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CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. Naidu v State of New South Wales [2019] NSWWCCPD 59
2. EML as agent for Insurance for NSW v AAI Limited t/as GIO [2019] NSWWCCPD 60
3. Puntigam v Tyzebet Pty Ltd [2019] NSWWCCMA 169
4. Secretary, Department of Industry v Nesci [2019] NSWWCCMA 172
5. Savage v That's Power Pty Ltd t/as Powertruss [2019] NSWWCCMA 174
6. Lecopoulos v Draft FCB Sydney Pty Ltd (deregistered) [2019] NSWWCCMA 173
7. Henderson v secretary, Department of Education [2019] NSWWCCMA 175
8. Papadellis v Tyree Industries Pty Ltd [2019] NSWWCC 372
9. Mahdavi-Aghdam v Imad's Locksmith and Shoe Repairs Pty Ltd [2019] NSWWCC 371
10. Tierney v Evalast Fencing Pty Ltd (Deregistered) & Ors [2019] NSWWCC 375
11. Dawson v Harvey Mechanical Installation [2019] NSWWCCR 6
12. Council of the New South Wales Bar Association v DEJ [2019] NSWCATOD 186

WCC – Presidential Decisions

Application to extend time under rule 16.2 (5) of the WCC Rules 2011 refused

Naidu v State of New South Wales [2019] NSWWCCPD 59 – Deputy President Snell – 22 November 2019

The appellant was employed as a Pathology Collector. On 5 November 2007, she injured her right ankle and foot at work. On 31 March 2008, she resumed work on restricted hours, but alleged that she was then bullied by her supervisor. She ceased work on 14 July 2008, following an alleged assault by her supervisor and she did not return to work. She compensation under ss 66 and 67 WCA, for 22% WPI for an alleged primary psychological injury, but the respondent disputed the claim.

Arbitrator Foggo conducted an arbitration on 26 September 2014, and on 13 October 2014, he issued a COD that entered an award for the respondent. His reasons are summarised below.

The Arbitrator noted that the respondent disputed the appellant's credit based upon her Facebook account, a surveillance report and associated video evidence. He observed that the evidence suggested that the appellant first decompensated psychologically on 11 March 2008, after a meeting with her Supervisor and rehabilitation co-ordinator. The GP's notes recorded various emotional problems, but the appellant's statement did not say what occurred at this meeting and there was no mention of inappropriate behaviour by her supervisor at that time. He noted that each of the appellant's complaint about her supervisor related to alleged incidents when no-one else was present. He considered this omission as "*troubling*", because if the appellant had forgotten the incident, it cast grave doubt on the reliability of her evidence. Alternatively, if it was a deliberate omission, it was at odds with the allegations of injury as there was no evidence that she presented to her GP on 12 March 2008 because of anything said or done by her supervisor.

The Arbitrator noted that an entry dated 8 July 2008 included a complaint of stress at work with her supervisor and noted, "*Due to her ongoing, prolonged pain esp aggravated by weight-bearing has pushed her right and was situation of post-traumatic disorder*". He held that the psychological symptoms at that stage were "*substantially and predominantly caused by her inability to cope with ongoing severe ankle and knee and leg pain as a result of the physical injury*".

The Arbitrator noted that while the GP recorded the alleged assault on 14 July 2008, the appellant's supervisor denied it. The appellant alleged that she reported the alleged assault immediately to another employee at work, but there was no statement from that person or evidence of any formal complaint to the respondent. When the appellant sought to complain to NSW Police, they declined to deal with it. There were no statements from anyone that the appellant allegedly complained to about her supervisor's conduct.

The Arbitrator described the appellant's attempt to involve Police in what was "*minor physical contact*" as "*inappropriate and suggestive of some agenda*". He noted that on 17 July 2008, three days after the alleged assault, the appellant consulted Dr Lam (pain management specialist). She gave a history of the assault, constant harassment by her supervisor and complained of symptoms including difficulty concentrating, stress and forgetfulness and said that she had been prescribed anti-depressants by her GP. Her complaints related solely to persistent pain and there was no enquiry or recommendation that she should undergo either psychological or psychiatric treatment. On 11 December 2008, Dr Lam noted that she stopped work due to persistent pain. The Arbitrator held that this evidence was at odds with the appellant's allegation that she ceased work because of bullying by her supervisor.

The Arbitrator also found that the images on the appellant's Facebook account were at odds with her description of them in her statement dated 16 December 2012 and that the surveillance evidence was "*even more at odds*" with her description of her psychiatric condition. This evidence was "*markedly inconsistent*" with her history to Dr Gertler regarding her social and recreational activities. On that basis, he was not prepared to accept the appellant's evidence unless it was independently corroborated and he preferred the evidence of her supervisor.

The Arbitrator discussed the test of causation stated by Kirby P in *Kooragang Cement Pty Limited v Bates,* described the appellant's explanation of the discrepancies between her statement and histories and the other evidence as "*inadequate*" and found that this raised an issue of whether her psychological complaints were "*exaggerations and falsehoods from their very inception*". He concluded:

> 19. … In my view, the [appellant's] actions in this regard were not actuated by malice or malingering but rather because she was no longer able to cope with the persisting and unrelenting pain in her right ankle and leg, exacerbated by the apparent inability of the medical profession to alleviate her pain and restrictions, and also the lack of support and understanding that she had experienced with her employer and Sol Espiritu in this regard. Even if the [appellant] actually perceived Sol Espiritu's behaviour to be bullying, it is clear from the contemporaneous notes of Dr Hanif that this was not the substantial contributing factor to the onset and persistence of her psychological symptoms, but rather it was her inability to cope with persistent and ongoing pain as a result of her physical injuries.

The Arbitrator held that if the appellant did sustain a psychological injury in the course of or arising out of her employment, it was a secondary psychological injury.

On 10 May 2019, the appellant sought to appeal against the Arbitrator's decision. However, on 17 May 2019, the Commission issued a Direction that required her to comply with Practice Direction No 6. On 31 May 2019, she lodged an Amended Application and the respondent filed a Notice of Opposition, after which the appellant instructed Solicitors and they lodged Submissions in Reply. On 12 August 2019, the Commission issued a Direction to the parties and on 26 August 2019, it directed the appellant to lodge and serve any Further Amended Application, accompanied by submissions in support of a grant of leave. The question of leave was to be determined by the Presidential member and the respondent was given time to lodge submissions in response to the Further Amended Application, including going to the question of leave.

Deputy President Snell noted that the appellant lodged a Further Amended Application on 16 September 2019. He granted her leave to rely upon it and he noted that the respondent did not oppose the granting of that leave and did not assert any prejudice. The appellant lodged further submissions in reply on 21 October 2019.

Application to extend time

Snell DP referred to s 324 (4) *WIMA* and he noted that the applicable principles, taken from *Gallo v Dawson*, were summarised by Roche DP in *Allen v Roads and Maritime Services* as involving the need to have regard to the following matters: (a) the history of the proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences for the parties of the grant or refusal of the application for the extension of time; (e) the prospects of the applicant succeeding in the appeal, and (f) upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for extension of time is granted

In *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd,* the Court of Appeal held that the primary considerations on an application for leave to extend time within which to appeal are: (a) the extent of the delay and the reasons therefor; (b) the prejudice to the applicant if the application were to be refused; (c) the prejudice to the defendant from the delay if the application were to be granted; and (d) the prospects of success of the proposed appeal.

As to "*delay*", Snell DP noted that the current appeal was lodged approximately four years out of time. The appellant asserted that she had instructed three lawyers to act for her since the Arbitrator's decision was issued and said she became self-represented in May 2018. Her original solicitor attempted to lodge an Appeal in November 2014, which was within time, but that it was rejected by the Commission. An Amended Appeal was filed on 27 November 2014, but it did not comply with Practice Direction no. 6 and it was also rejected. The Commission's file was then closed. He stated, relevantly:

51. The delay from 13 October 2014 (the date of the arbitral decision) to 19 December 2014 (the last conversation with the Presidential Unit Manager) is adequately explained. This leaves a period from about December 2014 to 30 May 2018, about three and a half years, when the appellant was represented by three different firms of solicitors. This period is largely unexplained. Two medical reports were obtained. There was a misconceived application to restore the original appeal proceedings which were no longer on foot. One of the firms requested material from the insurer, and formed the view the proceedings did not have reasonable prospects of success. This amounts to some explanation of the delay over this period but it is not, in my view, adequate. There is little explanation of what instructions the appellant gave, or of what (if anything) she did to have her solicitors progress the matter. There is no meaningful evidence about what contact the solicitors had with the appellant, and why.

52. This then leaves the period from 30 May 2018 to 10 May 2019, about one year, when the appellant was unrepresented. The only explanation of delay over that time is the appellant's statement that she saw the Registrar of the Supreme Court of NSW, to see if she could lodge her case in that jurisdiction.

53. Viewing the lengthy period of delay in its entirety, it is in no way adequately explained. There is little explanation at all of the last year.

Snell DP rejected that the appellant's arguments about '*injury.* As to whether there is "*an arguable case*" on appeal, he noted that the appellant relied upon 14 grounds, of which 7 concerned how the Arbitrator dealt with the medical evidence. He accepted the appellant's argument that the Arbitrator did not deal with the opinions of Dr Sringeri or Dr Gertler and stated, relevantly:

63. …In *Beale v Government Insurance Office of NSW* Meagher JA said:

> No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to."[59] (references omitted)

64. There was passing reference in the reasons to the reports of Dr Sringeri and Dr Gertler, but not to the opinion of those doctors relevant to the central issue of whether the appellant had suffered a 'primary' or 'secondary' psychological injury. That opinion evidence was contrary to the Arbitrator's conclusion that the psychological injury was secondary. It was necessary that the Arbitrator deal with this opinion evidence, and he failed to do so. This involved error.

Snell DP noted that grounds 3 and 4 related to the adverse credit findings that were based on the Facebook and surveillance material. The appellant alleged that she was denied procedural fairness as she did not have an opportunity to respond to allegations that her statement was untruthful, the Facebook evidence and her supervisor's denial of the assault. She alleged that the Arbitrator's finding was based upon speculation and not evidence and that he assumed the role of a medical assessor. However, he held that the appellant was not denied procedural fairness and stated that she did not raise these matters at first instance and they could not be raised on appeal.

