Bulletin

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ISSUE NUMBER 64

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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Supreme Court of NSW – Judicial Review Decisions

Judicial review — Plaintiff not permitted to rely upon surveillance evidence commissioned and obtained after the MAC issued — Held; the MAP did not err in rejecting the evidence

CSR Limited v Ewins [2020] NSWSC 511 – Adamson J – 8/05/2020

The worker suffered a psychological injury and on 24/04/2019, Dr Mason (AMS) issued a MAC that assessed 17% WPI. In reaching that assessment, he considered an opinion from Dr Teoh (qualified by the worker's solicitors), who assessed class 3 for the PIRS category of "Social and recreational activities" and stated that the worker had a significant loss of interest in her usual activities and social isolation, and assessed 17% WPI. He also considered a report from Dr Roberts (qualified by the Plaintiff) dated 3/11/2017, noted that the worker had gone back to church. The AMS agreed with Dr Teoh's assessment and for "Social and recreational activities" and found that the worker was moderately impaired.

On 14/05/2019, the Plaintiff instructed investigators to conduct surveillance of the worker, "*to expose video footage of her engaging in activities*" and "*to confirm the current activities*". The investigators conducted surveillance on 17/05/2019, 18/05/2019, 19/05/2019 and 26/05/2019, during which the worker was seen to collect a young child and go to church on 19/05/2019 and 26/05/2019, but she was not otherwise sighted.

On 16/05/2019, the Plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and sought an oral hearing before a MAP "*having regard to the volume of material admitted in the proceedings and the number of errors relied on and says that while re-examination by a Medical Appeal Panel may be necessary consideration of that re-examination should follow the oral hearing sought*".

On 7/06/2019, the Plaintiff sought to rely upon the surveillance evidence in the appeal and it also sought to amend the Appeal to rely upon s 327 (3) (b) *WIMA.* It asserted that the worker's complaints to the AMS were "*clearly false and cannot be relied upon for the purpose of determining impairment being specifically contradicted by the observation of her activities… none of the assertions made… can be accepted without independent and clear corroboration which corroboration is not provided otherwise within that Certificate…*" the Plaintiff also argued that the worker's complaints should be given no weight or consideration at all "*having regard to their being specifically contradicted by objective observations*" and that "*…the same considerations apply in respect of issues of travel and social functioning. There is simply no basis at all (other than vague and unfounded complaints) for placing the Respondent Worker in anything other than Class 1*".

The worker opposed the applications to amend the appeal and to admit the surveillance evidence and argued that the attempt to rely upon the "*new*" evidence was misguided, because:

> "…8. The surveillance material in the first instance is not material that was before the AMS as it came into existence after the MAC was issued and consequently has no probative value to the issue before the registrar that is whether the AMS was in error with respect to his clinical judgement on the day he saw the worker.
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> 9. In the second instance the attempt to rely on the surveillance report places the worker at a distinct disadvantage as she does not, in the clinical setting, have the opportunity of discussing the relevance of same with an AMS tasked to perform the PIRS assessment.

On 27/08/2019, the MAP rejected the fresh evidence and cited a number of authorities regarding the admission of fresh evidence, including *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435 and *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134. In *Quade* the Court stated (at [21]:

> While it is not necessary that the appellate court be persuaded in such a case that it is '*almost certain*' or '*reasonably clear*' that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.

The MAP referred to *Workers Compensation Nominal Insurer v Bui* [2014] NSWSC 832 (McCallum J) and *State of New South Wales v Ali* [2018] NSWSC 1783 (Harrison J), regarding the statutory context and s 327 *WIMA.* It found that there was no evidence or explanation as to why the evidence could not have been obtained before the proceedings commenced or before the AMS' examination. It held that the evidence was either irrelevant or of marginal relevance, as it did not show the worker socialising, maintaining relationships, travelling, concentrating or demonstrating employment capacity that would impact on any of the assumptions or clinical conclusions made by the AMS.

The MAP rejected the Plaintiff's application for an oral hearing and held that there was sufficient evidence before it and the AMS and that the written submissions identified alleged errors and grounds of appeal in sufficient detail to enable the appeal to be determined on the papers. It dismissed the appeal and confirmed the MAC.

The Plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision. It alleged that the MAP erred: (1) in its consideration of the additional relevant information and in determining that it could have been obtained before the medical assessment; (2) in its rejection of the additional relevant evidence; and (3) by denying it procedural fairness in determining the matter on a basis not put by or to the parties.

Adamson J rejected grounds (1) and (2). Her Honour held that reasons for decision must be read fairly and as a whole. In order to determine whether the ground under s 327 (3) (b) *WIMA* was made out, the MAP was required to apply the statutory test – whether the report constituted additional relevant information that was not available to, or could not have reasonably been obtained by, the Employer before the assessment by the AMS. It was a matter for the MAP whether it chose to start by determining relevance or to determine whether the report was not available to, or could not reasonably have been obtained by, the Employer before the AMS' assessment. If it decided either of those issues against the Employer, it was not necessary to proceed further to determine the other matter. It is plain from the SOR that the MAP was satisfied that the surveillance report was not information that was not available to, or could not reasonably have been obtained by, the Employer before the AMS' medical assessment. In any event, the discretion to receive the evidence under s 328 (3) *WIMA* was not reached because of the MAP's finding that the evidence would not qualify for reception in any event.

