# 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.*

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## WCC – Presidential Decisions

### *Appellant not a worker because there was no intention to enter into legal relations*

**Guilbert v Glenworth Valley Horse Riding Pty Ltd [2020] NSWWCCPD 10 – Deputy President Snell – 4 March 2020**

The respondent offered recreational and adventure activities including horse riding. The appellant went horse riding there as a customer from her early high school years and she commenced occasional activities with the respondent as a volunteer from when she was about 13 years old. Volunteers were not paid. They cared for horses and carried out more general duties such as cleaning, helping in the café and helping staff or the yard manager and from time to time, they participated in trail rides and riding lessons.

On 9/04/2010, the appellant was thrown from a horse while helping on a trail ride and injured her thoracic spine. She claimed compensation under s 66 *WCA* for 15% WPI, based upon an assessment from Dr O'Keefe, but the insurer disputed that she was a worker and that she had undergone reasonably necessary medical treatment.

On 6/08/2019, ***Senior Arbitrator Capel*** issued a COD, which determined that the appellant was not a worker. He cited the decisions of Roche DP in *Drive Recruit Pty Ltd v Back* [2013] NSWWCCPD 32 (*Back*) and *Bee* and his discussion of the elements involved in the formation of a contract of employment, including that there must be an intention to enter into legal relations and real consideration for the agreement – a quid pro quo.

The Senior Arbitrator found that the appellant performed a variety of tasks described in the respondent's "*Volunteers Job Roster and the Volunteers – Requirements and Conditions*". He noted that there was no induction or training "*as would usually be undertaken in a true employer/employee situation*" and that the appellant received a benefit for her activities and there was evidence of control, as she was required to attend for set hours and wear a shirt with a logo that identified her as a volunteer. She was required to undertake specified tasks, but there was no guarantee that she would ride each day and the direction, organisation and supervision of volunteers was for reasons of safety and ensured a full complement of volunteers. The appellant alleged that she would not have volunteered if not for the riding lessons and trail rides.

The appellant could not recall signing a disclaimer and she said that she did not know if her parents had done this on her behalf. The Senior Arbitrator opined that this issue could have been clarified in statements from the appellant's parents, but he held that it was "*highly likely*" that her parents signed this a disclaimer on her behalf. He noted that the "*Volunteers… – Requirements and Conditions*" made it clear that positions were being offered to volunteers, and not to employees, that their attendance was voluntary. He held that the term '*volunteer*' suggested "*a lack of intention by the respondent to create a legal relationship*". The disclaimer document provided that volunteers were forbidden from giving customers the impression they were employed by the respondent, which also suggested a lack of intention to create a legal relationship. He held that there was no intention to create legal relations.

On appeal, the appellant asserted that the Senior Arbitrator erred as follows: (1) in law in making findings contrary to the evidence; (2) by failing to make a material finding that the admission of 'consideration' by the respondent's general manager established an intention to create a legal relationship; and (3) in law by applying material findings which should not have been made to the test in *Bee* (sic).

***Deputy President Snell*** rejected ground (1). He held that the finding that the appellant's parents signed a disclaimer was available on the evidence and while the appellant challenged the evidentiary significance of the disclaimer, her direct evidence was that she did not sign one after turning 18. The existence and contents of the disclaimer were part of the circumstances surrounding the alleged formation of the contract that the appellant sought to prove and the disclaimer was objective evidence that was relevant to the parties' intentions. While the appellant sought to argue on appeal that there was no evidence that the form of the disclaimer in evidence was the same as that in use when she first became a volunteer, she did not argue this issue before the Arbitrator and he did not allow her to raise it on appeal.

Snell DP also rejected grounds (2) and (3). He stated, relevantly:

> 98. It follows that the material in that document was properly before the Senior Arbitrator and considered, in determining whether there was an intention to enter into legal relations. I do not accept the appellant's submission that the document had no application to the appellant. The Senior Arbitrator regarded the repeated use of the term "*volunteer*" in the "*Information for Volunteers*" document as demonstrating that the respondent did not have an intention to create a legal relationship. That conclusion was properly available. The subject matter, the appointment of volunteers, including children, is not reflective of an intention to enter into a legal relationship…

Snell DP observed that the volunteers regarded the horse riding as one of the "*good bits*" of their activities, and "*the morning saddle*" as one of the less "*good bits*". The riding activities were not a separate benefit that was made available in exchange for performing the duties of a volunteer and while the appellant stated that she would not have performed the mundane tasks, if not for the "*horse rides or lessons in exchange*", this did not assist her because there is no evidence that she made this known to the respondent. Consistent with the passage from *Ermogenous* quoted at [68] of his decision, he held that "*intention*" is used in the usual contractual context - what would objectively be conveyed by what was said or done, having regard to the circumstances. It is not a search for "*the uncommunicated subjective motives or intentions of the parties*".

Accordingly, Snell DP confirmed the COD.

### *Extension of time – Claim for medical expenses under s 60 WCA*

**Duck v EB and DE Bunt Pty Limited [2020] NSWWCCPD 11 – Acting Deputy President Parker SC – 9 March 2020**

In August 2017, the appellant fell at work and landed on both hands and his right elbow. He first consulted his GP about his injuries on 21/09/2017 and on 5/06/2018, his treating surgeon sought approval for bilateral carpal tunnel release surgeries. However, the Insurer declined the claim.