Snell DP described Arbitrator's manner of dealing with fact finding as "*a little unusual*", but felt that this was probably due to how the respondent disputed the claim. He held:

> 79. Whether the appellant suffered from a '*primary psychological injury*' was not purely a medical issue. The appellant's submissions before the Arbitrator dealt at some length with alleged events at work that were potentially causative of psychological injury, and medical histories that were associated with such events.[84] The balance of the grounds of appeal deal, in a general sense, with the issue of 'injury', more particularly whether the lay and medical evidence supported the occurrence of a 'primary psychological injury'.
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> 80. The Arbitrator found that he could not accept the evidence of the appellant unless it was independently corroborated.[85] Grounds Nos. 2, 7 and 10 seek to identify aspects of the evidence where the appellant was allegedly corroborated, such that her evidence should have been accepted in any event…
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> 85. The various complaints by the appellant relied on in this ground, although they are relatively contemporaneous, remain complaints that are dependent on acceptance of the appellant's reliability to establish that the events occurred. They do not involve independent corroboration, the term used by the Arbitrator in his credit finding. Earlier versions of events given by the appellant, if the appellant's evidence is not acceptable having regard to the Arbitrator's credit finding, do not establish the occurrence of the events…
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> 87. The appellant's submissions dealing with Ground No. 7 essentially raise the same point again. The appellant refers to Dr Hanif's report and the symptoms described. The appellant submits there is no suggestion these symptoms were feigned, so it is unchallenged evidence suggesting a psychological condition. To the contrary, the Arbitrator, in the reasons, did raise the possibility that symptoms were feigned. He referred to the disparity between the Facebook material and the surveillance, compared with the histories to doctors and the appellant's statement, and his view that the appellant's explanation of the difference between these was "*totally inadequate*". He said:
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> > It raises the question whether the [appellant's] complaints of psychological symptoms have been exaggerations or falsehoods from their very inception.
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> 88. The Arbitrator did not answer this question in specific terms. The above passage makes it clear how deeply the appellant's credibility had been damaged, in the Arbitrator's view, by the Facebook material and the surveillance. The passage demonstrates that the Arbitrator, as a result of his credit finding, did not accept the genuineness of the appellant's complaints of psychological symptoms, at any stage of the alleged illness. In those circumstances, the arguments advanced in respect of Grounds Nos. 2, 7 and 10 would not succeed.

In relation to ground 8, Snell DP noted that the appellant complained that the Arbitrator wrongly found that the meeting on 11 March 2018 was not significant as she did not refer to it in her statement and that this influenced his not finding a primary psychological injury. He held that the appellant bore the onus of proof and the Arbitrator's comments regarding the deficiency in her case was available.

Snell DP noted that grounds 8 and 9 refer to the decisions in *State Transit Authority of New South Wales v Chemler* and *Attorney General's Department v K*, in which Roche DP discussed *Chemler* and other authorities relating to proof of psychological injuries. In *Chemler,* Basten JA stated:

> Nor is it necessary to determine whether the Respondent's response was a misperception as to the intention or attitudes of his fellow workers. In contrast to discrimination law, the proper focus in this context is the consequence of conduct on the claimant and not, even in a limited sense, the motivation, intention or other mental state of the co-worker or supervisor: cf *Purvis v New State Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92 at [166] (McHugh and Kirby JJ); and [234]-[236] (Gummow, Hayne and Heydon JJ). If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognizable injury followed, it was open to the Commission to conclude that causation was established.

The appellant also argued that the Arbitrator failed to indicate that he considered the principles in *Chemler*. In relation to this argument, Snell DP stated, relevantly:

> 94…An independent witness could not corroborate something that the appellant allegedly perceived to have happened. On reflection, the respondent's submission on this point is correct. It having been raised in the appellant's submissions before the Arbitrator, and potentially being relevant to the case the appellant presented, the Arbitrator should have referred to the argument based on *Chemler*. However, given the credit finding, that argument would not succeed. The appellant's perception of events was not something that could be independently corroborated.

Snell DP held that there were no "*exceptional circumstances*" and in making that finding he discussed the decisions of Allsop P (as his Honour then was) in *Bryce v Department of Corrective Services,* Campbell JA, in *Yacoub v Pilkington (Australia) Ltd* and Keating P on *Webb v Penrith Rugby Leagues Club Ltd.* He stated that the circumstances surrounding the conclusion of the first appeal were not exceptional and they were "*relatively commonplace, regular or routinely encountered"* and the evidence dealing with the very lengthy delay does not establish exceptional circumstances. He stated:

> 109. In *Gallo v Dawson* McHugh J, dealing with an application to extend time in which to bring an appeal, said:
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> > The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties: see *Hughes v. National Trustees Executors and Agency Co. of Australasia Ltd.* [1978] VicRp 27; (1978) VR 257, at p 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant.
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> 110. In *Iovanescu v McDermott* Windeyer J (Sheller JA and Young CJ in Eq agreeing), dealing with an application that a matter be restored to the list, referred to the need for a proper explanation of delay, saying:
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> > It is always a question bearing upon the exercise of discretion in a claim for extension of time: *Salido v Nominal Defendant* (1993) 32 NSWLR 524 at 533, 539 and 541; *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128 at 136. That is because it goes to the question of whether it is just and fair to grant the indulgence sought, namely an extension of time ...
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> 111. In *Salido v Nominal Defendant* Gleeson CJ (as his Honour then was) said (in the context of an application under the *Motor Accidents Act 1988*):

> The diligence, or lack of diligence, shown by a plaintiff or a plaintiff's representatives, in ascertaining and asserting his or her rights will ordinarily be a material factor, as will the extent of the relevant delay, and the reason for it.

Snell DP concluded that the appeal is "*not fairly arguable*", based upon the decision in *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd,* in which Moffitt P said:

> ... it is not sufficient to show that some error of law appears in the judgment or during the course of the trial. The error has to be one upon which the decision depends, so the decision is vitiated by the error ... It will not suffice to establish that one or some only of a number of alternate findings upon which the decision was given involved errors of law, if one alternative involved no error of law.

Accordingly, he refused to extend the time in which to appeal under r 16.2 (5) of *the Rules.*

Sections 22 & 22A WCA – Apportionment of liability for weekly payments between insurers – Arbitrator not bound by agreed earlier apportionment regarding s 60 expenses

EML as agent for Insurance for NSW v AAI Limited t/as GIO [2019] NSWWCCPD 60 – Deputy President Wood – 3 December 2019

The worker was employed by Fire and Rescue NSW as a fire fighter from approximately 1984. In/about October or November 1988, he injured his back at work and underwent laminectomy and discectomy surgery. He resumed modified duties after 6 months off work and then resumed normal duties. However, in July 2007, he further injured his back at work and he was unable to resume normal duties after this injury.

A COD – Consent Orders dated 11 June 2013 recorded agreement that the proposed spinal fusion surgery was reasonably necessary and that liability for it was to be apportioned 25% to the appellant and 75% to the respondent. He underwent that surgery in 2013.

The appellant was the insurer on risk from 1 July 1989 and the respondent was the insurer on risk until 30 June 1989.

In 2008, the appellant and the worker entered into a complying agreement for 2% WPI with respect to the 2007 injury. At about that time, the respondent and the worker also entered into a complying agreement with respect to permanent impairment of the back and permanent loss of efficient use of the both legs with respect to injury due to the nature and conditions of employment from 30 June 1973 to 30 June 1989.

Arbitrator Wynyard apportioned liability for weekly payments 75% to the appellant and 25% to the respondent, but he apportioned liability for s 60 expenses 25% to the appellant and 75% to the respondent. He summarised the evidence and noted that Dr Davies was given a history of an injury that occurred in 1992, but that evidence in the Reply indicated that this occurred in 1991. A medical certificate dated 8 June 1993, indicated the onset of sciatica and he Arbitrator also noted that a further injury occurred in 1996.

The Arbitrator noted that the appellant sought orders that the payments it had made should be apportioned between it and the respondent on a 25% : 75% ratio. He inferred that the dispute before him related to the question of "*economic incapacity*." He stated that with respect to ss 66 and 60 *WCA,* he preferred Dr Davies' opinion that liability should be apportioned 75% to the appellant and 25% to the respondent.

However, the Arbitrator held that the question of liability for weekly payments falls under a different category, which is "*defined not by causation, but by the effect a given injury has on the worker's capacity to earn*." He stated, relevantly:

> 43. …It is apparent however that liability to pay weekly compensation by an employer is dependent upon the effect of a worker's injury on his capacity to earn. As such, it is not dependent upon any finding as to the cause of his injury."

The Arbitrator held that there was no evidence that the 1988 injury caused anything but temporary, occasional aggravations between that injury and the 2007 injury (a period of 19 years). He stated that ss 22 (1) (c) and 22A (1) (b) *WCA* gives the Commission a discretion in relation to apportionment, which is to be exercised in a "*just and equitable manner*" according to the special circumstances of the case. The discretion must be exercised in accordance with the law, so that in the apportionment of weekly payments, regard must be had to the evidence relating to the injured worker's capacity to earn. There was no evidence that the worker's change of duties in 1997 was due to any disability caused by the 1988 injury and the change of duties appeared to be a promotion and the fact that the worker continued to perform operational duties indicated that he was able to do full duties. However, there was evidence that he suffered work-related aggravations of his lumbar spine, some more serious than others, which were due to the 1988 injury, and some apportionment is required for the payment of weekly compensation.

The Arbitrator considered s 22A (1) (b) *WCA* and held that he should not make an order for apportionment based on the relative periods on risk. He was satisfied that the occasional aggravations provided special circumstances for making an order on a different basis and he therefore apportioned liability 75% to the appellant and 25% to the respondent. On 3 June 2019, he issued an amended COD.

However, the appellant appealed against the apportionment for weekly payments on 3 grounds, namely: (1) The Arbitrator erred in determining that a claim for apportionment in respect of weekly payments of compensation should be treated differently to a claim in respect of medical expenses; (2) The Arbitrator failed to give adequate reasons for his determination of the apportionment, thereby denying the appellant procedural fairness; and (3) The Arbitrator's determination was either not supported by any evidence or was illogical and irrational, so that the Arbitrator committed a jurisdictional error.

Deputy President Wood determined the appeal on the papers and noted that the threshold requirements were satisfied.

Ground (1)

The appellant argued that the Arbitrator erred because these proceedings sought apportionment, and not a determination of primary liability to pay weekly compensation and the correct approach to apportionment requires a direct inquiry into causation and it relied upon *Rail Services Australia v Dimovski, New South Wales Police Force v Kearns* and *Kooragang Cement Pty Ltd v Bates* as authority for that argument. It asserted that there is no distinction between the type of compensation that is to be apportioned and it noted that in *Ferndale Partnership v Widdison*, ADP Handley adopted the same apportionment in a weekly payments claim as the AMS apportioned in a s 66 claim. It argued that when undertaking the statutory exercise of determining what is just and equitable, the particular head of compensation is irrelevant because the Commission is undertaking a very different inquiry to one of determining primary liability. Therefore, the Arbitrator erred in law.

