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ISSUE NUMBER 50

Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. Legal Services Commissioner v Livers [2019] NSWCATOD 180
2. Rainbow Group Pty Limited v Carrabs [2019] NSWWCCPD 58
3. Jasmin v Cleaners New South Wales Pty Limited (in liquidation) [2019] NSWWCCMA 160
4. Theoret v Aces Incorporated [2019] NSWWCC 359
5. Lewin v Secretary, Department of Communities and Justice [2019] NSWWCCMA 163
6. The Secretary, Department of Education v Hurley [2019] NSWWCCMA 164
7. Hi-Tech Express Pty Ltd v Fuimaono [20196] NSWWCCMA 165
8. Schembri v Blacktown City Council [2019] NSWWCC 358
9. Galea v Colourwise Nursery (NSW) Pty Ltd [2019] NSWWCC 362
10. Wehbe v Rayrod Pty Ltd [2019] NSWWCC 369

Civil and Administrative Decisions Tribunal Decisions

Solicitor guilty of professional misconduct for altering the date of an audiogram, creating a false statement and preparing a misleading ILARS application

Legal Services Commissioner v Livers [2019] NSWCATOD 180 – The Hon F Marks (Principal Member), P Moran (Senior Member) and J Schwager (General Member)

Previous decisions in this matter reported in Bulletin Issues 23 and 27 as follows:

1. Legal Services Commissioner v Livers (No. 1) [2017] NSWCATOD 117 – 3 August 2017

NCAT found the solicitor guilty of professional misconduct because he: (1) misled and/or attempted to mislead WIRO by his answers to questions in the ILARS Application and by attaching a statement from his client and an Audiogram that he falsified as to their true dates of completion; (2) failed to disclose a previous claim for industrial deafness made in July 2012, which was resolved in the WCC by way of Consent Orders in November 2013;

and (3) he either knew that his client's statement was false or he was recklessly careless as to whether it was materially false (that no previous claim for hearing aids had been made).

2. Legal Services Commissioner v Livers (No. 2) [2018] NSWCATOD 152 – 7 September 2018

NCAT ordered that the Solicitor's name be removed from the Roll of Local Lawyers.

3. Livers v Legal Services Commissioner [2018] NSWCA 319 – Gleeson JA, Barrett AJA & Simpson AJA – 14 December 2018

The Solicitor appealed to the Court of Appeal and the Court upheld the appeal on the basis that he was denied procedural fairness. ***Gleeson JA (with whom Barrett AJA & Simpson AJA agreed)*** noted that NCAT twice referred to the impugned findings in its Stage 2 decision and it was not possible to separate or unscramble the cumulative effect of that finding from the other findings that led the characterisation of the appellant's conduct as professional misconduct, which justified the removal of his name from the Roll of lawyers. However, his Honour rejected the appellant's submission that the Court should consider the merits of NCAT's decision. Instead, he remitted the matter to NCAT for re-determination, with the costs of those proceedings to be determined by NCAT upon remittal and ordered the respondent to pay the appellant's costs of the appeal. He continued the order made by Beazley P on 22 October 2018 (which reinstated the appellant's name on the Roll) pending redetermination by NCAT or earlier further order.

Upon remitter, the Solicitor argued that his answers in the ILARS application were "*predominantly accurate*". It cross-examination before NCAT, the Solicitor said that he first turned his mind to the correctness of the statements in the application after he received Mr Garling's letter dated 3 February 2015. NCAT was comfortably satisfied that Ms Anthony completed the ILARS application after the solicitor gave her the client's file with the most-recent statement and the audiogram (then dated "*2014"*) placed on top of it and that she did so without reference to any other contribution or oversight by him and gave him the completed application to sign. He signed it without checking that its details were correct.

NCAT held that the solicitor altered the date of the audiogram, based upon circumstantial evidence. It referred to the summary of the principles regarding the use of circumstantial evidence in *Chamberlain v The Queen (No.2)* [1984] HCA 7; (1984) 153 CLR 521, where Gibbs CJ and Mason J (as his Honour then was) jointly said;

> 16. It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence (see *Luxton v. Vines* [1952] HCA 19; (1952) 85 CLR 352, at p 358; and *Barca v. The Queen* [1975] HCA 42; (1975) 133 CLR 82, at p 104). The statement by Lord Wright in *Caswell v. Powell Duffryn Associated Collieries, Ld.* (1940) AC 152, at p 169 , that "*There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish*" is obviously as true of criminal as of civil cases. The process of reasoning in a case of circumstantial evidence gives rise to two chances of error: "*first from the chances of error in each fact or consideration*

forming the steps and second from the chance of error in reasoning to the conclusion": *Morrison v. Jenkins* [1949] HCA 69; (1949) 80 CLR 626, at p 644 . It seems to us an inescapable consequence that in a criminal case the circumstances from which the inference should be drawn must be established beyond reasonable doubt. We agree with the statement in *Reg. v. Van Beelen* (1973) 4 SASR, at p 379, that it is "*an obvious proposition in logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt*". (at p536)

NCAT held that it is required to consider all of the evidence that is relevant, then ascertain whether it is able to draw an inference from the circumstances of the case that must raise a more probable inference in favour of what is alleged by the applicant, informed by the need to apply the *Briginshaw* principle. It found that the Solicitor altered the date on the audiogram no earlier than January 2014, but before he gave the file to Ms Anthony on 19 September 2014, and stated:

105. Unfortunately, the respondent has been unable to produce the original audiogram. We hold a photocopy of that document. There is no satisfactory evidence which would explain how the date came to be altered from 2012 to 2014 other than by a person making a mark through the tail of the 2 so that it appeared to be a 4. There are simply no other markings on the document which would indicate the presence of any line created by the operation of the photocopier or in any other manner. We repeat that the only mark contained on the audiogram is the line struck through the tail of the handwritten 2 to make it appear to be a handwritten 4.

106. The respondent sought to cast doubt on any assertion that he had himself made that alteration, because he said that there was no reason why he should do so, in all the circumstances pertaining to the application. We disagree. By January 2014 the respondent knew that his client's claim for the cost of hearing aids was time-barred. When he determined to pursue a claim for the cost of hearing aids on behalf of his client in February 2014, and when he determined to make the application on behalf of his client in September 2014, he was aware of the stance that the insurer would take. Furthermore, it would not be in his client's interests to direct attention to the fact that there had been an earlier unsuccessful claim for the cost of hearing aids initiated in 2012. Indeed, the evidence of Ms McManis confirms this.

107. If corroborative evidence of this is required, it is provided by the failure of the respondent to have extracted any material from the file relating to the earlier proceedings. It must be assumed that the respondent was at all times aware of those earlier proceedings at the time that the file was given to Ms Anthony to prepare the application. He had been intimately involved in his client's hearing loss claim over a substantial period of time, between November 2011 and May 2014. There is no evidence that the respondent brought the fact of the earlier proceedings to Ms Anthony's attention in any way. On the contrary, it was his failure to bring those matters to her attention that led to the preparation of an application which was clearly misleading in several significant respects, as we shall later discuss. For present purposes it is sufficient that we conclude that the respondent had a motive to conceal the fact of the earlier proceedings from WIRO, and an opportunity to do so by himself altering the date on the audiogram and taking steps to preclude Ms Anthony from adverting to those matters when she prepared the application. As we have said, on the evidence, the respondent was the only person who physically had access to the original audiogram. He was the only person who could have altered the date in the manner in which it occurred.

> 108. We add for completeness that the respondent submitted that altering the audiogram would not have logically ultimately assisted his client's case. We observe that matters of logic and what might otherwise be rational behaviour do not necessarily indicate that a person has not engaged in inappropriate conduct. Misconduct is almost always accompanied by illogical or irrational behaviour. We do not regard this submission as sufficient to displace inferences which may otherwise be appropriately drawn from the totality of the evidence…
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> 111. The respondent also sought to argue that his secretary had disclosed the existence of the earlier proceeding in January 2015 when she forwarded copies of letters from Allianz together with an invoice to WIRO. It was said that it would have been "*entirely irrational and self-defeating*" for the respondent to forward a letter to WIRO notifying it of the earlier claims if the respondent was seeking to conceal them from WIRO. As we have previously observed, questions of irrational behaviour occurring at a later date are not necessarily indicative that the respondent did not have the intention which we have impugned to him.
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> 112. The respondent also submitted that the amount of his professional fees ultimately billed to WIRO, being $2846.25 plus GST was a trivial amount when compared with the risk that the respondent ran of severely impacting on his professional reputation. Again, we observe that explanations of this kind are not generally inconsistent with guilt; we must approach the matter by reference to the totality of the evidence.
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> 113. In circumstances where we infer on the basis of all of the evidence that only the respondent had access to the audiogram before the date was changed to reflect the year 2014, and where we are satisfied that the date was so changed by a person drawing a line through the tail of the 2 so that it looked like a 4, we conclude that we are satisfied that it was the respondent who changed that date.

NCAT held that at all times, the Solicitor knew that his client's statement was false and that prima facie, the claim for hearing aids was time-barred. It rejected his assertion that he was merely negligent or ignorant of the consequences of this admitted false statement. At the least, he was recklessly careless about the falsity of the statement. He had a close knowledge of the history of the matter, which mitigates against the omission in this statement as being a mere careless or negligent slip. The amendment to the client's statement was a precise one and reflected a consciousness on the Solicitor's part to seek to hide the earlier claims history from WIRO. It considered his attempt justify his conduct by directing attention to his omission to insert the word "*successful*" as "*a facile excuse to hide the real history of his client's claims from WIRO*".

