Bulletin

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. Maguire v Lis-Con Services Pty Ltd [2020] NSCWC 3
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5. Workers Compensation Nominal Insurer v Kula Systems Pty Ltd [2019] NSWWCCPD 67
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Supreme Court of NSW Decisions – Jurisdictional error

Jurisdictional error – constructive failure to exercise jurisdiction

Maguire v Lis-Con Services Pty Ltd [2020] NSWSC 3 – Campbell J – 10 January 2020

The plaintiff was a carpenter, but on 12 December 2015, he was working as a dogman. He was holding a load of steel when the crane driver dropped it, causing a crushing injury that required amputation of part of his left thumb. He underwent reconstructive surgery, which was not entirely successful, and in all 4 operations were required.

On 26 April 2017, the plaintiff claimed compensation for 16% WPI under s 66 WCA, based upon an assessment from Associate-Professor Meares. However, the defendant disputed the claim based upon an assessment of Dr Walker, who assessed 12% WPI. Both doctors assessed 1% WPI for scarring.

On 12 September 2017, Dr Giles issued a MAC that assessed 14% WPI, but he allowed 0% WPI for scarring.

However, the plaintiff took issue with the assessment for scarring under s 327 (3) (d) *WIMA* and argued that there cannot be an amputation without any scarring.

The Registrar's Delegate then remitted the matter to Dr Giles for reconsideration under s 329 *WIMA*, as an alternative to an appeal. In a Further Assessment or Reconsideration, the AMS maintained his assessment of 0% for scarring and he confirmed his MAC.

The plaintiff then appealed against that MAC under ss 327 (3) (c) and (d) *WIMA*. He argued that the AMS did not assess his skin or his peripheral nerve injury and that he combined this impairment with the amputation impairment.

The Registrar's Delegate was satisfied that there was a demonstrable error and referred the appeal to a MAP. However, on 9 October 2017, the MAP confirmed the MAC.

The plaintiff applied for judicial review of the MAP's decision and alleged that: (1) The MAP erred in failing to correct the AMS' error in failing or declining to assess impairment due to scarring as specifically directed; (2) The MAP fell into jurisdictional error by failing to properly consider the Guidelines for the Evaluation of Permanent Impairment – Fourth Edition and its interplay with the AMA Guides to the Evaluation of Permanent Impairment - Fifth Edition; and (3) the MAP's conclusion that there was no evidence of a specific injury or disability to justify a finding of no scarring or disfigurement of the skin of the left hand was so unreasonable that no reasonable decision maker could have reached the same conclusion.

Campbell J held that the arguments advanced before him were argued before the MAP and that the MAP failed to give that matter serious consideration. This constitutes jurisdictional error in the sense discussed in *Drachnichikov v Minister for Immigration & Multicultural Affairs* [2003] HCA 796; 77 ALJR 1088 at [23]-[25]. He held that this was a material error because had the broader formulation based upon disfigurement been considered, rather than focusing upon scarring as "*a special type of disfigurement*", the result may have been more favourable to the plaintiff.

His Honour also held that the MAP misdirected itself or failed to ask itself the correct question, which is a constructive failure to exercise jurisdiction: *Minister for Immigration v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [41] and [82]. He noted that Guideline 14.2 provides "*disfigurement, scars and skin grafts may be assessed as causing significant permanent impairment when the skin condition causes limitation to the performance of activities of daily living (ADL)*". By focusing on the narrow issue of scarring, the AMS and MAP failed to direct themselves in accordance with the requirements of the Guidelines. The plaintiff's complaints, which were accepted by the AMS, and the AMS' findings on examination were capable of supporting the conclusion that the totality of his skin condition resulting from the partial amputation of the thumb did significantly interfere with his ADL's. The floppy skin and the absent nail, so far as the residual nail be on the stump was exposed, were capable of being aspects of the skin condition rather than the amputation per se, as was the unsightly appearance and possible difficulty in removing things from a pocket with his left hand. He stated, relevantly (at [38]):

> …It is only if the right question is posed in terms of the Guidelines that the proper categorisation of these matters, whether they (were) covered by the upper extremity impairment, or alternatively the skin condition impairment, can be ascertained.

His Honour also stated that if each of the matters relevant to set out the evaluation of minor skin impairments between 0% and 2%, as set out in Table 14.1 are considered, the AMS and MAP might well have concluded that the degree of permanent impairment due to the skin condition was somewhere between 1% and 2%.

His Honour was not satisfied that the MAP's failure to evaluate the plaintiff's skin condition resulting in a measurable degree of WPI was legally unreasonable, but it constitutes a material error.

Accordingly, his Honour set aside the decision of the MAP dated 9 October 2017 and remitted the matter to the Commission for referral to a MAP for determination according to law. As the Commission was not named as a party to the Summons, he reserved liberty to apply in relation to the COD dated 8 March 2018 and ordered the first defendant to pay the plaintiff's costs.

WCC – Presidential Decisions

Section 11A WCA – reasonable action with respect to discipline – duty to afford procedural fairness

Rail Corporation NSW v Aravanopules [2019] NSWWCCPD 65 – Deputy President Snell – 17 December 2019

The worker commenced employment with the appellant in 1999 and by 2011, he was a security Monitoring Facility Supervisor and supervised a team of eight workers. On/about 23 October 2015, two female workers complained to him about harassment and alleged that he had been following them to the toilet and touching them.

However, the worker said that he thought that he "*was good friends with these women*" and he was "*hurt and shocked by these allegations*". He sent a report to his direct manager (Mr Franke) and another manager (Mr Linsley) and requested a meeting and he met with them on/about 10 November 2015, during which he denied having acted inappropriately.

On 23 November 2015, the worker attended a meeting with the complainants and Messrs Franke and Linsley. The matter was referred to the Workplace Conduct and Investigation Unity and on 27November 2015, he was removed from his supervisory duties pending an investigation and was placed in a different work area. On 7 March 2016, he consulted Dr Rastogi for psychological issues and he ceased work on/about 29 March 2016.

An investigation was conducted and the complainants and another worker (Ms Herry) were interviewed. Ms Herry also complained that she had been touched by the worker. On 22 March 2016, the Acting Principal Manager, Workplace Conduct and Investigations Unity of the appellant, wrote to the worker describing the allegations made by the three complainants, but he stated, "*we are unable to provide you with specific dates or times*". He advised that the worker had an opportunity to respond to the allegations in writing within 14 days, by post or email and that this response, "*may include your version of events, provide an explanation and/or outline any mitigating circumstances*" and that the investigation would continue if he did not respond. He also stated that the worker may be interviewed as part of the investigation and that he would be advised in writing if this was required.

The worker instructed solicitors, who responded on his behalf on 22 April 2016. The response stated inter alia "*our client's position is that these allegations generally are either wild exaggerations of essentially benign events, or else outright concoctions*".

The Investigation Report was issued on 16 May 2016 and concluded that each of the allegations were substantiated and that the worker had breached ss 3, 4 and 12 of the Transport Code of Conduct. The worker was not interviewed. A "*disciplinary penalty decision*" was made that he be dismissed, which was confirmed on review in a letter dated 3 November 2016.

The worker claimed compensation and on 24 October 2016 and 25 July 2018, respectively, the appellant issued dispute notices that relied upon s 11A (1) *WCA*. The worker then filed an ARD.

Arbitrator Harris conducted an arbitration hearing and noted that the primary issue for determination was whether the appellant's conduct was reasonable for the purposes of s 11A (1) *WCA.* On 18 June 2019, he issued a COD, which determined that the s 11A defence was not made out. He noted that while the investigation report referred to a number of statements and attachments, none of these were provided to the worker and only the Code of Conduct was in evidence before him. He found that the appellant's decision to transfer the worker to alternate duties during the investigation was reasonable because the appellant's obligations with respect to employee safety far outweighed his interests. He noted that in *Ivanisevic v Laudet Pty Ltd* (unreported decision dated 24 November 1998), Truss CCJ stated (in relation to s 11A *WCA*):

> *In my view when considering the concept of reasonable action, the Court is required to have regard not only to the end result but to the manner in which it was effected.*

The Arbitrator stated that the correct test to be applied regarding natural justice was that in *Heggie* and he quoted from the decision in *Kioa*, in which Mason J referred to "*a flexible obligation to provide fair procedures*" and said that there may be circumstances where it was appropriate to withhold some or all of the witness statements from an employee. Safety or privacy reasons may arise for example. He held that in this matter, the worker should have been provided with the statements before a decision was made on the substantive allegations, for the following reasons:

> (a) The worker received (at some point) a summary of portions of the statements in the Investigation Report which formed adverse views of the him;
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> (b) The Investigation Report states that the statements were attached;
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> (c) The worker had no means to examine inconsistencies in the complainant's evidence or contrast these with the evidence from the other employees;
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> (d) References to portions of the statements in the Investigation Report indicate that the examination of witnesses went to many pages. Clearly large portions of the statements were not disclosed to the worker;
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> (e) There was no reason proffered by the appellant at any time, as to why the statements were withheld. The only reason proffered at the hearing was that they did not have to disclose the statements; and
>
> (f) As submitted by the worker, "*the allegations were serious and the proposed sanctions severe.*"

The Arbitrator held that the worker did not have a right to question the witnesses. As to the investigator's failure to interview the worker, the Arbitrator accepted that there was unfairness in how the conclusions were reached in the investigation report and held that this was a "*blemish*" of the entire process, but that it did not taint the entire action. He referred to the decision in *State of New South Wales v Stokes* [2014] NSWWCCPD 78*,* in which an employer, running a s 11A defence, failed to adduce evidence relating to the frequency of, and reasons for, false positives in drug tests involving urine analysis at a hospital that it conducted. The worker was disciplined due to such a false positive. The consequences for the worker were serious. Roche DP upheld an arbitral decision that the employer had failed to discharge its onus of establishing its actions were reasonable, in the absence of it putting on appropriate evidence about the testing process.

The Arbitrator noted that the appellant asked him to infer that it had complied with correct processes when it terminated the worker's employment, but he was reluctant to make that finding when the appellant failed to adduce evidence in its possession. He described the state of the evidence as "*unsatisfactory"* and stated that the fact that some material was in the worker's possession does not detract from the fact that he did not know what occurred during the relevant period.

The Arbitrator held that the worker was entitled to procedural fairness with respect to both whether the charges were satisfied and penalty. In the absence of evidence, the appellant failed to discharge its onus of proving what occurred during the period between the issue of the investigation report and the first notification that the worker's employment was terminated. The absence of the statements was raised at an early stage of the proceedings and the appellant was not caught by surprise. He therefore held that the appellant had made "*an intentional decision to withhold the statements from examination before the Commission*". No explanation was given and he held that he could not determine the reasonableness of the appellant's actions, in finding the charges substantiated and proceeding to termination, in the absence of the source material. He held that the appellant failed to discharge its burden of proving that the entirety of its action with respect to discipline was reasonable. He awarded the worker weekly payments from 4 November 2016 to 1 June 2018 and s 60 expenses and remitted the s 66 dispute to the Registrar for referral to an AMS.

The appellant appealed on 4 grounds, namely: (1) The Arbitrator erred in law in the application of s 11A *WCA;* (2) The Arbitrator erred in fact and law in concluding that the appellant had failed to "*discharge the burden of proof in establishing whether the entirety of its action with respect to discipline was reasonable*"; (3) The Arbitrator erred in fact as that the evidence does not support his conclusion that "*the [appellant] chose to withhold the statements from the [respondent] so that he was deprived of a legitimate opportunity to make submissions on both the allegations and penalty*"; and (4) The Arbitrator erred in fact and law in concluding, by inference, that the worker's psychiatric condition arose wholly or predominantly from the employer's failure to provide source material to the worker or interview the worker.

Deputy President Snell determined the appeal on the papers. He held that there was no evidence that the worker represented an ongoing threat to other employees while the investigation was being conducted and he rejected the appellant's argument that the worker was fully appraised of the allegations against him and that he was given ample opportunity to respond. He agreed with the Arbitrator's finding that the statements should have been provided to the worker.

Snell DP rejected ground (1) and he stated (citations excluded):

> 78. Ground No. 1 asserts error in the application of s 11A of the 1987 Act. This is a very broadly stated ground. The error alleged is identified with more precision with the assistance of the appellant's submissions. The submissions refer to the summation of authorities in Heggie and accept the correctness of that summary. The principles set out in Heggie, of course, deal with the application of the statutory test in s 11A(1) of the 1987 Act, not with principles governing the duty to afford procedural fairness and the content of that duty. The appellant's submissions on Ground No. 1 deal largely with whether the appellant complied with its (conceded) obligation to afford procedural fairness to the respondent. This is relevant to the issue of 'reasonableness' for the purposes of s 11A (1), but is clearly something different to that statutory test. The discussion above largely directs itself to arguments about procedural fairness, as this was the primary thrust of the appellant's submissions on Ground No. 1.

79. Jeffery v Lintipal Pty Ltd is authority that the test of reasonableness "*requires an objective assessment by the Commission*". Basten JA said:

> In my view, if, in the view of the Commission, the action taken by the employer in transferring an employee is not reasonable in all the circumstances, the employer cannot rely upon s 11A because it held a genuine belief, based on reasonable grounds, that its action was reasonable.

80. Consistent with this, it has been held that reasonableness is not established on the basis that "*an employer complied with its own protocols*", unless the protocols are objectively reasonable*: Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v Broad*. In *Balranald Shire Council v Walsh* failure by an employer, to follow its own disciplinary policy and disputes procedures, although it was not determinative, was one of two matters taken into account by O'Grady DP in upholding a decision that the employer's actions were not reasonable. In *Heggie* Sackville AJA said, of the employer's actions in the course of a disciplinary process:

> Compliance with the Policy Directive is not determinative of the objective reasonableness of the Health Network's actions, but it is a highly material consideration.

Snell DP stated that an employer's compliance with its own protocols can be highly relevant to the issue of '*reasonableness*', within the meaning of s 11A (1), as is the extent to which an employer complies with its procedural fairness obligations to a worker. He noted that in determining reasonableness on appeal, the Commission has applied the approach taken by Spigelman CJ in *Vines v Australian Securities and Investment Commission* [2007] NSWCA 126, as follows:

> Where, as here, the relevant statutory test turns on whether or not the Court is '*satisfied*' of a matter involving a broad evaluative judgment, then the case law indicates that the degree of restraint which an appellate court should manifest is of the same order as that applicable to a discretion, in the strict sense of that word. A statutory provision expressed in terms of whether a decision maker is '*satisfied*' of a particular matter is accurately characterised as conferring '*a very wide discretion'.*

Snell DP held that the Arbitrator proceeded on the basis that he was not required to determine whether the worker engaged in misconduct, but rather whether the appellant's actions were reasonable. His criticisms of the appellant's conduct were open to him and were amply justified.