The respondent argued that s 352 *WIMA* limits an appeal from an Arbitrator's decision to a determination as to whether it was, or was not, affected by error of fact, law or discretion. This is a narrow power and does not allow a general discretion to re-open or reconsider the Arbitrator's decision. The appeal process is defined by the establishment and correction of error and the appellant must establish that the Arbitrator's view of the primary facts found, and any inferences drawn from those facts, were wrong and not just different to those that might have been found by the appellate tribunal.

The respondent asserted that what constitutes such an error must be determined on a case by case basis, guided by the principles in *Fox v Percy* and the reasons should be read as whole, without combing them for error. It argued that the Arbitrator correctly identified weekly payments as being of a different category because the liability to pay depends jupon the effect that the injury had on the worker's capacity to earn. He conducted an analysis of the evidence and the effects of the injuries on the worker's capacity to earn, which was the correct approach, and his conclusion was available on the evidence.

Further, there is no constraint in the Act that requires the Arbitrator to find that the apportionments of liability for weekly payments and s 60 expenses are identical. Medical evidence before the Arbitrator indicated new pathology at the L5/S1 level, which was not necessarily implicated by the 1988 injury, and that evidence was sufficient to justify the Arbitrator's approach and there was no error of fact, law or discretion.

The respondent argued that *Widdison* does not support the appellant's proposition. Rather, the Presidential member determined that in the circumstances of that case it was not appropriate to assess the apportionment of weekly payments on a different basis to that of the lump sum entitlement. He took into account the Arbitrator's findings regarding physical capacity both before and after the later injury, which suggests that he did not feel constrained to apply the same apportionment that applied to the permanent impairment entitlement.

The respondent referred to the decision in *Morris v George*, in which the Court of Appeal held that where a later injury imposed further disability upon that arising from earlier injuries, and caused the worker to cease work, the later injury could be said to be the cause of the incapacity. In any event, whether incapacity and the need for medical treatment results from a work injury are questions of fact that must be determined based upon a common-sense evaluation, as discussed in *Kooragang.* In any event, the appellant has not pointed to any statutory basis or authority for its assertion that the Arbitrator's approach was impermissible.

Wood DP rejected ground (1). She held that the appellant must show that the Arbitrator's decision is affected by error of fact, law or discretion before a Presidential member can intervene. The appellant's reliance on the decision in *Bourke* is misplaced because this pre-dated the amendments to s 352 *WIMA* that took effect on 1 February 2011, and it is no longer relevant authority on the power to intervene in an appeal. Similarly the decision in *George*, which the respondent relied upon, pre-dated the amendments to ss 22 and 22A *WCA* made in 1995. She stated:

> 109. The basis upon which the Arbitrator formed the view that a different approach to the apportionment of weekly payments should be taken was that, in his view, liability for weekly payments is defined "*not by causation but by the effect a given injury has on an injured worker's capacity to earn*." The Arbitrator based that conclusion on a consideration of the heading for Division 2 of Part 3 of *the 1987 Act,* and the heading and contents of s 33 of *the 1987 Act*. Section 33 of *the 1987 Act* provides that weekly payments of compensation are payable to an injured worker where the injury results in partial or total incapacity. Division 2 of Part 3 of *the 1987 Act* deals with when weekly payments are payable and the method of calculating that entitlement. There was no issue in this case that the worker was entitled to weekly payments of compensation or the extent of those entitlements. Those provisions have no relevance as to where the liability for the payments rest. Sections 9, 15, 16, 17, 22 and 22A, which appear in Part 2 of the 1987 Act, deal with the liability to pay compensation. This part of the Arbitrator's reasons for applying a different apportionment to the weekly payments is flawed.

> 110. While the Arbitrator's reason that the legislature requires a different approach did not support a departure from applying the same apportionment, it does not follow that because the need for surgery and the lump sum entitlements were apportioned in a particular way, the Arbitrator was bound to adopt the same apportionment. This is particularly so given that the apportionment for those entitlements was agreed between the parties. The parties did not agree on the apportionment of the liability for the weekly payments.

Wood DP noted that the appellant relied upon *Widdison* and did not point to any other authority or legislative provision that supports the proportion put by it. Whether an incapacity results from am injury is a question of fact to be decided on the evidence using common-sense principles. Each case turns on its facts and depending on those facts, there may well be a proper basis for apportioning weekly payments on a different basis to that of treatment expenses or lump sums. In this case, the Arbitrator's reasoning process discloses considerations that would not necessarily be taken into account when determining other apportionments. Despite the flaw in the Arbitrator basing his conclusion on a consideration of the heading for Div 2 of Pt 3 *WCA*, and the heading and contents of s 33 *WCA,* that error has not infected the result and it does not constitute an error of the type that would entitle Presidential intervention.

Ground (2)

The appellant argued that in the exercise of his discretion, the Arbitrator was duty bound to provide adequate reasons as to why he rejected the opinions of Dr Davies, A/Prof Owler and Dr Bentivoglio, who all opined that 75% of the liability should be apportioned to the 1988 injury and this is particularly so when the respondent expressly relied upon those opinions when it conceded that it was liable for 75% of the cost of the surgery in 2013. As those opinions were unchallenged by contrary medical evidence, the Arbitrator required a sound basis upon which to reject them. He failed to provide reasons and therefore did not discharge his function, which is a jurisdictional error.

The respondent argued that the duty to give reasons is to be determined by the context, including the jurisdiction, and by having proper regard to the purposes for providing reasons, in accordance with the principles set out in *Beale v Government Insurance Office (NSW)*. In order to have the decision set aside, the appellant must establish that the reasons are not only inadequate but that their inadequacy discloses a failure to exercise the statutory duty to determine the matter fairly and lawfully, relying on *YG & GG v Minister for Community Services*.

The respondent asserted that the Arbitrator extensively reviewed the relevant evidence and the parties' submissions and gave reasons for coming to his conclusion as to the apportionment and it cannot be said that the reasons were inadequate. It is clear that in determining the relevant contributions of the injuries to the incapacity, the Arbitrator considered the medical evidence "*in a more general sense*" and overlaid upon that evidence a consideration of the history of the worker's incapacity. Further, the appellant has misapprehended the Arbitrator's reasoning process and this is not a matter whether the Arbitrator entirely ignored the severity of the 1988 injury as he apportioned 25% of the liability for weekly payments to it.

Wood DP rejected ground (2) and stated, relevantly:

> 116. Both parties have referred to the various principles arising from authorities relevant to the duty to give reasons. A useful summary of those principles, as they apply in the context of s 294 and r 15.6, can be found in the Presidential decision in *Precision Valve Australia Pty Ltd v Nanda*, in which Deputy President Roche said the following (citations omitted):

> While the Court of Appeal is conscious of not picking over extempore decisions by judges to look for error, and is mindful of the pressures under which judges work, the giving of adequate reasons lies at the heart of the judicial process (per McColl JA (Ipp JA and Bryson AJA agreeing) in *Pollard v RRR Corporation Pty Ltd*. These comments are applicable to s 352 appeals from Arbitrators.
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> The extent and scope of a trial judge's duty to give reasons depends upon the circumstances of the individual case (*Mifsud v Campbell*) … Though a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential that he or she expose the reasons for resolving a point critical to the contest between the parties (*Pollard*).
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> Similarly, though a judge does not have to refer to every piece of evidence, he or she must refer to evidence that is important or critical to the proper determination of the matter (*Pollard* at [62] citing *Beale v Government Insurance Office (NSW)*).
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> Where there is evidence supporting a party's position, and where a party has presented detailed arguments on that evidence, that evidence and those submissions must be considered in the Arbitrator's reasons. It is not appropriate for a judge to set out the evidence adduced by one side, and then the evidence adduced by another, and then assert that, having heard and seen the witnesses, he or she prefers the evidence of one and not the other (Ipp JA in *Goodrich Aerospace Pty Ltd v Arsic*).
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> Finally, where it is apparent from a decision that a judge made no analysis of the evidence competing with evidence apparently accepted, and gave no explanation for rejecting it, it is apparent that the process of fact-finding has miscarried (*Pollard* at [66]). This is because, so far as the reasons reveal, the judge made no examination of why the evidence which was accepted was preferred to that of other witnesses (*Pollard* at [66] citing *Waterways Authority v Fitzgibbon*).
>
> Having regard to the nature of the proceedings before Arbitrators and the terms of s 294 of the 1998 Act and Pt 15 r 15.6 of the Workers Compensation Commission Rules 2011, which expressly require the Commission to give reasons in support of its decisions, I believe that the above principles apply equally to the Commission's Arbitrators as to judges.

Wood DP held that the Arbitrator provided a detailed summary of the evidence before him, including the opinions of the medical experts regarding apportionment and he summarised the parties' submissions on that issue. His reasoning process is expressed in his reasons and he considered that the 1988 injury was responsible for at least some apportionment of liability. He found that s 22A (1) (b) provided for apportionment to be relative to the length of the period of insurance, but that it was open to him to order apportionment on another basis if the special circumstances of the case made it just and equitable to do so. He found that there were special circumstances, which he identified, and therefore apportioned the major liability to the appellant. She held, relevantly:

> 123. In assessing whether the reasons are adequate, the reasons must be read as a whole, and the reasons need not be lengthy or elaborate. A fair reading of the Arbitrator's reasons indicates that he did take into account the opinions of the medical experts, but acknowledged that a consideration of apportionment in respect of weekly payments required him to take into account other factors. The Arbitrator balanced the evidence of the medical experts against the factual background relevant to incapacity.

124. As explained by Kaye AJA (with Tate and Whalan JJA agreeing) in *Woolworths Ltd v Warfe*:

> The adequacy of the reasons must depend upon the issues, and nature of the proceeding, in any individual case. In an appropriate case, reasons can be adequate by a combination of what is expressly stated and the inferences that necessarily arise from what is expressly stated.

Wood DP held that the Arbitrator was required to determine, his reasons were adequate.

Ground (3)

The appellant argued the Arbitrator's determinations in paras 1 and 2 of the COD are irreconcilable and there was no finding of fact or inference that justifies a departure from the evidence and which he could rely upon, in special circumstances, to exercise his discretion as he did. The Authorities make it clear that such a departure is capable of grounding an error of law, particularly a jurisdictional error, which requires Presidential intervention. That error is the failure to properly decides and the decision has been infected by an illogical and irrational process.