Her Honour held that the MAP's finding regarding s 327 (3) (b) *WIMA* was plainly open to it and while its comments regarding the relevance of the evidence was obiter, it was entitled to express its view about relevance for the sake of completeness. Rejecting the Plaintiff's argument that the MAP erred in failing to have regard to the objective of fairness in construing s 327 *WIMA,* Her Honour stated:

> 54. …There are limits to the extent to which such broad objects and objectives ought be taken into account by those who are bound by legislation. In *Russo v Aiello* (2003) 215 CLR 643; [2003] HCA 53, Gleeson CJ said, in the context of notification of claims under the *Motor Accidents Act 1988 (NSW),* at [7]:
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> > The various statements as to the objects of the legislation show that the legislature made its own evaluation of the importance of prompt notification of claims, and constructed a statutory scheme around that evaluation. It is not for a court to re-assess that policy on a case by case basis.
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> 55. The statement also applies to the Panel. The Panel was bound to act in accordance with the Act and, in particular, ss 327 and 328. It had no authority to use the system objectives to undermine the express words of those sections on the basis of its understanding of the term "fair". The Panel applied the terms of ss 327 and 328 to its task in a way which does not demonstrate legal error.
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> 56. The Employer cannot complain of the Panel's conclusions when it failed to make submissions to the contrary, having availed itself of the opportunity to do so in its submissions dated 20 June 2019. While the Panel may have said more than it needed to on the contents of the report, it said enough to show that it applied s 327 (3) (b) and s 328 (3) in accordance with their terms. For the reasons given above, I am not satisfied that either of grounds 1 or 2 is made out.

Her Honour also rejected ground (3). She held that the MAP was obliged by cl 5.16 of the Guidelines to conduct a preliminary hearing of the matter. However, there is nothing in the Guidelines or the *WIMA* that required it to decide, before it determined any of the grounds of appeal, which procedure it would adopt for the remaining grounds of appeal. She stated:

> 63. … Indeed, the question of which procedure was to be adopted depended, at least in part, on the Panel's determination of the s 327 (3) (b) ground. The reason for this is that it was accepted by the Claimant that, if that ground was made out and the surveillance report received into evidence under s 328 (3), an oral hearing would be required. For this reason, it was open to the Panel to adopt an "*on-the-papers*" review of the s 327 (3) (b) ground, determine the ground and then consider which procedure to adopt for the balance of the grounds.

Noting that the Plaintiff argued that the MAP could use the surveillance report to undermine the worker's history and therefore revise an assessment under PIRS from Class 3 to Class 1, thereby reducing the percentage WPI, her Honour stated:

> 65. In these circumstances, the Panel was obliged to undertake a preliminary review of the matter (under cl 5.16 of the Guidelines) and was entitled to adopt the procedure of an "*on-the-papers*" review for the s 327 (3) (b) ground and the s 328 (3) question and then decide that an oral hearing was not necessary for the balance of the grounds. I am not persuaded that the approach taken by the Panel was other than in accordance with the Act, the Guidelines or the general law in relation to procedural fairness.
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> 66. I reject Mr Sheldon's argument that the Panel was obliged to put the Employer on notice that it was contemplating finding that the report did not constitute additional information that was not available to, or could not reasonably have been obtained by, the Employer before the assessment by the AMS. As the appellant to the Panel, it was for the Employer to persuade the Panel that the ground was made out. Neither the Employer's nor the Claimant's submissions specifically addressed that question. Nonetheless the Panel was obliged to determine it. Its role was "*neither arbitral nor adjudicative*": *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [47]. Procedural fairness requires only that a party be given an opportunity to make submission. That opportunity was provided to the Employer. It was its choice not to make submissions addressed to that question in its submissions of 20 June 2019. It cannot, in these circumstances, complain when the Panel made a finding on a matter which was squarely raised by the further ground which the Employer had propounded but which had not been addressed in its submissions.

Her Honour dismissed the Summons and made a costs order against the Plaintiff.

Judicial review – proceedings resolved between the parties following the decision of the Court of Appeal in Hunter Quarries Pty Limited v Mexon [2018] NSWCA 178 – Consent orders made that quashed the MAC, directed the MAP to issue a MAC certifying 0% WPI as a result of the injury and directed the WCC to issue a COD entering an award for the respondent

Agricultural and Development Holdings v Parker [2019] NSWSC 1338 – Adamson J – 20/05/2020

This application follows from the decision of the Court of Appeal in *Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator of the Estate of the late Ryan Messenger* [2018] NSWCA 178 (*Hunter Quarries*). In that matter, the deceased died on 28/07/2013, as a result of injuries suffered at work on 27/07/2013. On 10/10/2017, WCC issued a COD that awarded the deceased's widow (as executrix) compensation under s 66 *WCA* for 100% WPI. The COD was based upon a MAC issued by Dr Lahz.

On 16/08/2018, the Court of Appeal held that the expression "*permanent impairment*" in ss 65 and 66 *WCA* involved some lasting diminution in a worker's function and did not include an impairment resulting from a serious injury from which the worker died within a short time.

By an email dated 15/05/2019 to the plaintiff's solicitors, the solicitors for the first defendant (the deceased's widow) accepted that the decision in *Hunter Quarries* required that the MAC dated 5/09/2017 be quashed and that in lieu thereof: (1) the AMS should be directed to issue a MAC that certifies that there is no permanent impairment resulting from the injury; and (2) the WCC be directed to issue a COD that enters an award for the respondent.

Adamson J noted that the proceedings were resolved on those terms and she was satisfied that it was appropriate for her to make the consent orders in chambers.

WCC – Presidential Decisions

Principles that apply to disturbing factual findings – Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833, Raulston v Toll Pty Ltd [2011] NSWWCCPD 25 and Najdovski v Crnojivic [2008] NSWCA 175 considered and applied

French v Hayes [2020] NSWWCCPD 26 – Deputy President Wood – 7/05/2020

On 28/01/1998, the worker injured his neck and suffered symptoms in both arms when he was struck by a falling aluminium plank at work. On 4/12/2002, the employer agreed to pay him compensation under s 66 *WCA* for 25% permanent impairment of the neck and for pain and suffering. On 29/02/2012, a further claim was resolved on terms that he suffered a further 5% permanent impairment of the neck, 15% permanent loss of efficient use of the left arm at or above the elbow and 5% permanent loss of use of the right arm at or above the elbow.