Snell DP rejected ground (2) and held that when the reasons are read as a whole, it is apparent that the Arbitrator did not approach the test of reasonableness on the basis that the appellant was required to prove that each step or each omission was reasonable. The appellant argued that if it establishes that its actions taken as a whole were objectively reasonable, the worker must then identify any step or omission that was not objectively reasonable and that his psychiatric condition was wholly or predominantly caused by that step. However, it did not cite any authority in support of that proposition. He stated:

> 109. The appellant's argument on this point cannot be accepted in any event. The argument would involve considering the issue of whether an employer's actions or proposed actions in respect of one of the protected classes of activity in s 11A (1) were objectively reasonable, and then considering whether psychiatric injury resulted from some step or omission which was not objectively reasonable. There is no support for such an approach in either the legislation or authority. In *Minahan*, to which the respondent refers, Foster AJA referred to the finding of '*injury*' made by the trial judge, and continued:

> This finding was sufficient to entitle Mr Minahan to succeed in his Compensation Court Appeal, subject only to the Commissioner's defence raised under s 11A. His Honour held, correctly in my respectful view, that the section imposed an onus on the Commissioner to prove that the depression was, relevantly, 'wholly or predominantly caused by the reasonable action taken in respect of the discipline of the appellant'.

110. That is, the initial step was the finding of psychological injury. The onus was then on the employer, seeking to rely on s 11A (1) as a defence, to establish its elements. These included the issue of whether the injury resulted '*wholly or predominantly*' from the relevant actions, in that case, in respect of discipline. There is no suggestion in *Minahan*, or other authority, that a worker carries an onus in respect of '*wholly or predominantly'*.

111. The respondent submits also that the appellant's submission is illogical. Section 11A (1) only becomes relevant when there is a finding of psychological injury. I accept this, and adhere to the view I expressed in *Flanagan v NSW Police Force*, where I stated:

> It should be noted, for the sake of completeness, that the appellant's submission that the Arbitrator conflated the tests pursuant to ss 4 (b) and 11A (1) is also correct. In a case where s 11A (1) of *the 1987 Act* is raised as a defence, it is necessary that the issue of whether a worker has proved '*injury*', within the meaning of s 4, be dealt with initially. It is only if '*injury*' is established, that it is then necessary to consider whether s 11A (1) provides the employer with a defence (see *Manly Pacific International Hotel v Doyle* [1999] NSWCA 465; 19 NSWCCR 181 at [4]). In a claim involving the '*disease*' provisions of the legislation, the test to establish injury (whether or not *the 2012 Amending Act* applies) is different to the causation issue requiring determination in s 11A (1). There were occasions, in the Arbitrator's reasons dealing with '*injury*', where he interspersed references to whether various events, potentially relevant to 'injury', might be subject to the provisions of s 11A in any event (see the reasons at [230], [242], [256] and [299]). The two issues, '*injury*' and the causation test in s 11A (1), are different, and need to be considered separately.

Snell DP rejected ground (3) and noted that the worker correctly referred to the decision in *Raulston* and argued that it is not enough that a Presidential member would have drawn a different inference, it must be shown that the Arbitrator was wrong. However, the appellant's submissions did not assert that the inference about whether it deliberately withheld statements from the worker was wrong and he held that there were compelling reasons for that inference to be drawn. He also stated:

> 123. The appellant also submits there was no evidence regarding the appellant's motivation for withholding the documents. The way in which the reasons are expressed at [202] of the reasons, particularly the words "*so that*", are potentially ambiguous. They could suggest that depriving the respondent of an opportunity to make submissions was the appellant's intention, or they could simply record that the respondent's ability to make submissions was impeded as a result of the failure. In *Heggie* Basten JA said:
>
> > Her reasons for making the decision could have been relevant in a negative sense, if, for example, it were established that she was actuated by malice or other irrelevant factors. There was, however, no suggestion to that effect. Given the need to assess the reasonableness of the action objectively, her actual reasons for the decision were of little significance.

124. On one reading of the reasons at [202], malice may have been an element in the failure of the appellant to furnish the statements to the respondent at an appropriate time. On another reading it was not an element. The reasons at [195] refer to *"[w]hatever suggestion the [appellant] had for not providing this evidence [the statements] ...*". This does not suggest the Arbitrator made a finding that the appellant's failure to provide the statements was actuated by malice. There were other deficiencies in the appellant's case on reasonableness, identified by the Arbitrator in the reasons at [178] to [185]. Deficiencies, noted by the Arbitrator, are also referred to at [96] above. The majority of these would not involve the appellant being motivated by malice or other irrelevant factors…

126. The appellant submits the failure to produce material to the Commission could not have caused or contributed to the psychological injury, and therefore was irrelevant. The significance of the failure to produce the material to the Commission was not that it could be causally related to the injury. The significance was that the Arbitrator was dealing with whether the appellant had discharged its onus on the s 11A (1) defence, and it had failed to adduce evidence that was in its possession and arguably likely to be relevant, without explanation.

Snell DP also rejected ground (4). He noted that the appellant sought to argue that Dr Rastogi opined that the worker's injury occurred prior to October 2015 and March 2016 and before it failed to interview the worker or to supply him with the relevant statements. However, the worker properly objected to this argument being raised on appeal and he rejected it. He noted that this ground was based on a misconception of how the case was conducted before the Arbitrator and it was "*essentially unarguable*". He held that there was no substance to the argument that contrary to *Sinclair,* the Arbitrator relied upon "*individual blemishes*".

Accordingly, Snell DP confirmed the COD.

Effect of deed of release signed by the worker – ss 149 and 151A WCA considered

Gardiner v Laing O'Rourke Australia Construction Pty Limited [2019] NSWWCCPD 66 – President Judge Phillips – 19 December 2019

The appellant was employed by the respondent from 4 October 2011 to 12 March 2018. He had a prior history of mental illness and alleged that he suffered either a disease injury or an aggravation etc. of a psychological disease. On 12 March 2018, he filed a complaint with the Anti-Discrimination Board of NSW (ADB), alleging that he had been discriminated against on the grounds of his disability and victimised in the course of his employment with the respondent. The complaint was resolved on 5 September 2018 and the parties entered into a Deed of Release (DOR).

Arbitrator Rimmer held that a payment of $29,412.00 under the DOR was damages in respect of the same injury and the appellant was precluded by s 151A *WCA* from any further entitlement to compensation under the Act. She considered the decision in *Super IP Pty Limited v Mijatovic,* in which Keating P held, on the facts of the case, that a payment was made in respect of a psychological injury and he rejected an argument that it was the contractual intention of the DOR to keep retain the workers compensation entitlements.

The Arbitrator considered this matter as similar to *Mijatovic* as the chronology filed in the ADB proceedings identified same incidents that were the subject of the WCC proceedings. She held that the definition of "*claims*" in cl 1.1 of the DOR *"covers in the present case personal injury damages claims arising at least from (a) the employment and (3) any other matter referred to in the recitals*" and that the various carve-outs or exceptions within the DOR as to workers compensation did not entitle the appellant to escape the operation of s 151B (a) (a). Its broad language and the circumstances described as covered required a conclusion that the payment must be characterised as constituting a recovery of damages.

Further, if the recovery of damages was a mixed question of law and fact, as a matter of law the inevitable conclusion was that there had been a recovery of damages that required the application of s 151B (1) (a), which provided the respondent with a complete defence to the proceedings.

The appellant appealed and alleged that the Arbitrator: (1) erred in fact in finding that the appellant had recovered "*damages*" "*in respect of the injury concerned*"; (2) erred in law in that she failed to give effect to the purpose and intent of s 151A, which is to avoid double recovery of compensation; and (3) failed to give any or any adequate reasons for giving no weight to the repeated exclusions set out in the Recital to the DOR.

President Judge Phillips identified the issue for determination as whether, as a result of the DOR, ss 149 and 151A *WCA* were engaged so as to deny the appellant the right to pursue his proceedings in the Commission. He stated (citations excluded):

> 36. Before a detailed consideration of Ground One is undertaken, it is necessary to set out the relevant legal principles arising from previous cases where settlements have taken place and there was a later argument about whether or not the appellant worker was barred from pursuing workers compensation proceedings.
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> 37. *Adams* is an often relied upon case in this area. In *Adams*, the worker had brought proceedings in the then Australian Industrial Relations Commission with respect to his dismissal. These proceedings were settled by a Deed of Release, the operative provisions of which noted the employer's agreement to pay the employee an amount of $2,500 "*in respect of general and other damages".*
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> 38. Handley AJA noted that *"[t]he worker's difficulties flow not from the deed as such, but from his acceptance of the payment of $2500*", before turning to the question as to whether the amount recovered was "*damages in respect of an injury*". Handley AJA then construed the Deed and established that the payment was made "in respect of" the injury.[23] His Honour found that s 151A of *the 1987 Act* "*in its present form is intractable and the Court has no option but to give effect to the clear language of Parliament*."
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> 39. In *Mijatovic* President Judge Keating (as he then was) found that a worker by deed resolving a claim in the Australian Human Rights Commission had recovered damages with respect to the same injury. His Honour construed the Deed which gave a release with respect to all claims "except any claims made in accordance with the provision of any applicable workers compensation legislation". The Recitals to the Deed had recorded that the worker alleged that her employer had caused her psychological and personal injury and reports were provided in support. His Honour found that the broad definition of damages in s 149 of the Act included the compensation paid to settle the anti-discrimination complaint.
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> 40. Both of these matters involved a construction of the terms of the requisite deed of release in order to ascertain, as a factual matter, whether the damages recovered had been recovered in respect of the same injury. This was the task before the learned Arbitrator.

His Honour rejected ground (1) and held that the Arbitrator's conclusion was readily available on the evidence. He stated (citations excluded):

> 48. It is abundantly clear, as the learned Arbitrator found, that there was a real and obvious connection between the facts which gave rise to the claim before the Anti-Discrimination Board and the same facts which the medical evidence reveals as causing an exacerbation to Dr Gardiner's mental condition. It is clear that the Recitals and the Releases and their terms, as described by the learned Arbitrator, are drafted in sufficiently wide terms to cover all of these matters. The Arbitrator's approach is consistent with the proper approach to construction of written contracts relied upon

by Dr Gardiner. In my view, consistent with *Cordon Investments*, it is plain in this matter that the parties clearly intended to resolve a number of claims and not just the discrimination claim which had been initiated in the Anti-Discrimination Board.

49. There is no doubt that the injury as pleaded in the ARD has been subject to a recovery of damages pursuant to the Deed of Release. Not only is there no error in the learned Arbitrator's approach, factually or otherwise, it is indeed clear from a review of the evidence, that this was an available factual conclusion to be reached.

50. Dr Gardiner also attempts to distinguish the Court of Appeal decision in *Adams,* pointing to the covering letter which accompanied the cheque as identifying the damages as being for a "*work injury claim*" and drawing attention to the fact that no such description was given in this matter. It is correct to say that the term of art "*work injury damages*" was not used in this Deed of Release. However, the failure to use that term is not determinative. Section 149 of *the 1987 Act* defines damages more widely than "*work injury damages*". The key is the recovery of damages with respect to the same injury concerned in order to trigger s 151A of *the 1987 Act*. In *Adams*, the $2,500 settlement was paid with respect to "*the injury concerned*" and a number of other claims. That is precisely the case in this matter where the Recitals and the Release detail, in a factual sense, the various claims, complaints and concerns which are subject to the settlement. It is clear as a matter of construction that the parties to the Deed of Release were resolving a wide range of matters which were inextricably linked with both the claim before the Anti-Discrimination Board and the claim which is now sought to be brought in this Commission.

His Honour rejected ground (2), which he described as "*inelegantly expressed*". He held that it is abundantly clear that the s 151A *WCA* prohibition against double recovery of damages was uppermost in the Arbitrator's mind and he stated (citations excluded):

56. Unfortunately in this matter, due to the terms of the Deed of Release and as I have found in dismissing Ground One, Dr Gardiner resolved all of his rights (as pursued in this litigation) when he executed the Deed of Release and recovered damages. Because the learned Arbitrator found that the monies recovered in the Anti-Discrimination Board proceedings were for the same injury as advanced in these proceedings, the s 151A prohibition against double recovery was thus enlivened. Indeed once the learned Arbitrator made the finding that she did regarding injury at Reasons [71], the application of s 151A adopted by the Arbitrator was in fact the only proper approach available. This did not involve the learned Arbitrator in any error of law, rather it was a precise and principled application of the provision.

His Honour held that the problem for the appellant was terms of the DOR and the breadth of the facts, the claims and the releases which were subject to the settlement reflected in that DOR. Once he recovered the damages paid under the DOR, s 151A of *the 1987 Act* was enlivened.

His Honour rejected ground (3) and held the Arbitrator did not fail to give reasons why she did not give any weight to the repeated exclusions in the DOR. She construed these in a concise and succinct manner before expressing her ultimate conclusion and that approach is consistent with an Arbitrator's duty under *WIMA* and the *Rules* and case law. He stated:

77. It is clear from the learned Arbitrator's reasoning that the exclusion question was considered, the argument weighed and evidence reviewed to assess whether the exclusion applied. Particular issue is taken with how the Arbitrator dealt with the exclusion found in cl 4 of the Deed. The Arbitrator considered that the operation of the workers compensation exception was defeated because of the broad language of the Release. Dr Gardiner takes issue with this description in terms of the release being "*broad*", instead arguing that the Release is quite specific. This submission urges upon me a different construction of cl 4 of the Deed. It is hard to see how this

submission can support an appeal ground which alleges that there are no or inadequate reasons. Clearly at Reasons [65], the cl 4 Release is subject to construction by the learned Arbitrator. The reasons are succinct. The criticism regarding the reasoning set out at Reasons [64] (see appellant's submission in chief [36.2]) fails to read the decision in its context. Paragraph [64] of the Reasons sits within the section of the decision where the learned Arbitrator is reviewing the terms of the Deed of Release and dealing with Dr Gardiner's arguments regarding the effect of the workers compensation exception. This statement is based upon the wide definition of "*claims*" in cl 1.1 which the learned Arbitrator considered before coming to the conclusion reached in Reasons [64]. There is no basis to assert that there are no reasons or no adequate reasons in this regard.

Accordingly, his Honour confirmed the COD.

Costs are not 'compensation" for the purposes of satisfying the monetary threshold under s 352 (3) WIMA

Kula Systems Pty Ltd v Workers Compensation Nominal Insurer [2019] NSWWCCPD 68 – Deputy President Wood – 20 December 2019

The appellant appealed against a decision of Arbitrator Wynyard, which was the subject of a previous appeal by the respondent. The appellant was uninsured when the worker was injured and the respondent served a notice upon it under s 145 (1) *WCA*, seeking reimbursement of work injury damages that it paid to the worker under a DOR, which was signed by the appellant, the worker and the respondent.

The appellant applied to the Commission for a determination of its liability under s 245 (3) *WCA* and on 9 April 2019, the Arbitrator determined that it was not liable to reimburse the respondent. However, while the appellant sought a costs order against the respondent, the COD did not include a costs order and the appellant sought to appeal regarding the failure to award costs.

Deputy President Wood noted that the appellant wrongly relied on s 353 *WIMA* and that s 352 *WIMA* prohibits an appeal being brought if the monetary threshold is not satisfied. The Commission is not otherwise vested with discretion to grant leave to appeal.