The respondent argued that this complaint is without foundation. The rationale for the decision was simple and clear and that was that the evidence indicates that the worker maintained virtually full capacity for work until the 2007 injury occurred. The Arbitrator's conclusion regarding apportionment was therefore not illogical or irrational and his findings on apportionment of liability for weekly payments and s 60 expenses are not irreconcilable. He found, based upon the evidence, that the 2007 injury played a greater role in the subsequent incapacity than it did in the need for surgery and medical treatment.

The respondent also argued that s 22A (1) (b) *WCA* provides that the period of time on risk is a "default mechanism" for determining apportionment. Neither party argued that the provision applied automatically and the exercise of apportionment must be undertaken on a just and equitable basis. As is the case at common law, apportionment should involve a consideration of the relative importance of the acts that were causative of the injury, or at least the contributions of the relevant injuries, and this is what the Arbitrator did.

In any event, the appellant is required to establish that, as a matter of law, the Arbitrator was bound to apply the same apportionment to liability for weekly payments as for the need for medical treatment, which is a proposition that is not supported by the authorities. The Arbitrator's apportionment was within a reasonable range of outcomes, which was based on the evidence, and the appellate tribunal should not interfere with it.

Wood DP rejected ground (3). She held that the history of the worker's incapacity was evidence upon which the Arbitrator could rely and the appellant's allegation that there was no evidence cannot be sustained. She also held that the allegation that the decision was infected by an illogical or irrational process cannot be sustained as it was based on uncontested factual evidence. While a different decision maker may have given greater weight to other evidence, such as the apportionment of liability for other heads of damage made by medical experts, and come to a different conclusion, that does not demonstrate error of the kind required to interfere with a factual decision.

Accordingly, Wood DP dismissed the appeal and confirmed the amended COD. She also ordered the appellant to pay the respondent's costs.

WCC - Medical Appeal Panel Decisions

Demonstrable error in MAC – AMS applied a deduction of 10/10 under s 323 WIMA for an injury that was previously determined by the Commission – MAC revoked

Puntigam v Tyzebet Pty Ltd [2019] NSWWCCMA 169 – Arbitrator Rimmer, Dr D Dixon & Dr M Burns – 20 November 2019

The appellant claimed compensation under s 66 *WCA* for injuries to the cervical spine, both upper extremities, lumbar spine and both lower extremities that occurred on 7 February 2000. He received previous awards as follows:

> 1. 23 June 2003, Terms of Settlement (Compensation Court) for 12.5% permanent impairment of the neck, 2.5% permanent loss of efficient use of the right arm at or above the elbow and 5% permanent loss of efficient use of the left arm at or above the elbow;
>
> 2. 20 November 2007 - Complying Agreement - further 7.5% permanent impairment of the neck, 20% permanent impairment of the back, a further 3% permanent loss of efficient use of the left arm at or above the elbow, a further 5.5% permanent loss of efficient use of the right arm at or above the elbow and 8% permanent loss of use of the right leg at or above the knee; and
>
> 3. 5 June 2012 – MAC (Dr McKee) – 11% permanent loss of efficient use of both arms at or above the elbow (12% - 1/10) and 9% permanent loss of efficient use of the right leg at or above the knee (10% - 1/10).

On 24 October 2018, the respondent issued a s 39 notice to the appellant and the appellant then filed an Application for Assessment by an AMS. The Registrar referred the dispute to Dr Anderson to assess WPI with respect to the cervical spine, lumbar spine and both upper and lower extremities.

On 8 August 2019, Dr Anderson issued a MAC, which assessed combined 18% WPI (6% WPI - cervical spine (7% - 1/10)), 8% WPI - left upper extremity, 0% WPI - right upper extremity (8% - 10/10), 5% WPI - lumbar spine (5% - 1/10) and 0% WPI - both lower extremities).

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* He asserted that the issue of injury to the shoulders was determined by an Arbitrator and that the AMS was bound by that decision, but he had purported to decide that issue by applying a 10/10 deduction for the right shoulder. He argued that the AMS should not have applied that deductible and that if he had not done so, the MAC would have assessed 25% WPI. He made similar assertions regarding the assessments for both lower extremities and argued that the AMS should have assessed the cervical spine on the basis that there is evidence of radiculopathy and should have assessed 12% WPI (DRE Category II + 2% ADL's).

The respondent opposed the appeal. It disputed that the AMS purported to determine injury and argued that he accepted that there was an "*injury*", but applied deductibles for pre-existing impairment or abnormality and the MAC should be confirmed.

The MAP decided the appeal on the papers and considered that no further medical examination was necessary. It held that the AMS had decided "*injury*" with respect to the right upper extremity and that he erred by making a deduction under s 323 *WIMA* for restriction of movement that he considered to be due to a later injury. It agreed with his assessment of 8% WPI for the right upper extremity and concluded that no reduction should be made for the 2010 injury, which involved the elbow. With respect to the lower extremities (knees), it held that the AMS did not assess 0% WPI because he believed that there was no injury, but because on examination there was no impairment to be assessed. It agreed that there was no assessible permanent impairment in either knee.

In relation to the cervical spine, the MAP held that there was no finding of sensory change that was anatomically localised to an appropriate spinal nerve root distribution and the complaints of sensory change in the left hand were the associated with an ulnar nerve injury in 2010. It was not satisfied that there was evidence of radiculopathy.

The MAP revoked the MAC and issued a MAC that assessed combined 24% WPI.

Psychological injury – Employer argued AMS erred by not adopting correct approach to disregard secondary psychological injury – Discussion of Mercy Connect Limited v Kiely – MAC confirmed

Secretary, Department of Industry v Nesci [2019] NSWWCCMA 172 – Arbitrator Douglas, Dr J Parmegiani & Dr P Morris – 25 November 2019

On 23 May 2016, the worker suffered physical injuries and a psychological injury when she fell down stairs at work. On 4 October 2018, her solicitors gave notice of claims for lump sum compensation for both physical and psychological impairment. However, the appellant failed to respond to the claim and the worker filed an ARD.

On 9 July 2019, by consent, ***Arbitrator Sweeney*** remitted the matter to the Registrar for referral to an AMS (x 2) to assess permanent impairment of the cervical spine, thoracic spine, lumbar spine, left upper extremity (elbow) and nervous system (vestibular abnormality) and primary psychological injury.

On 31 July 2019, Associate-Professor Robertson issued a MAC, which assessed 15% WPI, based upon a median score of 3 in the PIRS categories and diagnoses of "simple phobia" and "adjustment disorder with anxiety and depressed mood". He stated, relevantly:

> Ms Nesci is a 62-year-old woman with a complex presentation. She sustained injuries in a falling incident in the course of her employment, which likely led to a time limited post-concussive syndrome and persisting headaches attributable to cervical spine injuries and possibly an element of somatisation of her underlying psychological distress. She has been noted consistently to demonstrate features of post-traumatic stress disorder although I would note on enquiry today, she also demonstrates elements of what has been termed "the post-fall syndrome" which is a condition usually seen in elderly patients interrogating the presence of specific phobia of circumstances similar to where a patient had fallen previously.
>
> There are elements of post-traumatic stress disorder present, concurrent with a specific phobia for falling and the putative presence of underlying vascular disease (based on MRI scanning) and the family history of stroke. While there is potential underlying organicity to Ms Nesci's presentation, this is speculative and the import of the neuropsychological assessment is that the primary cause of the observed cognitive impairment was anxiety.
>
> Ms Nesci has impairments in a number of domains that are in part determined by pain and therefore there is a component of a secondary psychological injury to her presentation. There do not appear to be any concurrent psychosocial stressors that are contributory to her presentation – her son is out of prison and appearing to make good his circumstances.

The AMS concluded, relevantly:

> a. I have focused comments about impairment on various domains on the PIRS from the perspective of her anxiety and mood disturbance rather than her pain, e.g. Class 3 impairment on employment/adaptation is the middle ground between total impairment arising from the combination of chronic pain and anxiety and full work capacity; Class 2 impairment on Table 11.1 refers to the effects of anxiety rather than pain in cruelling her efforts at activities such as food preparation.

b. I have taken the position that there is no evidence of a traumatic brain injury and that the underlying presumed cerebrovascular disease has not been demonstrated on neuropsychological findings and that the MRI findings are of uncertain clinical significance.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and requested that the worker be re-examined. However, the MAP held that it lacked the power to require the worker to undergo a further examination and that a further examination was not necessary, because the MAC did not contain a demonstrable error and the AMS had applied the correct assessment criteria.

The appellant alleged that the AMS found a secondary psychological injury, but failed to apply the "*two-step process*" set out in *Mercy Connect Limited v Kiely* to ensure that he had no regard to the impairment resulting from that injury. However, the worker argued that Harrison AsJ's decision in *Kiely*, with respect to the AMS adopting a two-step process to ensure compliance with s 65A *WCA*, was obiter and the AMS was not bound to adopt it. In any event, he undertook a two-step process because he reduced his PIRS ratings based upon his clinical judgment to ensure that he had no regard to impairment and symptoms resulting from the secondary psychological injury.

The MAP referred to the decision in *Kiely* and stated:

> 27. The respondent is correct when she submits that that passage from *Kiely's* case was obiter. It seems to the Appeal Panel that the method her Honour Harrison AsJ detailed to ensure compliance with s65A is one method that an AMS might adopt to ensure that when assessing a worker's permanent impairment from a primary psychological injury no regard is had to any impairment from symptoms resulting from the secondary psychological injury. The requirement of s65A (2) is however, not to have regard to any impairment and symptoms that results from a secondary psychological injury and so long as an AMS abides that requirement of sections 65A(2), the AMS will have discharged his or her task with respect to the assessment of the whole person impairment of a worker that results from the compensable psychiatric injury.
>
> 28. In this case, in the Appeal Panel's view, the AMS has clearly articulated within the MAC, when the considered as a whole, that the pain and secondary psychological symptoms that the respondent has from her physical injuries that she also suffered on 23 May 2016 has affected the respondent in her function with respect to self-care and personal hygiene (that is Table 11.1 of the Guidelines) and with respect to employability (Table 11.6 of the Guidelines). Her pain and secondary psychological symptoms did not affect her functioning in any of the other areas of function that must be assessed in accordance with [11.11] of the Guidelines.
>
> 29. It is obvious, it seems to the Appeal Panel, from what the AMS said in Part 9 of the MAC that the AMS took care not to rate the respondent's impairment from pain and secondary psychological symptoms from her physical injuries in the two areas of function in which the respondent's pain and secondary psychological symptoms had an effect, being the functions described in Table 11.1 and Table 11.6 of the Guidelines.
>
> 30. It is also apparent too, in the Appeal Panel's view, from the psychiatric diagnoses the AMS provided in Table 11.8, that is simple phobia and adjustment disorder with anxiety and depressed mood, that the AMS when assessing the respondent's impairment from her primary psychological injury had no regard to the respondent's pain and secondary psychological symptoms when classifying her function in the several areas of function that were required to be assessed.

