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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. Starr v Pendergast Painting Pty Ltd [2020] NSWSC 725
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Supreme Court of NSW Decisions

Judicial review – whether re-examination by a member of the MAP is required – adequacy of reasons – limits of jurisdiction under s 69 of the Supreme Court Act 1970

Starr v Pendergast Painting Pty Ltd [2020] NSWSC 725 – Adamson J – 11/06/2020

On 14/11/2014, the plaintiff injured his right shoulder at work. He underwent 2 operations and on 22/06/2017, he had surgery on his left shoulder, which was accepted as a consequential injury.

On 9/11/2018, Dr Bodel examined the plaintiff at the request of his solicitors and assessed combined 15% WPI (9% WPI for the right shoulder, 6% WPI for the left shoulder and 1% WPI for the skin).

The dispute under s 66 *WCA* was referred to an AMS and on 19/02/2019, he issued a MAC that assessed combined 14% WPI (9% WPI for the right shoulder, 6% WPI for the left shoulder and 0% WPI for the skin). In his statement of reasons, the AMS stated that the arthroscopic scars on the shoulders were barely visible because of tattoos and they did not give rise to an impairment rating according to the TEMSKI scale.

The plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and appeal was referred to a MAP. The plaintiff sought a re-examination by a member of the MAP.

On 27/06/2019, ***the MAP*** decided that a re-examination was not required because the photographs that the plaintiff relied upon were clear, in focus and in colour and a re-examination would not have further assisted it. Accordingly, the MAP confirmed the MAC.

The plaintiff filed a summons seeking judicial review of a decision made by a MAP on 27/06/2019, which confirmed a MAC, on the following grounds: (1) the MAP failed to correct the error by the AMS; (2) the MAP failed to consider the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (4th ed) (the Guidelines); (3) the MAP failed to give adequate reasons and came to a decision that was not open to it; and (4) the MAP failed to conduct a re-examination in circumstances which amounted to a denial of procedural fairness to the claimant.

Adamson J noted that the plaintiff initially argued that it was not open to the MAP to determine that it was not necessary to re-examine him. However, he subsequently argued that the MAP's reasons were inadequate and its refusal amounted to a denial of procedural fairness. He argued that the MAP would not be able to detect trophic changes from a photograph and would need to see the scars and that procedural fairness required him to be re-examined so that he could be asked whether he was conscious of the scars. However, he accepted that there was no material before the AMS that showed that he was conscious of the scars.

Her Honour was not satisfied that there was any deficiency in the MAP's reasons for its decision not to re-examine the plaintiff. While the reasons are brief, they are sufficient to explain why the MAP did not see the need to examine the plaintiff for itself. She stated:

> 33. I reject the claimant's submission that the Appeal Panel was obliged to examine the claimant as a matter of procedural fairness. The present case is to be distinguished from a case such as *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321 where the Appeal Panel "*reached a different conclusion from that reached by the AMS and, in doing so, made significant adverse credibility findings in relation to the Worker*" (Emmett AJA, Macfarlan JA agreeing)). In the present case, the Appeal Panel relied on the examination conducted by the AMS but did not reach a different conclusion. It drew an inference in favour of the claimant, namely, that he could locate the scars, and noted that he had not said (either in his statement or in the examination by the AMS) that he was conscious of them. Nor is the present a situation such as arose in *Boyce v Allianz Insurance Ltd* (2018) 96 NSWLR 356; [2018] NSWCA 22 where it was held that the failure by the State Insurance Regulatory Authority to inform the Panel that the claimant insisted on being re-examined resulted in practical injustice: (Sackville AJA, Macfarlan JA agreeing). In the present case, the Appeal Panel knew that the claimant wanted to be re-examined but decided that it would not be assisted by any such re-examination.
>
> 34. Procedural fairness required that the claimant be given the opportunity to have his evidence and submissions taken into account. The claimant did not adduce any material to the AMS to the effect that he was conscious of his scars. In these circumstances, it was open to the AMS and the Appeal Panel to proceed on the basis that he was not (which fulfilled the criteria for 0%) or that there was no evidence that he was (therefore falling short of the criteria for 1%). Thus, the claimant had the opportunity but failed to avail himself of it. This does not amount to a denial of procedural fairness.

35. The claimant also submitted that the Appeal Panel's reasons for its decision were inadequate. I reject that submission. The extract from the reasons of the Appeal Panel set out above shows that it addressed all the relevant matters, being the five points of contention raised by the claimant in his challenge to the assessment. The Appeal Panel was confined in its review to the ground of appeal which the Registrar had allowed to proceed, namely that the certificate contained a demonstrable error.

36. To the extent to which Mr Morgan maintained the submission that the Appeal Panel had constructively failed to exercise its jurisdiction, I reject it. The reasons of the Appeal Panel demonstrate its application of the correct criteria in performing its review of the AMS's assessment.

Her Honour dismissed the summons and made a costs order against the plaintiff.

WCC – Presidential Decisions

Injury under s 4 (b) (ii) WCA – findings of fact based on the evidence – s 9B WCA – drawing of inferences – adequacy of reasons

Sami v Victory Lodge Pty Ltd [2020] NSWWCCPD 34 – Acting Deputy President Parker SC – 3/06/2020

The appellant was employed by the respondent as a stable hand from an unspecified date in 2012. On 11/03/2015, the appellant suffered a heart attack while working at the respondent's premises. He alleged that he was carrying water, which was heavy, and he started getting pain in his chest and legs and the next thing he recalls is waking up in Liverpool Hospital. He was told that he had suffered a heart attack. He claimed lump sum compensation and the ARD alleged that he suffered "*physical injuries in the form of plaque rupture in the circumflex coronary artery as a result of heavy manual work. In the alternative, aggravation of disease is alleged. He also suffered physical injuries to his lumbar spine, right shoulder, left shoulder, right knee as a result of his employment which were aggravated by the injuries of 11 March 2015."* However, during the arbitration, counsel for the appellant informed ***Arbitrator Wynyard*** that the injury relied upon was limited to the heart attack on 11/03/2015.

On 21/10/2019, ***Arbitrator Wynyard*** entered an award for the respondent with respect to the claim for the heart attack and he discontinued the claims for other injuries. He dismissed attacks on the appellant's credit and accepted that he suffered a heart attack while he was carrying water, but he did not accept the appellant's description of the work as "*very heavy*" or "*heavy duty labouring work*". He accepted the respondent's evidence that the work was arranged to suit a not very fit large gentleman.