Wood DP noted that s 4 *WIMA* defines "*compensation*" as "*compensation under the Workers Compensation Acts, and includes any monetary benefit under those Acts*". The issue of whether costs constitutes "*an amount of compensation*" has been considered in a number of Presidential Appeals and by various Presidential members, as follows (citations excluded):

21. In *Grimson v Integral Energy*, Deputy President Fleming observed:

> The decision '*no order as to costs*' clearly does not concern an '*amount of compensation'*, either in the appeal, or in the original claim. The costs associated with an application to the Commission are not themselves an amount of compensation under the Workers Compensation Acts. '*Compensation*' is defined in section 4 of *the 1998 Act* as '*compensation means compensation under the Workers Compensation Acts, and includes any monetary benefit under those Acts*'. Chapter 4 of *the 1998 Act* deals with '*Workers Compensation'*. Part 3 of *the 1987 Act* deals with '*Compensation-Benefits'*. In the circumstances of this case there was no '*amount of compensation at issue*' as the substantive proceedings had been discontinued. This itself raises a question as to the power to award costs which, given the conclusion I have reached on the leave issue, is not a matter that need be finally decided in this appeal.

22. The decision in *Grimson* has been consistently followed in numerous Presidential decisions. Acting Deputy President Roche (as he then was) followed Deputy President Fleming's reasoning in *Sorbello v Yellamo Pty Ltd* and came to the same conclusion, that is, that costs could not be "*an amount of compensation*."

23. Deputy President Byron also applied *Grimson* in *Roads and Traffic Authority v Warden* and formed the view that:

> Where an appeal relates only to an issue of costs there is no dispute before the Commission, constituted by a Presidential Member, about an amount of compensation between the parties, as required by section 352 (2) of *the 1998 Act*.

24. President Keating took the same approach in *El-Said v 3WJ Pty Limited*. After citing *Grimson* and other Presidential decisions on point, his Honour concluded that:

> The only order made by the Arbitrator, other than recording the discontinuance was an order awarding costs in favour of the Respondent under section 112 of *the 1998 Act*, after the worker sought to discontinue the proceedings. The appeal does not relate to an '*amount of compensation*' but relates to the Arbitrator's order as to costs.
>
> I am satisfied that the decisions referred to above are correct and an appeal in relation to a costs order does not meet the threshold requirements in section 352 (2) and therefore leave to appeal is refused. Having made this order it is unnecessary to consider the Appellant's grounds of appeal.

25. At the time these decisions were made, appeals pursuant to s 352 of *the 1998 Act* required leave to be granted, and the former s 352 (2) (the equivalent provision to the current s 352 (3)) provided that leave could not be granted unless the monetary threshold was met. Appeals from decisions of arbitrators made from 1 February 2011 do not require leave to appeal, but the same prohibition in relation to the monetary threshold applies.

26. I note that, although invited to do so, the employer made no submissions about the threshold requirements. I see no reason to depart from the consistent reasoning and conclusions reached in the above cases. In this case, the monetary thresholds pursuant to s 352 (3) have not been satisfied and there is no right to appeal.

Accordingly, Wood DP held that there was no right to appeal.

Monetary threshold required by s 352 (3) WIMA – Application of Programmed Maintenance Services Limited v Barter [2005] NSWWCCPD 42 & Junsay v The Uncle Toby's Company Ltd [2009] NSWWCCPD 71

Workers Compensation Nominal Insurer v Kula Systems Pty Ltd [2019] NSWWCCPD 67 – Deputy President Wood – 20 December 2019

This appeal arises from the same decision that was the subject of the appeal in *Kula Systems Pty Ltd v Workers Compensation Nominal Insurer* (see above).

On 5 April 2019, ***Arbitrator Wynyard*** issued a COD, which determined that:

> (1) The appellant's actions under its power contained in s 142A (1) *WCA* were without jurisdiction;
>
> (2) The demand made under s 145 (1) *WCA* was null and void as being ultra vires; and
>
> (3) The certificate issued by the appellant under s 145 (5) *WCA* was null and void as being ultra vires. Therefore, the respondent was not liable to reimburse the appellant for the monies it had paid.

The appellant sought to appeal against that decision, but in order to satisfy the threshold it was required to prove that "*damages*" that it paid was "*an amount of compensation*".

Deputy President Wood noted that neither party addressed this issue in their submissions and she directed them to do so. She also drew their attention to the decision in *Junsay v The Uncle Toby's Company Limited*. She stated (citations excluded):

> 48. In my view, the payment the Nominal Insurer was seeking to recover cannot be considered to be a "monetary benefit." The only monetary benefits specified in *the 1987 Act* and *1998 Act* are those pertaining to benefits to workers or their dependants as set out in Part 3 of *the 1987 Act*. Clearly the amount the Nominal Insurer is seeking to have reimbursed is not in connection with weekly payments, treatment expenses or lump sum compensation, which are the monetary benefits referred to in *the 1987 Act*.
>
> 49. The payment made by the Nominal Insurer, which it now seeks to recover, was a payment made to the worker as work injury damages.
>
> 50. The distinction between "*damages*" and "*compensation*" has been considered in a number of Presidential decisions. In *Programmed Maintenance Services Limited v Barter*, Deputy President Byron considered subss (1) and (2) of s 352 of *the 1998 Act* which were in force at that time. Subsection (2) was in equivalent terms to the current subs (3) of s 352. Byron DP said:
>
> > It is clear that the 'compensation at issue' in section 352 (2) of *the 1998 Act*, is not the same as, or a reference to, '*damages*' at issue. Furthermore, section 352 (1) does not apply to a dispute in connection with a claim for damages. It does apply to a dispute in connection with a claim for compensation. Consequently, section 352 does not enable a party to bring an appeal to the Commission, constituted by a Presidential Member, in relation to a claim for '*damages*', nor does it empower the Commission, as so constituted, to deal with and determine such an appeal. As the Appellant Employer is not a party to a dispute in connection with a claim for compensation, I find that this appeal is not made in accordance with section 352 (1) of *the 1998 Act*, and that I have no jurisdiction to proceed to determine the appeal, in accordance with section 352(1), (2) and (5) of *the 1998 Act*.
> >
> > As stated at paragraph 35 above, the powers of the Commission, being a creature of statute, are limited to those powers expressly conferred upon it by the statute. Any attempted exercise of power beyond those conferred by the statute, would necessarily be of no legal effect (*Commissioner of Police v Donlan, Commissioner of Police v Hanson*, CA, 20 June 1995, unreported).
> >
> > The consequence of my finding that the Commission lacks jurisdiction to determine this appeal, obviously, is that I have no power to proceed to deal with the substantive issues in dispute, in the appeal.
>
> 51. In *Junsay*, Acting Deputy President Snell (as he then was) considered the Commission's jurisdiction to hear and determine a matter in relation to a work injury damages threshold. He also considered the question of whether a claim in connection with work injury damages could satisfy s 352 (1) in terms of the requirement that the issue on appeal was "*in connection with a claim for compensation*". He concluded that:

> It is apparent from the above definitions that the meaning of '*compensation'* in section 352 does not include work injury damages, or the possible value of a potential claim for work injury damages. The definition of '*damages*' contained in section 149, which is imported into Chapter 7, specifically excludes '*compensation under this Act'*. The definition of '*compensation*' in section 4 of *the 1998 Act* is compensation under the Workers Compensation Acts.
>
> 52. A number of other Presidential authorities followed the same reasoning and arrived at the same conclusion.

Wood DP noted that the Nominal Insurer argued that *Junsay* could be distinguished because in that case, there was no jurisdiction for the Commission to hear and determine the matter at first instance. She stated, relevantly:

> 57. The character of the payment for which the Nominal Insurer seeks reimbursement is not restricted by s 145 to "c*ompensation*" and nor is the power of the Commission to make a determination under s 145.
>
> 58. Curiously, the jurisdiction of the Commission conferred by s 145 is not expressed to be limited to determining liability for only those payments which were in relation to weekly payments, treatment expenses or lump sum entitlements. I note, however that s 105 of *the 1998 Act* confers exclusive jurisdiction on the Commission to hear and determine all matters arising under both *the 1987 and the 1998 Acts*, but, except for the operation of Part 6 of Chapter 7, the Commission does not have jurisdiction in respect of matters arising under Part 5 (common law remedies) of *the 1987 Act*. In addition, Part 6 of Chapter 7 is headed '*Special Provisions for Work Injury Damages*'. Section 312 provides:
>
> > Proceedings in respect of a claim for work injury damages may be taken in any court of competent jurisdiction, subject to this Part.
>
> The Commission is not a court of competent jurisdiction.
>
> 59. Further, the power to make orders or awards pursuant s 145 (4) (b) is limited to being with respect to "*the payment of compensation*".
>
> 60. What appears on the face of subss (3) and (4)(a) of s 145 to be a broad power to determine liability in respect of any payment made by the Nominal Insurer is difficult to reconcile with the provisions of s 105 and s 312 of *the 1998 Act*, and indeed the limited powers to make orders and awards contained in s 145 (4) (b).
>
> 61. However, the jurisdiction of the Commission in terms of hearing a dispute brought by an employer was not the subject of submissions before the Arbitrator, or the subject of the appeal. On the assumption that there was jurisdiction in the present case, that is not a basis upon which *Junsay* can be distinguished. In *Junsay*, Snell ADP decided that there was no right to appeal because the issue concerned liability in connection with work injury damages, and work injury damages as defined was not "*compensation*", so that s 352 (the right to appeal) was not satisfied. The authority is squarely on point…
>
> 65. In *Favetti Bricklaying Pty Limited v Benedek* Justice Bellew provided a useful summary of the rules of statutory construction as follows (citations omitted):
>
> > (i) the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute: *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*;

(ii) the task of statutory construction begins and ends with a consideration of the (statutory) text: *Federal Commissioner of Taxation v Consolidated Media Holdings Limited*;

(iii) the text must not be read in isolation from the enactment of which it forms a part. To do so offends against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context: *K. & S. Lake City Freighters Pty Limited v Gordon & Gotch Limited*;

(iv) accordingly, the meaning of the provision must be determined by reference to the language of the instrument when viewed as a whole: *Project Blue Sky;*

(v) a legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, such conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve the result which will best give effect to their purpose and language, while maintaining the unity of the provisions as a whole: *Project Blue Sky*;

(vi) legislative history and extrinsic materials cannot displace the meaning of the statutory text, nor is their examination an end in itself: *Consolidated Media Holdings*;

(vii) it is preferable to adopt a construction of legislation that will avoid a consequence which appears irrational or unjust: *Legal Services Board v Gillespie-Jones*;

(viii) it is also preferable to adopt a construction that will avoid an absurd outcome or consequences.

66. Section 250 of *the 1998 Act* provides that, for the purposes of Chapter 7 of *the 1998 Act* (New Claims Procedures) "damages" has the same meaning as in Part 5 (Common Law Remedies) of *the 1987 Act* and defines "*work injury damages*" as "*damages recoverable from a worker's employer* ...". Part 5 of *the 1987 Act* relevantly, which is set out at [21] above, provides that "*damages*" does not include "*compensation under this Act*."

67. For the purposes of Part 5 of *the 1987 Act* and Chapter 7 of *the 1998 Act*, therefore, "*damages*" does not include "*compensation*." Section 352 falls within Part 9 of Chapter 7 so that the definition of damages, which excludes compensation, applies.

68. Section 140, which is in Division 6 of Part 4 of *the 1987 Act*, provides that a claim can be brought under the Division "*for compensation under this Act or work injury damages*." This suggests that Division 6, which includes s 145, contemplates a distinction between damages and compensation, which is consistent with Part 5 of *the 1987 Act* and Chapter 7 of *the 1998 Act*.

69. The terms "*compensation*" and "*damages*" are used consistently throughout the legislation to refer to claims that are separate to and distinct from each other. While I have had regard to the object and purpose of *the 1987 and 1998 Acts*, the meaning of "*damages*" as it is used in Chapter 7 of *the 1998 Act* and throughout the legislation is clearly defined and does not include "*compensation*". No ambiguity arises as to its interpretation or the meaning of "*compensation*". While the result of excluding the right to appeal falls from that construction and is unfair, it is not up to courts or tribunals in construing a statute to consider what is or is not a desirable policy or to impute the favourable construction to the legislature in order to achieve the preferred outcome.

> 70. To construe "*compensation*" as it appears in s 352 to have a wider scope of meaning than it has in other sections of the Acts, including its exclusion from the definition of damages that appears in the same chapter (s 250), is inconsistent with the principles enunciated in *Favetti* by Bellew J above. To construe the term "*compensation*" in any other manner is to have disregard to the language of the instrument when viewed as a whole. While it is preferable to adopt a construction of the legislation that will avoid a consequence which appears irrational or unjust the text must not be read in isolation from the enactment of which it forms a part.

Wood DP held that the amount for which the appellant sought reimbursement is not "*compensation*," and that it has no right to appeal and she declined to make a costs order.

WCC – Medical Appeal Decisions

Demonstrable error on face of the MAC – Roads and Maritime Services v Rodger Wilson; NSW Police Force v Registrar of the Workers Compensation Commission discussed

Myer Pty Limited v El Bayeh [2020] NSWWCCMA 1 – Arbitrator Wynyard, Dr M Burns & Dr R Fitzsimons – Arbitrator Bell, Dr G McGroder & Dr J Bodel - 12 December 2019

On 5 August 2019, Dr Harrison issued a MAC that assessed 16% WPI. He referred to a previous MAC dated 6 August 2010, which described a crush injury to the left hand and recorded a history of multiple injuries as a result of three motor vehicle accidents.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. It asserted that the AMS erred in relying upon an incorrect history from the worker and considering injuries and symptoms that were not consistent with the Arbitrator's findings that the only injuries suffered on 5 April 2008 were to the left wrist, hand and fingers. It also asserted that as the AMS' findings on examination were similar to those indicated in the 2010 MAC, the assessment of 16% WPI cannot be justified and that the AMS erred in making an assessment for surgery when there had not been any further surgery.

The MAP held that there was no demonstrable error with respect to the assessment of the left upper extremity because the amended referral to the AMS required him to assess permanent impairment of the wrist, hand and fingers. It stated:

> 24. In addressing the overall medical picture for Mr El Bayeh, the AMS does refer to other body parts and several motor vehicle accidents as part of the general medical background. The AMS explains his assessment at Part 10.b.,
>
> > Then, using Figures 1, Upper Extremity Impairment Evaluation Record – Part 1 (Hand) & Part 2 (Wrist, Elbow and Shoulder) PP. 516 & 517, his left hand digit losses of motion (with none at his thumb) added up to combined flexion figures of 37, 57, 33 and 29 respectively for the index to little fingers and his combined digit extension losses were 5° per finger and 20 leaving 37, 52, 33 & 24 respectively as the assessed left hand impairments then. When converted from digit to hand impairments and added, they represented a 19% left hand impairment and by Table 16-2, p.439, a 17% UEI.
> >
> > Using Part 2 (Wrist) P. 517, when those calculated amounts of losses were added to the calculated UEI's for the left wrist as 11%, using the Combined Values Chart P. 604 that gave a 26% UEI which by Table 16-3, P. 439 represents a 16% WPI to which the scarring assessment is added, using the Combined Values Chart, P. 604: 16+2 = 18%.
> >
> > He therefore has… an 18% WPI affecting his left upper extremity at the wrist, hand and fingers as a consequence of the injury at work on 5 April 2008.