31. Simply put, the AMS ensured that when classifying the respondent's impairment in the several PIRS categories, he had no regard to the effect that the respondent's pain had in the two areas of function that her pain played a role, been self-care and personal hygiene and employability.

32. As mentioned, in the Appeal Panel's view, the AMS in so doing has complied with the requirement of s65A (2).

The MAP held that if the AMS adopted the appellant's approach, by deducting impairment resulting from the secondary injury from impairment resulting from the primary injury, the worker would have been assessed with a higher degree of permanent impairment due to the primary injury and that there was no error by the AMS. It therefore confirmed the MAC.

Demonstrable error – AMS erred by applying a deductible under s 323 WIMA comprising "apportionment" of 10% WPI based on DRE Lumbar Category III adopted from previous surgery – Held: correct deductible is 1/10 under s 323 (2) WIMA – Cole v Wenaline Pty Ltd, Fire & Rescue NSW v Clinen & Vitaz v Westform (NSW) Pty Limited applied

Savage v That's Power Pty Ltd t/as Powertruss [2019] NSWWCCMA 174 – Arbitrator Bell, Dr M Gibson & Dr M Burns – 26 November 2019

On 5 June 2017, the appellant suffered a frank injury to his back and pain in both legs. He underwent laminectomy and discectomy on 5 October 2017. He claimed compensation under s 66 *WCA.* On 6 August 2019, Dr Ivers issued a MAC, which assessed 7% WPI, comprising 6% WPI for the lumbar spine (16% - 10%) and 1% WPI for scarring.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and asserted that the AMS erred by applying a deductible under s 323 *WIMA,* based upon an apportionment of impairment, which is not a valid process based upon the decision in *Cole v Wenaline Pty Ltd.* He also argued that there was no basis for a deductible and that the AMS did not comply with the decision in *Fire & Rescue NSW v Clinen* because he did not explain how a previous injury or condition contributed to the current impairment. There should be no deductible (or at most a 1/10 deduction) as he was working and pain free before the injury.

The respondent agreed that the AMS erred in applying the deductible, but argued that the MAP should apply its own assessment under s 323 *WIMA.* It asserted that the appellant was not symptom free before the injury and noted that Dr Rowe applied a deduction of ½ and that the deductible should be at least ¾ based on the previous injury and surgery.

The MAP noted that the respondent purported to raise issues regarding the assessments of ADLs and scarring and sought to have it make changes to those assessments, which did not respond to any grounds of appeal and are not properly part of the Opposition to the appeal. However, as these were "*easily dealt with*" and do not require the appellant's involvement, it dealt with them as follows:

1. In relation to ADL's, the AMS took a history that the appellant's personal care has been effected, which is consistent with the assessment of 3% WPI under the Guidelines. There was no merit to this point and if it had been properly appealed, it would be destined to fail because there is no apparent error; and

2. In relation to Scarring, while the respondent argued that the scarring from surgery in 2014 should form the basis of a deduction, it did not point to any evidence to support such a deduction. In 2017, Dr Edger found evidence of internal scarring but he did not comment on external scarring. if this point had been the subject of appeal, it would not have been successful as there was no evidence of error.

In relation to the s 323 deductible, the MAP held that the AMS' approach, which involved apportionment and deduction from the assessment of WPI due to the previous surgery, is contrary to s 323 *WIIMA* and is a demonstrable error on the face of the MAC. However, it held that Dr Rowe did not explain hoe he arrived at his deductible of ½ and the evidence does not allow that degree of accuracy, but it is enough to establish that a proportion of the impairment is due to pre-existing degenerative change. It therefore applied a deductible of 1/10 under s 323 (2) *WIMA.*

Accordingly, the MAP revoked the MAC and issued a MAC that assessed 16% WPI as a result of the injury on 5 June 2017

Section 323 WIMA – AMS failed to consider whether 1/10 deduction was at odds with the available evidence and failed to provide adequate reasons – MAC revoked

Lecopoulos v Draft FCB Sydney Pty Ltd (deregistered) [2019] NSWWCCMA 173 – Arbitrator Harris, Dr M Gibson & Dr B Noll – 26 November 2019

On 6 February 2002, the worker injured her left foot at work, which required surgery. She alleged that in mid-2002, she began to suffer right knee pain and that because of reduced mobility from her ankle injury, and she gained weight. In 2003, x-rays of the foot indicated advanced osteoarthritis, mild post-traumatic degenerative changes and a scarred Lisfranc ligament with plastic deformation and in December 2003, she underwent an arthrodesis with bone graft and internal fixation. In 2006, Dr Korner opined that she was unable to lose weight (she had gained 45 kilos) and could not exercise because of severe pain. In October 2006, she underwent gastric band surgery and 2 later gastric sleeve surgeries, but her weight plateaued at 120 kilos. In November 2006, she complained of pain in both knees.

In 2018, she claimed compensation under s 66 *WCA* for permanent impairment of the left foot and both knees and scarring (as a result of bilateral total knee replacements), based upon assessments from Dr Wong. However, the respondent disputed the knee injuries based upon a report from Dr Bruce.

The worker filed and ARD and the dispute regarding injury was referred to an arbitrator. By consent, the s 66 dispute was remitted to the Registrar for referral to an AMS and on 18 September 2019, Dr Harvey-Sutton issued a MAC, which assessed combined 30% WPI (comprising 15% WPI for each lower extremity (knee) less a 1/10 deductible under s 323 *WIMA,* 6% WPI for the left foot and 1% WPI for scarring).

On 25 September 2019, the worker appealed against the MAC and on 16 October 2019, the respondent filed its own appeal. Each appeal relied on under ss 327 (3) (c) and (d) *WIMA.* The MAP decided the appeals on the papers. No further examination was required.

Respondent's appeal

The respondent argued that the assessments of the knees were made on incorrect criteria because the deductible of 1/10 under s 323 *WIMA* was at odds with the available evidence and the AMS failed to provide sufficient reasons as to why a deduction of more than 1/10 should not apply considering that the pre-existing condition contributed to the need for total knee replacements, and that a deductible of 50% was appropriate. It also argued that this constituted a demonstrable error on the face of the MAC.

However, the worker argued that her knees were previously asymptomatic and that her knee symptoms commenced in 2006 because of her altered gait and significant weight gain due to the foot injury. She asserted that the AMS explained the basis for the 1/10 deduction and described the respondent's assertion that she would have come to total knee replacements in any event as "*an exercise in speculation*".

The MAP held that a 1/10 deduction cannot be made if it is at odds with the available evidence. It agreed with the AMS' concluded that there were pre-existing bilateral degenerative changes that contributed to the need for total knee replacement.

After discussing the relevant authorities, it held that Dr Wong expressed a bare opinion that there was no s 323 deduction in respect of either knee. It did not accept that the AMS addressed whether the 1/10 deduction is at odds with the available evidence, particularly the 2002 x-ray that showed significant osteoarthritic changes in two compartments of the right knee, osteophyte formation and varus deformity, which were significant and pre-existed the work injury. It was medically impossible for those changes x-ray to have developed post-injury. It also considered that the fact that the applicant was only 37 years old at the time emphasised that there was a significant pre-existing constitutional condition. It accepted the AMS' opinion that the left knee had similar pathological changes to that shown in the right knee at the date of injury.

The MAP held that the AMS failed to provide adequate reasons in accordance with the test described in *Kaur* and that a 1/10 deduction is not appropriate. These are demonstrable errors and the AMS applied incorrect criteria. Therefore, it is required to reassess the deductible according to law: *Drosd v Nominal Insurer*.

While the respondent also asserted that the AMS erred by failing to consider whether a deduction was applicable to the left foot because of a pre-existing condition, the MAP rejected that ground of appeal.

Worker's appeal

The worker argued that the AMS erred by increasing the 1/10 deduction for each knee from 1.5% to 2% (by rounding). She asserted that consistent with paras 1.26 and 1.28 of the Guidelines, 1/10 should have been deducted from 15%, leaving an assessment of 13.5% WPI, which should have been rounded up to 14% WPI and not 13% WPI as assessed by the AMS.

The respondent conceded that the MAC contains this calculation error.

The MAP held that the AMS applied incorrect assessment criteria and that the assessment for each knee should be 14% WPI.

Re-assessment

The MAP determined that a deductible of 3/10 is appropriate for each knee and assessed 11% WPI (after rounding) due to the work injury.

Accordingly, the MAP revoked the MAC and issued a new MAC that assessed combined 26% WPI, comprising 11% WPI for each knee, 6% WPI for the left foot and 1% WPI for scarring.

Psychological injury – No evidence of demonstrable error or application of incorrect assessment criteria by AMS – MAC confirmed

Henderson v Secretary, Department of Education [2019] NSWWCCMA 175 – Arbitrator Peacock, Dr P Morris & Dr D Andrews – 27 November 2019

On 28 August 2019, Dr Bench issued a MAC, which assessed 8% WPI, comprising 9% WPI less a deductible of 1/10 under s 323 *WIMA* plus 2% WPI for the effects of treatment, with respect to a primary psychological injury that occurred on 27 March 2017 (deemed). He diagnosed Persistent depressive Disorder with anxious distress and intermittent major depressive episodes and assessed a median score of 2 under the PIRS categories.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and complained about the assessments made in all PIRS categories. The respondent opposed the appeal.

The MAP determined the appeal on the papers and held that there was no basis for a further medical examination of the appellant. It stated, relevantly (citations excluded):

> 22. The role of the AMS 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 and other medical opinion that is before the AMS. The AMS must bring his clinical expertise to bear and exercise his clinical judgement when making an assessment of impairment under the PIRS categories. The assessment is not to be based upon self-report alone. An appeal panel cannot disturb ratings under the PIRS scale for mere difference of opinion but must be satisfied as to error…

The MAP held that the AMS took a detailed history of injury, which is consistent with the other evidence that was before him and he had not based his assessment on self-report alone, but had clearly considered the other evidence that was before him. He conducted a mental state examination and summarised the injury and his diagnosis. It found no error in his PIRS ratings and there was no application of incorrect assessment criteria. Rather, each of the ratings was open to the AMS and he gave reasons for each rating, based upon the application of his clinical expertise.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Estoppel by conduct – An employer (who paid for lumbar surgery) is not estopped from disputing that the worker suffered injury to the lumbar spine

Papadellis v Tyree Industries Pty Ltd [2019] NSWWCC 372 – Senior Arbitrator Capel – 19 November 2019

The worker was employed as a production worker from 18 October 2010 to 23 January 2015. On 12 January 2012 (this should read "2013"), he claimed compensation for injury to his neck and left shoulder on 31 October 2012. The insurer accepted the claim and paid weekly payments and s 60 expenses until 21 August 2015. On 5 June 2015, his solicitor served a claim for WID's on the employer and insurer and sought concession regarding potential C7 surgery.