On 21/08/2019, ***Arbitrator Egan*** issued a COD, which entered an award for the respondent with respect to the claim for s 60 expenses for injuries to both wrists in the form of bilateral carpal tunnel syndrome. While he held, based on the electrical studies and the treating surgeon's opinion, that the appellant probably suffers from bilateral carpal tunnel syndrome, he was not satisfied that the appellant had discharged his onus of proof that he suffered a personal injury under s 4 (a) *WCA.*

The Arbitrator stated that he sought clarification from the worker's counsel as to whether he relied on a frank injury only, as in September 2018, Dr Marshall opined that '*one could assume that all the extra work and lifting he was doing with his left hand while his right elbow recovered could have exacerbated carpal tunnel features on the left side'*. He stated:

> 78. I consider each of the following equally plausible: the applicant suffered carpal tunnel injury in the incident (albeit, with delayed onset of symptoms); he developed the condition due to events after the injury, or as a consequence of the injury to the elbow; or he simply developed the condition idiopathically. That is insufficient to discharge the onus: *Luxton*; *Flounders*…

The appellant sought to appeal against the COD and requested a determination that the proposed bilateral release surgeries are reasonably necessary as a result of the injuries to the right forearm and elbow in August 2017. However, the appeal was lodged out of time and leave was required under s 352 (4) *WIMA.*

***Acting Deputy President Parker SC*** determined the application for an extension of time and the appeal on the papers. He noted that the appeal was lodged within time, but it was rejected by the Registry and an amended application to appeal was lodged 1 day late. He confirmed that the President recently considered the principles relevant to an extension of time in *Broadspectrum Australia Pty Limited v Skiadas* [2019] NSWWCCPD 31 (Skiadas) and he referred to the decision in *Land Enviro Corp Pty Limited v HTT Huntley Heritage Pty Limited,* in which the Court of Appeal held that the primary considerations on an application for leave to extend time within which to appeal are: (a) the extent of the delay and the reasons therefor; (b) the prejudice to the applicant if the application were to be refused; (c) the prejudice to the defendant from the delay if the application were to be granted; and (d) the prospects of success of the proposed appeal.

Parker ADP held that it is a very serious matter to bar a litigant's right to appeal for a trivial delay and a delay of 1 day does not cause any significant prejudice to the respondent. The appeal has prospects of success, although they are not overwhelming, but the difficulty is the "*exceptional circumstances*" requirement of rule 16.2. Although the circumstances regarding the late filing of the appeal are "*not compellingly exceptional*", he was satisfied that the are sufficiently out of the ordinary course, special and not common, to justify an extension of time.

The appellant alleged that the Arbitrator erred as follows:

> (1) in law and misdirected himself when he found that a claim for the cost of carpal tunnel syndrome to the wrists is not reasonably necessary, by requiring that such need must be a "*resul*t" of personal injury (s 4 (a) *WCA*);
>
> (2) by rejecting the evidence of Dr Marshall as "*mere conjecture*";
>
> (3) by failing to provide adequate reasons or adequately deal with the issue of whether the surgery to the wrists was reasonably necessary as a result of the injury to the elbow and forearm;
>
> (4) by not properly considering the accepted test for determining the need for medical treatment pursuant to s 60 *WCA*; and
>
> (5) by failing to determine whether the accepted elbow injury provided a material contribution to the need for wrist surgery.

Parker ADP rejected ground (1), which is confined to an asserted error of law and misdirection leading to an erroneous conclusion of fact, namely that the claim for the cost of surgery should not be allowed. However, neither the text of ground (1) nor the supporting submissions formulated the legal challenge in a precise manner. The Arbitrator expressed a conclusion that the evidence did not persuade him that the appellant had established injury to his wrists. In order to succeed, the appellant needed to establish that he suffered an injury to his wrists in the form of bilateral carpal tunnel syndrome, but the Arbitrator did not accept the accuracy of Dr Marshall's history regarding the onset of numbness in the hands and it was open to him to reject that part of the evidence. Dr Marshall relied upon that part of the history for his opinion on causation and the need for the proposed surgery. However, the appellant developed paraesthesia some months after the accident and that militated against the August 2017 injury causing it. Therefore, Dr Marshall's hypothesis on causation was not supported by the accepted evidence and the Arbitrator applied the correct test.

Parker ADP also rejected grounds (2) and (3). In relation to ground (2), he held that the Arbitrator did not reject Dr Marshall's evidence, as his reports were admitted into evidence, and this ground mis-stated the Arbitrator's reasons.

In relation to ground (3), Parker ADP stated that the principles relevant to an assessment of the adequacy of reasons by a judicial officer were discussed by the Court of Appeal in *Beale v Government Insurance Office of NSW*, in which Meagher JA stated that there are 3 fundamental elements: (1) refer to the relevant evidence; (2) set out the material findings of fact or ultimate findings of fact; and (3) provide reasons for making the relevant findings of fact and in applying the law to the facts as found. In *Beale* at p 444, his Honour stated, "*…an appeal court will reserve any intervention to those situations in which it is left with no choice; where no reasons have been given in circumstances where there was an obligation to provide them and in circumstances where a statement of reasons is so inadequate as to constitute a miscarriage of justice.*" Accordingly, he held that the SOR satisfies the requirements of s 294 (2) *WIMA* and the fundamental essentials for judicial exposition of reasons.

Parker ADP rejected ground (4) and held that the Arbitrator did not misapply the statutory test for an award of s 60 expenses.

Parker ADP also rejected ground (5), which asserted that the Arbitrator failed to determine whether the accepted elbow injury provided a material contribution to the need for wrist surgery. He noted that the issue was determined adversely to the appellant because the Arbitrator rejected Dr Marshall's opinion and this was the only supporting evidence.

Accordingly, Parker ADP confirmed the COD.

***Fact finding and drawing inferences from the available evidence – determination of incapacity – error where incapacity not disputed – Department of Corrective Services v Bowditch [2007] NSWWCCPD 244; University of New South Wales v Kurup [2014] NSWWCCPD 19 & Whaley v Upper Hunter Shire Council [2016] NSWWCCPD 32 considered***

**Guettaf v Spotless Services Australia Pty Limited [2020] NSWWCCPD 13 – Deputy President Wood – 9 March 2020**

On 3/05/2014, the appellant alleged injury to his right hip and an inguinal hernia as a result of lifting a bucket of chicken wings at work, and that he has not worked since 7/05/2014. The insurer initially accepted the claim, but on 13/02/2015, it issued a dispute notice that raised issues under ss 4, 9A and 60 *WCA.* It asserted that the injury had resolved and the appellant was no longer incapacitated and/or required any treatment. The appellant then claimed compensation under s 66 *WCA* and on 5/02/2019, the insurer disputed that claim.