The Arbitrator considered the conflicting medical opinions of Dr Berger and Dr Herman. He noted that Dr Berger opined that the appellant had multiple risk factors, including a very strong family history of premature coronary disease, poorly controlled diabetes and he was a smoker. He considered that lifting a 10 kg container of water was nothing more than a trivial contributor to the heart attack. However, Dr Herman was of the contrary opinion. The Arbitrator preferred Dr Berger's opinion and provided detailed reasons for his decision and he stated:

> Another problem is as to the nature of the injury. It was pleaded as the aggravation of a disease and there is no doubt that Mr Sami, on the evidence I have referred to, has arteriosclerotic disease. If it was, then it was a section 4 (b) (ii) (of *the 1987 Act*) claim, to which along with s16 being applied, it would have to be shown that the employment was the main contributing factor. For the reasons I have already given the risk factors that were found and mentioned by Dr Berger as the treating Cardiologist a week or so after the injury, it could not be said that the employment was the main contributing factor.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) Identifying the wrong test for injury; (2) Making findings of fact based on no evidence or evidence not properly weighed and failing to give adequate reasons; (3) Making findings of fact based on no evidence or evidence not properly weighed and failing to give adequate reasons; (4) Making findings of fact based on no evidence or evidence not properly weighed and failing to give adequate reasons; (5) Making findings of fact based on error of discretion; (6) Drawing a false inference; (7) Failing to make a determination on s 9B and inadequacy of reasons; and (8) Failing to make a determination on s 9B or inadequacy of reasons.

The respondent opposed the appeal, although the Opposition was filed out of time, and it required leave to rely upon it.

Acting Deputy President Parker SC granted leave to the respondent to rely upon the late-filed Opposition. He referred to Practice Direction Number 6, which applies to appeals against Arbitral decisions, and stated that the grounds of appeal "*are far short of the specific directions given*" in it, as they do not identify the specific error that the appellant complaints of; the contested material findings or the contested facts the subject of the appeal. This problem was particularly acute in relation to grounds 2, 3 and 4, which do not identify the precise complaint(s) to the reasons for the determination made by the appellant. Those grounds may also overlap.

Parker ADP rejected ground (1). He noted that the appellant argued that the Arbitrator found that work made some contribution, albeit minor in the overall picture, but did not find that there were other relevant contributors and as there were no competing aggravating factors and regardless medically of the size of the aggravation, his task of lifting the water bottles was wholly or mainly responsible for the myocardial infarction. He rejected the logic of the argument. The Arbitrator was required to consider whether the work was the "*main contributing*" factor to the myocardial infarction. He determined that it was a "*minor contributor*". He thereby necessarily determined that the work was not the "*main contributing*" factor. However, even if contrary to his view, the logic of the appellant's argument is correct, the Arbitrator found on the materials that the work was not the "*main contributing factor*". That finding means the appellant had not satisfied the definition of injury within s 4 (b) (ii). He therefore held that the Arbitrator did not fail to address the correct test or that he erred in finding that employment was not the main contributing factor.

Parker ADP rejected grounds (2) and (3). He stated:

> 78. The appellant's submission is that there was "*no evidence to support the factual proposition that the applicant was lifting the buckets 'all the time' or even that it was something that he had to do regularly throughout the day as the Arbitrator may have meant*."
>
> 79. The response by the respondent to Ground 2 addresses the point by reference to causation and does not really address the appellant's submissions. This is not a criticism of the respondent's attempts to address the appellant's submissions, rather it is a function of the imprecise way in which the Ground 2 is articulated.
>
> 80. In my view, the difficulty with the appellant's submissions in relation to this ground of appeal is that 7 (g) does not record accurately either the facts or the evidence before the Arbitrator.
>
> 81. The sort of work the appellant was doing before the heart attack is described in the passage from his statement quoted at paragraph [9] above.
>
> 82. The passage from the Arbitrator's reasons that includes the words "*that sort of work all the time*" is a reference by the Arbitrator to the general work performed by Mr Sami as a stable hand. The Arbitrator was simply concluding that there was nothing unusual in the work performed by Mr Sami on the day of the heart attack.

> 83. The submission that there was no evidence that Mr Sami was lifting buckets "*all the time*" misquotes the Arbitrator's award which does not say that Mr Sami was lifting buckets of water all the time.

Parker ADP held that the appellant's submissions at [7(g)] and at [13] are factually inaccurate and irrelevant to the histories given to the doctors and the Arbitrator's reasons for his conclusion that the work being performed by the appellant on 11/03/2015 was the same as that which he usually performed are adequate.

Parker ADP rejected ground (4). He stated that the evidence does not support the conclusion that the appellant engaged in repetitively lifting a large number of heavy buckets of water and that this was sufficiently strenuous to "*cause the plaque rupture that caused the heart attack*". He stated:

> 102. The history contended for by the appellant based on the GP's manuscript of Mr Sami "*repetitively lifting a large number of these heavy buckets of water*" is not supported by the other evidence and was not relied on by the medical specialists to support their opinions.
>
> 103. In any event even if the correct history was as recorded in the GP's notes, namely that Mr Sami was "repetitively lifting a large number of these heavy buckets of water", Dr Herman's opinion would carry less weight because the opinion in Dr Herman's reports is based on a different history.
>
> 104. Dr Herman recorded the history on which he relied in his report dated 28 March 2018, namely that before the heart attack Mr Sami carried a single container of 10 litres of water, walking some distance with it and lifting it one and a half metres to pour out the contents.
>
> 105. The further report by Dr Herman dated 18 December 2018 contains no additional history. There is a reference in that report to more than one container of water but there was no evidence as to the source of that information. The appellant told Dr Herman that he was carrying a single container. The history as recorded in the GP's notes was not the basis of Dr Herman's opinion, was not the appellant's evidence before the Arbitrator and cannot now be relied on to support the doctor's opinion as to causation.
>
> 106. If the appellant wanted to make a case that Mr Sami's myocardial infarction was caused by his repetitively lifting a large number of buckets of water it was necessary for two conditions to be satisfied: first, there needed to be acceptable evidence of that history; and second, the specialist needed to offer a supportive opinion based on that evidence. In my view the appellant has not satisfied either condition.
>
> 107. No submission is advanced as to the adequacy of the reasons. The Arbitrator makes clear in his statement of reasons the history that he accepted. I see no error as to the adequacy of the reasons.