The insurer disputed the claim and asserted that employment was a substantial contributing factor to the injury, that the worker had recovered from the effects of the injury and that he was no longer incapacitated as a result of that injury. It disputed his entitlement to s 60 expenses, compensation under s 66 *WCA* and work WID's.

On 14 August 2015, the worker's solicitor gave the insurer notice of a claim under s 66 *WCA* (cervical and thoracic spines) On 14 September 2015, they filed an ARD that claimed weekly payments, s 60 expenses and compensation under s 66 *WCA.*

The dispute regarding proposed surgery to the cervical spine was referred to Dr Meakin (AMS) for a non-binding opinion. On 10 November 2015, he issued a MAC that expressed the view that the proposed surgery at the C6/7 level was reasonably necessary.

On 15 January 2016, a COD - Consent Orders was issued, which discontinued the ARD. The respondent agreed to pay voluntary weekly payments under s 37 *WCA* and costs associated with the proposed cervical surgery.

On 23 March 2017, the worker's solicitor gave the insurer notice of a claim under s 66 *WCA* (cervical and thoracic spines), but those claims were not pressed.

On 6 June 2017, Dr McKechnie sought approval from the insurer for L3/4 laminectomy, microdiscectomy and rhizolysis.

On 27 June 2017, the insurer disputed that the worker had injured his lumbar spine on 30 October 2012. However, on 4 August 2017, it approved and paid for the lumbar spine surgery.

On 25 January 2018, the insurer offered to resolve the s 66 claim for the cervical spine for 14% WPI, but the worker did not respond to that offer.

On 2 May 2019, the worker's solicitor gave the insurer further notice of a claim under s 66 *WCA*, but the insurer responded by issuing a dispute notice under s 78 *WIMA.* This asserted, inter alia, that the decision to pay for the lumbar surgery was an error.

Senior Arbitrator Capel conducted an arbitration on 15 October 2019. Counsel for the worker sought to raise "estoppel", but was unable to make detailed oral submissions and the Senior Arbitrator directed the parties to file written submissions.

The worker argued that the respondent is estopped from denying that he injured his lumbar spine because it paid for the surgery, based upon the decision of the High Court in *The Commonwealth of Australia v Verwayen*. He also argued that the decision of the Court of Appeal in *Department of Education and Training v Sinclair* does not support the submission that the payment of compensation does not constitute an admission. In the alternative, the evidence indicates that he complained about his lumbar spine at an early stage and the mechanism of injury is consistent with such an injury occurring. As the claim before the Commission was for compensation under s 66 *WCA,* the dispute should be referred to an AMS for assessment of permanent impairment of the cervical, thoracic and lumbar spines.

However, the respondent argued that the worker's reliance on "*estoppel*" is misconceived and there was no contention of estoppel by conduct in *Sinclair,* which confirmed that voluntary payments of compensation did not amount to an admission. The Court of Appeal would have felt bound by *Verwayen* and could have raised the "*admission*" to an "*estoppel*", but did not do so. Therefore, *Verwayen* is of no relevance in the Commission. The worker bears the onus of proving injury to the lumbar spine and he failed to do so.

The respondent also argued that the amendments made on 1 January 2019, conferred jurisdiction on the Commission to deal with claims under s 66 *WCA.* Therefore, the decisions in *Jaffarie, Bindah and Trustees of the Roman Catholic Church for the Diocese of Bathurst v Hine* no longer apply and the Commission should find that the worker had recovered from the effects of the injury to his thoracic spine and refer the dispute under s 66 *WCA* to an AMS to assess impairment of the cervical spine only.

In relation to "*estoppel*", the Senior Arbitrator noted that in *Begnell v Super Start Batteries Pty Ltd* Roche DP held that neither the legislation nor the authorities establish that an insurer is estopped from disputing liability for an injury dispute merely because it had paid some compensation. He entered an award for the respondent regarding that injury, but found that the worker had not recovered from the injury to his thoracic spine.

The Senior Arbitrator held that while an Arbitrator now has the power to enter an award of lump sum compensation, the *2018 amendments* do not provide an Arbitrator with the power to assess the degree of permanent impairment arising from an injury. Accordingly he remitted the s 66 dispute to the Registrar for referral to an AMS to determine the degree of permanent impairment of the cervical and thoracic spines.

Was the applicant a worker – Did he suffer a consequential injury to his lumbar spine due to altered gait – Held: applicant was a worker, but he did not suffer a consequential injury to his lumbar spine

Mahdavi-Aghdam v Imad's Locksmith and Shoe repairs Pty Ltd [2019] NSWWCC 371 – Arbitrator Burge – 19 November 2019

The applicant suffered burn injuries to his hands, fingers and both legs as a result of solvent catching alight while he was in the respondent's shop on 31 December 2010. He also alleged that as a result of limping and his altered gait, caused by the burn injuries to his legs, he suffered a consequential injury to his lumbar spine.

The applicant alleged that he was employed by the respondent on a part-time basis while he was at school and he worked each Saturday and during school holidays. In June 2009, he approached Mr Imad Rizk, the owner of the respondent, because he was required to undertake work experience and he did work experience in the shop. Mr Rizk then asked him whether he wanted to work part-time on weekends and public holidays and he did so until the injury occurred. He was initially paid $30 per day for 6 months, then $50 per day and worked extra days during school holidays, during which he earned up to $300 per week. He did not lodge a tax return. He set out the duties that he performed in his statement and asserted that he was required to wear a T-shirt containing the respondent's livery.

However, the respondent disputed that he was an employee. He said that the applicant used to come to the shop and ask him for money to go to McDonalds and that from 2010, he would come to the shop for a couple of hours on a Saturday and would sit at the computer and doze off. Occasionally, he cleaned a bench or tidied the floor, but he admitted showing the applicant how to go about cutting a key. He denied paying the applicant a wage, but occasionally gave him some pocket money. On 31 December 2010, he called the applicant and asked him to come to the store after collecting an item for him at Hornsby. He then left the shop to do an errand and left the applicant alone and when he came back there was a fire. It also disputed that the applicant suffered a consequential injury to his lumbar spine.

The applicant initially claimed weekly payments, past and future s 60 expenses and lump sum compensation under s 66 *WCA,* but he discontinued the claim for weekly payments at arbitration and sought only a general order under s 60 *WCA.*

Arbitrator Burge identified the issues and discussed the evidence and confirmed that the essential feature of the definition of "*worker*" in s 4 *WIMA* is the "*contract of service*". Establishing a contract of service involves principles of contract law such as offer and acceptance, consideration and mutual obligation. A contract of service requires a mutuality of obligation in the formation of the contract with the intention to create legal relations: *Dietrich v Dare* (1980) 30 ALR 407. If there is clear evidence that a person offered services for a reward, and the proposed employer accepted the offer on the basis that payment for those services would be made, there will be an intention to enter into legal relations and a contract of employment will exist. He stated, relevantly:

> 48. There are four essential features of a contract of employment, which may be summarised as follows:
>
> > (a) There can be no employment without a contract (*Lister v Romford Ice & Cold Storage Co Ltd* [1956] UKHL 6; [1957] AC 555 at 587);
> >
> > (b) The contract must involve work done by a person in performance of a contractual obligation to a second person (*Abdalla v Viewdaze* (2003) 122 IR 215 at [23]). That is because the essence of a contract of service is the supply of the work and skill of the worker;

(c) There must be a wage or other remuneration, otherwise there will be no consideration (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515);

(d) There must be an obligation on one party to provide, and on the other party to undertake, work. The obligation required to constitute a contract of employment is that:

> … the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and that the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active". (*Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573; (2004) 144 IR 1 at [91]; see also *Wilton v Coal & Allied Operations Pty Ltd* [2007] FCA 725; (2007) 161 FCR 300 at [162]).

49. It is often unclear whether a relationship is one of employment. There exists however a number of criteria, or indicia, by which to gauge whether an employment relationship exists. The facts in each case must be carefully considered in order to balance the indicia both for and against a contract of employment.

50. The principal criterion remains the employer's right of control of the person engaged but it is not the sole determinant. In more recent times, the courts have favoured looking at a variety of criteria. As Ipp JA said in *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8:

> The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 36):
>
> > [I]t remains the surest guide to whether a person is contracting independently or serving as an employee. (at [54])

51. In the leading case of *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (*Stevens*), the High Court set out a number of relevant indicia. These include, but are not limited to, the following:

(a) The mode of remuneration;

(b) The provision and maintenance of equipment;

(c) The obligation to work;

(d) The timetable of work and provision for holidays;

(e) The deduction of income tax;

(f) The right to delegate work;

(g) The right to dismiss the person;

(h) The right to dictate the hours of work, place of work and the like, and

(i) The right to the exclusive services of the person engaged.

52. It is important to remember that it is the "*totality*" of the relationship that must be considered. The factors set out in *Stevens* are merely a guide to establishing the nature of the relationship.

The Arbitrator found that the applicant was paid weekly by the respondent and that he was carrying out duties while he was in the shop and that the respondent's second statement, to the effect that he paid the applicant each week for doing certain jobs, is consistent with the existence of an employment relationship.

In relation to the alleged consequential injury to his lumbar spine, the Arbitrator discussed the relevant authorities, including *Kumar v Royal Comfort Bedding Pty Ltd, Cadbury Schweppes Pty Ltd v Davis, Moon v Conmah Pty Ltd, Australian Traineeship System v Turner, Kooragang Cement Pty Ltd v Bates and Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan.* He confirmed that the Commission must be satisfied on the balance of probabilities by using a common-sense approach that the applicant's alleged lumbar spine condition relates to the injury on 31 December 2010. He stated, relevantly:

> 76. On balance, I am not satisfied of the presence of a consequential condition in the applicant's lumbar spine as a result of the injury at issue. There is no evidence of complaint surrounding the low back until 2015, some five years after the accident. There is no evidence to support the applicant's claim that he began to suffer low back pain within six months of the injury. In contrast, the only relevant treating doctor evidence for that period is the question and answer report by Dr Singh from 2012, at which point there is no complaint of low back pain.
>
> 77. Notwithstanding Dr Sun's report and his diagnosis of secondary lumbar spine condition consequent upon limping, I note he is alone in making that diagnosis. The lack of contemporaneous complaint and treating doctor material to corroborate the applicant's assertions regarding the onset of his lumbar spine condition in my view means he has failed to satisfy the onus of proof regarding the alleged consequential conditions, and there will accordingly be an award for the respondent on that part of the claim.