The appellant then filed an ARD claiming weekly compensation and s 60 expenses.

***Senior Arbitrator Capel*** directed the parties to file a wages schedule that included PIAWE as at the date of injury. The appellant replied by disputing that the respondent correctly calculated PIAWE and he claimed the difference between his asserted PIAWE and payments made by the respondent. On 7/06/2019, during an adjourned arbitration hearing, the Senior Arbitrator identified the following issues: (1) Injury to the right hip and groin/hernia - ss 4 and 9A *WCA;* (2) Whether the insurer made a work capacity decision on 22/07/2014 – s 43 *WCA;* (3) the Commission has jurisdiction to make orders with respect to the alleged work capacity decision on 22/07/2014 - Cl 6 of Part 19L of Sch 6 *WCA;* (4) the extent of the appellant's capacity and quantification of his entitlement to weekly compensation, including the date of commencement of such payments - ss 33, 36 and 37 *WCA;* and (5) Medical expenses - s 60 *WCA.*

On 10/07/2019, the Senior Arbitrator issued a COD (which was amended under the "*slip rule*" on 2/08/2019), which determined that: (a) PIAWE as at 7/05/2014 was $1,548.23; (b) the appellant had no capacity to work from 7/05/2014 to 17/06/2014 and from 4/07/2014 to 8/10/2014, but he otherwise had capacity for some work from 18/06/2014 to 3/07/2014 and from 9/10/2014; and (c) the respondent was entitled to credit for payments made.

On appeal, the appellant asserted that the Senior Arbitrator: (1) erred in law in: (a) (i) assessing his capacity during the period from 7/05/2014 to 3/03/2015; (b) denying him procedural fairness and disregarding the way the case was run in relation to the period from 7/05/2014 to 3/03/2015; and (c) failing to correctly apply the law (s 32A *WCA*) to the facts of the case; (2) erred in fact and law in drawing inferences from the economic loss evidence when assessing the PIAWE; and (3) erred in law by ordering the respondent to have credit for payments made during the period from 7/05/2014 to 3/03/2015.

***Deputy President Wood*** conducted an oral hearing of the appeal. She noted that the appellant and sought to rely upon emails regarding the calculation of PIAWE, which were exchanged after the issue of the amended COD, but she declined to admit those documents because she was not satisfied that they advanced either party's position.

Wood DP rejected ground (2). She held that the factual inference that the pay advice dated 4/03/2014 was in respect of 2 weeks' work, was available to the Senior Arbitrator and he was required to apply the mathematical formula provided, in accordance with ss 44C and 44D *WCA,* to calculate PIAWE. No error was disclosed in that process and the figure he arrived at was within the ambit of the parties' submissions.

In relation to ground (1), Wood DP noted that the respondent argued that the Commission had no jurisdiction to determine PIAWE because it had made a WCD. However, the appellant argued that there was no dispute raised by the respondent in respect of the extent of his incapacity and the Senior Arbitrator therefore had no jurisdiction to determine his capacity during the relevant period. She referred to the decisions in *Department of Corrective Services v Bowditch* [2007] NSWWCCPD 244, *University of New South Wales v Kurup* [2014] NSWWCCPD 19 and *Whaley v Upper Hunter Shire Council* [2016] NSWWCCPD 32, and stated:

> 154. Importantly, in this case there is no evidence that the respondent can point to that indicates that the respondent had resiled from its earlier acceptance that during the relevant period, when it paid the appellant weekly compensation, it did so on the basis that the appellant had no capacity.
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> 155. Having regard to the above authorities, the presentation of the evidence and the manner in which the case was run, I am not satisfied that there was a dispute between the parties which was properly before the Commission as to the extent of the appellant's incapacity between 7 May 2014 and 4 March 2015.
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> 156. It follows that the Senior Arbitrator erred in determining the appellant's incapacity during the period 7 May 2014 to 4 March 2015 and Ground One of this appeal succeeds on that basis. Consequently, it is not necessary for me to determine the complaints the appellant raises in respect of a failure to be afforded procedural fairness or that the Arbitrator failed to apply the correct law. Additionally, as the award of weekly payments during the relevant period is to be revoked, then it follows that the order for credit to be given to the respondent for payments made will also be revoked. Thus, it is not necessary for me to determine Ground Three of the appeal.
>
> 157. The quantification of appellant's entitlement to weekly payments during the relevant period will require submissions by both parties, given that the PIAWE determined by the Senior Arbitrator is confirmed on the appeal but is different from the PIAWE which was the subject of both parties' wages schedules. In those circumstances, it is not appropriate to re-determine the matter on appeal, and I remit the matter to an arbitrator for determination of the amount of weekly compensation payable to the appellant during the period from 7 May 2014 to 14 March 2015.

Accordingly, Wood DP revoked specific paragraphs of the amended COD, amended other specific paragraphs and remitted the matter to a different Arbitrator to determine the appellant's entitlement to weekly compensation from 7/05/2014 to 4/03/2015.

### *Psychological injury - application of State Transit Authority of New South Wales v Chemler [2007] NSWCA 249 and associated authorities – alleged errors in fact finding – procedural fairness*

**Blount v Penrith City Council [2020] NSWWCCPD 15 – Deputy President Snell – 13/03/2020**

The appellant was employed by the respondent as a carpenter. He alleged that he suffered a psychological injury on 4/09/2017 and 4/04/2019, due to various incidents relating to asbestos, public health and safety issues (i.e. erecting goal posts). He described the latter injury as a "*re-emergence*" due to his concern regarding mismanaged public health and safety issues. However, the respondent disputed the claim under ss 9A, 11A and 33 *WCA.* The appellant ultimately claimed weekly payments from 5/04/2018 to 4/06/2018.

