a '*mechanical contrivance'*, it may be *'apparatus'*.
>
> 70. Each case is decided on its own facts. When I weigh all of the evidence in the balance in this case and having regard to the relevant authorities to which I have been referred, I am satisfied, on the balance of probabilities, that the proposed Hyundai IMAX would provide the necessary therapeutic impact to qualify as curative apparatus in the circumstances of this case where the mobility aids required by Mr Dries to assist in the "continual war with disease" (his injured spine), "atrophy of the muscles by lack of use and even psychological decay by reason of lack of something to do" cannot, on the evidence, be transported in the current vehicle without risk of injury to Mrs Dries upon whom he is dependent to travel. Mr Dries lives in a house up a steep driveway and cannot mobilise around his yard. He needs to travel by car and he needs his mobility aids to mobilise when he gets to his destination. I am satisfied, on the balance of probabilities, that the proposed new vehicle is a curative apparatus which would more ably accommodate Mr Dries' mobility aids which he needs to mobilise to assist him in the "continual war with disease" namely his injured spine.

Accordingly, the Arbitrator ordered the respondent pay the costs of supply of a Hyundai Imax van (including the cost of ramp fit-out) less the trade in value of the worker's old vehicle, under s 60 *WCA*.

Worker failed to discharge his onus of proving that he suffered further injuries pursuant to s 4 (a) WCA

Nader v A O Family Trust [2019] NSWWCC 331 – Arbitrator Homan – 14 October 2019

On 13 June 2012, the worker cut his left hand at work. On 24 July 2014, he claimed compensation and on 23 October 2018, the Commission issued Consent Orders during a teleconference, which included awards for the respondent with respect to allegations of injury to the neck and bilateral carpal tunnel syndrome. The worker was awarded weekly compensation until 3 September 2015 and s 60 expenses of up to $10,000. However, on 13 March 2019, he claimed compensation under s 66 *WCA,* which included impairments of the thoracic and lumbar spines. The insurer disputed the spinal injury claims and asserted that the relevant threshold was not satisfied with respect to the hand injury.

Arbitrator Homan conducted an arbitration hearing and identified the issues in dispute as: (1) Whether the worker injured his thoracic and lumbar spines on 13 June 2012; and (2) The entitlement under s 66 *WCA.* She noted that in *Nguyen v Cosmopolitan Homes*, the Court of Appeal found that a tribunal of fact must be actually persuaded as to the occurrence or existence of the fact before it can be found and summarised the position as follows:

> (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;

(2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;

(3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and

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

The Arbitrator noted that the value of contemporaneous evidence has been repeatedly endorsed by the Courts. In *Onassis v Gergiottis* (1968) 2 Lloyds Report 403, Lord Pearce commented upon what is often recollected and said by witnesses, many years after an event, as opposed to what is contemporaneously recorded in documents at the time of the event, as follows:

> Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on the balance more likely that he was mistaken? On this point, it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

The Arbitrator held that the evidence established that the worker had suffered symptoms in his lumbar spine since at least 2006, but she was not satisfied that his evidence was consistent with the medical evidence from the date of injury in 2012 onwards. Despite alleging a sudden escalation of symptoms, there is no evidence that he reported it to either Liverpool Hospital or Dr Swid, and while he did complain to Dr Swid of mid-back and low-back pain about twelve days later, the clinical notes do not indicate that he attributed those symptoms to the work incident. There was "*simply no explanation*" for the worker's apparent failure to identify the alleged sudden and severe escalation in his back symptoms in the context of the work incident to his treating doctors for around a year, despite attending regular medical consultations.

While the Arbitrator was prepared to accept that the worker's capacity for work deteriorated between August 2012 and April 2013, she was not satisfied that there was a sudden pathological change in his spine on 13 June 2012. Otherwise, she held that there was no evidence of permanent impairment of the hand that was greater than 10% as a result of that injury and there was no basis for either referring that dispute to an AMS or awarding compensation under s 66 (1) *WCA.*

Accordingly, the Arbitrator entered an award for the respondent.