Accordingly, the Arbitrator remitted the dispute under s 66 *WCA* to the Registrar for referral to an AMS to determine permanent impairment of both upper extremities and both lower extremities as a result of the injury on 31 December 2010.

Section 20 WCA - Worker employed by uninsured first respondent, but third respondent held liable as principal to pay the compensation awarded to the worker – Stevens V Brodribb Sawmilling Co Pty Ltd, On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) and Hollis v Vabu Pty Ltd considered

Tierney v Evalast Fencing Pty Ltd (Deregistered) & Ors [2019] NSWWCC 375 – Senior Arbitrator Bamber – 25 November 2019

On/about 23 November 2015, the applicant injured his right knee while he was working with first respondent. He claimed compensation, but the first respondent alleged that it engaged him as a sub-contractor. However, the worker alleged that he was an employee of the first respondent and/or that he is a deemed worker under Sch 1 Cl 2 *WIMA.* He filed an ARD that claimed weekly payments, s 60 expenses and lump sum compensation under s 66 *WCA* against multiple respondents, but each respondent disputed the claim.

Senior Arbitrator Bamber conducted an arbitration hearing on 10 October 2019, during which the applicant discontinued the weekly payments claim and withdrew certain aspects of his claim under s 60 *WCA*. She noted that the main issue was whether the applicant was a worker employed by the first respondent at the time of injury. She noted the indicia of employment test set out in *Stevens v Brodribb Sawmilling Co Pty Ltd* but stated that the whole of the relationship needs to be considered.

The Senior Arbitrator held that the applicant was a worker and that he was employed by the first respondent. She stated relevantly (citations excluded):

> 91. Mr Tierney's understanding of the legal relationship between himself and Evalast Fencing was not listed as an indicia in the section 78 notice on which the Nominal Insurer's counsel based his submissions. However, I note that Mr Tierney in his first statement said he understood that he was a sub-contractor to Mr Green. This is not necessarily determinative, but is a factor to be taken into account when considering the totality of the evidence.
>
> 92. The third and fourth respondents submitted that Mr Tierney did not have his own place of business, he did not have any assets, there is dispute as to whether he provided his own tools and in any real sense he was not developing any good will. Therefore, it was submitted on an analysis of the entire arrangement the Commission would be satisfied that Mr Tierney was a worker, and he was not conducting his own business. Reliance was placed on the following passage from *Stevens*:
>
> > Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by whom of his own place of work or his own equipment, the creation by him of good will or saleable assets in the course of his work, the payment by him from his remuneration of business expenses or any significant proportion and the payment of remuneration without deduction for income tax. None of these leads to any necessary inference however in the actual terms and the terminology of the contract will always be of suitable importance.
>
> 93. Mr Tierney's counsel also relied upon the decision in *Hollis v Vabu Pty Ltd*. In that case the High Court upheld Mr Hollis' claim, stating that too much weight had been placed on the fact that the bicycle couriers owned their own bicycles. The Court considered that the couriers had little control over the manner of performing their work and, looking at the relationship as a whole, it should properly be characterised as one of employment. Mr Tierney's counsel pointed out, as did the third and fourth respondents' counsel, that the section 78 notice issued by the second respondent did not consider the indicia of control.
>
> 94. Mr Tierney's counsel submitted that supervision was always through Mr Green for Evalast Fencing and Mr Tierney did not choose his own hours. Mr Tierney's counsel adopted the submission that he could not be considered to be running a business.
>
> 95. I find that the submissions made by Mr Tierney's counsel and that of the third and fourth respondents are persuasive. My consideration of the indicia referred to above has led me to find that Mr Tierney was a worker employed by the first respondent. I acknowledge the facts that Evalast Fencing did not pay Mr Tierney superannuation or pay tax on his behalf are factors suggesting a non-employment relationship, however the control that Evalast Fencing exercised in the relationship to my mind outweighs these factors. The control was significant it covered the travel arrangements to job sites, the hours worked and the rates of pay. Also, of significance, was the manner of Mr Tierney issuing his invoices. As I have found above, he did not issue the invoices in order to obtain payment, but after the event of payment. The invoices did not have any features one would expect of business invoices, excepting the ABN. Furthermore, I accept there is no evidence that Mr Tierney was developing any good will or has assets which one would expect had he been conducting a business.

The Senior Arbitrator noted that there as no dispute that if she found that the applicant was either a worker or deemed worker employed by the first respondent, the evidence was that it contracted with the third respondent, and that as the first respondent was uninsured, the third respondent would be liable under s 20 *WIMA.*

Accordingly, the Senior Arbitrator held that the applicant's employment with the first respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of his pre-existing osteoarthritis condition and that the third respondent was liable to pay him compensation (including certain s 60 expenses) under s 20 *WCA.* She entered awards for the second and fourth respondents and remitted the matter to the Registrar for referral to an AMS to assess permanent impairment of the right lower extremity (knee) and scarring.

WCC – Registrar's Decisions

Ground of appeal against MAC not made out – Appeal not to proceed

Dawson v Harvey Mechanical Installation [2019] NSWWCCR 6 – Registrar's Delegate McAdam – 25 November 2019

On 29 November 2013, the appellant fell from a height and struck his head and neck. He claimed compensation under s 66 *WCA* based upon an assessment of 22% WPI from Dr Teychenne, who diagnosed a traumatic brain injury with cognitive deficits.

However, the respondent disputed the claim based upon an opinion from Dr Mellick, that there was no indication – either clinically or in relation to investigations performed – of a traumatically based organic disorder of the brain, spinal cord or nervous system impairing the appellant's capacity to resume work.

The appellant commenced proceedings in the Commission and the dispute under s 66 *WCA* was referred to an AMS.

On 5 September 2019, Dr Fitzsimons issued a MAC, which assessed 0% WPI based on a diagnosis of post-concussion syndrome. She determined that the appellant does not satisfy the pre-requisites for assessment of whole person impairment due to cognitive or emotional/behavioural consequences of brain injury because there is no medically verified significant post-traumatic amnesia, no abnormal Glasgow Coma Scale Record and no radiological intracranial abnormality (para 5.9 WorkCover Guides). Therefore, there is 0% WPI with respect to these conditions.

The AMS specifically disagreed with Dr Teychenne's impairment assessment, which did not take account of the pre-requisite criteria for an assessment under c. 5.9 of the Guides. He also assessed for balance but did not define any link to the fall and she essentially concluded that he had not assessed impairment as required by the Guides, which is required by s 322 *WIMA.*

On 4 October 2019, the appellant lodged an application to appeal against the decision of the AMS under ss 327 (3) (c) and (d) *WIMA.* He alleged that the AMS made a finding as to injury, which was not open to her and inconsistent with the Referral and that the AMS failed to accord procedural fairness in relation to a dispositive finding regarding the persistent symptoms experienced by the worker. He also alleged that the assessment was made on the basis of incorrect assessment criteria because the AMS failed to assess the traumatic brain injury in accordance with cl 5.9 of the Guidelines.

Registrar's Delegate McAdam was not satisfied that a ground of appeal was made out and he ordered that the appeal should not proceed. His reasons are summarised below.

Demonstrable error/Breach of procedural fairness

The Delegate was not satisfied that there has been a breach of procedural fairness and held that the ground of demonstrable error was not made out.

The appellant argued that the AMS denied him procedural fairness by failing to offer him the opportunity to address the view that a possible cause of the symptoms on presentation was an alleged B12 deficiency. He asserted that the alleged B12 deficiency was wholly unforeseen and unexpected finding on the evidence, was not open on the known material before the AMS, was not addressed by either party and they ought to have been permitted to obtain medical expert evidence to address this matter.

The Delegate noted that the extent to which procedural fairness must be afforded in administrative decision making depends on statutory context: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72:

> The content to be given to that obligation to accord procedural fairness must, of course, accommodate the particular provisions made in the Act which regulated how the Tribunal was to go about its task.

The AMS' statutory function was to determine the medical dispute that was referred to her. An AMS, as an administrative decision maker, has an obligation to afford procedural fairness to the parties. That does not necessarily mean that the AMS was obliged to offer the parties an opportunity to obtain medical evidence to address the possible vitamin B12 deficiency, as asserted by the appellant.

The Delegate noted that other diagnoses were made by various specialists and treating doctors, including psychological diagnoses), including chronic adjustment disorder with anxiety (Dr5 Vickery), possible major depressive disorder (Ms Tucker, neuropsychologist), post-concussion disorder (Dr McMahon), post-traumatic headache syndrome (Dr Graham) and potential sleep apnoea (A/Prof Heard). The AMS discussed these competing diagnoses in the MAC. He stated, relevantly:

> 22. …The AMS discussed Mr Dawson's presentation, including pathology results attached to the Application, and "*recommended in the strongest possible terms that Mr Dawson should be investigated with repeated relevant blood tests for B12 deficiency*".
>
> 23. However, the AMS provided a specific diagnosis on page 6 of the MAC, being:
>
> > Post-concussion syndrome. I agree with the various doctors who made a diagnosis of post-concussion syndrome, and also with comments (e.g. Dr Rosen, treating neurologist) that the symptoms have continued for an unusually long time for concussion.
>
> 24. There is no doubt that the AMS is required to provide a diagnosis in order to assess impairment. The MAC template specifically provides for a "*summary of injuries and diagnoses*", and the AMS has answered this question. The evidence, referred to above, shows how complicated and difficult the provision of a diagnosis has been since Mr Dawson's injury.
>
> 25. The question is the extent of the relevance of that diagnosis to the AMS's assessment of permanent impairment, which is the statutory function the AMS was exercising. The appellant submits that "*it was a critical matter for the AMS and in that sense dispositive of the issue for determination as it would have played a significant role in her assessment of the impairment resulting from injury*". The language of that submission reflects the case law concerning procedural fairness, which provides an obligation to identify any "*critical issue*":

> Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision. (per French CJ and Kiefel J in *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1 (*SZGUR*) at [9])

26. *SZGUR* was referred to (inter alia) in *Frost v Kourouche* [2014] NSWCA 39. Per Leeming JA at [35]:

> There is a well-established line of authority for a complementary proposition to that in *Kioa* referred to above to the effect that critical facts need to be drawn to the claimant's attention. The complementary proposition is that it is not necessary, in order to discharge the obligation to accord procedural fairness, to go further.

27. Leeming JA went on to refer to the above quote from *SZGUR*. What is relevant from consideration of both cases is that "critical facts" or "any critical issue" must be drawn to the attention of the parties.