On 4/09/2019, ***Arbitrator Wynyard*** issued a COD, which entered an award for the respondent. He was not satisfied that the appellant had suffered a psychiatric or psychological injury, but said that if he was wrong on this issue, the respondent had established a defence under s 11A *WCA.* He noted that the appellant alleged that he developed a psychological injury on 21/12/2017, because the respondent discovered asbestos on Council land at Werrington and that he was bullied and harassed over his attitude to asbestos and his safety concerns over the removal of goal posts. He said that he had been involved with "*asbestos issues*" at the Council for many years and his concerns about the installation and removal of the goal posts were dismissed.

The Arbitrator noted that on 15/01/2018, the appellant was given a disciplinary letter, which related to his conduct at the Werrington site on 21/12/2017, and the investigation occurred over a period of 2 months. On 4/04/2018, he attended a meeting with the respondent and was given a letter advising him of outcome of the investigation, which was that 3 of the 4 allegations against him were substantiated and the 4th allegation was partially substantiated. However, he was told that no disciplinary action would be taken against him and he was reminded about the Council's values and the Code of Conduct. The appellant queried why no disciplinary action would be taken given the seriousness of the findings and said that this decision "*put him over the edge*" and he stopped the meeting. He attended his GP and was put off work. He was cleared to return to work from 4/06/2018, but could not actually resume until 18/06/2018 due to an unrelated condition.

The Arbitrator noted that the appellant had lodged a grievance in the NSW Industrial Relations Commission, which dealt with the respondent's actions regarding asbestos and the removal and installation of goalposts. The Union became involved (which the appellant failed to mention in his statements) and he referred to a letter (in the investigation report), which detailed the respondent's actions to address asbestos issues at the nominated sites in 2004, 2007, 2008 and 2015. The respondent stated that it did not have a stockpile of dirt in Werrington, to which the Union replied that this was actually in St Marys. The respondent then advised the Union that the St Mary's site was certified as clear of asbestos. He noted that a Commissioner of the Industrial Relations Commission accepted the respondent's evidence.

The Arbitrator held that the appellant was not suffering from a psychological condition before the disciplinary process, the alleged psychological injury was wholly or predominantly caused by the respondent's reasonable actions.

The appellant appealed on 6 grounds, namely:

> (1) The Arbitrator erred in fact and/or law by failing to find that his injury arose out of or in the course of his employment by impermissibly scrutinising his perception of events;
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> (2) The Arbitrator erred in law by failing to provide him with procedural fairness by making adverse credibility findings about him and Dr Chew, in circumstances where: (a) their credibility was not challenged by the respondent, and (b) they were not provided with an opportunity to respond to the adverse finding made;
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> (3) The Arbitrator erred in fact and/or law by placing impermissible reliance upon extracts from the clinical records of Dr Chew and by then making findings that were not supported by the evidence;
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> (4) The Arbitrator erred in fact by not considering whether the whole or predominant cause of his psychological injury was the respondent's actions with respect to discipline and/or performance appraisal;
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> (5) The Arbitrator erred in law by reversing the onus of proof from the respondent onto him when determining whether the respondent's actions were reasonable for the purposes of s 11A; and

(6) The Arbitrator erred in law by finding the respondent's actions with respect to discipline and/or performance appraisal were reasonable.

***Deputy President Snell*** determined the appeal on the papers.

Snell DP rejected ground (1). He held that the Arbitrator was entitled to assess the appellant's evidence and noted that in *Attorney-General's Department v K*, Roche DP said:

> As the above authorities demonstrate, the Arbitrator did not have to consider if the worker's perception was erroneous or irrational. He had to determine if the events complained of actually occurred and, if they did occur, whether the worker's injury resulted from them.

The Arbitrator's discussion of Dr Chew's notes went to whether events at work associated with disciplinary proceedings had caused a psychological injury. This was relevant to whether events before 4/04/2018 caused the alleged injury, considering the absence of relevant recorded contemporaneous complaints, and the weight to be given to Dr Chew's opinion. He ultimately found that the evidence of Dr Chew and Dr Bosanquet was "*unhelpful*". He did not impermissibly scrutinise the appellant's evidence of perception, but assessed the medical evidence and the lay evidence upon which it was based in order to determine the weight to be given to the evidence in determining the issue of "*injury*".

Snell DP upheld ground (2). He noted that in *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1, Hunt J said:

> I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings.

Further, in *New South Wales Police Force v Winter* [2011] NSWCA 330, the Court of Appeal dealt with an alleged denial of procedural fairness, associated with counsel being prevented from further cross-examining in Commission proceedings. Campbell JA (Giles JA and Handley AJA agreeing) observed that, although s 354 *WIMA* permits Commission proceedings to be conducted with "*less formality and more truncated procedure*", an Arbitrator remains subject to obligations of procedural fairness. His Honour referred to the above passage from *Allied Pastoral*. He summarised the principles from a number of authorities in which the rule in *Browne v Dunn* was modified in circumstances where there were rules for the exchange of statements and materials prior to the hearing. His Honour quoted from his earlier decision in *West v Mead* and said:

> The consequence of these decisions is that the circumstances in which *Browne v Dunn* will require matter to be put to a witness in cross-examination will depend upon the nature of the pre-trial preparation there has been, and whether that pre-trial preparation has been sufficient to give notice to a witness of the submission ultimately intended to be put to the court. An aspect of this is that *Browne v Dunn* will require more extensive cross-examination in a case where all the evidence is given orally, than is necessary in a case where the substance of the evidence proposed to be given by each side is notified in advance by affidavit or statement.
>
> Even when there has been an exchange of affidavits or statements, the rule in *Browne v Dunn* will require a cross-examining counsel to put to a witness the implications which counsel proposes to submit can be drawn from the evidence, if those implications are not obvious from the evidence, or from other pre-trial procedures, or the course of the case. ...