Parker ADP held that ground (5) was not established and that the Arbitrator's preference for Dr Berger's opinion was soundly based and reasoned. He did not reject Dr Herman's opinion on discretionary grounds.

Parker ADP also found that ground (6) was not established. He stated:

> 120. The Arbitrator did not say expressly or by implication "*that moderate exercise frequently performed would probably not cause a heart attack*". That may be an inference that could be drawn from the medical evidence but it is not an inference the Arbitrator drew or was required to be draw.

> 121. Acceptance of Dr Berger's opinion gave rise to an inference that the work activities on 11 March 2015 were not the main contributor to the myocardial infarction. But in my view, the appellant has not demonstrated that the Arbitrator drew an incorrect inference about the efficacy of exercise in preventing heart attacks by accepting the opinion of Dr Berger.

Parker ADP held that grounds (7) and (8) were made out, but that these were not determinative of the appeal. He stated:

> 123. It is difficult to work out precisely what the Arbitrator decided having regard to s 9B.
>
> 124. The Arbitrator did not refer to *Renew God's Program Pty Limited v Kim.* If the Arbitrator's conclusions about s 9B were decisive in determining the appeal, then the appeal would need to be allowed.
>
> 125. The Arbitrator did not determine the matter on the basis of s 9B. The respondent is correct in its submission (paragraph [18]) that the Arbitrator determined that in the circumstances where employment was not a substantial contributing factor to the injury (or the main contributing factor to the aggravation), that the appellant failed on the issue of injury irrespective of a less than adequate consideration of s 9B.
>
> 126. Although the Arbitrator's expression of the determination under s 9B is, in my view, inadequate, given his preference for the views of Dr Berger, it is plain that he did not regard Mr Sami's employment as giving rise to a "*significantly greater risk*" of suffering injury in the form of a myocardial infarction than Mr Sami's risk had he not engaged in the employment. If as I find the Arbitrator was correct to accept Dr Berger's opinion it is patent that the employment did not give rise to a significantly greater risk in Mr Sami's case.

Parker ADP concluded that while grounds (7) and (8) were upheld, the appellant's failure to establish an injury within the meaning of s 4 (b) (ii) *WCA* means that the appeal must be dismissed. Accordingly, he confirmed the COD.

Consequential condition – Consideration of competing medical evidence – Adequacy of reasons

Schembri v Blacktown City Council [2020] NSWWCCPD 35 – Acting Deputy President Parker SC – 9/06/2020

The appellant was employed as a cleaner. On 6/07/2005, she injured her left shoulder, neck and lumbar spine at work. The self-insurer accepted liability.

After ceasing employment with the respondent, the appellant worked in a number of jobs, mostly involving casual light cleaning duties. In 2007, her GP referred her to a neurologist regarding "*chronic neck and bilateral trapezial fold pain especially with extension of neck – work related*".

On 24/02/2009, Dr Ellis (qualified by the appellant's former solicitors) opined that the appellant suffered neck pain spreading to her left shoulder and that her right shoulder and arm were not affected and that she is right-handed. On 2/06/2010, Dr Harrison issued a MAC, which assessed 5% WPI (cervical spine) and indicated that the left shoulder impairment was properly rated with the cervical spine. The appellant was awarded compensation under s 66 *WCA* based upon the MAC.

In 2018, Dr Mendelsohn (qualified by the appellant's current solicitors) opined that she injured her right shoulder as a result of overuse after the 2005 left shoulder injury.

The appellant claimed lump sum compensation for injuries to her cervical spine, left shoulder and right shoulder. However, the respondent disputed the claim for injury to the right shoulder.

Arbitrator McDonald issued a COD on 6/11/2019. She considered the appellant's evidence and the conflicting evidence of Dr Mendelsohn and Dr Powell (qualified by the respondent). She was not convinced by Dr Mendelsohn's explanation and preferred Dr Powell's view that the right shoulder symptoms were sufficiently explained by "*the presence of degeneration within the rotator cuff [consistent] with advancing age … [and the absence of] evidence that any right shoulder symptoms [fell] outside the expected presentation of age related or constitutional degenerative changes*." She stated that when he was specifically asked to outline the relevant activities which contributed to the development of the right shoulder condition, Dr Mendelsohn's response was general and he did not outline any tasks other than to say that her work and home tasks had doubled the wear and tear on her right shoulder. In his final report, Dr Mendelsohn said that the causation of capsulitis in the right shoulder was a result of over-reliance, but he did not disclose his reasoning process and his opinion is a '*bare ipse dixit.*' However, Dr Powell disclosed his reasoning process by reference to the radiological studies of the cervical spine. His opinion that the pain in her shoulders is a result of degenerative changes observed on the investigations of her cervical spine is consistent with that of the AMS, Dr Harrison, in 2010.

The appellant appealed and alleged that the Arbitrator committed errors of mixed fact and law as follows: (1) by inferring that, because her right shoulder symptoms could have multiple causes, such multiplicity would serve to exclude the contribution made by over reliance; (2) by overlooking the fact that her evidence that she placed greater reliance on her right shoulder was not challenged and was not implausible; (3) by erroneously criticising (without expressly rejecting) her probative, unchallenged and plausible evidence as "*general*", in circumstances in which that evidence provided a proper foundation for a finding that she did place a greater load on her right shoulder; (4) by erroneously stating that she did not identify when she first suffered problems with her right shoulder, and proceeded to criticise the appellant pursuant to that erroneous and in any event immaterial feature; (5) by considering that because she is right handed, she would not have over relied on that limb (reasoning that would mean that a consequential condition can only develop in a non-dominant limb); (6) by failing to make a specific finding as to whether she did place greater reliance on her right shoulder. Having omitted to make a finding with regard to that link in the causal chain, the ultimate determination lacked a proper substantive foundation and was accordingly flawed; (7) by erroneously criticising Dr Mendelsohn's record of the evidence of over reliance as limited, whereas the simple fact that she placed greater reliance on her right shoulder is unchallenged, and would follow as a matter of common sense; (8) by erroneously criticising Dr Mendelsohn's "*response*" as "*general*", whereas his opinion was founded upon assumed facts that were established on the evidence and involved a logical explanation of the relationship between her right shoulder symptoms and the injured left shoulder; (9) by erroneously stating that Dr Mendelsohn did not disclose his reasoning process, notwithstanding that the reasoning process was straightforward, evidence based, logical and readily discernible; (10) by accepting Dr Powell's opinion, notwithstanding that Dr Powell took no history of over reliance and that the Arbitrator herself had not made a finding that the appellant had not placed greater reliance on her right shoulder; (11) by failing to provide proper reasons for preferring the opinion of Dr Powell (who took no history from the appellant regarding over reliance on her right shoulder) to the opinion of Dr Mendelsohn (who did take a relevant history, and who did provide a logical explanation for his conclusions based upon a proper and unchallenged history); and (12) in all the circumstances, by failing to provide proper reasons for her determination.