The worker claimed weekly payments, s 60 expenses and lump sum compensation under s 66 WCA and an assessment of WPI for purposes of satisfying the threshold under s 32A *WCA.* However, the appellant disputed the claim.

On 29/05/2017, the worker underwent surgery to his cervical spine (2-level anterior discectomy and fusion at the C5/6 and C6/7 levels), which was performed under the public health system.

Senior Arbitrator Capel conducted an arbitration and noted the following issues: (1) Was the surgery reasonably necessary as a result of the injury on 28/01/1998; (2) the extent and quantification of the entitlement to weekly compensation; (3) liability for the s 60 expenses; and (4) quantification of the entitlement under s 66 *WCA.* On 30/10/2019, he issued a COD, in which he found that the surgery was reasonably necessary as a result of the injury. He remitted the s 66 and threshold disputes to an AMS for assessment and deferred the claim for weekly payments pending the issue of a MAC.

In relation to causation, the Senior Arbitrator referred to the High Court authority of *Comcare v Martin*, but said that the causal chain of connection described in *Kooragang Cement Pty Ltd v Bates* still had application in the Commission. He cited Kirby P's observation in *Kooragang* that notions of proximate cause were no longer accepted and that the mere passage of time between the work injury and the subsequent incapacity or death was not determinative of the entitlement to compensation. He also referred to the decision of Burke CCJ in *Rose v Health Commission (NSW)*, in which his Honour considered what constituted "*reasonable treatment*" for the purposes of s 10 of the *Workers' Compensation Act 1926 (the 1926 Act)*, which was the equivalent provision to s 60 *WCA.* He cited the relevant passages from that decision in which his Honour concluded that the Court should have regard to: (a) the medical evidence as to whether the treatment was appropriate; (b) whether alternate treatment was available; (c) the cost of the

treatment; (d) the actual or potential effectiveness of the treatment, and (e) the place that treatment took in the context of the usual treatment for the condition.

The Senior Arbitrator also referred to a later decision of Burke CCJ in *Bartolo v Western Sydney Area Health Service*, in which his Honour referred to the test as being whether it is better for the worker to have the treatment or not. However, he noted that in *Diab v NRMA Ltd* Roche DP questioned that approach and approved the approach in *Rose*. Roche DP also summarised the relevant principles for consideration and observed that all treatment carries a risk, so that a poor outcome does not necessarily indicate that the treatment was not reasonably necessary.

The Senior Arbitrator also held that a condition can have multiple causes and the worker needs to establish that the injury materially contributed to the need for surgery: *Murphy v Allity Management Services.* He noted that the worker's claim was supported by opinions from Dr Winder, Dr O'Keefe and A/Prof Dan and he opined that Dr Winder's views should carry more weight because, as a treating specialist, he had reviewed the worker on a number of occasions over several years, and he attributed the need for the surgery to the injury in 1998. He rejected the contrary view of Dr Casikar, which was the basis for the liability dispute and concluded, based upon the common-sense test of causation in *Kooragang*, that the 1998 injury materially contributed to the need for the surgery in 2017. He found that the surgery was intended and had the potential to alleviate the worker's symptoms although it had unfortunately not done so, and in applying *Diab* he concluded that the poor outcome did not mean that it was not reasonably necessary and an appropriate form of treatment. No alternative forms of treatment were available and the cost of the surgery was not unreasonable. Therefore, the surgery was reasonably necessary treatment as a result of the work injury.

On 14/11/2019, Dr Anderson issued a MAC, which assessed 29% WPI (cervical spine), 7% WPI (left upper extremity) and 5% WPI (right upper extremity), 36% permanent impairment of the neck, 10% permanent loss of efficient use of the right arm at or above the elbow and 20% permanent loss of efficient use of the left arm at or above the elbow.

The appellant appealed against the COD and alleged that the Senior Arbitrator erred as follows: (1) in fact in accepting the opinions of Dr Winder, Dr O'Keefe and A/Prof Dan; (2) in fact by determining that the surgery was causally related to the work injury; (3) in fact and law by determining that the surgery was reasonably necessary treatment; and (4) in fact in determining that the surgery did not cause a break in the chain of causal connection.

Deputy President Wood stated that in *Najdovski v Crnojlovic* [2008] NSWCA, Basten JA (Allsop P agreeing) summarised the principles that apply to an appeal from a primary judge's findings of fact, as follows:

> Once primary facts have been found and relevant inferences drawn, the ultimate conclusion may depend upon an evaluative judgment which may not be amenable to precise justification. The constraints which apply to a review of such a judgment recognise that views may reasonably differ as to the appropriate result and that error will not be found if the result is within the appropriate range. It may be that error is demonstrated in failing to reveal a process of reasoning where, although relevant and material facts have been found, the basis for the final conclusion remains impenetrable. There may be occasions in which such a result will demonstrate a failure to fulfil that part of the judicial function which requires revelation of the reasoning process, but more commonly such a case will be resolvable on the basis that the findings of fact are not as they appear or that there is otherwise an unrevealed error of principle.

Wood DP held that the principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505, which Roche DP summarised in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25, apply to this matter.

Wood DP rejected ground (1). While she noted that the appellant argued that the Senior Arbitrator did not merely choose between conclusions equally open to him, in circumstances where there was no preponderant view, as discussed by the Full Court in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833. She found that there was no conflict in the radiological evidence upon which such an argument could be based. The appellant did not put any other convincing basis upon which an error of the kind required to disturb the Senior Arbitrator's findings could be established. He did not overlook material facts or give undue or too little weight to the evidence and an opposite inference to that chosen by the Senior Arbitrator was not so preponderant as to establish that he that was wrong.