Snell DP noted that in *Seltsam Pty Limited v Ghaleb* [2005] NSWCA 208, Ipp JA (Mason P agreeing) summarised a number of authorities dealing with procedural fairness and said:

> 78. These cases illustrate the general principle that although the basis on which the parties conduct a trial does not bind the judge, if the judge contemplates determining the case on a different basis he or she must inform the parties of this prospect so that they have an opportunity to address any new or changed issues that may arise.
>
> 79. A failure so to inform the parties will ordinarily result in a denial of procedural fairness. A new trial will be ordered if a party is not afforded a fair trial in circumstances where a properly conducted trial might possibly have produced a different result. It will not ordinarily be necessary to lead evidence to prove that the denial of procedural fairness had the potential to affect the outcome; in most cases the facts will speak for themselves.

Snell DP agreed with a passage from the decision of Roche DP in *Kitanoski* (quoted at [94]), which is consistent with the decision in *Winter*. He held that the appellant was denied procedural fairness because findings adverse to the credit of the appellant and Dr Chew were made in circumstances where: (1) there was no cross-examination on the issue; (2) this issue was not the subject of submissions; and (3) the issue was not raised with the parties. In *Stead v State Government Insurance Commission* [1986] HCA 54, the High Court stated:

> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.

Accordingly, Snell DP revoked the COD and remitted the matter to a different Arbitrator for re-determination.

## WCC – Medical Appeal Decisions

***Methodology used by AMS in assessing primary and secondary psychological injury under s 65A WCA – MAP called for submissions regarding jurisdiction and determined that the referral to the AMS was beyond jurisdiction – State of NSW v Kaur & Jaffarie applied – Inconsistent Supreme Court decisions noted – MAC revoked and the matter referred to the Registrar***

**St Kyros Cranes Pty Ltd v Haddad [2020] NSWWCCMA 33 – Arbitrator Wynyard, Dr J Parmegiani & Dr M Hong – 28 February 2020**

On 8/12/2015, the worker suffered a traumatic amputation of the distal part of his right middle finger at work. On 23/07/2019, an AMS assessed 9% WPI with respect to that injury.

Dr Teoh then diagnosed a primary psychological injury and on 16/09/2019, a delegate of the Registrar issued an amended Referral to an AMS for assessment of WPI caused by a psychiatric/psychological disorder that occurred on 8/12/2015. The Referral invited the AMS to refer to Consent Orders dated 12/09/2019, which included a notation that the parties agreed:

> A. The AMS is to have regard to the provisions of section 65A of *the 1987 Act*.
>
> B. The existence of a secondary psychological injury is not accepted or conceded by the applicant.

On 9/10/2019, Associate-Professor Robertson issued a MAC, which assessed 15% WPI. However, the appellant appealed against the MAC under s 327 (3) (c) *WIMA.*

On 9/01/2020, ***the MAP*** referred to the notations in the consent orders and s 321A (2) *WIMA* and directed the parties to make submissions addressing the issue of jurisdiction.

They effectively replied that s 321A *WIMA* did not apply as there were no liability issues, but the MAP held that they failed to consider a lacuna in the legislative policy, as a result of s 321 *WIMA* being repealed and no regulation having triggered the commencement of s 321A *WIMA.* It stated, relevantly:

> 33. …Inasmuch as the issue was summarily dismissed by both parties, it seemed to be inferred that in the absence of any valid legislative enactment governing the referral of matters to an AMS, there was produced a legal vacuum, through which matters could pass to an AMS regardless of whether jurisdiction existed or not.

The MAP stated that if liability was in issue, there was a clear legislative intention evinced by the terms of ss 321 and 321A *WIMA* that the resolution of that issue must be determined by the Commission, albeit that there is at present a lacuna. It held that the decision of Campbell J in *State of NSW (Department of Education) v Kaur,* is clear authority that issues arising under s 65A *WCA* are issues pertaining to liability.

The MAP held that as jurisdiction cannot be conferred by consent of the parties where none exists, the matter must be remitted to the Registrar to be dealt with according to law, but if its conclusion on this issue was incorrect, it commented on the parties' arguments concerning the AMS' methodology and stated that the AMS has a duty to give adequate reasons for his conclusions so that the parties and an appellate tribunal can understand the path of reasoning by which the AMS reached his assessment.

In this matter, the AMS said that he had taken account of the effects of the primary and secondary psychological injuries, but he gave no adequate indication of how he had done so. Accordingly, the MAP revoked the MAC and remitted the matter to the Registrar to be dealt with according to law.

## WCC – Arbitrator Decisions

***Worker sent from Sydney to work on a building site in Adelaide – Injury to left eye while at a restaurant on a Sunday night – whether injury arose out of or in the course of employment – whether employment was a substantial contributing factor – "Camp cases" considered – Award for the respondent entered***

**Li v Brighton Australia Pty Limited [2020] NSWWCC 55 – Arbitrator Perrignon – 27 February 2020**

In February 2019, the worker travelled from Sydney to Adelaide to work on a construction site. He worked on weekdays and spent weekends in Adelaide. The respondent paid his accommodation costs and an extra $300 per week for expenses (including meals). Sunday night, 17/03/2019, the worker attended a Chinese restaurant with 2 work colleagues. After dinner, one of his colleagues was attacked by a patron and the altercation developed into a larger affray, during which the worker injured his left eye. He lost vision in that eye also suffered sympathetic opthalmia in his right eye, which compromised the vision in that eye. He therefore has no current work capacity.