Acting Deputy President Parker SC determined the appeal on the papers.

Parker ADP rejected ground (1) and stated that the appellant's complaint does not recognise the Arbitrator's careful analysis of the medical evidence. He stated that Dr Mendelsohn's reports did not have to satisfy s 79 of *the Evidence Act* but they did have to explain how he reasoned from the overuse of the right arm to the painful condition of the right shoulder. In making her determination, the Arbitrator was guided by the decision in *South Western Sydney Area Health Service v Edmond*s and she applied the correct principle for evaluating the report. The report was deficient in its failure to explicate the reasoning process and the Arbitrator was correct to conclude that the opinion was of no probative value to the causation issue before her.

Parker ADP rejected ground (2). He stated that the appellant's argument that the evidence of overuse of her right shoulder was not rejected as unreliable or implausible is correct, but of no importance. Her argument that the Arbitrator's reasoning was deficient because she allegedly overlooked the evidence of greater reliance on the right shoulder is incorrect. The appellant did not fail because the Arbitrator did not accept that pain in the right shoulder, but because she was not satisfied that Dr Mendelsohn's medical explanation provided for that pain.

Parker ADP rejected ground 3. He stated that in order to succeed, the appellant had to show that the right shoulder pain resulted from the injury in July2005, but she could not do that unless Dr Mendelsohn's opinion was accepted. It follows that the finding sought by the worker, even if made, would not have affected the outcome.

Parker ADP rejected ground (4). He stated that there is a difficulty with the logic of this ground because if the time when the appellant developed right shoulder pain is immaterial, then the fact that the Arbitrator noted that she did not identify when she first suffered problems in her right shoulder is also immaterial. He held that the Arbitrator did not place any great reliance on when the symptoms commenced, but she considered it significant that there was no complaint about the right shoulder to Dr Ellis in 2009 or to Dr Harrison.

Parker ADP rejected ground (5). He stated that the appellant's argument that the Arbitrator's reasons indicate that she was reluctant to accept that she placed greater reliance on her right arm is "*to overstate the matter*". He held that the Arbitrator's observation that the appellant is right-handed does not equate to her having a pre-determined view of anything, much less a pre-determined view that the dominant limb cannot be adversely affected by over-reliance.

Parker ADP rejected ground (6) and he stated:

> 103. The reliance or otherwise placed on the right shoulder by the appellant was not determinative of the causation issue. The passage from *Kooragang* referred to previously, makes clear that the determination of causation depends on the tribunal's consideration of the totality of the evidence.
>
> 104. There was no necessity for the Arbitrator to make a specific finding that the appellant placed greater reliance on her right shoulder. The issue was whether the symptoms in the right shoulder resulted from the injury sustained by the appellant in July 2005.
>
> 105. The expression "*as a result of*" requires more than a common-sense approach. Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory test construed and applied in its statutory context to best effect the statutory purpose. The expression "common sense approach" does not provide a useful, much less a universal, norm.

106. The passage from *Murphy v Allity Management Services Pty Limited* at [58] shows, with respect, how the epithet "*common sense test of causation*" is properly applied in the statutory context.

107. Roche DP said that Mrs Murphy only had to establish "that the treatment is reasonably necessary '*as a result of the injury*'". The Deputy President was there dealing with causation for the purpose of s 60 of *the Workers Compensation Act 1987 (the 1987 Act).* The language of the statute was expressly adopted.

108. So too in the present matter, the appellant had to establish that the injury of 5 July 2005 resulted in permanent impairment of the right shoulder. A finding that the appellant placed greater reliance on the right shoulder was not required nor was it determinative of the statutory question: Did the injury of July 2005 result in a permanent impairment of the right shoulder?

109. The appellant's submission at [58] does not correctly state the test for causation. The onus was on the appellant to show that symptoms in the right shoulder that she wanted referred to an AMS for assessment resulted from the injury of July 2005. That was overwhelmingly a medical question resolved adversely to the appellant when the Arbitrator rejected the opinion evidence of Dr Mendelsohn and preferred the opinion of Dr Powell.

110. It was not necessary for the Arbitrator to explicitly reject the appellant's case of over reliance. With respect to the appellant, the Arbitrator did not downplay any aspect of the evidence.

Parker ADP rejected ground (7). He held that it was open to the Arbitrator to reject Dr Mendelsohn's opinion and no error of fact or law was established.

Parker ADP rejected ground (8). He held that it was open to the Arbitrator to prefer the opinion of Dr Powell and reject the opinion of Dr Mendelsohn and she did not err in doing so.

Parker ADP rejected ground (9). He stated:

123. The repetition in the appellant's submissions at paragraph [65] of her case theory together with descriptors such as "*common sense*" "*human experience*", and "*cases regularly determined by the Commission*" does not take the matter further.

124. The rejection of Dr Mendelsohn's opinion has been dealt with previously and need not be repeated at this time. For the reasons previously given at paragraphs [58] to [66] above, I am of the view that the Arbitrator did not err in rejecting Dr Mendelsohn's opinion evidence on causation.

Parker ADP rejected grounds (10) and (11). He held that the appellant's argument at [70] is not correct. The issue with respect to the right shoulder is not whether over reliance on that body part contributed to the current symptoms, but whether the right shoulder symptoms resulted from the injury in July 2005. He stated:

144. For the reasons previously given above at paragraphs [53]–[66] in my view the appellant has not shown the Arbitrator to be in error in rejecting the opinion of Dr Mendelsohn.