25. At Part 8.e. the AMS notes a prior motor vehicle accident,

> He has had a prior motor vehicle accident on 11/06/06 and subsequent ones in July 2011 and 20/01/2015 where his neck and other regions had been affected as I described in the report.

26. The AMS also separates subsequent injury from the assessment at Part 8.g.,

> I have detailed that in the report in terms of other accidents and did not consider or include any additional impairments due to those subsequent two motor vehicle accidents that have occurred but I have restricted my assessment to the requested Left Upper Extremity (wrist, hand & fingers).

27. It is clear from the above that the references to other body parts and the history of the matter, including discussion about the previous MAC have not led to any error. The references are of a general nature and do not form part of the assessment. The AMS has conducted the assessment as referred to him and restricted it to the crush injury to the wrist, hand and fingers on 5 April 2008.

28. The appellant's submission that the AMS has included in the assessment injuries and symptoms other than the injury referred cannot be sustained. The appellant does not specify how this has occurred by reference to the explanation by the AMS of the calculations at Part 10.b. extracted above.

29. The AMS has used the correct assessment criteria and there is no demonstrable error on the face of the Certificate discerned by the Panel regarding the assessment asked of the AMS.

However, the MAP held that there was a demonstrable error with respect to the assessment for scarring as this was not referred to the AMS.

The MAP removed the assessment of scarring, which reduced the overall assessment to 16% WPI and it applied a deductible of 1/10 under s 323 *WIMA*, which reduced the assessment to 14% WPI (after rounding). It therefore revoked the MAC and issued a fresh MAC that assessed 14% WPI.

Traumatic brain injury – AMS failed to identify the Guidelines that he applied and failed to give adequate reasons – MAP re-examined the worker – MAC confirmed

Waters v Alcheringa Park Thoroughbred Pty Ltd [2020] NSWWCCMA 2 – Arbitrator Wynyard, Dr M Burns & Dr R Fitzsimons – 13 December 2019

The appellant was the stud manager and horse trainer of the respondent company. On 5 September 1996, a horse that he was riding stumbled and fell and rolled on top of him. He suffered back pain and gradually returned to pre-injury duties. On 7 September 1998, he suffered an injury about which he has no memory, and to which there were no witnesses, although he was possibly kicked by a horse. He was admitted to hospital for a time.

The referral to an AMS indicated 6 previous awards and/or settlements under s 66 *WCA* relating to both dates of injury. Dr Anderson, AMS, previously assessed permanent impairment of the back and permanent loss of efficient use of the left leg as a result of the 1996 incident. The appellant told Dr Anderson that in 1998, he believed that a young horse had reared and kicked him in the head because a large lump was found on the back of his head with a laceration that required suturing. He alleged that he suffered amnesia for about 12 days after this incident and that he suffered some loss of brain function since then.

In July 2014, the appellant underwent discectomy at the L5/S1 level, which relieved his left leg symptoms, but he suffered a post-operative infection that required further surgery. His symptoms returned and increased following that surgery.

On 3 May 2019, Dr Mellick issued a MAC, which assessed 16% WPI for the lumbar spine in relation to the 1998 injury, but 0% WPI for cognitive impairment. He noted that the worker kept a diary because of memory problems and that he suffered a mood disorder that required psychiatric care and that the worker suffered right frontotemporal headaches about once a week. He stated that the 1996 injury did not cause any assessable impairment and that there was no adequate evidence of a brain injury that justified a WPI assessment as a result of the 1998 injury. He also stated that surgical scarring was very difficult to identify and did not reasonably justify an assessment.

The AMS referred to a report of Dr Stening, a neurosurgeon qualified on behalf of the worker, dated 16 May 2018 (2019?). The doctor noted that the appellant underwent three neuropsychological assessments in November and December 2018 and commented that these suggested that the magnitude of the cognitive impairment was not in keeping with the evidence of the severity of the head injury. He did not consider that an assessment of WPI was justified.

However, in a further report dated 28 December 2018, Dr Stening assessed 25% WPI with respect to the head injury, based upon a neuropsychological assessment by Ms Wong dated 3 September 2018. The AMS did not refer to this report in the MAC, but he referred to a medico legal report of Dr O'Sullivan (neurologist), who had reports from Dr Crimmins and Dr Darveniza (treating neurologists) available to him and assessed 0% for cognitive impairment. The AMS noted that in February 2012, Dr Darveniza assessed 0% WPI using the "CDR scale". He stated:

> It is noted that they, too, did not identify adequate evidence to make a whole person impairment assessment for cognitive impairment (nervous system) because of the injury on 7 September 1998. Accordingly, my opinion is in accord with the body of neurological and neurosurgical opinion in that regard.

The appellant appealed against the assessment of 0% WPI for cognitive impairment under ss 327 (3) (c) and (d) *WIMA.* He alleged that the AMS failed to identify the criteria that he applied and that it was not possible to discern whether or not he had correctly applied the relevant criteria. He argued that the AMS had not mentioned or considered the Guides and/or AMA5 Guides and that his failure to consider the opinions of Dr Stening and Ms Wong also amounted to a demonstrable error and that he should also have considered the evidence of Dr McDonald, the psychiatrist who had been treating him for over 18 years. No reason was provided for why this evidence was not considered.

Following a preliminary review, the MAP determined that there was a demonstrable error and it requested that he attend a further medical examination by Dr Burns on 17 October 2019. It stated:

> 46. Mr Waters noted that the assessment was for the purposes of s 39 of the *Workers Compensation Act 1987* (*1987 Act*), which we note is concerned with the awarding of further weekly compensation. It was noted that lump sum compensation for brain impairment had been assessed pursuant to the Table of Disabilities (although we were unable to locate that particular award).
>
> 47. Mr Waters submitted "*particularly for this reason*" that due consideration had to be given to the existing clinical and other material. We assume that Mr Waters intended by the word *"*reason" to refer to the purpose of the assessment being pursuant to s 39 of the 1987 Act and the subordinate legislation contained in Schedule 8 of the *Workers Compensation Regulation 2016*.
>
> 48. Mr Waters then referred to an assessment by a neuropsychologist, Ms Tanya Kerr who had supervised the assessment of Mr Waters from the Hunter Rehab Brain Injury Service, and who had provided several reports that were attached to the application.

49. It was submitted that those reports recorded an array of functional disabilities and that the clinical material also included occupational therapy and speech therapy records. Mr Waters asserted that there appeared to be agreement amongst the treating practitioners that there was an element of psychological disorder and/or psychiatric presentation which led to his being referred to Dr McDonald.

50. Mr Waters submitted:

> While a careful examination is required to form an appreciation of a relatively complex symptom set, the following excerpts demonstrate examples of Dr McDonald's identification of neurological injury as being responsible, at least in part for the patient's disability ……

51. Reference was then made to reports from Dr McDonald of 14 August 2000, 8 April 2003, 9 July 2008 and 30 September 2009 which Mr Waters submitted pointed to neurological involvement.

52. Mr Waters also criticised aspects of the AMS's approach to the opinions of other specialists, repeating that he had not referred to Dr Stening's second report, nor to Ms Wong's assessment.

The respondent argued that there was no basis for the grounds of appeal and did not engage with any of the points raised by the appellant.

The MAP held that an AMS is not required to engage with all material sent to him, but is required to give adequate reasons: see *Vegan.* It held that the AMS' failure to the relevant Guidelines was a failure to give adequate reasons and that the parties (and itself) could not discern the basis of the assessment. It was unable to determine whether incorrect criteria were applied as no criteria has been mentioned by the AMS, and this was a demonstrable error.

The MAP adopted Dr Burns' report dated 17 October 2019 and it stated, relevantly:

> 70. It can be seen that the evaluation of this type of injury is complex and requires consultation with both the Guides and AMA 5. The Panel also initially had considerable difficulty in deciphering the notes from Maitland Hospital, as they appeared to have been copied and recopied several times. On 19 August 2019, we issued a direction seeking the production of legible notes, which were duly provided. They established that Mr Waters did have an initial abnormal CCS score of 14/15 and thus fulfilled the section of Chapter 5.9 of the Guidelines for diagnosis (and assessment) of a traumatic brain injury. They also established that he did not have a "*significant medically verified duration of post-traumatic amnesia*".
>
> 71. With reference to the criteria in Chapter 5.4 of the Guides, we are satisfied firstly that there was no evidence that Mr Waters' injury has permanently affected his level of consciousness or awareness.
>
> 72. Secondly, with regard to emotional and behavioural impairments, the evidence from Mr Waters' treating psychiatrist demonstrates that these were apparent in the early stages. In his last report of 24 February 2016, Dr McDonald, found that Mr Waters suffered from "*personality change and a variety of subtle neurological deficits caused by closed head injury at work in 1998*".
>
> 14 Over time Dr McDonald said there had been a gradual lessening in the impact of these deficits, as they had become milder. He noted Mr Waters' improved capacity to use coping strategies to minimise the impact of his deficits such as diary keeping and using GPS when driving. There was evidence of prior emotional and behavioural impairments, as noted by Dr McDonald, but Mr Waters' previous lability of mood, with a tendency to depression with outbursts of rage, has been ameliorated by his medication regime.

73. Thirdly, we are not satisfied that Mr Waters has any rateable cerebral impairment regarding aphasia and communication disorders.

74. On the CDR scale Dr Burns found memory as 0.5, one other criteria as 0.5 and four other criteria as 0.0. Page 319 of AMA 5 (bottom right column) provides:

> If 3 or more secondary categories are given a score greater or less than the memory score, CDR = the score of the majority of secondary categories unless three secondary categories are scored on one side of M (memory) and two secondary categories are scored on the other side of M. In this case CDR = M.

75. From this definition Mr Waters CDR will be 0.0. This would give 0% WPI.

In relation to the appellant's reliance on Ms Wong's report dated 3 September 2018, this was not a relevant test under Chapter 5.9 of the Guides as there is no evidence that Ms Wong is a registered clinical neuropsychologist who is a member of the Australian Psychological Society's College of Clinical Neuropsychology and there no evidence that she is eligible for membership. Of more significance, the results of those tests were not consistent with the appellant's presentation at re-examination and the MAP had "some reservations" as to her conclusions, as the "*Test of Memory Malingering (TOMM)*" revealed a pattern of sub maximal effort, but she relied on the Rey 15 Item Test score to establish that the appellant was generally making an adequate effort. It observed that the 14/15 score was achieved in a test designed to detect malingered amnesia, rather than overall effort and the high score tended to confirm that the appellant did make a sub maximal effort in the first test, and tended to indicate a degree of malingered amnesia in the second. It therefore did not place any weight on Ms Wong's conclusions regarding the effects of brain injury.

Accordingly, the MAP held that the AMS' assessment was correct and confirmed the MAC.

Injury to left knee – prior knee replacement – Arbitrator held that this was work-related - AMS applied a 50% deductible for the previous replacement and a further 50% deductible based upon his own view regarding causation - MAP found error and revoked the MAC

Ross v State of New South Wales [2020] NSWWCCMA 3 – Arbitrator Moore, Dr R Crane & Dr J B Stephenson – 16 December 2019

On 19 September 2019, Dr Burrow issued a MAC, which assessed 8% WPI as a result of the work injury. He assessed 30% WPI, but applied a 50% deductible due to the prior knee replacement, which reduced the assessment to 15%, but he then applied a further deduction of 50% because he opined that the need for the revision surgery was equally due to work and the failure of the prosthesis to adequately ingrow. on the basis

The AMS took a history that the appellant underwent left total knee replacement in May 2016, due to arthritis, and she resumed normal duties as a cleaner after 5 months off work. However, in February and March 2017, while doing repetitive mopping, she suffered further left knee pain and was unable to continue working. Dr Matthews diagnosed tibial tray loosening of the knee replacement without infection and performed revision surgery.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and the MAP summarised her arguments as follows: (1) The AMS' approach in making the deduction was incorrect; (2) Based on the evidence and details recorded by the AMS a deduction of 50% is excessive; (3) A deduction of 10% is appropriate when relying on the evidence and 323 (2); (4) The arbitrator determined that she injured her knee as result of excessive mopping and it was not open to the AMS to determine causation and then make deductions pursuant to s323 based on his findings on causation; (5) The AMS said that making a deduction was difficult and seeks to rely upon s323 (2). If the AMS is relying on s323 (2) a deduction of only 10% should be made from the 30% WPI, which leaves an assessment

of 27% WPI; (6) It was not open to the AMS to: (a) Determine that 30% WPI was due to the total revision of the left knee; (b) Then determine pursuant to s323 that there was a pre-existing impairment of 15% WPI (50% due to the initial knee replacement); (c) Then deduct 15% (50%) from the initial WPI assessment; and (d) Then consider causation and deduct another 50% of the assessable impairment of 15%, which left an assessment of 8% WPI.

The MAP accepted most of the appellant's arguments, but it held that a deductible exceeding 10% was warranted under s 323 *WIMA*. It accepted the AMS' initial assessment of 30% WPI and the deduction of 15% WPI for the previous knee replacement. It revoked the MAC and issued a new MAC that assessed 15% WPI due to the work injury.

Grounds of appeal based on unproven factual assumptions and further grounds based on mis-reading of AMS' findings – Appeal rejected

Shakiri v Bluescope Steel Limited [2020] NSWWCCMA 12 – Arbitrator Wynyard, Dr P Harvey-Sutton & Dr J Ashwell - 18 December 2019

The appellant was employed by the respondent as a mill operator from 1979 to 2012. On 5 March 2012, he fell onto a metal platform and landed on his back. He complained of pain in his neck and back and later developed gastrointestinal symptoms.

The Registrar referred a dispute under s 66 *WCA* to an AMS to determine the degree of permanent impairment of the cervical spine, lumbar spine and upper and lower gastrointestinal tracts.

On 22 July 2019, Dr Crane issued a MAC that assessed 13% WPI (7% WPI for lumbar spine, 5% WPI for cervical spine, 1% WPI for the upper gastrointestinal tract and 0% WPI for the lower gastrointestinal tract).

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. He argued that the AMS should have found that he suffered from cervical radiculopathy and erred by not taking an accurate history upon examination and that he erred in his assessment of the upper gastrointestinal tract.