Consent orders - Dispute about monies that the respondent could claim credit for under s 50 WCA (sick leave) for payment of sick leave – Held: credit limited to amount of weekly compensation payable in any period

Gibson v Holcim (Australia) Pty Ltd [2019] NSWWCC 330 – Arbitrator Harris – 14 October 2019

The worker alleged that she suffered a psychological injury on 1 August 2018 (deemed), but the self-insurer disputed the claim. However, on 5 April 2019, the dispute was resolved during an Arbitration hearing. By consent, the worker was awarded: (1) weekly payments from 1 August 2018 to 30 September 2018 at the rate of $2,218.50 per week and from 1 October 2018 to 30 October 2018 at the rate of $2.145.30 per week, with an award for the respondent thereafter; and (2) s 60 expenses of up to $3,000, with an award for the respondent thereafter. Notations were made to the effect that: (a) the worker had no incapacity after 30 October 2018; (b) the worker does not need further treatment; and (c) upon payment of the awards, the worker admits that she has received her full entitlements under the Act.

However, the worker applied for the consent orders to be either reconsidered or set aside, or an order that the respondent was not entitled to deduct various payments from monies payable under the consent orders.

Arbitrator Harris observed that the dispute appeared to be limited to the respondent's argument that the worker received salary from 15 August 2018 to 11 September 2018 (the disputed period) and sick leave paid in excess of the weekly compensation order. The parties agreed that the respondent is entitled to credit for sick leave paid to the worker during the period covered by the Consent Orders, but the worker argued that the maximum amount of that credit is the amount of weekly compensation ordered in the period for which sick leave was paid.

On 27 May 2019, the respondent's solicitor served a Schedule (prepared by the respondent) upon the worker's solicitor, which indicated payments of: (a) sick leave totalling $4,639.61 during the period from 1 August 2018 to 15 August 2018; (b) salary totalling $5,061.39 during the period from 16 August 2018 to 30 August 2018; (c) salary totalling $4,850.50 for the period from 1 September 2018 to 15 September 2018; and (d) annual leave totalling $4,850.50 for the period from 16 September 2018 to 30 September 2018. The respondent's solicitor asserted that the worker was paid a salary in addition to leave entitlements, which were deducted from the settlement monies "*except for the annual leave payment received*".

However, on 27 May 2019, the worker's solicitor responded as follows:

> I note your client proposes to deduct salary and sick leave from the workers compensation settlement amount. They have a legal right to not pay workers compensation during any periods that my client received sick leave. However, it appears they have mistakenly sought to claim an additional 'credit' for payments made during the 'Entitlement' column. There is no basis to deduct $191.30 from other weeks as it appears they are seeking to do. As such, we ask that this be removed from their calculations.
>
> With regard deductions for salary, this was never discussed nor raised during settlement discussions by anyone. My client settled the claims on a compromises basis and if this was to be deducted the it should have been raised at the time settlement discussions were occurring. Given the amount now sought to be deducted, it is most definitely likely that this would have had a significant bearing on my client accepting the offer that was the basis of the settlement.

There is no legal basis for your client to deduct these alleged salary payments from the workers compensation settlement. Nothing in the legislation allows for this. Should your client continue to press for this to be deducted the we will ask to have the matter relisted in the WCC for the issue to be agitated there and, if need be, seek to have the settlement set aside so that the matter can proceed to hearing.

On 4 June 2019, the respondent's solicitor wrote to the worker's solicitor as follows:

> The amount of $15,809.18 less taxation will be paid to your client and $137.35 will be paid to Medicare in accordance with the Notice of Charge received from you. The amount of $15,809.18 being made up as follows:
>
> 1.08.2018 – 14.08.2018 (2 weeks) in which your client was paid sick leave totalling $4,639.60. Our client has confirmed that the amount of $1,208.28 was paid by your client to Holcim in respect of an overpayment of sick leave during that period. The payment was made at the time of your client's redundancy. Thus, your client received a net amount of $3,431.32 from Holcim during this period. The entitlement to weekly payment during the period 01.08.2018 – 14.08.2018 was $4,257 of which your client received $3,431.32. The entitlement during this period being the difference of $825.68.
>
> 15.08.2018 – 11.09.2018 (4 weeks) in which your client was incorrectly paid salary payments at the rate of $2,425.25 per week. The entitlement to weekly payments during this period being at a rate of $2,218.50 per week. The entitlement during this period being $0.00.
>
> 12.09.2018 – 30.09.2018 (2 weeks) in which your client was paid annual leave entitlements. Your client remains entitled to $2,185.50 per week, the entitlement during this period being $4,257.00.
>
> 01.10.2018 – 31.10.2018 (5 weeks) at the rate of $2,145.30 per week. The entitlement during this period being $10,726.50.