145. The Arbitrator was entitled to accept the opinion of Dr Powell. The Arbitrator's Reasons show that she engaged with the countervailing opinion of Dr Mendelsohn. She gave reasons for rejecting his opinion and reached a logical conclusion based upon her acceptance of Dr Powell's evidence. The appellant, in my view, has not demonstrated error with respect to either ground.

Parker ADP also rejected ground (12). He stated:

> 158. For the reasons otherwise advanced in this decision, in my view the Arbitrator did not fail to accept the appellant's evidence in relation to the activities and use of her right shoulder. What the Arbitrator declined to do was accept Dr Mendelsohn's opinion evidence based on the history given to him.
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> 159. The Arbitrator was not required to provide any greater reasons with respect to the appellant's evidence in relation to the right shoulder than she did provide.
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> 160. At [15] of the Reasons, the activities Ms Schembri gave evidence about are set out. Later the history of activities and complaints contained in Dr Mendelsohn's reports are identified.
>
> 161. The Arbitrator accepted that the appellant had pain in the right shoulder. She did not make a finding adverse to the appellant with respect to the activities described in her statements. There is no finding and the appellant does not point to any express finding by the Arbitrator that she did not accept the appellant's evidence of over reliance on her right shoulder.

Parker ADP held that determination of the dispute did not require the finding contended for by the appellant. Therefore, the Arbitrator was not in error in failing to give reasons for not making the finding and her reasons satisfied the requirements for a reasoned determination of the dispute before her.

Accordingly, Parker ADP dismissed the appeal and confirmed the COD dated 6/11/2019.

Application to rely on fresh evidence under s 352 (6) WIMA – Alleged factual error – Current Work Capacity – Challenges to findings on credit

Gradan Bathrooms Pty Ltd v Workers Compensation Nominal Insurer [2020] NSWWCCPD 36 – Acting Deputy President Snell – 12/06/2020

The appellant operated a business carrying out waterproof testing and associated repairs. The worker was employed on a full-time basis from 3/01/2007, visiting customers' homes, testing for leaks, issuing quotes and arranging for contractors to perform remedial works and doing banking. Much of his time was spent driving a company vehicle to customers' premises.

On 7/02/2018, the worker injured his right elbow when a gust of wind blew the door to the vehicle and crushed it against the door frame. He alleged that he reported the injury to the appellant's administration officer by telephone that afternoon. However, he continued to work as an x-ray did not indicate a fracture.

On 5/03/2018, the worker submitted a resignation to Mr Chojnacki, a director of the appellant. Mr Chojnacki travelled to Sydney to discuss this with him and on/about 21/03/2018, it was agreed on a handshake that he would not leave the employer.

On 24/04/2018, the worker consulted another GP, Dr Kordi, because his right elbow was still swollen and painful. On that date, he told Dr Chojnacki that he was going to make a compensation claim and later that day, he received correspondence from him stating that his earlier resignation was accepted. On 25/04/2018, Dr Kordi assessed the worker unfit for work because he could not drive and lift. The worker was asked to finish upon 26/04/2018 and was off work from that time.

The appellant did not hold a workers compensation insurance policy at the relevant time and the worker claimed compensation against the Nominal Insurer. The Nominal Insurer accepted liability and paid weekly payments and s 60 expenses. On 8/02/2019, it issued a Notice under s 145 (1) *WCA*, requiring reimbursement of $57,562.86 from the appellant. The appellant sought a determination of its liability under s 145 (3) *WCA.*

On 3/04/2019, the Commission granted the employer leave to join the worker as a party to the proceedings.

Arbitrator Toohey issued an amended COD and SOR on 1/10/2019. She discussed the evidence and the oral evidence given by the witnesses, including cross-examination on behalf of the appellant, and the medical evidence. She noted that the worker denied any previous injury to his right elbow, but that clinical records from Dr Daoud referred to injuries to the right shoulder, elbow and wrist and that the worker was hospitalised from 3/11/2016 to 11/11/2016 for "right forearm crush injury". In an email dated 11/11/2016, the worker described his arm as "*too sore to use in any capacity*".

The Arbitrator referred to bank statements in the name of the worker's wife, which indicated 2 payments from MG Plumbing in June 2017. Mr Mineo (proprietor of MG Plumbing) gave evidence that these were reimbursements for repairs on a property that he rented to the worker and his wife. She noted that the worker and Mr Mineo were extensively and vigorously cross-examined about these payments on behalf of the appellant.

The Arbitrator summarised the parties' submissions and discussed the statutory background to the application under s 145 (3) *WCA.* She referred to decisions of the Court of Appeal in *Raniere Holdings Pty Ltd v Daley* [2005] NSWCA 121; 66 NSWLR 594 and *Ballantyne v Workcover Authority of NSW* [2007] NSWCA 239 and stated that her task was akin to an inquisitorial process and that the employer did not bear an onus of proving that the worker was not entitled to the compensation payments at issue. She noted that evidence of the worker's prior convictions for fraud offences in 1983 "*tended to underline a history of questionable conduct*" and that his claims and evidence should be approached with considerable caution. However, she was satisfied on the probabilities that the worker suffered the alleged injury on 7/02/2018 and that his employment with the appellant was a substantial contributing factor.

The Arbitrator then considered the issue of incapacity and noted that there was no medical evidence that the worker was fit for pre-injury duties from 4/05/2018 to 21/02/2019. She held that the totality of the evidence supported a finding on the probabilities that the worker had no current work capacity during that period. She also made orders regarding s 60 expenses and ordered the appellant to reimburse the respondent in the sum of $57,562.86 under s 145 (4) *WCA.*

The appellant appealed and alleged that the arbitrator erred: (1) in the determination and assessment of the question of the worker's work capacity in the relevant period; (2) in the assessment and consideration of the evidence in particular relating to capacity (but also to the credit of the witnesses); and (3) in determining the matter on a basis not put to or by the parties.

Deputy President Snell determined the appeal on the papers. He noted that the appellant sought to rely upon fresh evidence, in the nature of an internet search that indicated that Mr Mineo was not the owner of the property that the worker and his wife rented In June 2017 (the date of the 2 internet transfers). However, he ultimately refused to admit that evidence because there was no evidence that this could not have been obtained earlier with reasonable diligence. He also held that the exclusion of the evidence would not cause substantial injustice as it was not probative in nature. He concluded:

> 66. I additionally note that the application under s 352 (6) is a discretionary one. The worker submits, correctly, that if the fresh evidence were admitted it would probably be necessary for the worker to be placed in a position to put on evidence from himself and Mr Mineo in reply. This would be associated with delay. I also note the use the employer seeks to make of the evidence goes only to credit. It is not directly relevant to a matter in issue between the parties. These matters would militate against the grant of leave, even if one of the threshold questions in ***Strickland*** was satisfied.