NCAT was satisfied on the *Briginshaw* standard that the solicitor misled WIRO in order to obtain a grant of funding, but stated that if it had not made this finding, it would have found that he was recklessly careless as to the consequences in the sense that he did not care whether or not he misled WIRO in the manner in which paragraph 7 was framed, because it contained material omissions and false assertions.

In relation to "*the material omissions and false assertions*", the parties argued that NCAT should have regard to the solicitor's subjective intentions as stated by the High Court of Australia in *Murphy v Farmer* [1988] HCA 31; (1988) 165 CLR 19, in which Deane, Dawson and Gaudron JJ stated, relevantly:

> 4. It was common ground in argument in this Court, as it apparently was in the Court of Appeal, that the word "*false*", when viewed in isolation, is a latently ambiguous one. As the dictionaries confirm, it can mean merely "*untrue*" or "*wrong*". Or it can involve both subjective and objective elements and mean "*purposely untrue*"…

> 10. The above arguments and presumptions favouring one or other of the permissible meanings of the word false are, in our view, fairly evenly balanced. If it were necessary that we decide the matter by reference to them alone, we would incline to the view that the word "*false*" in s.229 (1) (i) should be read as meaning "*purposely untrue*". However, we find it unnecessary to dispose of the appeal on that basis. It seems to us that, regardless of what view one takes of the comparative weight of the competing arguments and presumptions, the latent ambiguity of the word "*false*" remains. Section 229 (1) (i) is to be found in Div. 1 ("*Forfeitures*") of Pt. XIII ("*Penal Provisions*") of the Act. It imposes forfeiture as the consequence of the giving of "*false or wilfully misleading*" information in relation to the entry of goods. The provision is, in our view, properly to be seen as penal or quasi-penal in character and as attracting the rule that *"(t)hose who contend that a penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty*" (*Dickenson v. Fletcher* (1873) 9 LR CP 1, at p 7).

NCAT held that *Murphy* has less relevance to this matter because the constituent parts of the complaint require an assessment to be made of the solicitor's subjective intention or, alternatively, whether he acted with reckless indifference with the overall effect of either misleading or attempting to mislead WIRO. It held that the answers were false with the exception of those in paragraphs 15.7, 15.10, and 15.12), and stated, relevantly:

> 139. If the respondent had deliberately set about ensuring that the answers given were in all the circumstances true, he would need to have qualified the application appropriately by reference to his then understanding of the state of the law notwithstanding the fact that a claim had previously been made for the cost of the hearing aids and ultimately abandoned. The respondent sought to argue that there was no room in the application form to qualify the answers in any way. Such an argument does not displace the necessity for the application to be accurate and to be not misleading, as the respondent was required to certify. It is obvious that an accompanying email would have resolved this issue…
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> 141. And notwithstanding the respondent's assertion that there was some "*proper*" basis for the application having been formulated in the manner in which it was, this does not explain the answer given to question 1 (a) of Part C of the application which is referred to in particular 15.6. This question asked the applicant to describe details of the matter and the legal action that the respondent wished to take by indicating whether it involved either a preliminary investigation or a desire to challenge the decision of the insurer. The application stated that this was a preliminary investigation. Of course, nothing could be further than the truth, and there was nothing preliminary about the pursuit of a claim for the cost of hearing aids on behalf of this client.
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> 142. None of this information was provided by the respondent to Ms Anthony in circumstances, as we have earlier found, he must have been aware of its existence. As we have earlier found, such conduct by the respondent can only be explained by reference either to a deliberate intention to withhold that information from Ms Anthony and therefore from its inclusion in the application or a reckless carelessness to withhold it on the basis that he didn't care whether or not it was disclosed to WIRO. The withholding of this information must also be seen against the failure of the respondent to check the application prior to it being forwarded electronically to WIRO.

NCAT found the solicitor guilty of unsatisfactory professional conduct as it constitutes a substantial failure to maintain a reasonable standard of competence and diligence, but that the totality of his misconduct justifies a finding that he is not a fit and proper person to engage in legal practice and is thereby also guilty of professional misconduct. It stood the matter over for a stage 2 hearing to determine the issues of final orders and costs.

WCC – Presidential Decisions

Findings of fact were available on the evidence – Davis v Council of the City of Wagga Wagga [2004] NSWCA 34 – COD confirmed

Rainbow Group Pty Limited v Carrabs [2019] NSWWCCPD 58 – President Judge Phillips – 19 November 2019

On 25 May 2012, the worker injured his lumbar spine at work. In prior WCC proceedings, the appellant agreed to pay reasonable costs of lumbar surgery under s 60 WCA and the worker underwent that surgery on 10 February 2015. The worker alleged that following that surgery, he was required to use crutches and that he suffered a consequential condition in his right shoulder. He claimed compensation under s 66 *WCA* for alleged permanent impairment of his lumbar spine and right shoulder, but the insurer disputed the injury to the right shoulder.

Senior Arbitrator Bamber conducted an arbitration hearing on 20 May 2019. On 31 May 2019, she issued a COD and determined that the evidence indicated a causal link between the use of the crutches following the lumbar surgery and the onset of right shoulder symptoms. The appellant largely relied upon the absence of contemporaneous references to the right shoulder condition in the clinical notes. However, the Senior Arbitrator found the treating doctor's evidence on this issue was compelling and noted that the clinical notes were not a verbatim account of his consultations with the worker. She referred to the decision in *Davis v Council of the City of Wagga Wagga* and found that it was unremarkable that the doctor would not have recorded a complaint of right shoulder pain, particularly if he told the worker that he thought that it would go away once he ceased using the crutches and was treating him for continuing lumbar symptoms following surgery. She declined to draw an inference that the doctor would have recorded the shoulder complaints if he had been told about it.

The Senior Arbitrator applied *Nguyen v Cosmopolitan Homes* and stated that she felt a actual persuasion that the worker was telling the truth and that it was more likely than not that the shoulder symptoms would have first come on with the use of crutches rather than appearing spontaneously. She noted that the appellant conceded that there was no other explanation for the onset of the shoulder symptoms. She remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment of the lumbar spine and right upper extremity (shoulder).

The appellant appealed and asserted that the Senior Arbitrator: (1) Made a material error of fact in finding that he developed right shoulder pain during the period from 16 February 2015 to 8 June 2015; (2) Made a material error of fact in finding that he had told his treating doctor that he was experiencing pain in his right shoulder prior to 19 April 2016; (3) Failed to give sufficient weight to the lack of contemporaneous evidence indicating that he was experiencing right shoulder pain during the period from 10 February 2015 to 19 April 2016; and (4) Made an error of legal principle in finding he had not discharged his evidentiary burden in establishing a causal connection between the lumbar surgery on 10 February 2015 and the development of right shoulder supraspinatus tendinopathy.

President Judge Phillips determined the appeal on the papers and was satisfied that there were no threshold issues. He noted that as grounds (1) to (3) (inclusive) concerned findings of fact, the principles set out by DP Roche in *Raulston* apply.

His Honour rejected ground (1) and held that the Senior Arbitrator's finding was plainly available on the evidence, was consistent with the authorities and involved no error.

His Honour rejected ground (2) and stated that this suffers from "*similar deficiencies*", as the appellant is advancing a case that is based upon the literal reading of clinical notes, which is contrary to authority and has little regard to the worker's unchallenged evidence that he first suffered shoulder pain while using crutches. It was clear that the Senior Arbitrator reviewed the notes and the worker's evidence and precisely applied the decisions in *Davis* and *Mason,* regarding provide how medical notes are to be treated. She carefully reviewed the evidence, and consistent with the decision in *Kooragang*, held that there was an unbroken chain of causation and that finding was plainly available on the evidence. No error was established.

His Honour rejected ground (3) and stated that this suffers from the same deficiencies as grounds (1) and (2). It sought to elevate the status of medical records to be above the other evidence and sought to argue that the sole evidence regarding the commencement of shoulder symptoms was the worker's statement, which was made many years after the event and that his recollection had potentially been coloured by his doctor's view that this could be related to the use of crutches. He stated, relevantly (citations excluded):

> 96. The difficulty with this submission is clear. At no stage either below or in this appeal has the appellant taken issue with the veracity of the history of the onset of right shoulder symptoms given by Mr Carrabs. No submission has been put that he is mistaken or lying, but that is the purport and effect of this submission. If this was the case that the appellant wanted to pursue, these allegations should have been put in terms and Mr Carrabs given the opportunity to respond. The case has been expressly pursued under this ground that Mr Carrabs' statement regarding the onset of right shoulder pain is either wrong, cannot be relied upon or has been adopted by him because of what the doctor said to him. No submission was made below or on this appeal that Mr Carrabs' statement cannot be believed and it is not available now for the appellant to make a submission to that effect. This type of situation was dealt with in *Davis* in the following respects:
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> > There are obviously matters of degree in cases such as the present. But this case fell, in my view, on the wrong side of the line. In *Boston Clothing Co Pty Ltd v Margaronis* (1992) NSWLR 580 Kirby P said (at 590):
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> > > I am inclined to agree with Burke CCJ that the practical rule of fairness enshrined in the *Browne v Dunn* principle required that the suggested contradictions in the worker's history should have been put to the worker before they were used as a basis not of challenging the opinions resting on them but of challenging the truth of the worker's evidence. No such challenge was put to the worker by counsel for the employer in his economical cross-examination. If the commissioner himself intended to rely upon the evidence in the way he did, procedural fairness required that he should have drawn the suggested inconsistencies which were troubling him to the notice of the worker or of counsel. Then the worker would have the opportunity of explaining the suggested inconsistencies. Her counsel would have had the chance of calling oral evidence from her medical advisers to supplement the written opinions which they had provided. In the course adopted by the commissioner there was a real risk of injustice to the worker.