Wood DP rejected ground (2). She held that the Senior Arbitrator considered and correctly applied the test set out in *Murphy* and she did not accept that the reasons for the surgery did not exist.

Wood DP rejected ground (3) and held that the Senior Arbitrator correctly applied the decision in *Diab* and provided cogent reasons, supported by medical evidence, for finding that the surgery was reasonably necessary.

Wood DP also rejected ground (4). She noted that the appellant argued that the surgery was a *novus actus interveniens* because it was not reasonably necessary, which was the subject of grounds (2) and (3). She held that the Senior Arbitrator did not err in accepting the opinions of Dr Winder, Dr O'Keefe and A/Prof Dan over the opinions of the AMS and Dr Casikar. As a result, there was no evidence supporting the appellant's claim that the worker's loss of earning capacity and impairments following the surgery were independent of the 1998 injury and that the surgery severed the causal chain.

Accordingly, Wood DP confirmed the COD. She remitted the matter to the Senior Arbitrator to determine the remaining issues.

WCC – Medical Appeal Decisions

Psychological injury – AMS did not make a demonstrable error or apply incorrect assessment criteria

King v State of NSW (NSW Police Force) [2020] NSWWCCMA 79 – Arbitrator Peacock, Dr L Kossoff & Dr M Kong – 28/04/2020

The appellant suffered a work-related psychological injury on 9/01/2018 (deemed). On 7/01/2020, Dr Shaikh issued a MAC, which assessed 9% WPI, which did not satisfy the threshold under s 65A *WCA.*

The appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) *WIMA* and he particularly complained about the assessments in 3 PIRS Categories (Social and Recreational Activities, Travel and Social Functioning). In relation to s 327 (3) (b) *WIMA*, he sought to rely upon a further statement dated 29/01/2020.

The MAP determined that a further medical examination was not required and determined the appeal on the papers. It held that the AMS' role is to make an independent assessment on the day of examination, not based on self-report alone, and using their clinical expertise and in this matter, the AMS disagreed with the PIRS assessments made by Dr Scurrah (the worker's qualified specialist) in relation to social and recreational activities (class 3) and social functioning (class 3). It found no discernible error in the AMS' ratings in the relevant PIRS categories and that the AMS did not apply incorrect assessment criteria.

The MAP held that the AMS provided reasons for each rating and a clear and reasoned explanation, based upon his clinical expertise, for why he did not accept Dr Scurrah's ratings. Accordingly, it confirmed the MAC.

Assessment for visual defect - No demonstrable error and AMS did not exceed jurisdiction by finding that an absolute field defect was artifactual and not assessable

Edwards v Secretary, Department of Education [2020] NSWWCCMA 81 – Arbitrator Dalley, Dr H Stern & Dr M Delaney – 30/04/2020

This is the first of 2 medical appeal decisions involving this appellant.

On 29/01/2010, the appellant fell at work and struck her head. She suffered an intracerebral haemorrhage in the left occipital lobe and was sound to have suffered right homonymous hemianopia and persisting problems with loss of peripheral vision, headaches and dizziness.

In January 2019, Dr Bors (the appellant's qualified ophthalmologist) assessed 25% WPI (visual system). The respondent qualified Dr Steiner, who assessed 8% WPI. The dispute was referred to an AMS.

On 17/01/2020, Dr Wechsler issued a MAC that assessed 10% WPI. He stated that the appellant's visual field defect is relative and not absolute and cannot be assessed under the AMA4 Guides. He stated that the appellant's dyslexia is a direct result of her relative left inferior homonymous visual field defect because she lacks the capacity to quickly scan letters or words right of her fixation point. This lack of visual function is not reflected in a measured decrease in visual fields because there is no absolute scotoma to be measured. He noted that Dr Bors found an absolute field defect, but he disagreed with that finding. Instead, he agreed with the findings and opinion of Dr Sanbach, who assessed a relative field defect.

The appellant appealed against the MAC and alleged that it contained a demonstrable error and that the AMS erred: (1) in failing to assess "*absolute field defect*"; (2) to the extent that he had "*made findings on the nature and extent of the referred injury for assessment*", which was not the role of the AMS; (3) in failing to assess "*inferior field changes*"; and (4) in failing to assess impairment arising from inferior field changes.

The MAP held that the AMS' opinion was based upon his consideration of the test results and appropriate examination of the appellant and was open to him in the circumstances. The AMS' findings make it clear that there was no "*absolute field defect*" to assess arising from the subject injury and he provided a full and comprehensive explanation for his assessment and conclusion. No error was demonstrated. The AMS also explained that any absolute field defect was artifactual, that is, due to physical factors unrelated to the subject injury, and that this was due to the upper eyelids. That explanation was open on the evidence and available to the AMS and no further explanation was required. The AMS was required to assess "*the degree of permanent impairment of the worker as a result of an injury*" (section 319 (c) of *the 1998 Act*). A visual field defect resulting from other causes was not to be considered for assessment and no error was demonstrated.

With respect to the role of the AMS, the MAP stated:

> 30. In *Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79 (at [250]) Roche DP said:
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> > … In a claim for lump-sum compensation, the physical consequences of the injury (in relation to the assessment of whole person impairment as a result of the injury) are not within the exclusive jurisdiction of the Commission. They are within the exclusive jurisdiction of the AMS.