Arbitrator Harris stated that the principle issue in dispute relates to the respondent's assertion that the worker was paid wages during the period from 15 August 2018 to 11 September 2018 and whether it could have credit for that payment under s 50 *WCA.*

The respondent asserted that the worker was, or should have been aware, that she received wages during that period. However, the arbitrator noted that the worker was not cross-examined about that issue and that the matter was not raised at teleconference stage and the respondent's wages schedule in the prior proceedings did not make that assertion. He did not accept that the worker was paid wages during that period and stated:

> 48. The only basis relied upon by the respondent in supporting its assertion that the applicant was paid wages during the relevant period are the payslips for August and September 2018. These payslips were created on 14 August 2018 and 14 September 2018.
>
> 49. The reasonable inference from the dates of the payslips is that they show an actual statement as to what has occurred in the first half of the month and a forecast of what is expected to occur for the second half of the month.
>
> 50. The August payslip, issued on 14 August 2018, indicates that the applicant was paid sick leave from 1 August 2018 to 15 August 2018 and salary for the balance of the month. I agree with the applicant's submission where she submitted:

> It is clear from the payslips that the respondent pays its employees in approximately the middle of each month (14 August and 14 September). It is patently clear that the first half of the month is paid in arrears and the (approximately) second half in advance and on the basis that the employee continues to earn salary (i.e. pay for attending work). Adjustments are made later if it turns out that the employee has not worked the second half of the month.

The Arbitrator held that the respondent did not pay the worker salary for a portion of the period from 24 August 2018 to 11 September 2018. The respondent argued that the worker and her legal advisers "*would or should have been aware that during this period claimed the Applicant received during part of that period sick pay or wages*". However, the respondent's counsel did not put to the worker the proposition that she was aware that wages had been paid in the relevant period. He stated, relevantly:

> 66. In relation to the proposition that the applicant and her legal advisers "*should have been aware*", this same knowledge appeared to escape the attention of both the respondent and its legal advisers.
>
> 67. The signed terms of settlement, presumably drafted by the respondent in accordance with the common practice in the Commission, did not state that it was relying on salary paid during this period and did not provide a notation or an order that there would be credit for payments made.
>
> 68. In my view, it is unreasonable to assume that that the applicant would appreciate that, apart from the deduction of sick leave payments, she would have further payments deducted during the relevant period in addition to the paid sick leave…
>
> 70. The applicant also contended that the respondent was seeking a credit on sick leave paid above the amount of the agreed weekly compensation order. The applicant referred to the principles discussed in *Bellamy v Albury City Council* (*Bellamy*) and submitted that "*no credit is given for any excess of sick leave payments over and above compensation payable in respect of any period where compensation is payable.*"
>
> 71. In *Bellamy,* Neilson J stated:
>
> > On a mere construction of the words used in section 50(3) the employer's credit can only be for the actual liability to pay compensation during the period which the sick leave was paid. The credit therefore is for the actual liability to pay compensation of $21,532.80 and not for a greater sum which would give the employer credit for sick leave to be deducted from the award outside the period during which sick leave payments were made.
>
> 72. In *Bellamy,* Neilson J made declarations reflecting the correct amount that the employer was entitled to claim as a credit against the award of the Compensation Court…

The Arbitrator held that the respondent is entitled to credit for the sick leave paid, limited to a maximum of the compensation payable for the same period. The sick leave that can be credited, is limited to the amount of the weekly compensation order for the period 1 August 2018 to 24 August 2018. Adopting Neilson J's approach in *Bellamy*, he determined that the respondent has no entitlement to seek credit for the period from when annual leave commenced on 24 August 2018.