His Honour regarded the appellant's submissions as being "*very close*" to those in *Davis*. The rule in *Browne v Dunn* would have required, at the very least as described by Kirby P, that the challenge to the worker's evidence should have been put, and put in terms so that

it could have been answered. As Kirby P described, often these issues are matters of degree, but this case "*falls on the wrong side of the line*".

His Honour also rejected ground (4) and stated that this does not accurately describe or reflect the worker's case. He noted that the appellant alleges that the principles in *Nguyen* were not satisfied by the Senior Arbitrator and he stated, relevantly:

> 103. In *Nguyen,* McDougall J described the principles regarding the discharge of the burden of proof in the following manner:
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> > 44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.
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> > 45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at 305 where his Honour said that '*[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied*'. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* [1981] HCA 38; (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* [1982] HCA 15; (1982) 149 CLR 155 at 161 – 162, and Mason J (with whom Brennan J agreed) in the same case at 168.
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> > 46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.
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> > 47. In *Malec v JC Hutton Pty Limited* [1990] HCA 20; (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:
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> > > A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred.
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> > 48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion…
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> > 52. In my view, that is the approach that should be adopted in the resolution of disputed questions of fact. It is something of particular significance where a resolution of the disputed question depends upon the drawing of inferences from entirely circumstantial evidence. It also accommodates the requirement that attention be paid to the seriousness of the fact in issue, or the consequences of finding that it has occurred.

53. It is of course trite to observe that, in an appropriate case, circumstantial evidence may lead to satisfaction beyond reasonable doubt; and, a fortiori, on the balance of probabilities. However, in considering the probative quality of circumstantial evidence, there is a significant distinction to be observed according to whether proof is required beyond reasonable doubt, or on the balance of probabilities. In the former case, the tribunal of fact must be able to exclude any reasonable hypothesis that stands against the existence of the fact sought to be proved. In the latter case, it is not necessary to do so. See *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5. There is a qualification, in the 'post hoc propter hoc' field of discourse. I deal with that, in the context of causation, at [63] below.

54. In *Bradshaw*, the Court (Dixon, Williams, Webb, Fullagar and Kitto JJ) said at 5 that in considering whether circumstantial evidence proves the existence of a fact on the balance of probabilities, '*it is enough in [sic: obviously, 'if'] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is [a] mere matter of conjecture.... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise...*'. That does not however authorise a court '*to choose between guesses... on the ground that one guess seems more likely than another or the other*', as Dixon CJ pointed out in *Jones v Dunkel* at 304.

55. The position may be summarised 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;
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> (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;
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> (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
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> (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.

His Honour held that the appellant's submissions did not specify the alleged error of law by the Senior Arbitrator in applying the decision in *Nguyen* and he concluded that as this ground depended upon the establishment of grounds (1) to (3), either singularly or collectively, it was not made out. Accordingly, he confirmed the COD.

WCC - Medical Appeal Panel Decisions

Demonstrable error – Application to admit fresh evidence rejected - AMS erred in concluding that the condition in the lumbar spine did not result from the injury where this was a finding from the Commission – Same assessment made on reassessment – MAC confirmed

Jasmin v Cleaners New South Wales Pty Limited (in liquidation) [2019] NSWWCCMA 160 – Arbitrator Dalley, Dr B Noll & Dr D Crocker – 4 November 2019

On 11 August 2009, the appellant injured her right knee. She underwent an arthroscopy in March 2010, did not return to work and her employment was terminated in May 2010. She had further knee surgery on 1 February 2011. In November 2013, she claimed compensation under s 66 *WCA* for 14% WPI based upon a report from Dr Dixon (14% WPI for the right knee and 0% WPI for the lumbar spine). However, the respondent disputed the claim based upon a report from Dr Crane (8% WPI for the right knee (9% less 1/10 deduction)).

On 5 March 2015, the appellant underwent partial right knee replacement surgery. In 2018, he claimed compensation under s 66 *WCA* for 27% WPI based upon a report from Dr Khan (20% WPI for the right knee, 7% WPI for the lumbar spine and 1% WPI for scarring). However, the respondent disputed the claim based upon a report from Dr Powell (18% WPI for the right knee), who opined that the lumbar spine condition was not work-related.

On 17 June 2019, the ***Senior Arbitrator*** determined that the lumbar spine condition was consequential to the right knee injury and remitted the matter to the Registrar for referral to an AMS to assess permanent impairment of the right knee, lumbar spine and scarring. However, the MAC certified 18% WPI (right knee), but 0% WPI for both the lumbar spine and scarring.

The appellant appealed against the assessment for the lumbar spine under s 327 (3) (d) *WIMA.* The MAP decided to determine the appeal on the papers and that a further medical examination was not required.

The appellant sought to adduce a Statutory Declaration that disputed the AMS' history and argued that the AMS had assessed her based upon an incorrect history. However, the MAP declined to admit this as fresh evidence in the appeal because the additional information was not qualitatively different to the evidence that was before the AMS.

The appellant argued that the AMS' conclusion that the lumbar spine condition was not related to her right knee injury, was not open to him because the Referral was based upon a finding by the Commission. However, the respondent argued that it was open to the AMS to conclude that no impairment resulted from any consequential condition.

The MAP found that there was a demonstrable error to the extent that the AMS relied upon an incorrect history about the onset of lumbar spine symptoms. The AMS' conclusion on this issue was not open on the evidence and it stated (citations excluded):

> 49. The respective roles of the AMS and the Arbitrator in assessing the effects of injury have been discussed in a number of decisions including *Haroun v Rail Corporation of New South Wales (Haroun), Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd (Bindah)*, *State of New South Wales v Bishop (Bishop)*, and *Jaffarie v Quality Castings Pty Ltd (Jaffarie)*.
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> 50. Deputy President Roche in *Jaffarie* analysed the decisions in *Haroun, Bindah and Bishop*. The Deputy President concluded:

> [250]…. in a claim for lump sum compensation, the physical consequences of the injury (in relation to the assessment of whole person impairment as a result of the injury) are not within the exclusive jurisdiction of the Commission. They are within the exclusive jurisdiction of the AMS. That is so even if the matter also involves a disputed claim for weekly compensation and disputes about causation, which the Commission has determined.

51. The Deputy President said:

> [257] ….. "the nature of the injury" is a matter for the Commission to determine. This is consistent with Emmett JA's statement at [111] [in *Bindah*] that it is for the Commission 'to determine whether a worker has suffered an injury within the meaning of s 4 of *the [1987] Act*' and his Honour's later statement (at [118]) that only '*certain matters of causation*' (emphasis added) are within the exclusive jurisdiction of an AMS.

52. The Deputy President said of *Bishop*:

> [276] Significantly, for the purposes of the present appeal, no issue arose, based on any of the obiter comments in *Bindah*, as to whether the Commission had jurisdiction to determine if the fracture to the left foot and ankle had resulted from the 2004 injury to the back. The Court clearly accepted that the Commission did have jurisdiction. Thus, the causation issue was an issue for the Commission. This approach was consistent with the approach I outlined earlier in this decision, namely, that, save for the nature and extent of hearing loss suffered by a worker, it is for the Commission to determine if a worker has received an injury and whether, as a result of that injury, a further or consequential condition (such as the fracture in Bishop) has arisen.

The MAP found no error in the AMS' clinical findings and it held that the criteria for an assessment of DRE Lumbar Category II were not satisfied. Accordingly, it confirmed the MAC.

Referral to AMS following Arbitral decision regarding consequential conditions – AMS contradicted Arbitrator's findings in MAC – MAC revoked & s 323 WIMA deductible applied

Lewin v Secretary, Department of Communities and Justice [2019] NSWWCCMA 163 – Arbitrator Wynyard, Dr M Burns & Dr B Noll – 11 November 2019

On 2 February 2013, the worker injured his right ankle and fractured his right fifth metatarsal, which required surgery. He gradually returned to work and resumed full duties by mid-May 2013. However, in October 2013, he complained of left hip pain and x-rays indicated osteoarthritis in both hips, but the left hip pathology was complicated due to an injury that probably occurred during childhood.

On 25 November 2013, the worker underwent surgery to remove the implant in his right ankle and the screw was removed, but he suffered increased pain and it was found that the fracture had not healed. On 16 June 2014, he had further ankle surgery (insertion of a plate with bone grafting), after which he mobilised with a scooter, which meant that his knee was taking all of his weight. On 16 October 2014, he had total left hip replacement surgery and he had right total hip replacement surgery on 21 August 2017.

On 24 June 2019, the Registrar issued an amended Referral to an AMS for assessment of permanent impairment of the right lower extremity (foot), right lower extremity (hip – consequential injury), left lower extremity (hip – consequential injury) and scarring (TEMSKI), in accordance with a COD issued on 30 May 2019.

On 3 July 2019, Dr Ho (AMS) issued a MAC, which assessed combined 4% WPI (3% WPI for the right foot and 1% WPI for scarring). He also assessed 15% WPI for each hip, but applied a deductible of 100% under s 323 *WIMA.*

On 18 July 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* He complained that the AMS applied a factual determination that was at odds with the Commission's determination and that he made a demonstrable error by ignoring the terms of the amended Referral.