Snell DP rejected ground (1) and (2). He stated:

> 81. The insurer makes its submissions on these grounds on alternative bases. The distinctions that the insurer draws are not completely clear. They appear to be based on what the author drew from the decision in *Ballantyne*. The third of the alternative bases deals with the weekly payments on the basis that the Arbitrator needed to be satisfied the periods and rates at which weekly compensation was paid were appropriate. This was the basis on which the Arbitrator approached the matter. It also is consistent with how counsel for the parties, including the insurer, dealt with the matter before the Arbitrator. Having made submissions on '*injury*' the insurer's counsel said "*the question then becomes capacity*". He submitted to the Arbitrator:
>
> > So that is the case and you have to assess it to determine whether the weekly compensation payments.. (not transcribable 1:28:28).. are appropriate and with great respect, they are, and indeed, having made those payments in good faith in response to the claim and supported by some medical evidence my client's entitled to have those payments reimbursed." …
>
> 83. The employer's submissions in support of Grounds Nos. 1 and 2 essentially constitute an attempt to re-argue points that it argued unsuccessfully at the arbitration hearing. Such an approach is inconsistent with the principles that govern appeals pursuant to s 352 (5) of *the 1998 Ac*t (see [13] to [17] above). The various factual errors that the employer seeks to establish are not made out in any event, for reasons that follow…
>
> 85. The Arbitrator set out her reasons for preferring the views of Dr Kordi. She said she had a difficulty with the opinion of Dr Bradshaw, who did not specify what he thought the worker might be capable of and "*did not indicate the extent of any capacity in either report*". Dr Bradshaw said the worker had "*very severe*" pain and a "*high degree*" of functional impairment. The Arbitrator noted Dr Walls saw the worker only once, described a "*very significant injury*" and considered the worker fit for one-handed activity, avoiding use of his dominant right arm. The doctor suggested telephone work or light paperwork. The Arbitrator referred to Dr Kordi's close involvement in the worker's treatment over the relevant period of weekly payments, assessing him every two to three weeks. She said the opinions of Drs Bradshaw and Walls regarding work capacity were "*in very general terms without indication of the actual extent of capacity*".
>
> 86. The Presidential decision in *Wollongong Nursing Home Pty Ltd v Dewar* is regularly applied in the Commission, dealing with issues regarding whether or not workers are "*able to return to work in suitable employment*" within the meaning of s 32A of *the 1987 Act*. In that matter Roche DP said:
>
> > Therefore, the determination of whether a worker is '*able to return to work in suitable employment*' is not a totally theoretical or academic exercise and Mason P's reference to the '*eye of the needle*' test may still be relevant in many cases. To use his Honour's example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment [in s 32A]. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of *the 1998 Act*, and do not exist in any labour market in Australia, will be suitable employment.
> >
> > And:

> Thus, the task requires the identification of whether there are any '*real jobs*' (*Giankos v SPC Ardmona Operations Ltd* [2011] VSCA 121 at [102]) which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are '*available*' (to the worker) or are '*of a type or nature that is generally available in the employment market*'. (emphasis added)
>
> 87. The short point is that whether a worker has an ability to return to work in suitable employment depends on whether there are real jobs in the labour market in which the injured worker would be able to work. If there are not, then an injured worker will not have current work capacity. The Arbitrator did not specifically refer to Dewar, but her reasoning, and the basis of her rejection of Drs Bradshaw and Walls on this point (see [85] above) was consistent with the application of these accepted principles.
>
> 88. The employer, on appeal, makes an additional submission that the opinion of Dr Kordi amounted to a '*bare ipse dixit*'. Dr Kordi's views on capacity were in the form of a bare ipse dixit to the extent that the pro forma WorkCover certificates provided essentially called for such an approach. There was some other information that the pro forma document called for and Dr Kordi filled out the certificates appropriately. This included how the injury related to work, diagnosis, and whether there was any current capacity for employment. The certificates were not the only material from Dr Kordi. The doctor's initial correspondence to the insurer dated 24 May 2018, which dealt with the nature of the injury, was in evidence, as were the doctor's clinical notes. It was appropriate that material from the doctor be read as a whole. The material from Dr Kordi, including his certificates, had probative value. A decision regarding whether a worker had '*current work capacity*' was to be made on the whole of the evidence. On the evidence as a whole, it was open to the Arbitrator to accept the opinion of Dr Kordi that there was 'no *current work capacity*'.

Snell DP stated that the employer's point, about the message from the worker regarding another job, was argued before the Arbitrator and rejected for short reasons, which were properly available. Its argument regarding the banking records and items marked "*internet transfer*" was also dealt with and rejected by the Arbitrator and the Arbitrator correctly observed that there was no evidence as to the meaning or source of these transfers, or for whose benefit the payments were made. He stated:

> 95. The way in which I am required to deal with challenges to credit findings, pursuant to s 352 (5), must be constrained to at least the same extent as the Court of Appeal, in which an appeal is dealt with on the basis of rehearing. I am required to comply with the principles in the above authorities. The employer's submissions on the credibility findings have made no attempt to address these established principles regarding such a challenge. The submission that I should listen to the recording of the evidence of these witnesses, with a view to forming my own view on credibility as opposed to that of the Arbitrator who saw and heard the witnesses, is inconsistent with authority. The employer's submissions do not constitute a viable attack on the Arbitrator's conclusions regarding the credit of the worker and Mr Mineo. They are rejected.

Snell DP also rejected ground (3). He held that the Arbitrator was under no obligation to accept the employer's submissions on the matters dealt with at paras [164] and [166] of the reasons. He stated:

102. It was inherent in the overall conduct of the case that the insurer and the worker did not concede the employer had succeeded in its attack on the worker's credit. The insurer's counsel, dealing with the 'injury' issue, described the employer's attack on the worker's case as "speculative and circumstantial". He referred to the employer's stance that the worker "*just can't be believed about anything he says*", saying "*but the doctors have accepted him and he clearly has pathology*". The worker's counsel submitted the worker's credit would be accepted on '*injury*'. Dealing with the employer's allegation of fraud, the worker's counsel submitted "*what at best Mr Macken's been able to produce is entirely speculative*". Dealing with the employer's submissions about the banking records, the worker's counsel was critical of the employer's position, when it had not cross-examined the worker on the basis that every deposit was for the credit of the worker.