However, the respondent disputed that the injury to the left eye arose out of or in the course of the worker's employment and it also asserted that employment was not a substantial contributing factor to the injury because it did not encourage him to attend the restaurant.

***Arbitrator Perrignon*** held that the worker did not work on Sunday, 17/03/2019, but that in the evening he went to a restaurant in China Town with 2 work colleagues, where he purchased and ate dinner. After dinner, he and a colleague ordered takeaway food for lunch the next day and after his takeaway food was presented at the table, the restaurant owner asked him to drink some wine, or some more wine, which he declined. Another patron of the restaurant said, "*Fuck you*" and hit a colleague, who fell to the ground.

When the other colleague tried to assist, the assailant called on associates outside the restaurant, who entered the restaurant and attacked them both. The worker went to their aid and one or more of the assailants attacked his left eye with a glass or bottle, as a result of which he lost the sight in his left eye and suffered a severe compromise of vision in his right eye.

The Arbitrator held that the left eye injury did not occur because of the worker's mere presence at the restaurant, even though it occurred while he was there, and it did not occur while he was ordering or consuming a meal there, or because he did so, or while he ordered or waited for takeaway food there, or because he did so. Rather, it occurred because he came to the aid of his co-workers There was no evidence that the respondent knew that the worker and his colleagues ever attended or would attend the restaurant where the assault occurred, and the Arbitrator was not satisfied that it knew of their attendances at that restaurant, or encouraged or approved of them and/or that it knew that the worker would come to the aid of his colleagues in an affray at that restaurant.

In relation to the issue of causal nexus, the Arbitrator considered the common law decisions of *Hatzimanolis v ANI Corporation Limited* [2002] HCA 21 and *Comcare v PVYW* [2013] HCA 41. In the latter decision, the High Court explained its reasoning in *Hatzimanolis* as follows (emphasis added):

> 38. The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the **injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity.** It is only if and when one of those circumstances is present that the question arising from the *Hatzimanolis* principle becomes relevant. **When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity?** When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment.
>
> 39. It follows that where an activity was engaged in at the time of the injury, the relevant question is not whether the employer induced or encouraged the employee to be at a place. **An employer's inducement or encouragement to be present at a place is not relevant in such a case**…
>
> 52. The relevant connection or association created by the *Hatzimanolis* principle is between that activity and the employer's encouragement to engage in it. Likewise, when an injury is sustained by an employee at a place and by reference to that place, in the sense earlier discussed , the connection between that circumstance and the employment is provided by the fact that the employer induced or encouraged the employee to be present at that place.
>
> 53. The connection or association spoken of is not the causal connection which is attributed to the expression "*arising out of … the employee's employment*" in the definition of "*injury*" in *the SR&C Act* . It is accepted that compensation may be payable in respect of an injury which is suffered "*in the course of*" the employee's employment notwithstanding that there is no such causal connection. The connection presently spoken of is by way of an association with the employment. In *Kavanagh v The Commonwealth*, Dixon CJ said that "*no direct … causal connexion … is*

*proposed as an element necessary to satisfy the conception of an injury by accident arising in the course of the employment but only an association*" with the employment.

54. Dixon CJ expressed that association in two ways. In a positive sense it might be said that, had it not been for the employment, the injury would not have been sustained. Put negatively, and perhaps more usefully for present purposes, it requires that "*the injury by accident must not be one which occurred independently of the employment and its incidents.*"

The High Court found that PVYW was not injured in the course of employment and stated:

60. The principle in *Hatzimanolis* should nevertheless be understood to have sought, and achieved, a connection or association with employment. For present purposes that understanding is helpful to explain, if it be necessary, that for an injury occurring in an interval in a period of work to be in the course of employment, the circumstance in which an employee is injured must be connected to the inducement or encouragement of the employer. An inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured whilst engaged in an activity at that place.

Conclusion

61. It may be accepted that the purpose and the effect of the principle stated in *Hatzimanolis* was to create an interval between periods of actual work, to better explain the connection that an injury suffered by an employee in certain circumstances has to the employment. It did so by reference to the fact that the employer induced or encouraged the employee to do something or be somewhere in particular and the fact that the employee did so and was injured. The two circumstances identified by *Hatzimanolis* were where an injury was suffered by an employee whilst engaged in an activity in which the employer had induced or encouraged the employee to engage; or where an injury was suffered at and by reference to a place where the employer had induced or encouraged the employee to be. An injury sustained in these circumstances may be regarded as sustained in the course of the employee's employment. Properly understood, whilst the inducement or encouragement by the employer may give rise to liability to compensation, it also operates as a limit on liability for injury sustained in an overall period of work.

The Arbitrator noted that the Court of Appeal discussed and applied the decisions in *Hatzimanolis* and *PVYW* in *Tran v Vo* [2017] NSWCA 134 and *The Star Pty Limited v Mitchison* [2017] NSWCA 149, which were not '*camp cases'.* Like Mr Hatzimanolis and Ms PVYW, the worker was injured in an interval during an overall period of work while he was stationed far from his home for work purposes. His injury will have arisen in the course of his employment if it was suffered whilst he was engaged in an activity that the employer had induced or encouraged him to engage in; or where [it] was suffered at and by reference to a place where the employer had induced or encouraged him to be.

The Arbitrator held that the left eye injury was directly referrable to the worker's actions in defending his colleagues and compensability depends on whether the employer encouraged or induced that activity. There is no evidence that it did and the injury is not covered by the principle in *Hatzimanolis*, and is not compensable. The employer also did not encourage or induce him to attend that particular restaurant at that time, even if by paying him a food allowance it encouraged, induced or approved of him purchasing food generally when off work or off site. Therefore, the injury did not arise out of the worker's employment.