The Arbitrator refused the worker's application to rescind the Consent Orders as the objectives of the system include the provision of an efficient and effective workers compensation system that is fair, affordable and financially viable. The re-litigation of settled matters would impose an inefficient drain on a system designed to deal quickly and efficiently with workers compensation claims. He concluded:

> 85. I otherwise observe that if there was merit in the respondent's position that it was entitled to deduct the amount of salary it alleged was paid, then I would have considered setting aside the Consent Orders because the right to deduct these monies was clearly not contemplated by the parties when they entered into the agreement. In *Atomic Steel Constructions Pty Ltd v Tedeschi* Roche DP discussed in detail the type of settlements where the Commission may intervene to set aside consent orders.
>
> 86. My present findings should conclude the present dispute. The applicant appreciated that sick leave paid during the period covered by the Consent Orders was potentially repayable. The respondent's entitlement to credit is limited to the sick leave paid up to the maximum of the weekly compensation order. My finding only reflects what was contemplated by the applicant and her legal advisers. In those circumstances, there has been no unfairness visited upon the applicant.

Extent of a worker's capacity was disputed at hearing - Request for reconsideration of a decision granted where the decision was based upon an incorrect assumption that the parties had agreed to the length of incapacity

Peric v State of New South Wales (NSW Health Pathology) [2019] NSWWCC 332 – Arbitrator Dalley – 14 October 2019

On 10 April 2019, the Arbitrator issued a COD and determined that the worker suffered a work-related psychological injury on 14 April 2015 (deemed). He ultimately claimed weekly payments for the period from 26 June 2016 to 8 September 2017 and s 60 expenses.

The parties agreed that the issue in dispute was the entitlement to weekly payments during that period, which turned on the proper calculation of PIAWE. The worker argued that PIAWE was $2,178 per week, but the respondent argued that it was $952.28 per week. The worker argued that the respondent's calculation was wrong because it did not allow for periods where he was absent from work due to a prior injury and those periods should be excluded from the PIAWE calculation, but the respondent argued that the worker had voluntarily taken himself out of employment and was not entitled to exclude those weeks where he had not been at work (s 44D (2) (a) *WCA*).

Arbitrator Dalley accepted the worker's argument regarding the calculation of PIAWE, as the payslips indicated that he worker only worked, took annual or sick leave for a period of 22 weeks and that during the period from 18 May 2015 to 24 January 2016, he was on leave without pay for a total of 30.87 weeks. Also, a COD dated 15 December 2015 (in respect of the prior injury) awarded the worker weekly payments for a total of 15 weeks between 20 April 2015 and 6 August 2015, and it was reasonable to infer that the worker did not work during that period and that his incapacity was a result of the prior injury.

The Arbitrator noted the worker's evidence that he was advised that his pre-injury position (that is the earlier injury) was made redundant and was not available from mid-October 2015 and he could not return to work in September or October 2015, because no duties were provided to him. From 7 January 2016 to March 2016, he was seconded temporarily to Westmead because it was not safe for him while his complaints were investigated. He held that it is appropriate to calculate PIAWE by excluding from the 52-week period the 32 weeks during which the worker did not actually work and was not on paid leave.

The Arbitrator held that the worker had no capacity for work during the relevant period. In relation to the issue of suitable employment, he noted that in *Wollongong Nursing Home Pty Ltd v Dewar,* Roche DP stated:

> In context, the phrase 'employment in work', in the definition of suitable employment, 'in relation to a worker', must refer to real work in the labour market. That is, it must refer to a real job employment for which the worker is suited.

He held that suitable work would be work in a scientific role with managerial responsibility provided that the worker had the assistance of a rehabilitation provider and ongoing treatment to enable him to return to the workforce in what would probably be a less senior position and which would require skilled professional medical support. He stated:

> 75. I am not satisfied that a position involving employment for 18 hours a week in a scientific or technical role constitutes a "real job" but I have not based my reasoning on that aspect but rather whether the consequences of the injury including both the emotional state and the physical symptoms are such as to have prevented Mr Peric from engaging in employment in the period of the claim. The evidence of Ms Kairouz and Dr Bertucen establishes that this is the case.