The MAP rejected the appellant's submissions in relation to radiculopathy, noting that while his submissions contained allegations of fact, he had not tendered evidence upon which they are based. It stated:

> 38. Mr Shakiri submitted that the statement by the AMS which recorded lessening of strength in the right hand some three years before was evidence that there was still a lessening of strength in the right hand on assessment. This is contradicted on the findings on examination, and again there is no evidence before us to sustain Mr Shakiri's speculative interpretation that the AMS meant when he recorded the lessening of strength, that it was still present at the assessment.
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> 39. Mr Shakiri attempted to deal with that difficulty by simply describing the normal findings on examination on being contrary to the symptoms the AMS recorded. We reject that submission. In the first place, matters of history which are recorded by the AMS are not recorded as facts but rather as allegations made by a claimant. They are accordingly not "*findings*" or "*observations*." In any event the entry simply indicates that three years ago Mr Shakiri had lessening of strength in the right hand. That cannot be conflated into a statement that not only did he have lessening of his strength three years ago, but that it continued to the present day.

In relation to the gastrointestinal tract, the appellant asserted that the AMS erred by finding 1% WPI for the upper gastrointestinal tract, when he stated that he agreed with Dr Greenberg's opinion that 2% WPI was appropriate, and that he provided no reasons for his assessment of 0% WPI for the lower gastrointestinal tract. The MAP stated:

45. That submission must also be rejected. The AMS made it clear in discussing the report of Dr Greenberg that Mr Shakiri was simply suffering from constipation problems, which were well managed with laxatives. This did not entitle the appellant to any WPI in accordance with the Guidelines. Chapter 16.9 of the Guides provides:

> Effects of analgesics on the lower digestive tract… Constipation is a symptom, not a sign and is generally reversible. A WPI assessment of 0% applies to constipation.

46. It follows that the AMS was referring to the reason he gave 0% for the lower digestive tract. However Mr Shakiri has raised an inconsistency in the reasons given by the AMS that he found 1% for the upper gastrointestinal tract, when he had agreed with the 2% assessed by Dr Greenberg.

47. We find no such inconsistency. The AMS did not say he agreed with Dr Greenberg's assessment, he said he agreed with a finding of impairment for the upper gastrointestinal tract. He had already stated his reasons for finding a 1% (the requirement for Nexium) and his finding was separated from his précis of Dr Greenberg's opinion by a fresh paragraph.

The MAP held that the MAC contained a "slip" error in para 10a, which referred to an overall assessment of 14% WPI, but noted that the assessment of 13% WPI was correct. It therefore confirmed the MAC.

WCC – Arbitrator Decisions

Dispute between natural persons who are residents of different states – Whether Commission has jurisdiction due to s 75 of The Constitution – Bilal v Haider discussed & applied – Insurer substituted for respondent

Burridge v PW Russell & M A McNeil [2019] NSWWCC 398 – Arbitrator Rimmer – 12 December 2019

On 20 September 2019, the worker filed an ARD which named natural persons, who were insured by AAI Limited t/as GIO, as respondents. He claimed compensation under s 66 *WCA* for 24% WPI as a result of an injury that occurred at Bega. NSW, on 31 August 2013. The dispute concerned the degree of permanent impairment.

When the injury occurred, all parties resided in NSW, but the worker then moved to Tasmania. However, s 75 (iv) of *the Constitution* confers original jurisdiction upon the High Court of Australia in all matters between States, or between residents of different States, or between a State and a resident of another State. Further s 77 (iii) of *the Constitution* provides that the Parliament may make laws investing any court of a State with federal jurisdiction.

On 23 October 2019, ***Arbitrator Rimmer*** remitted the dispute to the Registrar for referral to an AMS to assess the degree of permanent impairment of the lumbar spine as a result of the injury on 31 August 2013. She also directed the parties to parties to lodge written submissions addressing the following matters: (1) Whether any determination by the Commission would be in breach of s 75(iv) of the *Commonwealth of Australia Constitution Act, 1900* (see *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254) as the Commission is not a Court (see *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* [2003] NSWCA 146); (2) Whether it is appropriate in these circumstances to join the insurer as a respondent to the proceedings: see *Civil Liability (Third Party Claims Against Insurers) Act, 2017 (NSW)*; and (3) Drew their attention to the decision of Arbitrator Harris in *Bilal v Haider.*

The Arbitrator held that the Commission is not a Court: see *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* [2003] NSWCA 146; *Mahal v State of New South Wales (No 5)* [2019] NSWWCCPD 42. She stated, relevantly:

> 19. In *Burns v Corbett* [2018] HCA 15 (Burns) the appellant applied to a predecessor of part of NSW Civil and Administrative Tribunal (NCAT), the Administrative Decisions Tribunal, for certain redress under the *Anti-Discrimination Act 1977 (NSW).* This related to the making of comments found to have constituted homosexual vilification in breach of that Act. The appellant resided in NSW and the respondent in Victoria. Under s 75 (iv) of *the Constitution*, only a body invested with federal jurisdiction can deal adjudicatively, as opposed to administratively, with the matter in these circumstances. It was assumed in this case that NCAT was not a court but it was found to be acting judicially, so jurisdiction was wanting.
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> 20. In *Attorney-General of New South Wales v Gatsby* [2018] NSWCA 254 (*Gatsby*), a mother residing in Queensland had applied to NCAT for an order under the *Residential Tenancies Act 2010 (NSW)* to terminate a lease to her daughter of her house located just south of the border, as rent was in arrears. The issue argued was whether NCAT is a 'court' for the purposes of Chapter III of *the Constitution*. The Court of Appeal determined two questions:
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> > 1. Whether the Tribunal was exercising *"judicial power*" in making an order to terminate a residential tenancy agreement; and if so, 2. Whether the Tribunal was a "*court of a State*" for the purposes of *the Constitution* and s 39 of the *Judiciary Act* which was vested with federal jurisdiction to determine matters between residents of different States.
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> 21. In relation to the first question, the Court of Appeal held that the Tribunal was exercising judicial power. It found that the making of an order under s 87 of the *Residential Tenancies Act 2010 (NSW)* terminating a residential tenancy agreement was analogous to that exercised by courts under the general law, because it required the Tribunal to identify the existence of a contract constituting the agreement, whether that contract was breached, and whether that breach was sufficient to justify termination. The Court also noted that such termination orders were enforceable by the Tribunal.

The Arbitrator held that the Commission was exercising administrative power, and not judicial power, in referring the dispute to an AMS. She stated, relevantly:

> 23. In *Bilal*, the issues requiring determination included that the claim for compensation was not made within the time limits proscribed by ss 254 and 261 of *the 1998* Act and that Mr Bilal was not a worker as defined by *the 1987 Act*.
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> 24. The applicant claims in respect of an injury which he alleges occurred in Bega, NSW, whilst employed by the respondent in NSW. Such injury occurred while both the applicant and the respondent were residents of NSW. Although no specific evidence has been directed to where the contract of employment was entered into, it may be assumed provisionally that the contract of employment was probably made in NSW and involved work being done in NSW. However, the jurisdictional issue in the present case does not turn on the place of entry into the employment contract or the place where work was done under such employment contract…
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> 27. In recent years, the Court of Appeal in *Burns v Corbett* [2017] NSWCA 3, the High Court in *Burns* and the Court of Appeal in *Gatsby* have considered whether other NSW tribunals have jurisdiction to determine proceedings between residents of different states, if such State tribunals are not "*courts of a state*" invested with federal jurisdiction to determine matters between residents of different States pursuant to Chapter III of *the Constitution* and s 39 of *the Judiciary Act (Cth)*.

28. It is undoubted that at both the date when the matter commenced in the Commission and at all stages since that date, the applicant and the respondent resided, and have continued to reside, in different states. If the respondent was not a natural person, but instead was a corporation, no jurisdictional problem would exist, as the expression "residents of different states" under s 75 (iv) of *the Constitution* only applies to natural persons and does not apply where one of the two opposing parties is a corporation: (*Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282; *Crouch v Commissioner for Railways (Qld)* (1985) 159CLR22. But where the only opposing parties are respectively a natural person and a company, the proceeding does not come within s 75 (iv): *Rochford v Days* (1989) 84 ALR 405.

29. Under s 77 (iii) of *the Constitution*, the Federal Parliament may make laws investing any court of a State with federal jurisdiction. Section 39 (2) of the *Judiciary Act,* enacted pursuant to s 77 (ii) and (iii) of *the Constitution*, provided that "*the several courts of the States shall …be invested with federal jurisdiction*" in all matters in which the High Court has original jurisdiction.

30. The Court of Appeal in *Gatsby* concluded that the Civil and Administrative Tribunal of NSW (the Tribunal) was not a "*court of a State*" within the meaning of s39 (2) of the *Judiciary Act* and s 77 (iii) of *the Constitution*: *Gatsby* at [184]-[192], [197], [198], [201]-[205], [223]-[228], [279]. For the same reasons as were given by members of the Court of Appeal in *Gatsby*, I conclude that the Commission is not a "*court of a State*" within those provisions of the *Judiciary Act* and *the Constitution*.

31. In *Gatsby*, the Court of Appeal held that the Tribunal lacked jurisdiction to determine matters between residents of different states under s 75 (iv) of *the Constitution*: *Gatsby* at [197], [205], [292]-[304].

32. The Court of Appeal also concluded that the Tribunal was exercising judicial power in making an order under s 87 of *the Rental Tenancies Act (NSW)* because the discretion exercised by the Tribunal to make such an order was analogous to that exercised by courts under the general law, since s 87 required the Tribunal to identify whether the contract constituting such residential tenancy agreement existed, whether the contract was breached, whether the breach was sufficient to justify termination, and whether any such termination was enforceable by the Tribunal.

33. However, the present issue in respect of which the exercise of the Commission's jurisdiction is being sought is a quite limited one, and not, in my view, sufficiently analogous to the types of issues which in *Burns* and *Gatsby* led to determinations by the High Court and the Court of Appeal that by reason of ss 75 (iv), 77 (ii) and 73 (iii) of *the Constitution* and s 39 (2) of *the Judiciary Act*, the particular Tribunals lacked jurisdiction to hear and resolve the particular dispute.

34. The remittal to the Registrar for referral to an AMS has already taken place by consent of both parties. The referral by the Registrar to an AMS has either already occurred or else is on the brink of occurring. The Commission would ordinarily issue a Certificate of Determination making orders giving effect to the assessment by the AMS. But the Commission's task in making such orders can best be described as purely administrative, rather than judicial or quasi-judicial.

35. Therefore, my provisional view is that the outstanding issues in the present case would not appear to raise for decision by the Commission any jurisdictional issue of constitutional dimension. Further, even if, as is doubtful, judicial power, as distinct from administrative power, has been exercised or is expected to be exercised by the Commission taking further steps to resolve this matter, there does not appear to be involved any past or proposed exercise of Commonwealth judicial power in order to complete the resolution of this case.

> 36. However, the question of whether jurisdiction exists must be determined by reference to the claim as made from the outset and whether jurisdiction was validly invoked or accepted at the threshold stage, and not solely by reference to the position subsequently appearing at the time when the potential jurisdictional issue was first raised either by any of the parties or by the Commission itself.

The Arbitrator held that jurisdiction of a tribunal cannot be established by consent or acquiescence of the parties and must be determined by the tribunal itself and if there is a lack of jurisdiction from the outset, the later narrowing of issues by the parties so that all that remains to be done involves no significant decision by an Arbitrator, does not solve any jurisdictional problem.

Further, an Arbitrator cannot make a determination of issues of interpretation of The Constitution. However, in all proceedings in the Commission, the insurers and Workers Compensation Nominal Insurer are corporations and are directly liable under the NSW legislation. Therefore, in cases of this type, simply substituting the insurer (or Nominal Insurer) as the sole respondent is the best way to deal with the matter so that the proceedings are no longer between natural persons who are residents of different States.

Accordingly, the Arbitrator adopted the approach taken by Arbitrator Harris in *Bilal* and she granted leave to the worker under the *Civil Liability (Third Party Claims Against Insurers) Act 2017*, to substitute the insurer for the respondents.

Section 38 WCA – correct approach to adopt in determining worker's capacity to earn when insurer fails to make a work capacity decision

Clarke v Secretary, Department of Communities and Justice [2020] NSWWCC 1 – Arbitrator Young – 12 December 2019

The worker suffered a psychological injury in the course of her employment (deemed date of injury: 15 July 2013). The respondent paid weekly compensation until 7 May 2018, which included a period of about 100 weeks after the worker's s 37 entitlement ceased. The worker did not ask the insurer to make a work capacity decision and the insurer did not make one. The worker claimed weekly compensation for a period of 30 weeks from 8 May 2018 to 4 December 2018.

Arbitrator Young noted that the following issues: (1) Does s 38 *WCA* apply so that the Commission is able to make a work capacity decision for reasons identified in that section? (2) Does the worker present with work capacity as required by s 38? (3) if so, what is the worker's capacity to earn during the relevant period?; and (4) Is a general order for s 60 expenses appropriate?

The respondent first raised s 38 *WCA* as an issue at arbitration. It had not advised the worker of her potential rights under s 38 *WCA* before her s 37 entitlements expired and it simply kept paying her under s 37 *WCA.* It then took issue with the Commission's power to determine the dispute because the worker did not ask it to make a work capacity decision. The Arbitrator adjourned the hearing in order to afford the parties procedural fairness and he directed the worker to apply for a work capacity assessment.

By the time of the further hearing (25 November 2019), the worker had asked the insurer to make a work capacity decision but it had not performed the assessment. The respondent conceded that the Commission could determine the matter and the parties agreed that: (1) PIAWE is $1,653.85; (2) 80% of that amount is $1,323.08; (3) the maximum that the worker earned during the relevant period was $1,288.21 per week; and (4) her earnings averaged $754.76 per week.

The worker argued that the Commission should determine her entitlement under s 38 *WCA* based upon her average earnings.

However, the respondent argued that the worker's capacity to earn should be considered as this may exceed average weekly earnings and she was able to earn more than that amount in May 2018 and in October 2018, she was able to earn $1,228.21 per week. It argued that the medical certificates do not provide any rational basis for determining the dispute as the worker's hours of work exceeded those certified.

The Arbitrator held that the medical evidence indicates that the worker had current work capacity during the relevant period and that her ability to perform work is reflected in the fact that she actually earned income during the period claimed. He stated that the expression "*for a period of not less than 15 hours per week*" in s 38 (3) (b) does not mean "*a period of not less than 15 hours every week*", and that there is evidence that during several weeks, the worker worked more than 15 hours per week. He also held that the expression does not require an analysis of whether the worker worked an average of 15 hours per week, as if this was intended by the legislature it would have said so. He stated, relevantly (at [23]):

> It follows in my view, the fact that in some weeks during a period the applicant worked less than 15 hours per week does not detract from the proposition that the applicant during the period worked more than 15 hours per week.