As to whether employment was a substantial contributing factor, the relevant question is "*was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?*" That test cannot be satisfied merely by proving that but for the employment, the worker would not have been at the scene of the accident. In *Pioneer Studios v Hills* [2012] NSWCA 324, Allsop P (Basten & Hoeben JJA agreeing) stated:

> [29] In circumstances where it is not expressly concluded that the injury arose in the course of employment and thus where, on this hypothesis, the injured worker was not at work, it is not apparent how the Deputy President could draw any conclusion about the injury arising out of employment or employment being a substantial contributing factor without considering the kinds of matters to which Mason P referred in *Mercer* at 745 [13]. This is not to confine "*arising out of*" to what is required of an employee but rather what she in fact does in the employment. This would require focus upon what was the employment, not what Ms Hills thought was the employment.

Accordingly, the Arbitrator held that employment was not a substantial contributing factor to the injury. He entered an award for the respondent.

### *Insurer made proactive settlement offers before 19/06/2012 – Worker entitled to compensation for pain and suffering under s 67 WCA (as in force before 12/06/2012)*

**Usher v Lend Lease Project Management & Construction (Australia) Pty Limited [2020] NSWWCC 64 – Senior Arbitrator Capel – 3 March 2020**

On 29/03/2000, the worker suffered injuries to his back and right knee at work. On 16/03/2001, the insurer made a proactive settlement offer with respect to the worker's entitlement to lump sum compensation for the 2000 injuries.

On 21/09/2005, the worker injured his left knee at work. On 31/05/2007, the insurer made a proactive offer regarding his entitlement for the 2005 injury.

Accordingly, valid claims under s 66 *WCA* were made on 16/02/2001 and 31/05/2007.

With respect to the injuries in 2000, a MAP assessed 17% permanent loss of use of the right leg at or above the knee and 20% permanent impairment of the back. With respect to the 2005 injury, it assessed 13% WPI.

The issue for determination was whether the worker is entitled to compensation under s 67 *WCA* with respect to those impairments and, if so, the extent of his entitlement.

***Senior Arbitrator Capel*** held that the worker is entitled to compensation for pain and suffering and he assessed the entitlements as follows: (1) in relation to the 2000 injuries – 40% of a most-extreme case; and (2) in relation to the 2005 injury – 35% of a most-extreme case. His reasons are summarised below.

- The insurer's proactive offers were not finally dealt with and the decisions in *Halloran, White, Eaton, Newbold and Bianco* confirm that a proactive offer can be regarded as an alternative to a lump sum claim being made by a worker;
- There is compelling evidence that the insurers were fully appraised of the circumstances of the worker's injury before they made their offer, such that they complied with ss 281 and 282 *WIMA* and their obligations under the Guidelines;
- Therefore, a valid claim was made prior to 12/06/2012; and
- In accordance with the principles discussed by Keating P in *Wagg,* the worker is entitled to compensation for pain and suffering under s 67 *WCA*, due to cl 15 of Div 1 of Pt 19H of Sch 6 *WCA* and cl 10 of Sch 8 of *the Regulation*.

### *Provision and maintenance of an assistance dog is reasonably necessary therapeutic treatment as defined in s 59 (b) WCA*

**Bunce v State of New South Wales – Central Coast Local Health District t/as Gosford Hospital [2020] NSWWCC 62 – Arbitrator Wynyard – 4 March 2020**

The worker was as a registered nurse. On 21/03/2017, she suffered a catastrophic reaction to an incident when a patient became aggressive and threatened her. While the patient was restrained before he caused her any harm, she had witnessed a similar incident in 1999 that resulted in the death of a patient. There was no dispute that she suffered a psychiatric condition due to her experiences in 1999 and childhood trauma, but she had functioned normally until the 2017 incident occurred. She sought a declaration that the provision and maintenance of an assistance dog is reasonably necessary medical treatment.

***Arbitrator Wynyard*** noted that the insurer argued that s 60 (2A) *WCA* applied and that the worker did not obtain its prior approval. However, he held that the Commission had considered this issue many times and under Table 4.2 of the Guidelines, a worker is exempt from the operation of s 60 (2A) if there is a determination that any disputed treatment was payable. He discussed the principles regarding s 60 (1) *WCA*, which Roche DP summarised in *Diab v NRMA Ltd* [2014] NSWWCCPD 72, as follows (citations omitted):

> 86. Reasonably necessary does not mean '*absolutely necessary*' (*Moorebank* at [154]). If something is '*necessary*', in the sense of indispensable, it will be '*reasonably necessary*'. That is because reasonably necessary is a lesser requirement than '*necessary*'. Depending on the circumstances, a range of different treatments may qualify as '*reasonably necessary*' and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment is "*reasonable and necessary*", which is a significantly more demanding test that many insurers and doctors apply…
>
> 87. Giles JA added (at [49] in *O'Shea*) that the qualification whereby the necessity must be reasonable calls for an assessment of the necessity having regard to all relevant matters, according to the criteria of reasonableness. His Honour was talking in the context of whether an easement should be granted under s 88K of *the Conveyancing Act 1919*, which provides that '*the Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement*'. However, his Honour's observations are applicable in the present matter and are clearly consistent with *Clampett*.
>
> 88. In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> (a) the appropriateness of the particular treatment;
>
> (b) the availability of alternative treatment, and its potential effectiveness;
>
> (c) the cost of the treatment;
>
> (d) the actual or potential effectiveness of the treatment, and
>
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

89. With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.

90. While the above matters are '*useful heads for consideration*', the '*essential question remains whether the treatment was reasonably necessary*' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression '*no reasonable prospect'* should be understood, '*[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content."*

The Arbitrator noted that despite the doctors' reservations regarding the small evidence base for the effectiveness of treatment by way of the provision of an assistance dog, there was unanimity there the worker received a therapeutic benefit in the treatment of her condition by the presence of her dog. Associate-Professor Robertson expressed a pragmatic view that the presence of the dog had enabled the worker to re-engage with employment and improve on her clinical progress.