Accordingly, the Arbitrator awarded the worker compensation as follows: (1) Section 36 – from 26 June 2016 to 25 September 2016 @ $2,042.80 per week; (2) Section 37 – from 26 September 2016 to 8 September 2017 @ $1,742.40 per week; and (3) Section 60 – general order

Aggravation of a pre-existing disease in the cervical spine materially contributed to the need for spinal fusion surgery

Smith v Blacktown City Council [2019] NSWWCC 335 – Arbitrator Isaksen – 15 October 2019

The worker sought an order under s 60 (5) *WCA* that the respondent pay for cervical spine surgery (decompression and fusion from the C3 to C6 levels). He alleged that this was required because of a work injury on 15 January 2003, or that his work as a backhoe operator was the main contributing factor to the aggravation of a pre-existing disease in his cervical spine.

The respondent conceded that the worker injured his cervical spine on 2003, but disputed that this resulted in the need for the surgery. It also denied that the worker's employment was the main contributing factor to the aggravation of a disease of the cervical spine or that an aggravation materially contributed to the need for the surgery.

Arbitrator Isaksen identified the following issues: (1) whether the need for surgery results from the injury in 2003? (2) whether the worker suffered a disease injury to his cervical spine for the purposes of s 4 (b) (ii) *WCA?* (3) whether the need for surgery results from a disease injury sustained in the course of the worker's employment with the respondent? He stated:

> 54. Windeyer J in *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 (*Semlitch*) (at [9]) held that an aggravation occurs when "*the disease has been made worse in the sense of more grave, more serious, or more serious in its effects upon the patient.*"
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> 55. Deputy President Roche in *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71 citing *Semlitch* said at [66]: "*an aggravation or exacerbation of a disease occurs where the experience of the disease by the applicant is increased or intensified by an increase or intensifying of symptoms.*"

56. The approach of the Commission in a number of matters since the amendments made to section 4 (b) (ii) in 2012 is to undertake an examination of whether "*the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease" and not to the overall pathology or the overall disease process*" – see *Mitic v Rail Corporation of NSW* (WCC8497/2013) (*Mitic*) (ex tempore decision); and followed in *Mylonas v The Star Pty Ltd* [2014] NSWWCC 174 at [151]-[166] (*Mylonas*); *Egan v Woolworths Limited* [2014] NSWWCC 281 at [60]-[82].

57. Arbitrator Harris in *Mitic* said:

> The opening words of the amended s 4 (b) (ii) relate to the aggravation, acceleration, exacerbation or deterioration '*in the course of employment of any disease*'. In my view, those opening words therefore direct attention to the work related component of the *'aggravation, acceleration, exacerbation or deterioration'*. The following words of clause (ii) then state '*but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease*'. The concluding words of clause (ii) requires an examination of whether the employment was the main contributing factor '*to the aggravation, acceleration, exacerbation or deterioration of that disease*' and not to the overall pathology or the overall disease process.
>
> If one was looking at whether the employment had to be the main contributing factor to the overall pathology then the concluding words of s 4 (b) (ii) would be to the overall pathology or the disease and not to the aggravation, acceleration, exacerbation or deterioration of the disease.
>
> In my view, the amendment to s 4 (b) (ii) does not require the applicant to establish that the employment must be the main contributing factor to the overall disease process or pathology within his left knee but simply that the employment must be the main contributing factor to the injury, that is, the aggravation, acceleration, exacerbation or deterioration of such disease.

The Arbitrator held that employment was the main contributing factor to the aggravation of the disease process in the cervical spine. However, he was mindful of what Roche DP stated in *State Transit Authority v El-Achi* [2015] NSWWCCPD 71 *El-Achi*) at [72]:

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

The Arbitrator stated that applying an evaluative process to this dispute, employment is the main contributing factor to the aggravation of the disease that has resulted in degeneration of the worker's cervical spine. He referred to the decision of Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 (*Murphy*) at [57-58]:

> Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary "*as a result of" the injury*" (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716).

As neither party addressed on the deemed date of injury, the Arbitrator held that it was 11 January 2018, being the date upon which the claim for a disease injury was made: s 16 (1) (a) (ii) *WCA.* He concluded that the injury in 2003 did not materially contribute to or result in the need for the proposed surgery.

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