The Arbitrator held that the second limb of s 38 (3) (b) *WCA,* which requires that the worker's current weekly earnings for the relevant period be at least $185 per week, was satisfied. In relation to s 38 (3) (c) *WCA*, he stated:

> 25. In terms of section 38 (3) (c) it is important in my view, to first consider the time at which the question should be asked whether the applicant is "*likely to continue indefinitely to be incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings*". Because the enquiry as to the workers "*current*" work capacity relates to a specific past period, it would be inconsistent and illogical in my view to assess the applicant's capacity as at now. The enquiry should be approached as at 8 May 2018, being the commencement date of the relevant period. In terms of the various enquiries, it may seem inconsistent that in a matter such as this the enquiries under sections 38 (3) (a) and 38 (3) (b) look to the past whereas the enquiry under section 38 (3) (c) looks to the future as at the time of the work capacity assessment. This is explained when one examines section 38 (4) which requires an insurer (use of the word "*must*") to conduct the assessment during the last 52 weeks of the second entitlement period. In this matter the insurer has not complied with that obligation, meaning that the potential operation of section 38 (3) has been defeated, hence requiring the Commission to now perform the insurer's statutory function.

The respondent argued, based upon Dr Bertucen's opinion, that non-work factors caused the worker's incapacity after 2017, namely her difficulty adjusting to the transfer to the private sector and her reaction to the insurers' approach to handling her claim. The Arbitrator stated:

> 27. In terms of the insurers' reaction, because injury is not in issue, I take it to mean that (the respondent's) submission refines to one under section 33 of *the 1987 Act*, namely that her incapacity does not result from injury. But to point to this external influence in the context of common-sense causation concepts overlooks some important matters. First, "*injury*" is not disputed. Second, the submission in part must be a challenge as to whether this incident arose out of or in the course of the applicant's employment, namely (in the former case) whether the applicant's discussions with the claims officer were incidental to her employment. Clearly, they were. Third, once it is accepted that they were, consideration of the "results from" concept in section 33 is established because on the respondent's own submission, part of the incapacity was caused or materially contributed to by this incident.

28. I accept (the respondent's) submission that the medical certificates do not align with the applicant's actual ability to work during the relevant period. I accept Mr Davies' submission that psychological injury by its nature as a matter of common-sense renders a person subject to good days and bad days. I am of the view to some extent this has affected the applicant's actual earnings during the relevant period because although availability of work can be a factor, in my view the applicant's condition had a material bearing upon her ability to work at various times during the period.

The Arbitrator assessed the worker as being able to earn $900 per week ($60 per hour for 15 hours per week) during the relevant period and he awarded her weekly benefits of $423.08 per week from 8 May 2018 to 4 December 2018. He also made a general order for payment of s 60 expenses.

Accepted injury to right arm - whether worker suffered a frank injury or consequential condition to his cervical spine – no frank injury or consequential condition established

Huynh v Australian Reinforcing Company (ARC) – St Marys [2020] NSWWCC 3 – Arbitrator Burge – 12 December 2019

On/around either 18 May 2016 or 20 May 2016, the worker suffered a frank injury to his right elbow and shoulder at work. The insurer accepted that claim. However, he also alleged either a frank injury or consequential condition in his cervical spine and the insurer disputed that claim.

Arbitrator Burge held that the claim for frank injury to the cervical spine was not made out as there was no evidence of a "*sudden or identifiable pathological change*": see *Castro v State Transit Authority (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 and Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear [2014] NSWWCCPD 47.* He noted that Dr Sun (the worker's qualified specialist) opined that cervical spine impairment was caused by the nature and conditions of employment, which the worker did not argue before him, and that the parties agreed that any impairment so caused could not be combined with impairment of the right upper extremity resulting from the frank injury and the impairment that Dr Sun assessed (8% WPI) did not satisfy the relevant threshold.

The Arbitrator also held that the worker had not established that he suffered a consequential condition in his cervical spine. He stated that the worker needed to establish that the symptoms and restrictions in his cervical spine "*resulted from* " the accepted injury to the right upper extremity: see *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8; *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 and *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23. He stated that there is no evidence that provides sufficient grounds that satisfied him on a common-sense basis that there is a causal connection between the frank injury and the cervical spine condition.

Accordingly, the Arbitrator entered an award for the respondent with respect to the claim for the cervical spine and he remitted the s 66 dispute to the Registrar for referral to an AMS with respect to the right upper extremity injury.

Alleged consequential condition – what degree if precision in medical histories of expert examiners is required?

Slade v Peter James Rogers t/as The Little Green Truck Mid North Coast [2020] NSWWCC 6 – Arbitrator Egan - 12 December 2019

The worker injured his left shoulder at work on 24 October 2016. The insurer accepted that claim. However, he also alleges that he suffered an injury to his cervical spine and a consequential condition in his right shoulder. He claimed compensation under s 66 *WCA* for 35% WPI based upon assessments from Dr Bodel (27% cervical spine, 6% WPI left upper extremity and 6% WPI right upper extremity). The insurer disputed the injuries to the cervical spine and right shoulder.

Arbitrator Egan identified the following issues: (1) Whether the worker suffered an injury by way of an aggravation of an underlying degenerative condition in his cervical spine under ss 4 (a) or 4 (b) (ii) *WCA* on 24 October 2016?; and (2) Whether, as a result of the accepted left shoulder injury and/or the cervical spine injury (if proven) the worker developed a consequential condition in his right shoulder?

The Arbitrator stated, relevantly:

> 90. In *Murray v Shillingsworth* [2006] NSWCA 367; 4 DDCR 313 (*Murray*), Einstein J (Hodgson and Santow JJA agreeing) rejected as "*misconceived*" (at [62]) the employer's submissions that the substantial contributing factor test in s 9A was only satisfied if employment was a substantial contributing factor to a "*fully blown injury*". His Honour pointed out that the submissions failed to recognise that in s 4 (b) (ii) the only compensation is for the effect of the aggravation and not for the effect of the original non-aggravated disease.
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> 91. In the context of this lump sum claim, I am only required to find that an injury to the cervical spine occurred. For the right shoulder, a consequential condition is all that is claimed. The consequences will be a matter for the AMS: *Jaffarie v Quality Castings* [2014] NSWWCCPD 79.
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> 92. In the case of the consequential right shoulder condition, it is not necessary to establish that there was "*significant pathology*" in his shoulder: *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8. In *Catholic Healthcare Limited v Rhyder* [2016] NSWWCCPD 60, Snell DP said at [125]:
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> > 125. The Arbitrator, in his reasons at [59], quoted a passage from *Kumar* (see [13] above) which clearly identified the distinction between proof of a consequential condition, as opposed to an '*injury'* under s 4 of *the 1987 Act*. At [58] of his reasons he correctly identified the question requiring his determination.
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> > 126. The dichotomy which the appellant seeks to draw between a condition (on the basis of symptoms) and 'injury' within the meaning of s 4 of *the 1987 Act* is not helpful. Whilst the occurrence of '*injury*' by way of the aggravation, acceleration, exacerbation or deterioration of a disease may involve pathological change, it also may simply involve the worsening of symptoms (see *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; 110 CLR 626 at [7] per Kitto J). On the other hand, if a worker's injured leg gives way, and he falls fracturing his arm, this is consequential to the original leg injury, but clearly involves the occurrence of additional pathology.
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> 93. In *JR & DI Dunn Transport Pty Ltd v Wilkinson* [2015] NSWWCCPD 38, Keating J said at [135]:

> 135. The submission against a finding of a consequential back condition is that such a finding is not supported by reasoned opinion or change in pathology. I reject that submission. I am satisfied that the history recorded by Dr Endrey-Walder provided a fair climate for the acceptance of his opinion. That opinion was that Mr Wilkinson suffered a consequential back condition by reason of the accepted injuries to his neck and shoulder: *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58; 62 ALR 85; 59 ALJR 844.
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> 136. Mr Wilkinson did not allege that he suffered a s 4 injury to his back in the altercation. His case was that, as a result of the injuries received in the altercation, he suffered an increase in the back symptoms caused by an earlier back injury. In other words, his case (as argued at the arbitration) was that his back symptoms have, in part, resulted from the injuries received in the altercation (*Kooragang*). Dr Endrey-Walder's evidence supports such a connection and the appellant called no contrary evidence. *Therefore, Mr Wilkinson did not have to show that the altercation caused a pathological change in his back, such as to support a s 4 injury.* (my emphasis)

94. When an injury or condition is claimed, the cause of it is a question of fact: *March v E & MH Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506 per Mason CJ at [16]. It falls to be determined on a simple common sense test in accordance with *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*). I must feel actual persuasion of the occurrence or existence of the fact in issue before it can be found: *NOM v DPP* [2012] VSCA 198 at [124]. See also Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336.

95. The Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (*Nguyen*) summarised the approach as follows:

> (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
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> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
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> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the nonexistence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
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> (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue. (at [55])

96. When reading the expert reports I acknowledge the passage by Spigelman CJ (Giles and Ipp JJA agreeing) in *Australian Security and Investments Commission v Rich* [2005] NSWCA 152 at [170] (Rich), where he said: "*[a]n expert frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, that it is not able to be articulated*".

97. However, inferences may only be drawn from acceptable evidence. Inferences cannot be used to create evidence: *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; *Conargo Shire Council v Quor* [2007] NSWWCCPD 245; *Rodger W Harrison and Peter L Siepen t/as Harrison and Siepen v Craig* [2014] NSWWCCPD 48 (*Craig*). Findings must be based on the evidence, or reasonable inferences open to be drawn from the evidence, not on the judge's knowledge (*Strinic v Singh* [2009] NSWCA 15 at [60]).

98. In *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 (*Luxton*), at 359, it was held in that:

> [The element of causation would not be established] where it is '*quite impossible to reconstruct from any materials*' the manner in which the accident occurred and where that '*can be done only by conjecture*' but where '*a number of conjectures is open, equally plausible*'.

99. In *Flounders v Millar* [2007] NSWCA 238 (*Flounders*), Ipp JA said at [35]:

> …it remains for the plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inferences of the equal degree of probability for plausibility. The choice between conflicting inferences must be more than a matter of conjecture. If the court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail.

The Arbitrator held that on the balance of probabilities, the incident on 24 October 2016 aggravated the effects of pre-existing degenerative pathology in the cervical spine and that an injury under s 4 (a) *WCA and/or s 4 (b) (ii) WCA* was established and that employment was a substantial contributing factor and the main contributing factor.

However, the Arbitrator held that the wasting in the right shoulder was the result of long-standing degenerative changes in the cervical spine and that the worker had not discharged his onus of proving a consequential injury. Accordingly, he entered an award for the respondent with respect to that claim.

The Arbitrator remitted the s 66 dispute to the Registrar for referral to an AMS to assess the degree of permanent impairment of the left upper extremity and cervical spine.

Hearing loss – worker entitled to prosecute claim against respondent despite making a claim against another employer as no compensation was recovered

Hanzlicek v Protech Management Pty Limited [2020] NSWWCC 13 – Arbitrator Burge – 19 December 2019

The worker claimed compensation under s 66 *WCA* against the respondent for an alleged 15% WPI for binaural hearing loss (deemed date of injury: 29 February 2019). There was no dispute that the respondent was the last noisy employer, but it disputed the claim on the basis that in 2004, the worker claimed compensation for 12% WPI from another employer, although he did not recover any compensation.

Arbitrator Burge noted that the issue for determination was whether the proceedings should be dismissed as they relate to a claim for a further 3% WPI to that claimed in 2004 and it therefore does not satisfy the threshold for an award under s 66 *WCA.*

The worker argued that the appropriate respondent is the last noisy employer and that while the AMS may take the previous claim into account, under s 17 *WCA* the last noisy employer is liable for a claim for hearing loss.

The Arbitrator accepted the worker's argument and he rejected the respondent's argument, as while there was a previous claim, there was no finding as to permanent impairment and no compensation under s 66 *WCA* was ever paid. He stated, relevantly:

> 17. Some guidance as to the effect on a subsequent action of a prior claim against a different employer is found in the decision of Deputy President Roche in *Downer EDI Works Pty Ltd v McLuckie* [2014] NSWWCCPD 57 (*McLuckie*). In that matter, the worker made two separate claims for compensation against different employers, both relating to the development of skin cancer.

18. In 2005, Mr McLuckie made a claim in respect of a 19% WPI arising from skin cancer. Proceedings in relation to that claim were ultimately discontinued. In 2008, he made a claim in respect of 36% WPI against the later employer, also for skin cancer. In both claims, the skin cancer was alleged to have arisen by virtue of a disease of gradual process relevantly caused by the nature and conditions of his employment.

19. Given the nature of Mr McLuckie's alleged injury, he relied on sections 15 and 16 of *the 1987 Act*. For relevant purposes, those sections are in the same terms as section 17, namely that they deem compensation payable by the last employer for whom an applicant worked in relevant employment which caused or contributed to the relevant disease process.

20. The later employer in *McLuckie* alleged, analogous to the respondent here, that because previous proceedings had been commenced against an older employer, the deemed date of injury was the date the first claim was made (in the current matter, in 2004).

21. At first instance, Arbitrator Sweeney in *McLuckie* held that even though the applicant had made claims on two different dates against different employers, as the later claim was nominated as the relevant date of injury in the proceedings at issue, the applicant was entitled to prove that claim. The arbitrator found the fact Mr McLuckie had made an earlier valid claim that gave rise to an earlier notional date of injury did not prevent him from pressing the later claim. Mr McLuckie could "*make an election*" as to the claim on which he relied, and the earlier claim did not provide the later employer with a defence against the later claim. The employer appealed, and the arbitrator's reasons on this aspect were upheld by Deputy President Roche.

The Arbitrator considered this matter to be analogous to *McLuckie*. The worker made a previous claim for hearing loss against a different employer in respect of which no permanent impairment compensation was paid, and now seeks to prosecute a claim for hearing loss against the last noisy employer, the respondent. Consistent with the reasoning in *McLuckie*, he held that the worker is entitled to prove that claim and that it was proven for the following reasons:

23. There is no issue the respondent was the last noisy employer… In light of the decision in *McLuckie*, I decline to apportion any impairment between this claim and the previous one. The applicant is entitled to prosecute this matter, and to have his level of impairment assessed. I therefore decline to request the AMS apportion liability between the respondent and the previous employer.

24. Although the respondent asserts the claim is misconceived as it seeks only a further 3% WPI and is therefore under the threshold for permanent impairment compensation, such a finding would, in my view, be contrary to the decision in *McLuckie*. An examination of the provisions of section 17 of *the 1987 Act* reveals they are relevantly on the same terms as those discussed in *McLuckie*, namely they sheet home liability to the last relevant employer. As already noted, in this matter there is no issue the respondent is the last such employer.

25. Mr Guest submitted the claim also faced difficulty because the claim form failed to disclose the previous claim. I do not agree with that submission. The fact of the pervious claim is before the commission and is well known to the parties. Moreover, the respondent admits it is the last noisy employer. Were that issue in dispute, it may well be the fact of the nondisclosure has some impact on the applicant's credit. But that matter is not in issue, and in any event the respondent was aware of the prior claim well in advance of the hearing.

26. I also note and accept Mr Carney's submission that the Claim Form specifically directs an injured worker not to complete details of any previous claims if they relate to noise induced hearing loss (see page 12 of the Application). Given this is the case, I do not believe the respondent can take any comfort from the applicant's omission of the previous claim, which omission was in accordance with the directions on the claim form itself.