The MAP held that there was a demonstrable error on the face of the MAC. It cited the decision of White JA (agreeing with Leeming and MacFarlan JJA) in *Jaffarie* at [80]:

> In any event, the jurisdiction of the Senior Arbitrator to determine the nature of the injury sustained in the course of Mr Jaffarie's employment on 12 June 2009 is resolved by the terms of the order made by this Court on 29 October 2015. As noted by Leeming JA at [6] the matter was remitted for re-determination by a different arbitrator '*in accordance with the reasons and the Deputy President's judgment of 9 December 2014 as varied by this judgment.*' Deputy President Roche in his judgment of 9 December 2014 (*Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79) analysed in detail the reasons of this Court in Bindah7 and concluded as follows:
>
> > [249] Notwithstanding the different approach by Emmett JA and Meagher JA, it is my view that the following principles apply to proceedings in the Commission:
> >
> > > (a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing the degree of permanent impairment "*as a result of an injury*", and whether any proportion of permanent impairment is "*due*" to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection (*Bindah* at [110]);
> >
> > > (b) it is for the Commission to determine whether a worker has received an injury within the meaning of s 4 of *the 1987 Act* and whether there are any disentitling provisions, such that compensation is not payable for that injury (*Bindah* at [111] and s 105 of *the 1998 Act*);
> >
> > > (c) the Commission's jurisdiction is restricted by s 65 (3) of *the 1987 Act*, which precludes the Commission (an Arbitrator or a Presidential member) from awarding permanent impairment compensation if there is a dispute about the degree of permanent impairment, unless the degree of impairment has been assessed by an AMS (*Bindah* at [111]);
> >
> > > (d) the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the AMS or, on appeal, the Appeal Panel and is not a matter for determination by an Arbitrator (*Bindah* at [112]);
> >
> > > (e) a finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (Haroun at [16] and [19]–[21]), and
> >
> > > (f) it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues (*Bindah* at [110]; *Tolevski* at [35])...
> >
> > [255] The only matters that are '*conclusively presumed to be correct*' are those matters listed in s 326 (1). They are:

(a) the degree of permanent impairment of the worker as a result of an injury,

(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,

(c) the nature and extent of loss of hearing suffered by a worker,

(d) whether impairment is permanent,

(e) whether the degree of permanent impairment is fully ascertainable.

[256] It follows that, since "*the nature of the injury*" (or the "*condition*" or "*aetiology of the condition*") is not a matter on which an assessment in a MAC is conclusively presumed to be correct, the opinions of an AMS on such matters do not bind the Commission. This follows from s 326 (2), which states that "*[a]s to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings*". This conclusion is reinforced when one considers s 319 (e), which defines medical dispute to include "*the nature and extent of loss of hearing suffered by a worker*", and s 326 (c), which states that an assessment in a MAC is conclusively presumed to be correct as to "*the nature and extent of loss of hearing suffered by a worker*" (McGowan v Secretary, Department of Education and Communities [2014] NSWWCCPD 51 (*McGowan*)). In other words, if the injury is a loss, or further loss, of hearing an AMS determines the "*injury*" issue. That is an exception to the norm.

[257] The absence of any similar provisions for "*the nature of the injury*" points strongly to the conclusion that "*the nature of the injury*" is a matter for the Commission to determine. This is consistent with Emmett JA's statement at [111] that it is for the Commission "*to determine whether a worker has suffered an injury within the meaning of s 4 of the [1987] Act*" and his Honour's later statement (at [118]) that only "*certain matters of causation*" (emphasis added) are within the exclusive jurisdiction of an AMS.

The MAP noted that White JA approved the dicta of Roche DP and it held that the question of whether or not an injury is consequential clearly that falls outside the terms of s 326 (1) *WIMA.* It therefore revoked the MAC and determined the appropriate deductible under s 323 *WIMA.*

The MAP expressed reservations about whether the recovery from the first surgery would have caused the onset of the appellant's left hip pain but for the pre-existing condition that appeared to have been caused, or at least contributed to, by a childhood injury. The MAP Specialists were satisfied that although the left hip condition was previously asymptomatic, it was so advanced that it made a significant contribution to the impairment.

The MAP was also satisfied that there was evidence of pre-existing osteoarthritis of "*mild to moderate*" severity in the right hip. The connection with the work injury was more tenuous because the total hip replacement did not occur until 21 August 2017, and no complaint was made about those symptoms until 22 September 2014. It considered it germane that by 17 February 2016, the treating surgeon reported that the appellant had a normal gait.

The MAP applied an 8/10 deduction with respect to the left hip and a 9/10 deduction with respect to the right hip. It issued a MAC that assessed combined 9% WPI, comprising 3% WPI (right foot), 2% WPI (right hip), 3% WPI (left hip) and 1% WPI. Accordingly, although the appeal succeeded on technical grounds, the outcome did not entitle the worker to recover compensation under s 66 (1) *WCA.*

Psychological injury – MAP found no error in ratings under PIRS but revoked MAC in order to correct obvious errors

The Secretary, Department of Education v Hurley [2019] NSWWCCMA 164 – Arbitrator Peacock, Dr J Parmegiani & Dr D Andrews – 12 November 2019

The worker suffered a psychological injury on 3 March 2016 (deemed). She claimed compensation under s 66 *WCA* and on 15 July 2019, Dr Roberts (AMS) issued a MAC, which assessed 22% WPI, but he applied a deductible of 3% under s 323 *WIMA* and assessed compensable impairment of 18% WPI.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* It asserted that the AMS erred in his assessments under all PIRS Categories (except for "concentration, persistence and pace") and by failing to consider whether the worker's other health problems were contributing to her impaired functioning. However, the worker argued that there was no medical support for the appellant's arguments and it is not sufficient to assert that a pre-existing condition automatically impacts upon psychological functioning. Therefore, the MAC should be confirmed.

The MAP confirmed that the AMS' role is to conduct an independent assessment on the day of examination. The AMS is required to take a history, conduct a mental state examination, make a psychiatric diagnosis and have due regard to other evidence that is before them. The AMS must bring their clinical expertise to bear and exercise their clinical judgment when making an assessment under the PIRS categories and that assessment is not to be based solely upon the worker's self-report. A MAP cannot disturb those ratings for mere difference of opinion, but must be satisfied as to error. It found no error in the AMS' examination, reasons and assessment ratings and held that each of the ratings were open to him in accordance with the correct application of the criteria in the Guides.

Accordingly, the MAP confirmed the overall assessment of impairment, but it revoked the MAC in order to correct the following obvious errors: (1) A typographical error that wrongly referred to the date of injury as 30 March 2016; and (2) A mathematic error in the deduction of 3% WPI under s 323 *WIMA,* which leaves a compensable impairment of 19% WPI.

Demonstrable error – Assessment of WPI of the upper digestive tract – MAC revoked

Hi-Tech Express Pty Ltd v Fuimaono [2019 NSWWCCMA 165 – Arbitrator Batchelor, Dr R Crane & Dr N Berry – 13 November 2019

On 30 April 2019, the worker filed an ARD that claimed compensation under s 66 WCA for multiple frank injuries: (1) 1 July 2008 –head, neck, left shoulder, back and both legs; (2) 1 August 2008 –back, both legs, left shoulder and neck; and 14 September 2008 – right leg and right foot. However, the appellant disputed the claims.

On 28 May 2019, ***Arbitrator Perrignon*** conducted a teleconference, during which the worker was given leave to rely solely on the injury dated 1 July 2008. At an arbitration hearing on 5 July 2019, by consent, the Arbitrator entered an award for the respondent in respect of the allegation of injury to and consequential condition of the left upper extremity and/or left shoulder as a result of injury on 1 July 2008. The s 66 dispute was remitted to the Registrar for referral to an AMS to assess permanent impairment of the upper digestive tract. The balance of the claims in the ARD were discontinued.

On 25 July 2019, a MAC certified 2% WPI with respect to the anus. However, the appellant appealed against the MAC under s 327 (3) (d) *WIMA* and asserted that no dispute regarding the lower digestive tract and anus were referred to the AMS. It noted that the AMS diagnosed dyspepsia caused by Helicobacter pylori gastritis in the upper digestive tract and inflammatory bowel disease including ulcerative colitis and Crohn's disease in the lower digestive tract, which are non-work related conditions.

However, the worker argued that the MAC does not contain a demonstrable error because there was a medical issue between the parties as to the nature and extent of his injuries and there was nothing in the material before the AMS that restricted the extent of his injury, as long as he complied with the requirements of ss 323, 324 and 325 *WIMA.* The AMS complied with s 325 *WIMA* because there was an identifiable injury to the lower digestive tract, that resulted in injury to the anus, that could be assessed. No more was required as a basis for a referral to an AMS and the AMS correctly exercised his clinical judgment and did not act beyond the scope of the Referral. He argued that the appeal should not be referred to a MAP and that the MAC should be confirmed, failing which "*the result will be unfair*". Alternatively, he argued that he should be re-examined under s 329 *WIMA.*

The MAP determined the appeal on the papers and decided that a further medical examination was not required. It held, relevantly:

> 30. In *Merza* 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 s327 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.
>
> 31. In *Aircons* Malpas AJ said at [20]:
>
> > 20 The prescription contained in subsection (1) of s 325 requires the approved medical specialist (AMS) to give a certificate as to the matters referred for assessment. It is significant that the provision appears to distinguish between '*a medical dispute*' and '*the matters referred for assessment*'. The statutory function of the AMS is to give a certificate as to those matters.
>
> 32. On the basis of these authorities, the Panel is of the view that the MAC issued by Dr Garvey does contain a demonstrable error. The only matter referred to him for assessment was WPI as a result of the condition in the upper digestive tract as a result of injury on 1 July 2008. Dr Garvey correctly assessed this at 0%. However, he also assessed WPI as a result of conditions in the lower digestive tract and anus as a result of injury on 1 July 2008. He was not asked to do this.