Accordingly, the Arbitrator held that the provision and maintenance of the assistance dog was reasonably necessary medical treatment.

***Death Claim – Deceased injured his ankle after leaving a third party's work site, suffered a thromboembolism and died – Deceased was the sole director and an employee of the respondent – Held: injury was suffered in the course of employment and not on a journey and employment was a substantial contributing factor – Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Pty Ltd followed***

**Wynn v Elyon Pty Ltd [2020] NSWWCC 63 – Arbitrator Burge – 6 March 2020**

On 2/07/2018, the worker fractured his right ankle while he was crossing a road near the University of Sydney. He was the sole director and an employee of the respondent, which provided IT consulting services to the University, as well as other organisations. As a result of that injury, his leg was immobilised in a moon boot and he developed a DVT. On 12/09/2018, he suffered a thromboembolism and died. The insurer did not dispute the causal connection between the injury and the deceased's death. However, on 8/10/2019, it asserted that the deceased was on a journey home at the time of the injury, or alternatively, he was on a journey between 2 discrete periods of work or in an interval between periods of work.

***Arbitrator Burge*** noted that the lay evidence indicated that it was common for the deceased to leave the University of Sydney during the course of his contract and travel to his office in the Southern Highlands. He would then work at his office until his wife called him to come home and have dinner with the family. There was no direct evidence that the deceased intended to adopt this course of action on the date of his injury, but the Arbitrator inferred that he was going to do so because: (a) The nature of his employment meant that he was not someone who simply left a given worksite and ceased working for the day; (b) His employment required him to be at the University on virtually full-time hours, but this was not the only place he had to work during the period of the contract; and (c) His colleagues stated that he worked odd and extended hours and that he typically attended to emails and made phone calls while travelling back to his office and after he arrived there. He held that the deceased was in the course of his employment when the injury occurred.

The Arbitrator rejected the respondent's argument that employment was not a substantial contributing factor to the injury by reference to s 9A (2) *WCA* and the Court of Appeal's decision in *Badawi v Nexon Asia Pacific Pty Ltd trading as Commander Australia Pty Ltd* [2009] NSWCA 324. He stated:

> 32. In that matter, the appellant sustained a knee injury when she and her supervisor were on a business trip at the Perisher Blue Ski Resort. The purpose of the trip was to secure the resort as a client for the respondent. It had been arranged that the appellant would go skiing with a representative from the resort on the final day of the trip. The resource representative withdrew from the commitment, and the appellant and her partner went skiing at that time. The appellant was skiing, her supervisor telephoned and requested she return to the resort to discuss further business matters before they return to Sydney. She began to ski down the mountain, fell and injured her knee.
>
> 33. The Court of Appeal discussed the meaning of the phrase "*substantial contributing factor*" and determined it involves a causative government. For employment to be a substantial contributing factor to an injury, the causal connection must be "*real and of substance.*" The Court affirmed that the matter set out in section 9A (2) must be taken into account to the extent they are relevant. Basten JA, noted at [128]-[129] that if the conduct out of which the injury arose occurred in the course of employment (as I have found here) and was the effective cause of the injury, then absent misconduct on the part of the employee, the only conclusion reasonably open is that the employment was a substantial contributing factor to the injury. Having found that the deceased's injury in this matter arose out of or in the course of his employment, adopting the approach of Basten JA in *Badawi*, I am satisfied that the deceased's employment was a substantial contributing factor to his injury. As His honour noted, the preferable construction of section 9A is that it does not seek to differentiate between activities arising within the course of employment so that some may be found to be substantial contributing factors and others not.

### *Alleged aggravation of psychological condition under s 4 (b) (ii) WCA – Worker's IME failed to consider prior psychological symptoms and treatment and whether employment was the main contributing factor – award for the respondent entered*

**AX v AY [2020] NSWWCC 71 – Arbitrator Isaksen – 11 March 2020**

In 2011, the worker commenced employment as a labourer. He alleges that between 20/06/2018 and 19/09/2018, he suffered an aggravation of a psychological disease as a result of incidents at work. In September 2019, without admission of liability, the respondent agreed to pay weekly payments from 15/01/2019 to 23/07/2019, for a psychological injury caused by the nature and conditions of employment. The worker then claimed compensation under s 66 *WCA* for 24% WPI for a psychological injury resulting from a disease injury under s 4 (b) (ii) *WCA*, but the insurer disputed this claim.

***Arbitrator Isaksen*** discussed the evidence and stated that in *NSW Police Force v Gurnhill* [2014] NSWWCCPD 12 (*Gurnhill*), DP Roche said (in relation to section 4 (b) (ii) *WCA)*, that the critical point is that before a finding can be made that a worker has suffered an aggravation injury under s 4 (b) (ii), it is first necessary to establish (among other things) that he or she suffers from a disease (*Semlitch* per Windeyer J at 638). He stated:

> 69. The fundamental difficulty which the applicant has in succeeding with this claim and which I raised with Ms Grotte towards the end of the hearing on 28 February 2020, is that the only opinion relied upon by the applicant to support his claim that he sustained a psychological injury in the course of his employment with the respondent is from Dr 2, but Dr 2 does not acknowledge that the applicant suffered a disease or opine that the applicant's employment was the main contributing factor to the aggravation of that disease.

The Arbitrator held that the treating doctors' clinical notes chronicle a consistent history of attendances for depression and the prescribing of anti-depressant medication and are consistent with what Kitto J in *Hussey* describes as "*a pathological condition continuing to operate according to its pathological nature.* However, the worker's IME did not have a history of prior psychological symptoms and treatment for depression and he held that that opinion is flawed and no other medical evidence assisted the worker to establish an injury under s 4 (b) (ii) *WCA.* While one or more of the alleged incidents could have been the main contributing factor to the aggravation of the psychological disease, no treating doctor provided that opinion.

Accordingly, the Arbitrator entered an award for the respondent.