27. Mr Guest submitted I have the power to make a finding in relation to WPI. That submission was made in the context of a broader one to the effect the applicant's claim against the respondent was only for a further 3% WPI, and in accepting that submission, I could dismiss the claim as it failed the threshold test for permanent impairment compensation. Whilst it is the case that arbitrators now have power to make WPI assessments, I decline to do so in this matter. In my view, the interests of the parties and of justice are best served by the permanent impairment arising from the applicant's injury being determined by an AMS.

The Arbitrator concluded that the evidence establishes that the worker suffered an injury by way of binaural hearing loss in the course of his employment with the respondent, which was his last noisy employer, and he remitted the matter to the Registrar for referral to an AMS to determine the permanent impairment arising from the injury.

Section 38 WCA - cessation of weekly payments under an award in 2015 – respondent estopped from relying on aspects of earlier findings and from raising an issue as to whether it was correctly named as respondent – no valid work capacity decision made – worker entitled to weekly payments

Webber v Racing NSW [2020] NSWWCC 24 – Arbitrator Perry – 20 December 2019

The worker claimed continuing weekly payments from 28 June 2019 with respect to injuries to her cervical and lumbar spines as a result of the nature and conditions of employment, which involved the training and riding of racehorses. She filed an ARD that named Racing NSW as the employer and insurer, but the respondent disputed that it was the employer.

Arbitrator Perry noted that there had been 4 previous proceedings between the parties:

(1) A COD issued in 2012 and names the parties as they are named in the current ARD;

(2) Proceedings in 203 were discontinued by consent;

(3) A COD dated 13 May 2014, named the parties as they are named in the current ARD and provided:

> … By consent … respondent will pay reasonable medical expenses relating to the recent surgery and associated expenses … pursuant to s 60 … (*the 1987 Act*) … By determination … joint application for an adjournment of the arbitration hearing to allow the parties to further investigate the applicant's claim for weekly compensation is granted … conciliation conference and arbitration hearing adjourned to … 15 July 2014 … reasons … given that both parties need to further investigate … claim for weekly compensation, following new information that had only come to light during the conciliation conference, I believe that an adjournment should be granted … adjourned to 15 July 2014 … Glenn Capel, Arbitrator …

(4) A COD dated 17 July 2015, named the parties as they are named in the current ARD and provided:

> … A conciliation and arbitration conference was held where the parties were assisted by me acting as an arbitrator. By reason of their agreement … the determination … is as follows:

Findings:

1. The applicant filed an (ARD) dated 27 January 2015 claiming … weekly payments of compensation as and from 2 October 2012 of 2 October 2012 injury (deemed) to lumbar spine and cervical spine … application was amended … on 17 April 2015 to commence the claim for weekly payments … from 18 November 2013 and continuing.

2. The respondent is estopped from denying the applicant suffered injury to her lumbar spine resulting from the nature and conditions of her work with a date of injury 2 October 2012.

3. The applicant as a result of the nature and conditions of her work during the period April 2002 through 2 October 2012 suffered injury to her cervical spine (deemed date 2 October 2012).

4. The applicant suffered an incapacity for work as a result of injury to her cervical spine and lumbar spine from 2 October 2012. The applicant has an entitlement to claim weekly payments of compensation in respect of the 2 October 2012 injury.

5. The applicant has had an entitlement to claim weekly payments of compensation in respect of incapacity resulting from injury of 2 October 2012 and as at 2 April 2015. At least 130 weeks has elapsed since weekly payments of compensation have been paid or payable under s36 and s37 of *the 1987 Act.*

6. The applicant's PIAWE is $1,200 per week … 80% of the PIAWE is $960 per week … applicant had a capacity to earn of $400 per week working 20 hours per week in suitable employment for the period 2 October 2012 through 10 October 2013 and $240 working 12 hours per week in the period 11 October 2013 until undergoing spinal surgery … on 17 February 2014. Following the spinal surgery, the applicant had no capacity during the period 17 February 2014 through 24 March 2014 and from 25 March 2014 through 1 April 2015 the applicant had a capacity to earn $760 per week in suitable employment working 38 hours per week.

7. The Commission has no jurisdiction to make orders in respect of any claim the applicant may have in respect of weekly payments … beyond 1 April 2015.

The Arbitrator noted that the respondent was ordered to pay compensation under s 37 *WCA* from 18 November 2013 to 1 April 2015 and to pay compensation under s 60 *WCA.* Otherwise, the matter was remitted to the Registrar for referral to an AMS in respect of the claim under to s 66 *WCA.* He also referred to a Statement of Reasons – Extempore Orders (SOR) dated 17 July 2015, named the parties as they are named in the current ARD and provided:

> … In this matter, a conciliation and arbitration hearing was held on 17 April 2015, where I acting as arbitrator used my best endeavours to bring the parties to an agreed resolution of the dispute. The parties were *unable to come to an agreement* … the reasons for the orders set out below were given orally on 15 July 2015 … a sound recording of the reasons given is available to the parties …Findings … (emphasis added).

The Arbitrator noted that a COD dated 11 January 2016, awarded the worker compensation under s 66 *WCA* for 32% WPI, based upon a decision of a MAP, and on 6 December 2016, a COD – Consent Orders noted that without admission of liability, the respondent agreed to make voluntary payments of weekly compensation under s 37 *WCA* from 25 January 2016 to 6 December 2016 (agreed to total $25,000).

Thereafter, the worker was employed by a trainer, Tim Martin, as a casual foreman and she was paid $200 per week for supervising staff. She underwent further back surgery on 2 April 2019 and had been unemployed since 10 October 2019.

The Arbitrator identified the following issues: (1) Whether the respondent has been correctly named as respondent and employer?; (b) Whether the respondent should be prevented from raising that issue?; (3) Whether the respondent is estopped from raising the issues in the s 78 notice provided to the worker?; (4) Whether there was a lawful work capacity decision?; and (5) The quantum of any entitlement to weekly payments.

In relation to issue (1), the respondent argued that as it was not the correct employer, if an award was made for the worker, it could not be satisfied and there was a more fundamental issue of whether a claim had been properly made. However, the worker argued that this issue had not been raised in the dispute notice and the respondent should not be permitted to raise it at the arbitration hearing in view of the previous proceedings that named the parties as per the current ARD. The worker also argued that the respondent was a legal entity and was established as a body corporate under s 4 of the Thoroughbred Racing Act 1996 (NSW). She also referred to Sch 1 Cl 9 *WIMA* and argued that she was relevantly engaged in riding work in connection with horse racing and was taken to be a worker employed by the racing club or association (and the respondent was such a racing club or association).

The respondent argued that it was not such a club or association and that the actual employer ought to be the respondent. However, neither counsel pointed to any other authority or reason as to whether there was a correct naming of a respondent. The Arbitrator stated, relevantly:

> 26. … I asked Mr Saul why this proposed issue was of any real consequence, given that it is common for amendments to redescribe a respondent being made in this Commission. He submitted it did matter because it went to whether a claim had been properly made. During this argument I invited Mr Brown, on two occasions, to consider whether he wished to make an amendment to re-name the employer as asserted by Mr Saul. On both occasions he declined, stating there was no intention to do so.
>
> 27. In the result, I rejected the submission for the respondent that there was no need for leave to be granted under s 289 of *the 1998 Act* for it to be able to agitate an issue about whether the employer was properly named, and being of consequence because it went to a fundamental question of whether a claim had been properly made. There was no development of this argument. Strict compliance with s 260 of *the 1998 Act* is not required for the Commission to have jurisdiction (*Rinker Group Ltd v Mackell* [2008] NSWWCCPD 100 (*Rinker*) at [89]-[106]). The extremely late notice of the application, and the consequences for the applicant (as submitted for her) were taken into account in the disposition. The previous conduct of the respondent in not raising such issue in each of the earlier proceedings was also relevant.
>
> 28. I also refused the respondent's application to raise this matter as a dispute by reference to s 289 (4) of *the 1998 Act*. This involved a balancing of the factors noted by Roche DP in *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services* [2007] NSWWCCPD 227. For example;
>
> > (a) The question about the correct name of the employer or respondent – whether or not it be presented as whether the correct employer has been joined - clearly, and contrary to the submission for the respondent, was not raised in the s 78 notice, at least not with sufficient clarity for the purposes of s 289(4). The bare reference to "*Fasteedious Pty Ltd*" in the claim form attached to that notice is not sufficient to allow for this to be seen by a reasonable person as

raising such an issue. It did not clearly and plainly identify such an issue. The worker should not be forced to wade through attachments to the notice in an attempt to uncover the real issues. They must be clearly and succinctly stated in the notice itself.

(b) Far from the respondent bringing an un-notified matter to the attention of the Commission and the other party in a prompt manner, this was raised with the applicant only minutes before the commencement of the conciliation and arbitration.

(c) The delay in raising the previously un-notified matter was unexplained by the respondent.

(d) If the application were to be granted, there would be substantial delay and prejudice to the applicant. The weekly payments of compensation she had enjoyed since the 2015 COD ceased on or about 28 June 2019; soon after her spinal surgery.

(e) The conduct of the parties in the past is relevant. Since the 2013 COD, both parties had conducted themselves by accepting that the correct name of the respondent was as appears in the ARD.

29. Immediately after this decision (the interlocutory decision), Mr Saul, on instructions, stated that the respondent would appeal that decision, that the appeal ought to be determined before the substantive case, and therefore the substantive case should be adjourned forthwith. Mr Brown opposed such course and reiterated that the applicant was presently without weekly payments and was not able to work following recent major spinal surgery. After taking into account practice direction number 2 and all other matters already identified, I refused the application.

The Arbitrator directed the parties to file written submissions, which he summarised. He noted that there is no basis, material or authority to support the respondent's assertion that the employer is either Fasteedious or Rosehill Racing Club. He stated:

63. In my opinion, this reinforces the interlocutory decision. In *Keeble v Murray* [2014] NSWSC 151 (*Keeble*), Harrison AsJ found it was arguable that the plaintiff, a strapper performing riding work at Kemble Grange racecourse, was a deemed employee of either the Illawarra Turf Club or Racing NSW (at [56] and [90]). While the facts here were different to the present facts, and Her Honour only made the finding on the basis of arguability, such finding, together with the associated discussion in the case, shows that at least in some cases, the question of identifying the correct employer, or the name of the correct employer, may need to be the subject of evidence (at [74]). It also shows that in these circumstances, there is a difference between the term "*actual employment*" (as described by Barwick CJ in *Sydney Turf Club v Crowley* [1972] HCA 25; (1972) 126CLR 420 at [9]) (*Crowley*) and "deemed" employment under clause 9. Her Honour carefully traced through the relevant provisions of both *the 1998 Act* and the section relevant to *Crowley*, and relevant authorities (at [51]-[74]).

64. This discussion is not to the point that the respondent has been correctly named in this case. It is rather that it was, and is not, appropriate to allow the respondent to throw up such an issue, at such an extremely late stage, when it had filed a Reply in the present proceedings naming itself as the employer and insurer and not raising the issue in four previous proceedings.

65. That the authorities are clear about there being a difference between the concept of an actual employer and a deemed employer for the purposes of the clause may explain why Mr Macken has now conceded that "*Rosehill Racing Club*" may be the employer, if clause 9 applies. This would be consistent with the authorities considered in *Keeble*, including *Racing NSW v NSW Self Insurance Corporation (a continuance of the NSW Insurance Ministerial Corporation), trading as Treasury Managed Fund No. 1* [2008] NSWSC 6 (the *Racing NSW case*), *Crowley; Ebb v Fast Fix Steel Fixing Pty Ltd* [2007] NSWCA 236 (*Ebb*); *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250 (*Day*); *OP Industries Pty Ltd v MMI Workers Compensation (NSW) Ltd* [1998] NSWSC 632; (1998) 17 NSWCCR 193 (*OP Industries*).

66. *Day* shows the law does not recognise that an employee "*can have two masters when acting in a particular capacity*" (*Keeble* at [57]-[59]). However, this relevantly relates to the applicant's "*actual employment*". Whether or not that indeed is with Fasteedious does not answer the question of who her employer is "*for the purposes of this Act*" (clause 9). Clause 9 states that a person who "*is engaged in riding work in connection with horse racing on the race course or other premises of a racing club or association (emphasis added)*" … "*is, **for the purposes of this Act**, taken to be a worker employed by the racing club or association* (emphasis added).

67. *Crowley, Ebb, OP Industries and the Racing NSW Case*, all stand, relevantly, for the proposition that clause 9 (or s 6 (10) of the *Workers Compensation Act 1926,* now repealed – which was in similar terms to clause 9) is the statutory deeming provision applying only "*for the purposes of the Act*". So, in *Crowley, Ebb & OP Industries*, it was found that the relevant deeming clause or section was not relevant for other purposes. In *Crowley*, there was a public liability policy issued by the insurer to the jockey club which did not extend to injury claims to any person "*arising out of or in the course of the employment of such person in the service of the insured*". Similarly, in *Ebb*, Basten JA stated (at [39]) that *Crowley* was, "*…authority for the proposition that the deeming provision in the 1926 Act did not affect the operation of the policy which was not a statutory policy under the 1926 Act…*".

68. In the *Racing NSW Case*, Einstein found ([at [32]) that:

> although … clause 9 … has wide application '*for the purposes of the Act'*, it does not follow that the fictional '*employer*' is to be substituted for the actual employer in every section of the Act. Clause 9 … does not at least in express terms provide that for the purposes of the Act '*employer'* means those persons deemed by the clause to be employers…

70. Again, this analysis is not for the purposes of making a decision about who was the employer. I am setting out these principles in the hope that it may assist the parties to identify the correct name of the respondent so as to regularise these proceedings. The interlocutory decision only refused leave to the respondent for the purposes of its application to raise an issue about whether a different employer ought to be joined to the proceedings. The point of that application was that a new party to the proceedings needed to be joined – with the result that the whole claims process would need to start again. I rejected that submission and I reject it again, now that Mr Macken has raised it again in the written submissions. It is not necessary to review the interlocutory decision. The purpose is to assist the parties to identify the correct name of the respondent.