In relation the upper digestive tract, the MAP noted that the AMS assessed 0% WPI because there were no clinical signs or other objective evidence of upper digestive tract disease, anatomic loss or alteration and there was no objective evidence of NSAIDs gastropathy, analgesic gastropathy or reactive gastropathy. The MAP stated, relevantly:

> 35. … The Panel agrees with this assessment. The medical members of the Panel note that normally it would be expected of somebody suffering from analgesic gastritis to develop the symptoms within 6 to 12 months of commencing the medications for their injury. In this man's case, it was approximately 2012 before he reported any symptoms. On 4 August 2016, he did have a colonoscopy9 which reported multiple aphthous ulcers and was directed by Dr Teoh to cease all anti-inflammatory medications, and it appears that he did so. When he underwent a repeat colonoscopy with gastroscopy on 12 July 2017 his colonoscopy was normal, and the histology of the gastric biopsy reported Helicobacter pylori which would account for his ongoing symptoms.
>
> 36. In Mr Fuimaono's case, the medical members of the Panel are of the view that at the present time in the absence of medications he has no evidence of injury from non-steroidal anti-inflammatory drugs (NSAIDs) and should be assessed at 0% WPI for the upper digestive tract.

The MAP also agreed with the AMS' assessment of 0% WPI for the lower digestive tract, despite this not being a matter that was referred for assessment. In respect of the assessment of the anus, which was also not referred to him, the MAP stated, relevantly:

> 38. … The Panel does not agree with this assessment. It is the Panel's view that skin tags represent resolution of haemorrhoids. It accepts that earlier constipation may have been implicated in producing haemorrhoids, but on the cessation of medication these resolved as is reported. There was no further bleeding from the bowel and two skin tags which do not alter anal function do not justify 2% WPI.
>
> 39. The Panel is satisfied that there is a demonstrable error in the MAC of Dr Garvey as he went beyond the scope of the referral and assessed two items that were not referred to him for assessment. For this reason, the Panel is also of the opinion that this is not a matter that warrants referral for further assessment pursuant to s 329 of the 1998 Act as submitted by the respondent.

Accordingly, the MAP revoked the MAC and issued a MAC that certified 0% WPI with respect to the upper digestive tract.

WCC – Arbitrator Decisions

Interpretation of s 82A WCA - Dispute regarding commencement date for indexation of weekly payments – Held: indexation commenced on 1 April 2013, pursuant to an Order published by the Authority under s 82A (4) WCA

Theoret v Aces Incorporated [2019] NSWWCC 359 – Arbitrator Harris – 6 November 2019

The dispute in this matter related to an injury that occurred on 23 December 2002. The worker disputed the insurer's calculation of PIAWE, but that dispute concluded when a claims assessor determined that PIAWE was $407.42.

On 3 April 2019, the insurer served a dispute notice on the worker, stating that he had been paid weekly payments for 116 weeks, that he had no current work capacity and that "*indexed PIAWE*" is $466.

On 24 July 2019, the worker's solicitors disputed the calculation of "*indexed PIAWE*" under s 82A *WCA* and they asserted that PIAWE should have been indexed from December 2002 and that it should be $690.19.

Arbitrator Harris conducted a teleconference as a Delegate of the Registrar. He identified the sole issue as being whether indexation applied from the date of injury or from 1 April 2013. He advised the parties that he considered this issue in *Thompson v ATN Channel 7 (No 2)* ("*Thompson*"), which the legal representatives had not considered, and he directed them to file written submissions. He ultimately determined the dispute as an Arbitrator, as opposed to a Delegate of the Registrar.

The Arbitrator noted that s 82A *WCA* was introduced by the 2012 Amendments and was further amended by the 2018 Amendment Act, which included the repeal of s 82A (3) and a change to the wording of the various subsections under which "*the Authority*" was substituted for *"the Minister*" in s 82A (4) and that the Authority is to declare, by order published on the NSW Legislation website, the number that equates to the factor B/C. A similar change was made to the wording in s 82A (5).

The Arbitrator referred to his previous decision in *Thompson (No 2)*, in which he declined to index PIAWE from the date of injury and indexed it from 1 April 2013, and stated:

11. As the plurality stated in *Military Rehabilitation Commission v May*, the "*question of construction is determined by reference to the text, context and purpose of the Act*"; citing *Project Blue Sky Inc v Australian Broadcasting Authority* and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.

12. In *Grain Growers Limited v Chief Commissioner of State Revenue (NSW)* Beazley P stated11 that "*the starting point and end point is with the text of the provision*". Her Honour cited the comments of the High Court in Alcan when the plurality stated:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Footnotes omitted) See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].

13. I do not accept the applicant's submissions and respectfully disagree with the decision of *Edwards* in relation to the finding that the PIAWE can be indexed prior to 2013 in accordance with the formula contained in s 82A (2).

14. Section 82A is part of Division 6A of *the 1987 Act*. The section was inserted into *the 1987 Act* by the *Workers Compensation Legislation Amendment Act 2012 (2012 amendment Act).*

15. Section 82A (1) provides that the amount of weekly payments is varied "*on each review date after the day on which the worker became entitled to weekly payments*". "*Review date*" is defined in s 82A (2) to mean 1 April and 1 October in each year. Section 82A (4) provides that "*before each review date*" the Minister notifies by order on the NSW legislation website the number that equates to the factor B/C.

16. The applicant in this case is seeking an indexation of the pre-injury average weekly earnings in accordance with its calculation of the factor B/C. Whilst the figure provided by the applicant may be the same calculation as set out in s 82A (1), it is not in accordance with the requirement set out in s 82A (4) that the Minister notify the number that equates to the factor B/C by order published in the NSW legislation website.

17. As the respondent correctly submitted, the Minister has not notified a number that equates to the factor B/C for any period prior to 1 April 2013.

18. Section 82A is operational from 1 October 2012. It was passed as part of a scheme of amendments for entitlements to weekly payments of compensation. These amendments included the entitlement to weekly payments in the first entitlement period of 13 weeks (s 36) and the second entitlement period (s 37), all of which are also operational from 1 October 2012.

19. The submission that the average weekly earnings can only be indexed during a period after the commencement of the operation of the section is more consistent with the context of the amendments to weekly payments that are operative from 1 October 2012.

20. The applicant's submission is that the critical words in s 82A (1), that the figure is indexed "*on each review date after the date on which the worker became entitled to weekly payments*" is without reference to a starting commencement year. That

submission ignores the context of the section, reads the words "*review date*" in isolation and otherwise ignores the clear words of s 82A (4) of the Act.

21. In *NSW Trustee and Guardian v Olympic Aluminium Pty Ltd* Keating P analysed the various authorities, particularly with reference to the observations of the majority of the High Court in *Alphapharm Pty Ltd v H Lundbeck A/S*, which reiterate that the words under consideration must be viewed in context rather than in isolation.

22. The plurality in *Alphapharm*, referring to previous High Court authority, stated:

> It is not always appropriate to dissect a composite legislative expression into separate parts, giving each part a meaning which the part has when used in isolation, then combine the meanings to give that composite expression a meaning at odds with the meaning it has when construed as a whole.

23. The reference to "*review date*" as being any "*1 April or 1 October*" ignores the requirement in s 82A (4) that the Minister must notify, by order published in the NSW legislation website, the number that equates to the factor B/C.

24. I do not accept that the applicant's submissions. The submissions are contrary to contextual aspects of s 82A and specifically contrary to the requirements in s 82A (4) that the number for B/C be published by order in the NSW legislation website.

25. The reasoning in Edwards supporting the applicant's position was that workers compensation legislation is beneficial legislation which should "*be construed beneficially giving the fullest relief that the fair meaning of its language will allow*". Arbitrator Dalley stated:

> To apply indexation from the first review date after 18 November 2009 seems to me in accordance with the beneficial nature of the legislation as well as being in accordance with the plain words of the section. It has the effect of adding words to the section limiting indexation to the value of 'A' only on and after 1 April 2013. I accept the applicant's submission that the value of 'A' is to be indexed in accordance with the formula from the first review date after weekly payments became payable following injury on 18 November 2009.

26. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel* as having a "*non-beneficial operation*" and by the Court of Appeal as disclosing "*a cost-savings objective*": *Cram Fluid Power Pty Ltd v Green*.

27. Recently in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* Leeming and Payne JJA observed:

> 42. The applicant repeatedly invoked in support of its construction the legislative purpose, which was to benefit subcontractors in its position. But Gleeson CJ observed in *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [6] that:
>
> > [T]he underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of *the Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose.

28. In *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40] it was said, by reference to *Carr*, that:

> Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem.