28. This is at the essence of the consideration of whether, in the circumstances of the current matter, there has been a breach of the procedural fairness obligations of the AMS.

The Delegate held that the diagnosis of the appellant's condition is critical for the purposes of understanding his presentation and "*probably for some purposes within the scope of the workers compensation scheme (for example, considering what medical expenses may be awarded under section 60 of the Workers Compensation Act 1987).*" However, that does not mean that the AMS' discussion of the potential vitamin B12 deficiency was critical to her assessment of permanent impairment. He stated, relevantly:

> 29. … In considering the relevance of the AMS identifying this potential issue in her reasons, close attention must be paid to the evidence provided by the parties, how Mr Dawson's injury must be assessed under the Guidelines, and the reasons of the AMS for her assessment of impairment.
>
> 30. A MAC must be read as a whole, but that does not mean every part of a MAC is a "*critical issue*" for the assessment of impairment. To the extent that the AMS made comments about a potential B12 deficiency, the appellant has not shown how this matter influenced her ultimate opinion on the issue that was referred to her, that is the assessment of permanent impairment of the worker.
>
> 31. I have discussed the various diagnoses provided in the medical evidence at [19] and [20] above. The applicant's claim for permanent impairment was based on Dr Teychenne, who assessed 22% whole person impairment. The respondent relied on the report of Dr Mellick who discussed the report of Dr Teychenne at length, and opined "*There is therefore no compelling evidence of a brain injury and I respectfully disagree with Dr Teychenne's comments*".
>
> 32. Further to the above discussed medical opinions, Mr Dawson has also previously been assessed by a different AMS (Dr Boyce), who determined that "*In my opinion, Mr Dawson does not qualify as having a brain injury, as per the WorkCover Guides Page 35, Paragraph 5.8.*" Dr Boyce assessed Mr Dawson under the 3rd edition of the Guidelines. I note that the reference to paragraph 5.8 of that edition of the Guidelines has been replicated in cl 5.9 of the 4th edition Guidelines, under which the AMS conducted her assessment.

> 33. Dr Boyce's opinion may be inelegantly expressed, as it appears to be a finding of injury, rather than a finding in regard to impairment (which is the jurisdiction exercisable by an AMS).

The Delegate held that the assessment of brain injuries falls within quite specific criteria within the Guidelines, which are outlined in cl 5.9. He agreed with the AMS' opinion that Dr Teychenne's impairment assessment did not comply with the Guides. He stated:

> 40. Considering the circumstances of the case, I do not consider the AMS's discussion of the possible vitamin B12 deficiency a "*critical issue*" or a "*critical fact*" that the AMS should have drawn to the attention of the parties. Based on a fair reading of the MAC as a whole it has played no part in her assessment of impairment. That assessment was made in accordance with the Guidelines and in the absence of the presence of circumstances outlined in cl 5.9 of *the Guidelines*, was not capable of an assessment of more than 0% whole person impairment, as assessed by the AMS.
>
> 41. The lengthy discussion of the potential vitamin B12 deficiency was, when read in context, an attempt to identify a cause of the presentation of Mr Dawson's symptoms. The AMS recommended "*in the strongest possible terms" that Mr Dawson investigate B12 deficiency as a potential cause of his symptoms, as a "correctible cause of progressive cognitive impairment*".
>
> 42. As such, the discussion of the potential vitamin B12 deficiency was not relevant to the AMS's consideration and assessment of impairment. Accordingly, it was not a "*critical issue*" of which the AMS was obliged to inform the parties. It played no role in the ultimate assessment of impairment, and accordingly was not an exercise of a statutory function.

The Delegate noted that the appellant has not described what evidence could have been obtained regarding the B12 deficiency or how that evidence may have changed the AMS' impairment assessment considering that the he did not satisfy the pre-requisites for a WPI assessment. He also felt that this matter is distinguishable from other judicial review decisions arising out of the Commission's medical dispute resolution functions and particularly that of *Pascoe v Mechita Pty Ltd* (*Pascoe*). He noted that in *Pascoe*, the AMS took into account specific material adverse to the worker in a claim for hearing loss without providing notice that they proposed to do so. He stated, relevantly:

> 46. Where the current case differs from Pascoe is the consequence of that consideration. Unlike in Pascoe, the AMS has not relied on the vitamin B12 deficiency to assess impairment. The comments made by the AMS concerning the vitamin B12 deficiency were ancillary to, and did not form part of, her assessment of impairment, the statutory role she was undertaking. Whilst Mr Dawson has been assessed at 0% whole person impairment, an assessment that is obviously an adverse determination, this assessment has not been influenced by the comments concerning vitamin B12, but rather has been made in accordance with the Guidelines.

Demonstrable error/Incorrect criteria – brain injury

The Delegate found that this ground was not made out. He noted that in essence, the appellant alleged that the AMS erred by determining that there was no significant brain injury, when cl 5.9 of the Guidelines refers to "*traumatic brain injury*" and not "*significant traumatic brain injury*". Therefore, she approached her statutory task incorrectly and it was not open to her to make that determination as it is a legal and factual matter that is within the purview of an arbitrator.

The Delegate referred to the AMS' findings and noted that she generally agreed with Ms Tucker, who opined that the neuropsychological findings do not support a significant brain injury. He held that the AMS' comment that she was "*in general agreement"* with Ms Tucker is not a finding of injury or an incorrect application of the Guidelines and it does not constitute an impermissible finding of injury. Further, the appellant did not substantiate the assertion that the AMS approached her statutory task by requiring the brain injury to be significant rather than the impact to the head to be severe.

The Delegate also held that the decision in *Haroun* does not support the appellant's submissions. In this matter, an arbitrator made certain orders amending the particulars in the Application and for referral to an AMS and determined, by consent, that the appellant suffered a "*brain/head*" injury. In accordance with the decision in *Haroun,* the arbitrator could not bind the AMS in relation to the results of that injury (the assessment of permanent impairment). While the appellant appeared to argue that the consent finding satisfies the criteria in cl 5.9 of the Guidelines, he did not accept that this was the case. He stated:

> 64. The medical dispute before the AMS involved a question of causation – did the injury suffered by the worker cause the factors outlined in cl 5.9 of the Guidelines. The AMS determined that they did not, a finding open to her based on her findings on the day of assessment and consistent with other medical opinions provided. This was not a finding of injury.
>
> 65. The appellant's final submission is that the AMS has applied incorrect criteria in failing to assess brain injury as a result of the impact to the head in accordance with cl 5.9 of the Guidelines. For the reasons given above, in particular at [33] to [37], I am satisfied that she has.

NCAT Decisions

Professional misconduct - Confidentiality and Anonymisation – Tribunal makes orders for anonymisation and non-publication of the names of the respondent and his wife but nevertheless published its decision that the respondent be struck off

Council of the New South Wales Bar Association v DEJ [2019] NSWCATOD 186 – M Craig QC ADCJ, Principal Member, G Blake AM SC - Senior Member, E Hayes – General Member – 11 December 2019

The respondent was a barrister against whom the applicant sought findings of unsatisfactory profession conduct and/or professional misconduct and consequential protective orders arising out of his failure to meet his income tax obligations.

On 7 June 2017, NCAT made a non-publication order in respect of the respondent's name under s 64 of the *Civil and Administrative Decisions Tribunal Act 2013 (NSW)* (*the CAT Act*). However, at the commencement of the hearing on 17 August 2017, the respondent sought (and the applicant did not oppose) the making of orders that would have the effect of anonymising the names of himself and his wife and prohibiting their disclosure. That application was based upon medical evidence that the respondent suffers from a serious psychiatric condition accompanied by suicidal ideation and has attempted suicide on a number of occasions. The respondent's treating psychiatrist opined that if his name was published in connection with these proceedings, his capacity to avoid suicide would reach rock bottom and he urged in the strongest possible terms that publication of his name in association with any adverse disciplinary findings should be avoided.

NCAT held, relevantly:

> 10. It is well-established that the overarching principle of open justice mitigates against the anonymisation and non-publication of the names of parties to proceedings, and in particular disciplinary proceedings. The relevant principles are encapsulated in the judgment of McHugh JA (as his Honour then was) in the Court of Appeal in *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 477:
>
> > Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication.

I note that since that decision was published, the *Court Suppression and Non-publication Orders Act 2010 (NSW)* has been enacted, which inter alia provides empowers the making of orders, the grounds for making orders and the procedure for making orders.

NCAT also held:

> 11. The relevant power of the Tribunal to restrict the publication of certain matters in proceedings before it is found in s 64 of the *CAT Act*:
>
> > 64 Tribunal may restrict disclosures concerning proceedings
> >
> > (1) If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders:
> >
> > > (a) an order prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),
> > >
> > > (b) an order prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal,
> > >
> > > (c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,
> > >
> > > (d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.
> >
> > (2) The Tribunal cannot make an order under this section that is inconsistent with section 65.
> >
> > (3) The Tribunal may from time to time vary or revoke an order made under subsection (1).
> >
> > (4) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.

12. Each application brought under s 64 must be considered on its own merits. There are proceedings where anonymisation and non-publication orders have been made pursuant to s 64 based on evidence concerning the possible adverse impact of publication on an individual, whether a party to the proceedings or even a family member of a party.

13. We are conscious that the name of the Respondent has already been published in connection with these proceedings. However, having regard to the evidence of Dr Williamson, and Dr Llewellyn-Jones, which we accept, and what is known concerning the Respondent, as will be revealed later in these reasons for decision, we conclude, on balance, that it is appropriate to make anonymisation and non-publication orders in terms submitted jointly by the parties. Although the name of the Respondent will not be published, the factual circumstances surrounding his practice as a barrister will be published. The publication of those circumstances will promote two of the relevant matters in the making of protective orders, namely to provide a deterrent against similar misconduct by other legal practitioners and to enhance the confidence of the public in the legal profession.

Accordingly, NCAT made consent orders that anonymised and prevented disclosure of the names of the respondent and his wife. However, it nevertheless published its reasons for its decision and orders that included an order that the respondent be struck off.

FROM THE WIRO

WIRO wishes to advise that Mr Kim Garling's appointment as the Independent Review Officer will conclude on Friday, 13 December 2019.

Mr Phil Jedlin has been appointed as the Acting Independent Review Officer, pending the formal appointment of the new Independent Review Officer, whose term will commence in early February 2020.

WIRO wishes to acknowledge and congratulate Mr Garling upon his significant achievements in the role as Independent Review Officer and to thank him for his significant contribution to oversight of the statutory scheme in New South Wales and his leadership of this office.

The WIRO Team