71. The present circumstances have some similarity to those in *Chhong Heng Taing t/as The Arcade Pharmacy v Gauci* [2010] NSWWCCPD 90 (*Gauci*). Kevin O'Grady DP stated:

> … it is further argued that the MAC '*was issued when the current appellant was not even a party to the proceedings and when issues which are a necessary pre-condition to the referral to an AMS had not yet been determined by the Commission'*. It is further asserted that the '*current proceedings*' had not '*commenced until the appellant was named as a party*' … anything occurring before … joinder of Mr Taing … including the issuing of the certificate … will not be binding on a party added to proceedings at a later date … argument concerning the status of … MAC must be rejected. The employer, however described from time to time, has at all times been represented by Mr Macken. The reply included a notation that it had been filed by Mr Macken's firm on behalf of the employer, the employer's representative and the specialized insurer. Whilst that endorsement in the reply is, to an extent, confusing, it is clear that Mr Macken's instructions had emanated from both the employer of the worker and the specialized insurer … there has never been any doubt during the conduct of these proceedings that Mr Macken's appearance before the Commission had been made, in part, with the view to protecting the interests of the specialized insurer … it is surprising that there was a delay of many months before those represented by Mr Macken were in a position to advise the Commission of the correct description of the worker's employer. Once the relevant description was ascertained, an appropriate amendment was made by consent. What occurred at that time was not … the addition of a new party to the proceedings but rather the substitution by amendment, of the correct description of the employer for an erroneous description. The present circumstances raise issues similar to those … addressed by the High Court in *Bridge Shipping Pty Ltd* … the Court in *Bridge Shipping*, when addressing the question as to whether the particular rules of Court applied to the factual circumstances of that matter, drew a distinction between the joinder of an additional party to the proceedings and the substitution of a party where a mistake had been made as to the name of that party …the argument advanced on behalf of the appellant … seeks to elevate form over substance … the effect of the amendment of the description of the worker's employer constitutes the substitution of a party for another party rather than the addition of a party to the proceedings … (at [60-62]).

72. Similarly, if Racing NSW is not the correct respondent, I agree, for essentially the same reasons given by O'Grady DP, referred to above, that such would properly be categorized as a mistake as to the name of the party – rather than the need for the joinder of an additional party. The respondent should also not be allowed to agitate the issues that were agitated either leading up to the interlocutory decision or are being agitated now by Mr Macken. In my opinion, it is prevented from doing so by estoppel. I will deal with the principles below. But in relation to whether a mistake has been made as to the name of the party, I still have concerns about whether that is so. Mr Macken now submits that if clause 9 applies, the respondent would be "*Rosehill Racing Club*". But I am unable to see that entity exists. It certainly does not appear in the evidence in this case. I am unable to find it on searches otherwise. I also similarly wonder whether indeed the Australian Turf Club should be the correct employer.

The Arbitrator held that s 354 (2) *WIMA* authorises him to inform himself on any matter in such manner as thought appropriate, subject to procedural fairness and he stated:

74. In *Technical & Further Education Commission t/as TAFE* [2019] NSWWCCPD 27, President Judge Phillips stated this:

> … a preliminary matter arose at the beginning of the hearing … regarding the proper identification of the appellant employer … the parties were directed to confer and agreement was communicated to Commission … the power under s350 (3) bestows wide discretion (noting the principles discussed and set out by Roche ADP in *Samuel v Sebel Furniture Ltd* [2006] NSWWCCPD141 ((*Samuel*), which principles I also take into account). Whilst the consent of the parties is relevant, such a discretion must be exercised independently and for a proper purpose. It is certainly a proper purpose and in the interest of justice that parties against whom binding order are made are in fact the correct parties, or in this case, the true employer of the worker … it is important that the correct party be named and respond to these proceedings so as to enable the successful party to have the protection of the decision against their opponent thus obviating the risk of further litigation against the correctly identified entity. Whilst it is regrettable that this oversight or mistakenly named party was not identified sooner, I make the order substituting the correctly named respondent … pursuant to my power contained in s350 (3) of *the 1998 Act*. In making this order, to the extent necessary, I dispense with compliance with the rules… (at [24-27]).

The Arbitrator applied the President's approach and directed the parties to confer regarding the correct name of the respondent and to advise the result within 28 days.

In relation to issue (2), the Arbitrator held that he made an interlocutory decision and not a final decision as to matters of substance after a hearing on the merits. To the extent that it may be necessary, he utilised the power under s 350 (3) *WIMA* to deal with it further and in so doing, he considered the principles in *Samuel.* He also stated that if it is necessary to use that power, it is for the purpose of discharging the duty to do justice between the parties according to the substantial merits of the case. He held (at [78]) that the respondent should be estopped for raising issues (1) and (2) based on *Anshun* type principles, namely:

> (a) The respondent seeks to now agitate an issue, in defence of the applicant's claim, about a matter – namely, the identity of the employer – that was and is so relevant to the subject matter of each of the earlier proceedings that it was unreasonable not to then rely upon it.
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> (b) Having regard to the nature of the applicant's claim and its subject matter, it would be reasonably expected that the respondent would have raised the defence, on at least one occasion in one of the earlier proceedings, and thereby enable the issue about the correct identity of the employer or respondent to be determined in either one proceeding or at least prior to the present proceedings.
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> (c) The issue now sought to be raised as a defence to the applicant's claim – namely, the correct identity of the employer or respondent – is and was so closely connected with the subject matter of the earlier proceedings that it ought to have been expected that it would be relied upon as a defence to any or all of the earlier claims by the applicant.
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> (d) The respondent has not adduced evidence to show why it failed to raise the issue about the identity of the employer before the extremely late stage that it did seek to raise the issue.
>
> (e) If the respondent were allowed to agitate the issue, it would have resulted in prejudice to the applicant for the reasons identified in the interlocutory decision.

The Arbitrator also stated:

> In *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA28; (2015) 256CLR 507 (*Tomlinson*), the High Court stated (at [22-26]) that:
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> > … considerations similar to those which underpin this (*Anshun*) form of estoppel may support a preclusive abuse of process argument … it is appropriate … to explain the relationship between the doctrine of estoppel and the doctrine of abuse of process as it has since come to be recognised and applied in Australia … is informed in part by similar considerations of finality and fairness. Applied to the assertion of rights or obligations, or to the raising of issues in successive proceedings, it overlaps with … estoppel … the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding … abuse of process which may be involved in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a Court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel … accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel … Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim ought to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel …
>
> 80. To the extent that it may be doubted that Anshun principles do not operate to estop the respondent in relation to this issue, e.g. if it be said that such principles only apply to proceedings between the same parties, in my opinion the broader and more flexible doctrine of abuse of process would still apply. To allow the respondent to agitate issues 1- 2 at the time and in the way it did would be unjustifiably oppressive and unfair to the applicant for the reasons already identified at paragraphs 3 – 8, 11 and 72 -73 above.

The Arbitrator considered it was important that the respondent sought to effectively abort these proceedings over an issue concerning its name, which it did not raise in the four earlier proceedings, when it would have the opportunity to control the conduct of these proceedings because it is the insurer of Fasteedious and would clearly be the insurer of any other person deemed to be the employer under clause 9. He held that *Tomlinson* essentially dealt with a question of issue estoppel and clarified the circumstances in which a person may be subject to an issue estoppel by virtue of being a privy in interest with a party to prior court proceedings. In summary, where the person's legal interests were represented by a party to the prior proceedings, they would be treated as a privy in interest with that party if they had an opportunity to control the conduct of the previous proceedings, and the potential detriment to them from creating such an estoppel was taken into account in the conduct of those proceedings (at [36] and [49] and [131] and [187].

In relation to issue (3), the Arbitrator held that there was no valid or lawful work capacity decision within the meaning of s 43 *WCA.* He inferred that it was likely that the Sor was anterior to the 2015 COD and that in circumstances where the parties were unable to agree on certain issues, the Arbitrator at determined at least issues relating to the lumbar spine and PIAWE. He stated:

> 87. …The existence of the SOR here likely puts this case in a different category. However, if it is looked at as a consent award case, not all of the documents in those proceedings, such as the pleadings, are in evidence. But I still believe it is clear enough from that which does exist that the issues relating to the lumbar spine – as noted in the SOR and 2015 COD were necessarily decided.
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> 88. It is not totally clear why the arbitrator specifically found the respondent was estopped with respect to the lumbar spine injury, but not with the cervical spine injury. But it can be seen from the summary of the reports by Dr Edwards, noted above, that it was only for the lumbar spine injury that he opined that there was no causal relationship with work. As such, and applying the principles of estoppel noted above, in my opinion an issue estoppel does exist in relation to the lumbar spine injury. It is clear, from the 2015 COD and SOR that the respondent now seeks to agitate an issue, involving ultimate and not mere evidentiary facts, which may be deemed to have been necessarily decided, having regard to the terms on which the prior proceedings concluded. So much can be gleaned from the arbitrator finding, inter alia, "*the respondent is estopped from denying the applicant suffered injury to her lumbar spine resulting from the nature and conditions of her work with a date of injury 2 October 2012*"; and the fact that the reports of Dr Edwards disputed the condition of the applicant's lumbar spine was relevantly causally related to work. It can also be seen from the SOR that there was a conciliation and arbitration hearing on 17 April 2015 – two months before the 2015 COD was issued, and the arbitrator gave his reasons orally on 15 July 2015. The arbitrator specifically noted, "*The parties were unable to come to an agreement*".

The respondent rejected the respondent's arguments that the COD dated 17 July 2013 [sic] was made by consent and that the previous proceedings did not involve a determination of any issues in dispute and that a consent agreement at best creates a rebuttable admission. He stated, relevantly:

> 90. …While it is not totally clear why the 2015 COD refers to the consent of the parties, the SOR, and their existence prior to the 2015 COD cannot be ignored. In this regard, I accept the submissions for the applicant that otherwise there would have been no need for the SOR if the COD had already been entered. Clearly enough, the chronology shows that the arbitrator determined and gave oral reasons on 15 July 2015. The SOR is dated 17 July 2015 but it states that "the reasons for the orders set out below were given orally on 15 July…" (emphasis added). Again, what was set out below is essentially identical to what appears in the 2015 COD. It seems likely that the matters determined on 15 July 2015 are reflected in both documents. It could not have been the case that the 2015 COD reflected something other than what comprised the reasons. It seems unlikely the arbitrator would have taken back his oral reasons and findings.
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> 91. Nevertheless, the extensive analysis of this question by Roche DP in *Rinker* (at [111]-[130]) and *Bouchmouni v Bakhos Matta t/as Western Red Services* [2013] NSWWCCPD 4 at [33] - [47] shows that the question of whether a consent award can give rise to an issue estoppel depends, inter - alia , upon all the surrounding circumstances of the case. In this regard, I do not think it is so clear that the injury to the applicant's cervical spine can be regarded as having been the subject of an issue estoppel. In those circumstances, I propose to determine the question now. The

respondent accepts that the "*prior orders … at best creates a rebuttable admission*". I find there was an admission by the respondent in relation to the cervical spine injury and how it came about, including its timing as recorded in the 2015 COD and SOR. I appreciate that it is only one piece of evidence. But it is evidence of the respondent formally admitting, in July 2015, that the applicant sustained injury to her cervical spine (deemed date 2 October 2012) as a result of the nature and conditions of her work between April 2002 and 2 October 2012, and her having suffered an incapacity for work from 2 October 2012 and thereby being entitled to weekly compensation.

The Arbitrator held that the applicant suffered injury to her cervical spine as a result of the nature and conditions of her employment from April 2002 to 2 October 2012 (deemed date of injury: 2 October 2012) and that she suffered an incapacity for work as a result of injury to her cervical spine from 2 October 2012 as noted in the 2015 COD.

The Arbitrator held that an issue estoppel exists with respect to PIAWE, but if he was wrong about this, the likely reason would be because the 2015 consent orders and SOR are not seen as having necessarily decided this question. He stated that this would then raise an *Anshun* estoppel, the same reasons as noted in paragraph 78 above, except of course the reference to the correct name of the respondent. Further, if he was wrong about conclusions that estoppel does arise in relation to the 2015 PIAWE, he would still determine that PIAWE, for the purposes of the present claim for weekly payments, is $1,200 – on the basis of the submissions put for the worker in reply (see paragraph 59 (d). He noted that the 2015 PIAWE was arrived at three years after the 2012 tax return.

The Arbitrator also stated, relevantly:

> 99. There appears an elliptical submission that the Commission lacks jurisdiction to assess weekly payments of compensation because the respondent has made a work capacity decision. The whole of it is quoted in paragraph 58(i) above. I disagree there has been such a decision.
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> 100. There was a failure to comply with the WorkCover Work Capacity Guidelines ("*work capacity guidelines*") in October 2013. These are issued under s 376 (1) of *the 1998 Act* and s 44A of *the 1987 Act*. The respondent did not comply with the fair notice provisions of those Guidelines, nor did it give notice of its decision in the manner required by the Guidelines (*Sabanayagam v St George Bank Ltd* [2016] NSWCA145 (*Sabanayagam* – at [145])).
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> 101. The respondent did not exercise its power under s 44A (1) of *the 1987 Act* to conduct a work capacity assessment of the worker. While an assessment is not necessary for such a decision (s 44A (3)), the absence of any such assessment militates against the decision properly being a work capacity decision (cf *Sabanayagam* at [146]).
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> 102. The decision was made at a time, 16 May 2019, when the applicant, on any view of the evidence, had no current work capacity. She had only recently, on 2 April 2019, undergone further major spinal surgery. I believe this factor points towards the PIAWE aspect of the s 78 notice being either part of an overall decision that is most properly classifiable as a dispute about liability for weekly payments of compensation – or, looked at on its own, is really a decision to dispute liability for weekly payments of compensation, rather than a true work capacity decision. For example, the underpinning and critical part of the PIAWE aspect of the s 78 notice goes to the purported attempt to recalculate the applicant's PIAWE which was the subject of formal findings, whether or not made by consent, in the 2015 COD.

103. I have already made findings that the respondent is estopped from raising or agitating an issue about the applicant's 2015 PIAWE (paragraphs 96-97 above. This means that the foundation upon which the purported work capacity decision was made does not exist. This is a further factor militating against the lawfulness or validity of the purported decision. However, it is noted that the decision relevantly notes "… *recalculated your… (PIAWE)… to be… $216.44 gross per week and having regard to your capacity for suitable employment we have reduced weekly compensation to nil…*".. This intertwines the PIAWE and capacity aspects of this part of the s 78 notice.

104. I also note that there is no explanation or detail about the purported capacity aspect of the decision. The explanation and detail is no more than "*as you have a demonstrated earning capacity*". To the extent that this may be answered by the s 78 notice attaching certificates from Dr Eliades on 6 September 2017 and 8 December 2018 is misleading. These were certificates showing the applicant had some capacity at those times. But the notice was given on 16 May 2019. The respondent knew, or ought to have known, that the applicant was still recovering from major surgery. The respondent paid for that surgery.

In relation to issue (5), the Arbitrator held that the worker had no current work capacity until 16 November 2019 and he awarded her weekly compensation from 28 June 2019 to 16 November 2019 at the rate of $960 per week under s 38 (2) *WCA.* Thereafter, he awarded her weekly payments at the rate of $845 per week (as adjusted) under s 38 (3A) *WCA* and held that she is unable to engage in employment involving track work riding without substantial risk of further injury.

Other matters of interest

The Workers Compensation Commission has issued a number of updated and new Practice Directions:

1. Practice Direction No 6 – Appeal against a decision of an Arbitrator (updated)
2. Practice Direction No 7A – Directions for production (updated)
3. Practice Direction No 13 – Schedule of earnings (updated)
4. Practice Direction No 16 – Appeal against medical assessment (new)
5. Practice Direction No 17 – Reconsideration applications (new)

The Commission's practice directions are available on its website: **www.wcc.nsw.gov.au**

FROM THE ACTING WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Phil Jedlin