29. Whilst the amendments to weekly compensation made by the *2012 amendment Act* may not fall within the same class as the amendments to permanent impairment compensation, discussed by the High Court in *Goudappel* and the Court of Appeal in *Cram Fluid*, the 2012 amendments otherwise limited the entitlement to weekly compensation. These amendments included the restriction of the meaning of "suitable employment" by excluding the notion of whether alternative work was available in the employment market, by restricting the number of weeks to weekly compensation entitlements as set out in Division 2 of Part 3 of *the 1987 Act* and introducing the concept of a work capacity decision which is undertaken by the insurer managing the claim. These changes to weekly compensation introduced by the *2012 amendment Act* were, in some respects, not beneficial to workers.

30. I do not agree that the s 82A should be given "*the fullest relief that the fair meaning of its language will allow*". In any event, read in context, I do not accept that the reference to "*on each review date*" in s 82A (1) means a date where the Minister has not published, in accordance with s 82A (4), the number for the factor B/C on the NSW legislation website.

31. The respondent submitted that s 82A "*is not retrospective*". I do not reject the applicant's entitlement based on suggestions of "*retrospective operation*". Section 82A clearly operates from 1 October 2012. The section does not have retrospective operation within the first sense discussed in *Goudappel* , that is, it does not purport to operate on entitlements existing prior to the date of commencement of the section. The section otherwise does not breach the concept of retrospective operation in the second sense discussed in *Goudappel*, that is, it does not operate "*to alter rights or liabilities which have already come into existence by operation of prior law on past events*".

32. The section does not affect either of those rights as it does not affect an entitlement to weekly compensation up until 1 October 2012 when the section commenced. In that sense I do not consider that the question of "*retrospectively*" is relevant to the construction of the section. If I am wrong in this respect, then it is a further argument favouring the respondent's position.

33. For these reasons I reject the applicant's submission that the indexation applies from 2000. The indexation to s 82A applies from 1 April 2013.

The Arbitrator rejected the worker's submission that his interpretation in applying the order declared under s 82A (4) *WCA* is using subsequent delegated legislation to interpret the legislation. The worker cited the decision in *Mine Subsidence Board v Wambo Coal Pty Ltd* (*Wambo*) as authority for the proposition that:

> Delegated legislation in the form of regulations or publications by the minister or Authority come after the enactment of the legislation and do not accordingly disclose the intention of parliament when it passed the legislation.

The Arbitrator stated (citations excluded):

> 43. I assume that the applicant was referring to that part of the decision in *Wambo* when Tobias JA stated:
>
> > 41. Although the appellant sought to call in aid the terms of a regulation made for the purpose of s 12A (2) (a), accepting that no such regulation had been made for the purpose of s 12A (2) (b), in my opinion it is well established that as a general rule it is impermissible to call in aid in the construction of an Act delegated legislation made under that Act: Pearce & Geddes 'Statutory Interpretation in Australia', 6th ed. (2006), Chatswood, [3.41] pp.104-105 and the cases there cited. It was not suggested by the appellant that the regulation

> in question and the Act formed part of a legislative scheme which, for the purpose of ascertaining but not construing that scheme, permits of a partial exception to the general rule.

44. The decision is referred to in *Pearce & Geddies, Statutory Interpretation In Australia*, Eighth edition (*Pearce & Geddies*) which also refers to the observations of French CJ in *Plaintiff M47-2012 v Director-General of Security* when his Honour stated:

> Generally speaking, an Act which does not provide for its own modifications by operation for regulations made under it, is not be construed by reference to those regulations: *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J.

45. The applicant's submission fails to consider that s 82A (4) authorises the declaration of the factor B/C. Using the words of French CJ set out above, s 82A (4) provides for its own modification through the order made pursuant to it. Section 82A (4) is not delegated legislation and is the source of power for the declaration of the order that equates to the factor B/C is to be published on the NSW website. Accordingly, I am not using the orders made under s 82A (4) to interpret the legislation but applying it as a modification of the section…

47. In my view, s 82A (4) provides a clear intention that the number published on the NSW legislation website is the relevant number for the purposes of the section. The applicant stressed reliance on the wording of s 82A (1). In my view, that provision must be read subject to the express provision in s 82A (4)…

49. I note that I did not apply a purposeful approach in *Thompson (No 2)*. What I then said was that I would not follow the reasoning in *Edwards*, a decision which reached the contrary conclusion, because it solely relied on a beneficial construction in construing the section. I was not prepared to give the section "*the fullest relief that the fair meaning of its language will allow*". I otherwise referred to various authorities which cast doubt on the approach of stating the purpose of legislation to solve the problem of interpretation.

The Arbitrator confirmed the view that he expressed in *Thompson (No 2)*, which are to be read with the reasons in this matter. He concluded that the worker's interpretation "*basically ignores the clear words contained in both s 82A (4) and (5) and the order declared by the Authority and published on the NSW legislation website"*. However, he declined to enter an award for the respondent because it was validly paying weekly compensation in respect of his injury. Accordingly, he refused the application.

Consequential condition – Kooragang Cement v Bates & Kumar v Royal Comfort Bedding discussed – Arbitrator not satisfied that disputed right shoulder injury was a consequence of the accepted left shoulder injury

Schembri v Blacktown City Council [2019] NSWWCC 358 – Arbitrator McDonald – 6 November 2019

The worker was employed by the respondent as a cleaner. On 5 July 2005, she injured her left shoulder, neck and back at work. In 2010, she made a claim under s 66 *WCA* and on 2 June 2010, a MAC certified 5% WPI (cervical spine) and 0% WPI (lumbar spine).

The worker made a further claim under s 66 *WCA* based upon a report from Dr Mendelsohn dated 3 April 2018, which assessed 5% WPI (cervical spine), 7% WPI (lumbar spine), 8% WPI (left shoulder) and 9% WPI (right shoulder)). He attributed capsulitis of the right shoulder to the left shoulder injury and opined that the worker's post-injury employment did not cause any permanent impairment.

However, the respondent disputed the claim based upon an opinion from Dr Powell that the right shoulder condition was not a consequential injury and that the left shoulder injury essentially represented referred pain from the cervical spine because there was no significant structural pathology.

Arbitrator McDonald conducted an arbitration hearing, during which the parties agreed that the worker had not suffered any additional impairment of the neck and that the assessment of 5% WPI should be combined with any impairments of the lumbar spine and left upper extremity

The worker argued that as a consequence of her left shoulder injury, she relied heavily on her right shoulder for day to day tasks and that this aggravated her shoulder pain. The Arbitrator stated that while she did not doubt the worker's complaints of considerable right shoulder pain, the evidence discloses a number of possible causes and that the worker's statement and Dr Mendelsohn's evidence did not allow her to draw the conclusion that the right shoulder condition is a result of the left shoulder injury. She held (citations excluded):

> 56. Paragraph 11 of the statement sets out the matters which she considers led to her right shoulder condition. It is noteworthy that Ms Schembri is right handed. The tasks on which Ms Schembri relies include sleeping on her right side, driving and "*day to day tasks*." Ms Schembri's evidence about driving refers to both of her arms and shoulders. In paragraph 11(iii) she said that she had to change to an automatic car but said that was because she found it difficult to change gears with her left hand.
>
> 57. Ms Schembri identified dishwashing and reaching to cupboards to put away dishes and sweeping but said that she avoided sweeping because of her chronic pain. She lowered the clothes line to avoid reaching above her shoulders and said that she used only her right arm, suffering pain as a result of reaching above shoulder height. She found that cooking, particularly chopping and stirring activates pain in her right shoulder. She has difficulty washing and dying her hair because she cannot lift her arms…
>
> 59. The relevant principles of onus of proof were discussed by the Court of Appeal in *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* (Nguyen) where McDougall J (McColl and Bell JJA agreeing) said at [44]:
>
> > A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in Helton v Allen [1940] HCA 20; (1940) 63 CLR 691 at 712.
>
> 60. While an injury or condition can have multiple causes, there is insufficient evidence to draw the conclusion (or feel an actual persuasion) that the tasks about which Ms Schembri complains are difficult because of a right shoulder condition and that she has suffered a right shoulder condition which was the result of the accepted left shoulder injury.

The Arbitrator described Dr Mendelsohn's evidence regarding causation of the right shoulder as "*limited*" as he did not outline any tasks that contributed to the development of the right shoulder condition other than to say that her work and home tasks had "*doubled the wear and tear*" on her right shoulder. He did not disclose his reasoning process and his opinion was "*a bare ipse dixit*". However, Dr Powell disclosed his reasoning process by reference to radiological evidence of the cervical spine and this opinion that the shoulder symptoms were due to age-related degenerative changes in the cervical spine is consistent with the view expressed by Dr Harrison in 2010.

The Arbitrator was not satisfied that the right shoulder condition is a consequence of the accepted left shoulder injury. She remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment of the lumbar spine and left shoulder, with an instruction that the AMS is to combine those assessments with the agreed assessment of 5% WPI for the cervical spine.

Application to rescind COD to enable an appeal against a MAC issued in a s 66 WCA under ss 327 (3) (a) and (b) WIMA, for the purpose of satisfying the threshold under ss 39 and/or 151H WCA, where no threshold claim made – Held: worker entitled to lodge appeal under ss 327 (3) (a) and/or (b) WIMA

Galea v Colourwise Nursery (NSW) Pty Ltd [2019] NSWWCC 362 – Arbitrator Harris – 12 November 2019

The worker injured both arms at work on 17 October 2014 (deemed). On 27 April 2016, she claimed compensation for 14% WPI under s 66 *WCA* and on 6 December 2016, a MAC certified 12% WPI (7% left upper extremity, 5% right upper extremity & 0% scarring). However, on 19 January 2017, the MAC was amended to correctly combine the assessments to 11% WPI. On 25 January 2017, Arbitrator Farrell issued a COD that awarded the worker compensation under s 66 *WCA* based upon the amended MAC.