31. In making that observation the Deputy President took into account the reasoning of Emmett JA in *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd* [2014] NSWCA 264 (*Bindah*) where His Honour said (at [110]):

> However, that is not to say that there is no scope for an approved medical specialist or Appeal Panel to make findings of fact necessary for the performance of the function that they are given under the Management Act. Questions of causation are not foreign to medical disputes within the meaning of that term when used in the Management Act. A medical dispute is a dispute about or a question about any of the matters set out in s 319. Those matters include the degree of permanent impairment of a worker as a result of an injury, and whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality. The words in bold in relation to each of those matters call for a determination of a causal connection. Thus, the language of causal connection is squarely within the definition of "*medical dispute*". Having regard to the conclusive effect of s 326, it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues. There is no bright line delineating causation from medical evidence. Issues of causation may well involve disputes between medical experts that must be resolved by an approved medical specialist or by an Appeal Panel (see *Zanardo v Tolevski* [2013] NSWCA 449 at [35]).

32. The assessment of impairment arising from injury to the visual system necessarily involved the AMS in determining what impairment arises from the injury and what was attributable to other unrelated factors. The findings of the AMS were within his role as defined in *Bindah* and *Jaffarie*, and in accordance with the Guidelines and Chapter 2 of AMA 5 which sets out the "*Rules for Evaluation*" of permanent impairment. No error is demonstrated in this regard.

The MAP held that the AMS correctly assessed inferior field changes as relative and accordingly no error was demonstrated. Accordingly, it confirmed the MAC.

Brain injury - appeal from assessment of 14% WPI (9% visual system & 5% nervous system-brain) – Whether AMS erred in attributing memory and cognitive impairment to pre-existing depression and microvascular disease – whether AMS failed to assess emotional or behavioural status or dyslexia acquired after injury – MAC confirmed

Edwards v Secretary, Department of Education [2020] NSWWCCMA 84 – Arbitrator Perrignon, Dr M Davies & Dr M Fearnside – 4/05/2020

This appeal arises from the facts reported in the previous decision, but relates to a MAC issued on 17/01/2020 by Dr Fitzsimons, which assessed 5% WPI (nervous system - brain) and 14% combined WPI. The AMS noted that the worker felt that she was not depressed before the accident, but also noted that the treating GP provided quite extensive documentation of depression and hypertension around 2005, 2006 , 2007 and 2008. On examination, the AMS found no objectively identifiable cognitive deficits and she stated:

> … It is perfectly possible and not at all uncommon for a patient with pathology restricted to an occipital lobe to have no more general neurological or cognitive manifestations, which is not to say that other intricate brain connectivities may not sometimes be affected. Subtle changes (and not-so-subtle changes) may be extremely difficult to distinguish from the effects of depression and other factors on speed of processing and memory.

> The fact that her [Glasgow Coma Score] was 14/15 in the ambulance, rising to 15/15 when seen at hospital argues against there being likely significant long term cognitive deficits. Likewise, the absence of "significant medically verified PTA [post traumatic amnesia]" means that her long-term prognosis in relation to memory should be good. (I do not consider the Registrar's comments of a possible few minutes PTA to be significant, and indeed she did have good recall of events surrounding the accident).
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> It is clear that her senior treating specialist - Dr Kathleen McCarthy, Brain Injury Rehabilitation Specialist, Westmead Hospital, definitely did not think that she would have long term cognitive consequences of brain injury (see quotes above). Dr Alexander Walker, the neuropsychologist who conducted the early neuropsychology tests, was of much the same opinion, although she did note a minor relative difficulty with visual as opposed to auditory memory (which could be construed as consistent with occipital lobe haemorrhage). Most subsequent neuropsychologists expressed a similar opinion, although Dr Pegum (October 2017) reported some apparent deterioration and some apparent improvement in subdomains since 2010.
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> She undoubtedly has had multiple vascular risk factors (including hypertension, high cholesterol, diabetes mellitus and obesity) for brain microvascular disease, and these rather than her haemorrhage would be responsible for any progression in cognitive deterioration since the accident.
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> Taking these various reports and factors together, including the pre-accident documentation, I consider that her depressive symptoms and emotional/relationship issues which were particularly manifest at school and which were certainly present before the accident are likely to be primarily responsible for her present cognitive issues, with a contribution from microvascular/brain ischemic factors to any progression, and that these factors interacted with her personal situation at the school/workplace.

The AMS did not rate permanent impairment due to emotional/behavioural status and stated that the evidence indicates that these issues were long-standing and pre-dated the accident and were not due to direct physical consequences of the brain injury.

The appellant appealed and alleged that the MAC contained a demonstrable error. She asserted that the AMS erred: (1) in finding that pre-existing depression and microvascular disease were primarily responsible for, and a contributor to, clinical dementia; (2) in finding that pre-existing depression precluded an assessment of emotional or behavioural status due to brain injury; (3) in finding that the deterioration of memory and cognitive impairment resulted from depression and microvascular disease rather than from injury; and (4) in failing to consider her profound history of acquired dyslexia post-head injury, which was identified by Dr Wechsler.

The MAP rejected ground (1) and stated that the AMS exercised the power to determine whether the whole or any part of the cognitive impairment resulted from the injury and held that only part of it resulted from the injury. She provided detailed reasons and her conclusion was open to her on the evidence and does not disclose any error.

The MAP rejected ground (2) and held that the AMS assessed impairment by constructing a clinical dementia rating in accordance with Table 13-5 and it would have been an error to assess by reference to behaviour and mood.

The MAP rejected ground (3). It noted that the appellant alleged that memory was not assessed and held that that allegation is mistaken. The assessment of 0.5 was reasonably open to the AMS and did not involve any error.

The MAP also rejected ground (4) and held that it was not satisfied that the AMS failed to consider reading difficulties caused by the visual field defect when constructing the Clinical Dementia Rating. On the contrary, the AMS referred to it when assessing "*home and hobbies*".