103. Following addresses at the arbitration hearing by counsel for the insurer and the worker, the employer's solicitor addressed at length in reply, in a fashion that repeatedly raised issues of credit. This was consistent with the employer conducting the hearing, after submissions by the other parties, on the basis that the worker's credit remained a live issue.

Accordingly, Snell DP confirmed the amended COD.

WCC - Medical Appeal Panel Decisions

Demonstrable error in MAC as AMS provided unclear and insufficient reasons for assessment – MAC confirmed as MAP considered 90% of the overall impairment resulted from the work injury

Toll Global Logistics v Smith [2020] NSWWCCMA 97 – Arbitrator Douglas, Dr R Pillemer & Dr M Gibson – 3/06/2020

The respondent claimed various forms of compensation, including lump sum compensation for 16% WPI, as a result of the aggravation etc. of a disease in his left hip due to the nature and conditions of his employment. He alleged that the injury occurred on 7/02/2018.

On 13/11/2018, The worker underwent left total hip replacement surgery and he resumed work seven weeks later.

On 15/02/2020, an Arbitrator entered consent awards for the worker in respect of the claims for weekly payments and s 60 expenses and remitted the matter to the Registrar for referral of the s 66 dispute to an AMS to assess permanent impairment of the left lower extremity (hip) and scarring (TEMSKI).

On 20/02/2020, Dr Yui-Key Ho, AMS, issued a MAC, which assessed combined 15% WPI, comprising 15% WPI of the left lower extremity less a 1/10 deduction under s 323 *WIMA* and 1% WPI for scarring. He noted that well over a year before 10/01/2017, the worker had x-rays of his left hip, which indicated moderate osteoarthritic changes and that further x-rays dated 12/02/2018, indicated obvious deterioration. He considered that the surgery produced a very good result and he assessed the total hip replacement at 95 points, which equated to 15% WPI.

The AMS noted that Dr Bodel (qualified by the worker) did not make a deduction under s 323 *WIMA* and that Dr Powell (qualified by the appellant) applied a 100% deductible. He stated:

> In my opinion, there should be contribution from pre-existing condition even though the other hip is functioning well without obvious problems. I think with his age and size and all the potential possibility of injury outside work, a deduction of 1/10th for pre-existing condition is appropriate and that will leave behind a 15% whole person impairment.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and alleged that the AMS did not sufficiently explain the causal connection between the impairment and the work injury and did not consider whether any part of the impairment was due to the worker's extensive martial arts training and activities and he failed to comply with s 352 (2) (c) *WIMA* and cl 1.6 (c) of *the Guidelines*. Rather, he assumed and deemed the worker's symptoms to be due to his employment and therefore applied an incorrect test when assessing impairment resulting from the injury.it also argued that the AMS did not consider the medico-legal opinions, which applied a deductible because of the worker's martial arts activities and he should have applied a deductible of greater than 10%.

The MAP determined that a further medical examination was not necessary and decided the appeal on the papers. It held that it was impossible to know exactly when the disease in the left hip became present, although it did not appear to have been present when the worker commenced employment with the appellant in 2000 and it was unlikely to have been present in 2008, when the worker ceased martial arts training. He did not consult his GP regarding left hip pain until 15/07/2015. It stated:

> 35. The Appeal Panel considers, contrary to what the appellant has submitted, that the evidence does not establish that the respondent engaged in martial arts or weight training in the period between the onset of the idiopathic disease of osteoarthritis in the respondent's left hip and the date on which the respondent had hip replacement surgery. It follows that the evidence does not establish that the respondent engaged in that activity at a time when the disease was active in his left hip. Hence, because the respondent did engage in such activity during this time, such non-existent activity necessarily could not have contributed to any aggravation, acceleration, exacerbation or deterioration of the disease.
>
> 36. The Appeal Panel is of the view that at exactly the time the idiopathic disease of osteoarthritis became present in the respondent's left hip, which was sometime after 2008 and more likely nearer 2015 when the respondent first experienced symptoms in his left hip, the heavy nature of the work the respondent was then performing for the appellant acted upon and thereby aggravated and accelerated and caused a deterioration of the disease. That activity precipitated symptoms for the respondent from the idiopathic disease. That is to say, it would have brought on the respondent's symptoms from the disease earlier than what the respondent otherwise would have likely experienced symptoms and made the respondent's symptomatic experience from the disease worse than what would have otherwise been the case had he not been doing that activity.

The MAP held that the AMS erred because he treated the disease of osteoarthritis as a pre-existing condition, but as the appellant did not raise this in its grounds of appeal, it could not conclude that the MAC contains either a demonstrable error or was based upon incorrect criteria on that basis. It noted that the appellant argued that the AMS erred and applied incorrect criteria by not attributing more than 10% of the worker's overall permanent impairment to the underlying disease and he did not explain sufficiently why he attributed 90% of the overall impairment to the work.

The MAP held that the AMS' reasoning for assessing that 90% of the permanent impairment is due to the work injury 10% is due to the underlying osteoarthritis is sparse and his reasoning was flawed. It stated:

> 40. The Appeal Panel observes that the respondent's permanent impairment of his left hip is due to the respondent now having an artificial joint in his left hip. He also has an impairment as a consequence of scarring from the procedure that was required to install the artificial joint. What has occurred in this case is, as has been discussed above, that a constitutional condition in the form of osteoarthritis

commenced spontaneously in the respondent's left hip. The exact date upon which that occurred cannot be known, but it was at some point between 2008 and 2015, and most likely closer to 2015. As soon as the disease became present, the respondent's heavy work acted upon the disease initiating the symptoms and aggravating, accelerating and worsening the disease and the symptoms from it. That is to say, the respondent's work brought on the respondent's symptoms earlier than what would otherwise have been the case if he were not engaged in such work activity and also worsened the respondent's symptomatic experience from the disease than what would otherwise be the case if he were not engaged in heavy work.