The worker applied to rescind the COD under s 350 (3) *WIMA*, to enable an appeal against the MAC under ss 327 (3) (a) and (b) *WIMA* for deterioration following surgery to the left shoulder on 28 February 2017.

On 8 May 2018, the worker's solicitors served a report from Dr New upon the respondent, which assessed 24% WPI. They conceded that the worker was not entitled to make a further claim under s 66 *WCA,* but requested a concession that the thresholds for either work injury damages and/or s 39 *WPI* were satisfied. It did not make any concession and on 21 November 2018, the worker's solicitors advised that the matter would be referred to the Commission "*to have her entitlements determined in regards to both the threshold as well as section 39*".

On 6 June 2019, the respondent issued a s 39 notice to the worker, based upon an assessment of 12% WPI from Dr Bosanquet and stated that weekly payments would cease on 9 June 2020 (the decision wrongly states the year as "*2000*").

On 16 August 2019, the worker filed a Miscellaneous Application and requested a further assessment by an AMS for the purposes of a threshold dispute.

Arbitrator Harris conducted a teleconference on 16 September 2019. He drew the parties' attention to his previous decisions in *Lizdenis v Centrel Pty Ltd* and *Habib v Glowmeat Pty Ltd* and directed them to file written submissions. He noted that the worker asserted that as her claim involved a threshold dispute, it is not caught by s 66 (1A) *WCA*, but the respondent argued that as the MAC did not involve a threshold dispute, there could be no appeal from it under s 327 *WIMA* as any appeal is confined to the matters that were the subject of the initial referral: see *O'Callaghan v Energy World Corporation Limited* [2016] NSWWCCPD 1 at [90]. It also argued that under s 322A (2) *WIMA,* the one assessment extends to any further or medical dispute about the degree of permanent impairment of the worker as a result of the injury: see *Merchant v Shoalhaven City Council.* However, this assertion was not the subject of detailed submissions.

The Arbitrator stated (citations omitted):

> 32. As the plurality stated in *Military Rehabilitation Commission v May*, the "*question of construction is determined by reference to the text, context and purpose of the Act*"; citing *Project Blue Sky Inc v Australian Broadcasting Authority* and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue.*

33. In *Grain Growers Limited v Chief Commissioner of State Revenue (NSW)* Beazley P stated that "*the starting point and end point is with the text of the provision*". Her Honour cited the comments of the High Court in Alcan when the plurality stated:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Footnotes omitted)
>
> See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].

The Arbitrator referred to the decision of the Court of Appeal in *JC Equipment Pty Ltd v Registrar of the Workers Compensation Commission of New South Wales (JC Equipment)*, in which Tobias JA held:

> (a) Section 281 of *the 1998 Act* contemplates two different claims by the injured work; a claim for compensation pursuant to s 66 of the 1987 Act, and also a claim for work injury damages (at [50]);
>
> (b) Section 281 (2B) of *the 1998 Act* mandates that the employer notify the claimant whether or not it accepts that the degree of permanent impairment of the claimant resulting from injury is "*sufficient for an award of damages*". This is a reference to the minimum 15 per cent degree of permanent impairment in s 151H (1) of *the 1987 Act* (at [51]);
>
> (c) Section 313 of *the 1998 Act* contemplates a dispute as to whether the degree of permanent impairment of the injured worker is sufficient for an award of damages. Section 314 of the 1998 Act provides a mechanism for determining whether there is any dispute (at [56]);
>
> (d) The statutory regime emphasises the dichotomy between damages and statutory compensation (at [59] – [60]), and
>
> (e) The employer's agreement or acceptance of the degree of permanent impairment, for the purposes of s 66 of the 1987 Act, did not constitute acceptance that the degree of permanent impairment was sufficient to satisfy the s 151H threshold.

The Arbitrator held that the decision in *JC Equipment* was referred to and applied in *Wilkinson v Perisher Blue Pty Ltd,* and in *Wattyl Australia Pty Ltd v McArthur,* Beazley JA questioned Tobias JA's construction but noted that it was a recent, unanimous decision of the Court of Appeal and should be followed. He found that s 314 (3) expressly accepts the distinction between a claim for work injury damages and a claim for permanent impairment compensation. It provides that acceptance by a person of the degree of permanent impairment compensation constitutes acceptance of the degree of permanent impairment of the claim for work injury damages, which overcomes the effect of *J C Equipment*, and other amendments introduced by the *Workers Compensation Legislation Amendment Act 2012 (2012 Amendment Act)* support that distinction. He stated, relevantly:

> 48. Section 39 (3) of *the 1987 Act* requires an assessment pursuant to s 65 of *the 1987 Act* which itself requires an assessment under Part 7 of *the 1998 Act*. As the respondent submitted, s 314 (2) of *the 1998 Act* requires an assessment by an Approved Medical Specialist if there is a threshold dispute.

49. Section 322A (1) of *the 1998 Act* provides that there can be only one assessment "*of the degree of permanent impairment of an injured worker*". Sub-section (2) provides that the certificate given is used for other purposes.

50. In *Merchant v Shoalhaven City Council* Keating P held that the s 322A (2) extended to an assessment for the purposes of whether a worker was "*seriously injured*" within the meaning of s 32A of *the 1987 Act*.

51. That decision undoubtedly reads the words in the brackets as examples of how the one certificate is binding for all purposes and not simply for the specific threshold purposes stated in the subsection.

52. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel* as having a *"non-beneficial operation*" and by the Court of Appeal as disclosing "*a cost-savings objective*": *Cram Fluid Power Pty Ltd v Green.*

53. Accordingly, a claim for permanent impairment compensation is clearly distinct from a threshold claim. Despite the introduction of s 314 (3), there remains a distinction between a claim for permanent impairment compensation and a claim for the purposes of establishing the threshold pursuant to s 151H of *the 1987 Act*. However, the medical assessment certificate can be used for all purposes. In one sense, the distinction articulated in *J C Equipment* has been overridden by legislative amendment.

The Supreme Court of NSW considered the meaning of "*matters referred for assessment*" in s 325 *WIMA* in *Aircons Pty Ltd v Registrar of the Workers Compensation Commission (NSW) (Aircons).* Malpass AsJ stated:

20 The prescription contained in subsection (1) of s 325 requires the approved medical specialist (AMS) to give a certificate as to the matters referred for assessment. It is significant that the provision appears to distinguish between "*a medical dispute*" and "*the matters referred for assessment*". The statutory function of the AMS is to give a certificate as to those matters.

21 I am satisfied that the medical assessment certificate given by Dr Fry contains demonstrable error. He has addressed matters other than those referred to him for assessment. He has not given a certificate as to the matters referred for assessment. This has seen him venture outside that area and one of the consequences is that there is overlapping with the assessment made by Dr Bodel. The supplementary certificate given by Dr Bodel was founded on the correctness of the certificates that both he and Dr Fry had given. Accordingly, the supplementary certificate is infected with the error contained in the earlier certificate of Dr Fry.

The Arbitrator referred to the decision in *O'Callaghan*, in which the worker was originally assessed for permanent impairment restricted to the lumbar spine. An application for reconsideration of the Commission's orders was then made to enable an appeal to be filed against the MAC based on alleged deterioration under s 327 (3) (a) *WIMA.* That application was dismissed and an appeal against that decision was dismissed, principally on the basis that the threshold requirements under s 352 (3) *WIMA* were not satisfied. He stated:

60. Ms O'Callaghan argued that her condition had deteriorated and sought an assessment in respect of the cervical spine. No claim for permanent impairment had previously been made in respect of the cervical spine and the original medical assessment certificate was limited to the assessment of impairment of the lumbar spine.

61. During the course of his Reasons, Roche DP stated:

> I do not accept that Aircons does not relate to the circumstances contemplated by grounds (a) and (b). Once it is accepted, as it must be, that a s 327 appeal is '*against a medical assessment'*, *Aircons* is directly relevant and binding. As held in that case, an AMS can only give a certificate as to the matters referred for assessment. To say that the Medical Appeal Panel is not restricted to the matters in the original referral to the AMS ignores the fact that a matter does not get to a Medical Appeal Panel unless and until the Registrar is satisfied that, on the face of the application and any submissions made in support of it, at least one of the grounds for appeal specified in subsection (3) has been made out.

62. Roche DP referred to the decision of the Court of Appeal in *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW* as being consistent with this interpretation. The relevant passage in *O'Callaghan* relied upon by the respondent in its submission (set out in full at [29] herein) was:

> Contrary to Mr McManamey's submissions, s 327(3)(a) does not allow an appeal in respect of all of the consequences of the work injury. It is confined to its terms and has been the subject of binding judicial scrutiny in *Aircons* and *Riverina Wines*.

63. The Deputy President stated that the matters referred for assessment were the body parts, not whether it was it was an assessment based on a claim for permanent impairment or a threshold claim.

64. That conclusion is otherwise consistent with the contextual language. Section 325 (2) provides that the medical assessment certificate is to set out the "*details of the matters referred for assessment*" (s 325 (2) (a)) and certify "*with respect to those matters*" (s 325 (2) (b)).

65. The appeal under s 327 is an appeal against "*a medical assessment*" (s 327 (1)) limited to "*a matter as to which the assessment of an approved medical specialist certified in a medical assessment certificate under this Part is conclusively presumed to be correct*."