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Death of worker in a MVA in the course of employment – dispute re: identification of employer - meaning of "premises" in s 20 (6) WCA does not include the motor vehicle that the deceased was driving at the time of death – fourth respondent was the employer & the Nominal insurer is liable as that employer was uninsured

Waitoa v Laundry Logistics Management Pty Limited, Workers Compensation Nominal Insurer & Anor [2020] NSWWCC 128 – Senior Arbitrator Bamber – 23/04/2020

On 15/01/2019, the worker died as a result of injuries suffered in a MVA. His widow (the applicant) and daughter (third respondent) were dependent upon him at the date of death. The applicant claimed lump sum death benefits and weekly payments on behalf of the third respondent, but the third respondent sought an apportionment of the s 25 benefits in her favour, which the applicant opposed. Both the applicant and third respondent alleged that the worker was employed by the first respondent, but its insurer disputed that allegation. In the alternative, they alleged that the uninsured fourth respondent was the employer.

Senior Arbitrator Bamber noted that the deceased signed an employment contract with the fourth respondent on 1/06/2018. She noted that counsel for the fourth respondent argued that if the Commission found that it was the employer, s 20 *WCA* would operate to create a liability in the first respondent, as principal given that it was uninsured. However, she noted that s 20 (6) provides:

> This section does not apply in any case where the injury occurred elsewhere than on, in or about premises on which the principal has undertaken to execute the work or which is otherwise under the principal's control or management, but nothing in the foregoing affects the liability of the contractor under any other provisions of this Act.

The fourth respondent argued that a vehicle should be regarded as "*premises*", as it was operating a courier business, and the provision should be interpreted beneficially. However, the Senior Arbitrator held that as the applicant and second respondent could receive compensation from the Nominal Insurer, they did not receive the benefit of s 20. She stated that the meaning of "*premises*" in s 20 (6) *WCA* is not defined in the section or in s 4 *WCA* or s 4 *WIMA.* It argued that s 238 *WIMA* define "*premises*" to include a vehicle. However, the Senior Arbitrator noted that the opening words of s 238 (1) provides "*In this section*" and she held that this definition does not apply beyond s 238. In any event, s 238 deals with powers of entry by an inspector and involves different considerations to s 20 *WCA.* She stated:

> 187. I have not found any cases dealing with a driver injured in the course of driving and section 20 being applied because the vehicle was considered part of the premises of the principal. The facts in *Lanesbury v Air Card Pty Ltd* [2001] NSWCC 180, involved a worker employed to deliver pharmaceutical goods to a pharmacy. The worker, Ms Lanesbury, was injured after she got out of her vehicle but before entering the pharmacy. Curtis J in *Lanesbury* found:

> 13. I am satisfied that as principal Elite employing the services of Air Card Pty Ltd undertook to the pharmacist that the pharmaceuticals would be delivered to the pharmacist's premises. Air Card Pty Ltd, the applicant's employer undertook to execute the work of this delivery; that is, work which required that the applicant go to a place about the premises of the pharmacist.
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> 14. The phrase "*about the premises*" is a geographical expression denoting close propinquity to the premises (*Powell v Brown* [1899] 1 QB 157 (CA)) – the provision of a statute being satisfied in that case where the injury occurred while the worker was loading a cart in the street near the entrance to the premises.
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> 15. I am referred by Mr Bradford for the respondent to the decision of *Allbut and Coramba Milling Co Ltd v George Kydd King* 1928 WCCR 73. That case, however dealt with facts distinguishable from the present in that the worker, at the time of his injury, was travelling on a daily journey between his place of abode and place of employment.
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> 16. In the present case the applicant suffered injury when she was geographically about the premises at which the work of delivery had to be performed. I am satisfied that the applicant was an employee of Air Card (this is not in dispute) and that Air Card was the principal in relation to a contract to perform work for Elite Express Pty Ltd. The applicant prima facie is entitled to succeed.

188. In the *Oxford English Dictionary*, the word "*premises*" is relevantly defined to mean:

> A house or building together with its grounds, outhouses etc., esp. a building or part of a building that house a business.

189. This definition is consistent with Curtis J finding the injury was suffered when Ms Lanesbury was geographically about the premises at which the work of delivery had to be performed, that is the pharmacy shop.

190. Judge Curtis found that Air Card Pty Ltd, Ms Lanesbury's employer, undertook to execute the work of this delivery; that is, work which required that the applicant go to a place about the premises of the pharmacist. I find that N&F, Mr Waitoa's employer, undertook to execute the work of delivery of linen for LLM which in turn was contractually obliged to have the linen delivered to various sites, some of which were the premises of SPL. I find the pick-up and delivery sites were not the premises of LLM.

The Senior Arbitrator held that the normal meaning of "*premises*" does not include a vehicle and that the deceased did not die on, in or about premises on which the principal has undertaken to execute the work or which is otherwise under the principal's control or management. Therefore, s 20 (6) *WCA* precludes a finding that the first respondent is liable as principal to pay the compensation that otherwise the fourth respondent tas employer is liable to pay.

Accordingly, the Senior Arbitrator entered an award for the First Respondent and made orders for the apportionment of benefits payable under s 25 *WCA* and orders for the payment of benefits to the Second Respondent under s 26 *WCA.*

WCC has power to assess the extent of permanent impairment and pre-existing impairment under s 323 WIMA

McGill v Maitland City Bowls, Sports & Recreation Club Ltd [2020] NSWWCC 134 – Arbitrator Harris – 28/04/2020

The worker injured both knees at work on 8/12/2004 (deemed). She claimed compensation under s 66 *WCA* for both lower extremities and the skin.

Arbitrator Harris conducted a teleconference, during which the parties agreed that he should determine the degree of permanent impairment consistent with the President's decision in *Etherton v ISS Property Services Pty Ltd (citation?).* He noted that on 28/02/2011, Dr O'Keefe issued a MAC, which assessed permanent impairment of both lower extremities as a result of the nature and conditions of employment from April 1990 to 8/12/2004 (deemed date of injury). He assessed 8% WPI (right leg) and 4% WPI (left leg), applied a 0% deduction under s 323 *WIMA* and assessed combined 12% WPI.

The Arbitrator discussed the parties' medical evidence and noted that both Dr Ghabrial and Dr Bentivoglio concurred that there were assessable impairments of both lower extremities and the skin and that the right total knee replacement was required as a result of the work injury. Both doctors assessed scarring at 2% WPI and the Arbitrator adopted that assessment. He stated:

> 63. In *Secretary, Department of Education v Johnson* [2019] NSWCA 321 (*Johnson*) Emmett JA stated (at [55]):
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> > The phrase '*the degree of permanent impairment of the person as a result of an injury'* appears in both ss 319 (c) and s 326 (1) (a) of the *Management Act*. That composite phrase requires an enquiry as to the causal connection between the degree, or percentage, of assessed permanent impairment of a worker, on the one hand, and the compensable injury, on the other. That is to say, it was necessary for the AMS and the Appeal Panel to assess the degree, or percentage, of whole person impairment of the Worker that was caused by or is attributable to the First Injury. In doing so, common law principles of causation in tort are to be applied.

The Arbitrator held that para 3.20 of *the Guidelines* modifies Table 17-31 of AMA 5 and provides that only the compartment with the "*major impairment*" is used and the different compartments cannot be added or combined. With respect to the left knee, he noted that Dr O'Keefe previously assessed the patellofemoral joint at 2 mm and Dr Ghabrial agreed with that assessment, which amounts to 4% WPI Under para 3.20 of *the Guidelines*, the worker is only entitled to the greatest assessment of 4% for loss of cartilage in the patellofemoral joint and he adopted Dr O'Keefe's assessment of 0% under s 323 *WIMA.*

With respect to the right knee, the Arbitrator accepted Dr Bentivoglio's opinion and assessed 30% WPI. With respect to s 323 *WIMA*, he held that the worker had a genetic predisposition to arthritis, which is not a pre-existing condition within the meaning of s 323. However, he regarded Dr Bentivoglio's assessment of a 50% deduction as being inconsistent with the AMS' opinion in 2011 that the whole condition in the patello-femoral compartment was caused by the work injury. As the degree of pre-existing impairment was difficult to determine, he applied a deductible of 10% under s 323 *WIMA.*

Accordingly, the Arbitrator assessed combined 31% WPI.

Psychological injury wholly or predominantly caused by reasonable action with respect to the provision of employment benefits

Ceccato v Australian Steel Mill Services Pty Ltd [2020] NSWWCC 131 – Arbitrator McDonald – 28/04/2020

The worker allegedly suffered a psychological injury due to bullying and harassment at work on 22/05/2017. The respondent conceded that he suffered a psychological injury, but argued that it was wholly or predominantly caused by reasonable action with respect to the provision of employment benefits.

The worker claimed weekly compensation from 22/05/2017 to 10/05/2018 and continuing weekly payments from 2/05/2019. The respondent did not dispute that he was incapacitated for work and the parties ultimately agreed that PIAWE was $2,287.74.

Arbitrator McDonald noted that in 2015, the respondent introduced new employment contracts, which removed the right to unlimited sick leave, reduced redundancy entitlements and removed company cars from salary packages. Employees were given a choice of keeping the car and not receiving a pay rise or relinquishing the car and receiving a salary component for it. They were asked to sign a letter indicating their choice and were advised that the same choices would be offered at the end of the lease period.

The worker asserted that he was 8 weeks worse off under the new EBA and he suffered a major loss of the redundancy benefit. He elected not to sign the contract and he was the only employee that did so. He decided to keep the car, as a result of which he did not receive a pay rise in 2015 or 2016 and he was the only employee who did not receive a pay rise. He was not happy about this, but he continued to work. However, in November 2016, the respondent gave him a letter stating that it was going to take the company vehicle in July 2017, and it would no longer be part of his package. He considered this to be unreasonable and that from late-2016 until he went on "*stress leave*" in 2017, there were "*ethical issues at work that were compromising my integrity, as I felt that BlueScope was being deliberately misled on contractual items related to my role.*" His employment was terminated on 18/07/2019.

After considering all of the evidence, the Arbitrator held that the injury was predominantly caused by the action taken by the respondent with respect to the new contract. There was no contemporaneous evidence that the 4 broad issues raised by the worker in his response to the dispute notice, or any perceived interference in his role, contributed to him ceasing work. She held that the overwhelming tenor of the evidence is that the issues that led to the injury and the cessation of work were those related to the contract.

The Arbitrator held that whether the respondent's action was reasonable involves an objective test and she cited Geraghty J's decision in *Irwin v Director General of School Education* (unreported decision dated 18/06/1998) as follows:

> The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness.

The Arbitrator found that the worker's perceptions of the respondent's conduct are not relevant to that determination. While he asserted that he felt pressure to sign the new contract, under the insinuation of termination if he did not agree to do so, none of the correspondence about employment benefits raised any possibility of the termination of his employment for any reason. While the worker asserted a workplace right to a company car, the respondent's witnesses explained the way in which employment contracts were changed, over time and after negotiation and consultation with the workforce. She stated:

> 177. …The desire to update employment contracts is not, or itself unreasonable. Mr Bartkowiak said that it was necessary to bring all employees under the same terms and conditions. He explained that the contract had included a car before Fringe Benefits Tax was implemented and that the provision of the car had become expensive. Mr Ceccato was given a choice of annual salary increases or the car and he kept the car. When he no longer had the car, he was paid salary increases, while he was off work on sick leave.
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> 178. Mr Bourke described the commencement of consideration regarding phasing out company cars for private use in 2013 and the decision to change the policy in 2015. He described the process of communicating the company's decision and the initial discontent about the new employment contracts. He said that he discussed signing the letter briefly with Mr Ceccato in November 2016 and suggested it was in his interests to sign…

The Arbitrator found that neither the action in renegotiating the terms of the contract nor was the way in this was done was unreasonable,. The respondent did not permit pay rises while the worker kept the car, but once the car was returned, a pay rise backdated to the date of its return of the car would be made, placing him on an equal footing with other staff. Accordingly, the injury was predominantly caused by reasonable conduct with respect to the provision of employment benefits and she entered an award for the respondent.