66. Consistent with the provisions of ss 326 and 327 of *the 1998 Act*, an Appeal Panel may confirm the original certificate or revoke that certificate and issue a new certificate "*as to the matters concerned*" (s 328 (5)).

67. These provisions, when read to together, show that the appeal under s 327 is with respect to the degree of permanent impairment of the various matters or body parts referred for assessment.

68. Section 322A was introduced as part of the changes introduced by the *2012 Amendment Act*. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel (ADCO Constructions)* as having a "*non-beneficial operation*" and by the Court of Appeal as disclosing "*a cost-savings objective*": *Cram Fluid Power Pty Ltd v Green (Cram Fluid)*. The issues of interpretation in those cases involved the entitlement to only make one claim for permanent impairment compensation under s 66 (1A) of *the 1987 Act*.

69. I accept that the introduction of s 322A (1) had a similar purpose to those discussed in *ADCO* and *Cram Fluid*. Whilst not the subject of submission, I am conscious that of the observations of both the High Court and the Court of Appeal concerning purpose with respect to these amendments. Section 322A was not a beneficial provision.

70. I agree with that part of the respondent's submission, that the neck is a new allegation and was never previously assessed. That body part was not a matter referred for assessment and cannot now be the subject of an appeal.

71. I disagree with the respondent's submission that as the threshold dispute was never claimed in the Original Application then the MAC cannot be appealed to establish that threshold. I accept that the applicant has an entitlement to appeal the MAC for the purposes of establishing a threshold such as that provided by s 39 and/or s 151H of *the 1987 Act*. Having examined the statute based on text, context, purpose and decided caselaw, the applicant has an entitlement to appeal the MAC for the following reasons:

(a) The one medical assessment certificate is used for all purposes (s 322A (2));

(b) The applicant's statutory right to appeal the medical assessment certificate pursuant to s 327 is protected by s 322A (4) of *the 1987 Act*;

(c) There is no time limit to appeal a medical assessment certificate if the grounds for appeal are based on s 327 (3) (a) and/or (b);

(d) The applicant's entitlement to appeal is restricted to the matters referred for assessment. Those matters were the various body parts assessed by the AMS;

(e) Despite the fact that the applicant had not made a threshold claim when the MAC was issued, the MAC determined that issue. Consistent with the clear statutory language which provides for an appeal against a medical assessment certificate, the MAC can be appealed for the purposes of any threshold issue.

The Arbitrator noted that the reconsideration power under s 350 (3) *WIMA* was considered by the Court of Appeal in *Hatfield Engineering Pty Ltd v Fitzgerald*, in which Santow JA described s 17 of the *Compensation Court Act* (the predecessor of s 350) as "*a discretion virtually without limit".* Further, in *Reodica v State Rail Authority*, Tobias JA stated:

> It is well established that s.17 (4) of the *(Compensation) Court Act* confers a discretionary authority upon the Compensation Court itself to review, and correct, errors of both fact and law: *Hardaker v Wright & Bruce Pty Limited* (1960) 62 SR(NSW) 244 at 248, 249; *Schipp v Herfords Pty Limited* (1975) 1 NSWLR 412 at 424. The width of the subsection was described by Owen and Walsh JJ in *Hardaker* (at 249) in the following terms:
>
> > Such reconsideration was not necessarily limited to an examination of changed circumstances or fresh evidence concerning the original circumstances. It may, in a proper case, extend to considering whether an error had been made, whether of fact or of law, and to making such new or altered award as the circumstances, when thus reconsidered, appeared to require. This passage was cited with approval in *Schipp* by Mahoney JA at 438.

The Arbitrator also referred to *Atomic Steel Constructions Pty Ltd v Tedeschi,* in which Roche DP echoed similar comments to Street CJ in *Hilliger* when he stated:

> The discretionary power conferred by the reconsideration power is in '*extremely wide terms*' (*Hardaker v Wright & Bruce Pty Ltd* [1962] SR (NSW) 244 at 248). It is important, however, to remember the distinction between the existence of the reconsideration power and the occasion of its exercise, and that courts should not lose sight of the general rule that the public interest requires that litigation should not proceed interminably (Street CJ in *Hilliger v Hilliger* (1952) 52 SR (NSW) 105 at 108). Nevertheless, as Street CJ further observed, it is clear that the legislature intended

> to leave with certain tribunals the power of reviewing the decision to see "*that justice is done between the parties.*

As to the merits of the worker's allegation of deterioration, the Arbitrator referred to the decision in *Riverina Wines*, in which Campbell JA stated at [94] (Hodgson JA and Handley AJA agreeing):

> Considering that submission involves, first, construing section 327 (3) (a). '*Deterioration*" of a person's condition is an inherently relational concept. It involves the condition in question having become worse than it previously was, at some particular point in time. In my view, the '*deterioration*' that section 327 (3) (a) talks of is a deterioration from the degree of impairment that has been certified by the MAC, over the time since the examination or examinations on the basis of which the MAC was issued took place. That conclusion follows from the fact that the appeal in question is, as section 327 (2) requires, against a matter as to which the assessment of an AMS certified in a MAC is conclusively presumed to be correct.

The Arbitrator found no real difference between the assessments of Drs New and Bosanquet, except that Dr Bosanquet applied a deductible of 50% under s 323 *WIMA.* While there is no estoppel in a changing situation he considered the existence of a deductible of 50% when the AMS made no such deduction 3 years ago would be "*unusual*" and any such deductible would have to arise before the period of the worker's employment: *Cullen v Woodbrae Holdings Pty Ltd.* He held that it was difficult to see how any s 323 deduction would be applied and felt that the worker had a strong case for showing a deterioration in permanent impairment and attaining at least the s 151H threshold. She also had real prospects of attaining the s 39 threshold. He said that he made these comments, which are not binding on any future MAP, because the strength of the claim is a relevant factor in determining whether the COD should be set aside.

The Arbitrator stated that the finality of litigation should be considered in the context that s 327 (3) (a) does not specify a time limit in which to file an appeal based on deterioration and such an appeal will usually arise after a COD has been issued and is unlikely to arise in the short time between the assessment and the issuing of the COD. He stated:

> 108. I previously held that it was unnecessary to revoke a certificate of determination to pursue an appeal based on the threshold. That is a different matter and something I return to later in these reasons.
>
> 109. The applicant has clearly stated in her written submissions that she is not asserting a further entitlement to s 66. That claim has been made and resolved. That approach, that she does not have a further entitlement to permanent impairment compensation by reason of s 66 (1A) of *the 1987 Act*, is consistent with my earlier decisions.
>
> 110. I accept that submission from the applicant's legal advisors as binding on her in the exercise of my discretion to set aside the COD. Any higher assessment from an Appeal Panel does not amount to an entitlement by the applicant to additional s 66 compensation. I make this clear in the event that the applicant subsequently suggests to the contrary. I consider the applicant's submission that she has no additional entitlement to s 66 claim as binding on her in relation to any future conduct.
>
> 111. I have concluded that the applicant has a proper legal basis for filing an application to appeal the MAC based on s 327 (a) and (b) of *the 1998 Act*. Had the applicant not identified a legal basis to appeal the MAC then I would have dismissed the application on the basis of lack of utility.

112. I have considered the applicant's delay and the principles concerning finality of litigation. However, given the applicant has real and strong prospects of establishing a deterioration in the assessment of her permanent impairment, I accept, in the interest of justice, that there should be reconsideration of the COD so that she have the right to prosecute an appeal against the MAC.

113. In my previous decisions of *Lizdenis* I concluded that it was unnecessary to set aside the certificate of determination as that is "*not issued with respect to the threshold claim*" and the threshold claim was not determined by the issuing of a certificate of determination.

114. That view may have been an unnecessary restrictive of the interpretation of s 327 (7) which, on its face, prevents an application to appeal against a medical assessment certificate from proceeding. The COD entered by the Commission records that the assessment of the permanent impairment is in accordance with the findings by the AMS of 11%. If the COD stands in the way of an appeal being lodged, which it may, then the prudent course is to set it aside.

Accordingly, the Arbitrator ordered the COD to be set aside. However, he held that an Arbitrator cannot assess a worker's entitlement under the appeal provisions, as there is no statutory basis to appeal a MAC to an Arbitrator. He stated:

122. Pursuant to the *Workers Compensation Legislation Amendment Act 2018 (2018 Amendment Act)* the Commission now has power to make an assessment of permanent impairment. However, the Commission's power to make an assessment is not in addition to the assessment process undertaken by an AMS. Section 322A (3), enacted as part of *the 2018 Amendment Act*, provides that a medical dispute cannot be separately assessed by an Approved Medical Specialist and the Commission.

123. Consistent with these provisions, the assessment of the degree of permanent impairment has been referred to an AMS and cannot now be referred to the Commission…

The Arbitrator concluded that he "*tended to agree*" with the respondent's submission that the establishment of a threshold for s 39 and/or s 151H *WCA* requires a MAC. He held that the worker is entitled to file an application to appeal against the MAC under ss 327 (3) (a) and (b) *WIMA* and stated that while he cannot order an appeal to be filed within any period, if this is not done with proper expedition he would hear any further application by the respondent to reconsider his orders.

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.

This is an historic Bulletin being the 50th issue. It has proven to be an information distribution relied upon by many in insurers' offices as well as the legal profession. The publication statistics shows that it is generally opened shortly after receipt by a significant number of recipients.

Michelle Riordan is the author under the watchful eye of Wayne Cooper.

Congratulations to both of them and thank you.

Kim Garling