Provision of "Lite 'n Easy" meals is a reasonably necessary expense under s 60 WCA

Tilley v State of New South Wales [2020] NSWWCC 138 – Arbitrator Burge – 1/05/2020

On 8/07/2011, the worker was assaulted at work and suffered injuries to her right wrist and hand. On 4/12/2012, she fell while at a railway station and injured her right knee and right upper extremity. In 2019, the Commission found that she also suffered a consequential condition in her left knee.

The worker claimed compensation under s 60 *WCA* for the provision of "*Lite 'n Easy*" meals and dental treatment. However, on 17/06/2019, the respondent disputed the claim. It asserted that there was no relationship between the worker's obesity and her injury and that the proposed dental treatment was for pre-existing problems.

Arbitrator Burge accepted that the worker had gained significant weight since the injury to her knees. He was satisfied that the provision of "*Lite 'n Easy*" meals was a reasonably necessary expense under s 60 *WCA,* as the meals were shown to have assisted the worker to reduce her weight.

However, the Arbitrator noted that there was no contemporaneous complaint of facial or dental injury following the assault in 2011 and he found that it was improbable that the worker would have not mentioned her attacker striking her face in either the incident report or to staff at the Emergency Department. He accepted the respondent's argument that the worker suffered dental issues before the assault and that 2 months it occurred her GP recorded complaints of pain in the teeth and that 2 front teeth were missing. There was also no evidence of dental injury as a result of the fall in 2012. Accordingly, he entered an award for the respondent with respect to the claim for alleged dental/mouth injury.

Section 44F WCA - Calculation of PIAWE where concurrent employment was paid by way of a non-pecuniary benefit – worker only entitled to an average of his earnings over a 38-hour working week in accordance with Sch 3, Item 8 WCA

Sinitsky v Workpac Constructions Pty Ltd [2020] NSWWCC 152 – Arbitrator Harris – 13/05/2020

Arbitrator Harris relevantly considered the calculation of the PIAWE in circumstances where the worker was employed with the respondent for approximately 30 hours per week and had concurrent employment at a hotel, which was paid in the form of free accommodation and food.

The worker argued that the accommodation and food from the Hotel (valued at $1,452.83) should be treated as a fringe benefit and that PIAWE is $2,842.04. In the alternative, item 8 of Sch 3 *WCA* applies and PIAWE should be calculated by averaging the value of those earnings over 38 hours and adding overtime with the respondent for the first 52 weeks.

Arbitrator Harris held that s 44E *WCA* (in force at the date of injury) applies to this matter and he stated:

> 21. The calculation of ordinary earnings includes the non-pecuniary benefit as defined and calculated pursuant to s 44F. Accepting the applicant's submission that the monetary value of all earnings be calculated in accordance with ss 44E and 44F, the meaning of "*ordinary hours*" as defined in Item 8 of Schedule 3 must be given application.
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> 22. In the current circumstances the non-pecuniary benefit paid to the applicant in the form of free accommodation and food was in return for working an average of 32.5 hours with the Great Centrel Hotel. The benefit was not in addition to the payments made by the respondent and was the applicant's remuneration for the concurrent employment with the Great Centrel Hotel.
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> 23. There is no inconsistency between ss 44C and 44E and Item 8 of Schedule 3. Section 44E provides that the monetary value of non-pecuniary benefits are included in the meaning of "*ordinary earnings*". However, as the applicant's ordinary earnings are derived from employment with two employers, the ordinary earnings are to be recalculated in accordance with Item 8 of Schedule 3, that is, an averaging to obtain the earnings for 38 hours.
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> 24. The general provision for the calculation of "*ordinary earnings*" in s 44E must give way to the specific provision in Item 8 of Schedule 3 as to the application of prescribed hours where a worker is employed by two or more employers and working more than the prescribed hours: *Commissioner of Police v Eaton* [2013] HCA 2 at [21].
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> 25. Whilst I have accepted the applicant's submission as to the calculation of the value of the provisions of accommodation and food by reference to s 44F, the total hours worked for both employers clearly exceed the number of "*prescribed hours*" in Item 8 of Schedule 3.
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> 26. The alternative construction proposed by the applicant treated the earnings from the concurrent employment as payment for the hours worked.
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> 27. I accept the applicant's alternative submission as to the value of the provision of accommodation and food based on the monetary value as provided by s 44F of *the 1987 Act*. However, Item 8 of Schedule 3 provides that where a worker is employed by two or more employers then the worker's "*average ordinary earnings*" is to be averaged over the prescribed number of hours. In that respect the applicant's alternative submission, which I accept, is that the prescribed number of hours is 38.

28. There was no dispute in the written submissions that the applicant's overtime and shift allowances were $549.84. Accordingly, the applicant is entitled to that additional sum for the first 52 weeks. I therefore treat the earnings with the concurrent employment on the basis as set out in the applicant's alternative submissions, that is ordinary earnings of $1398.02 per week and overtime/shift allowances of $549.84.

29. The respondent's concession of a greater figure is based on the amended legislation applicable to injuries after 21 October 2019 and cannot be considered.

30. I otherwise observe that the respondent made no contrary submission for the correct figure for the post 52-week period. Accordingly, I accept the applicant's alternative submission that the PIAWE in the first 52 weeks is $1,947.86 and the amount of $1,398.02 after 52 weeks.