41. The respondent's work activity therefore resulted in the respondent needing surgery earlier than what would otherwise have been the case to replace his diseased left hip joint with an artificial joint so as to abate the respondent's symptoms. It seems to the Appeal Panel that, in those circumstances, the degree of the respondent's permanent impairment that results from his injury, being the aggravation, acceleration, exacerbation and deterioration of the underlying constitutional osteoarthritis that occurred spontaneously, is of the order of 90%. That is to say because the respondent's injury brought on his symptoms earlier and made them worse than what would otherwise have been the case had he not been working for the appellant, and because this resulted earlier than what would otherwise have been the case in his having an artificial joint in left hip, from which his impairment arises, the assessment that the AMS ultimately made of the degree of the respondent's permanent impairment resulting from his injury was correct.

The MAP held that although the AMS erred by not providing a sufficient explanation for his assessment that the work-related degree of permanent impairment was 90% of total impairment, and he made a further error (which neither party identified) by concluding that a proportion of the impairment was due to a pre-existing condition, his ultimate assessment of 15% WPI is correct. It therefore confirmed the MAC.

Psychological injury – Demonstrable error - AMS erred in applying a deduction under s 323 WIMA & failed to adopt the methodology set out in cl 11-1 of the Guidelines – MAC revoked

Outram v Insurance Australia Group (IAG) t/as CGU Workers Compensation [2020] NSWWCCMA 101 – Arbitrator Rimmer, Dr P Morris & Dr J Parmegiani – 10/06/2020

The appellant suffered a primary psychological injury on 17/08/2017 (deemed) as a result of his employment as a Senior Case Manager and Technical Advisor.

On 21/02/2020, Dr Bench issued a MAC, which assessed 14% WPI, comprising 17% WPI less a deductible of 3% WPI under s 323 *WIMA.* As a result, the appellant was not entitled to recover compensation under s 66 *WCA.*

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.*

The MAP determined the appeal on the papers. It noted that the AMS applied a deductible of 3% under s 323 *WIMA* on the basis that it was evident that the appellant suffered multiple previous episodes of anxiety and depression, which were successfully treated with anti-depressant medication. He found that when the work injury occurred, the appellant's major depressive disorder was in remission as a result of treatment and stated that an adjustment of 3% was attracted "*…for the effects of treatment for the total elimination of permanent impairment provoked by the treatment.*"

The MAP discussed the decisions of Garling J in *Pereira v Siemens Ltd* [2015] NSWSC 1133, Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 and Campbell J in *Ryder v Sundance Bakehouse* [2015] NSWSC 526 and relevant paragraphs of the Guidelines. It held:

> 41. The Appeal Panel was satisfied that the AMS did not adopt the methodology set out in Clause11-1 of the Guidelines. The AMS did not refer to or assess the level of functioning in the various Psychiatric impairment rating scales (PIRS) categories pre-injury or consider whether the pre-existing injury or condition, on the available evidence, caused or contributed to the assessed WPI. He did not properly explain why he did not assess and rate the preinjury level of functioning in each of the PIRS categories or specifically state that the percentage of pre-existing impairment could not be assessed. While the AMS did say that the extent of the deduction was difficult or costly to determine, he gave no reasons for this conclusion. It was not clear if the AMS considered that there was no impairment that would be rated in the PIRS categories caused by the pre-existing condition at the time when the subject injury occurred or whether he was unable to rate the pre-injury level of functioning in each of the PIRS categories. The Appeal Panel considered it was possible that Mr Outram could have been in remission but still have a level of impairment.
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> 42. The AMS, without adequate explanation, proceeded to adopt an impairment assessment for the pre-existing condition based on the effects of treatment as a means of assessing contribution of pre-existing impairment. The Appeal Panel considered that the failure to adopt the methodology in Clause 11.1 or to clearly explain why that methodology was not adopted was an error and the assessment was made on the basis of incorrect criteria.
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> 43. As noted above, the Appeal Panel noted that the AMS considered that the extent of the deduction was difficult or costly to determine but then expressed the view that the available evidence was that the deductible proportion was large and a deduction of one tenth was at odds with the available evidence.
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> 44. The Appeal Panel considered that the evidence did not support the finding that the deductible proportion was large. It was clear that Mr Outram was on medication before the subject injury and the evidence suggested that his pre-existing condition was well controlled by such medication. The Appeal Panel considered that where Mr Outram was well controlled by medication prior to the subject injury, it would be difficult to work out the precise contribution of the pre-existing injury to the impairment assessed. However, the Appeal Panel did not agree that an assessment of 3% WPI, which was the maximum allowed for the effects of treatment, was an appropriate figure for a s 323 deduction in this case.
>
> 45. The respondent referred to the decision of *Wills*. The Appeal Panel accepts that there is no requirement to apply Clause 11.10 of the Guidelines if by applying the Clause it "*would produce an anomalous assessment contrary to the [relevant] principles*". The Appeal Panel noted that in Wills the worker was found to have a pre-existing impairment, notwithstanding treatment, causing recurrent periods of psychosocial and vocational impairment. Further, in *Wills* the worker was under treatment at the time of her work injury, including medication and psychiatric counselling treatment. The facts in this case are quite different and Mr Outram was working in 2009 and 2010 when he first reported symptoms and there was no evidence that he had any time off work in respect of a pre-existing psychological condition or was having psychiatric counselling treatment at the time of the subject work injury.

46. The AMS justified the 3% WPI deduction under s 323 of *the 1998 Act* by reference to the effects of treatment outlined in Clauses 1.32 and 11.8 of the Guidelines. In this regard, Clause 1.32 of the Guidelines provides that an assessor may increase the percentage WPI by 1%, 2% or 3% where effective long - term treatment results in apparent substantial or total elimination, but where the worker is likely to revert to the original impairment if treatment is withdrawn. It is possible that in making an assessment of impairment from a pre-existing condition, an assessor may increase the percentage WPI by 1% 2% or 3%, however, the AMS did not actually make an assessment of WPI for the pre-existing injury and then add an additional percentage for the effects of treatment.

47. The Appeal Panel after reviewing the clinical notes from Charlestown Medical and Dental Centre, which cover the period from 2009 to July 2018, considered that a deduction of 10% under s 323 of *the 1998 Act* and Clause 11.1 of *the Guidelines* was not at odds with the evidence. The Appeal Panel considered that there was a serious decline in Mr Outram's mental state and a range of symptoms developed including increased depressed, anxious and irritable mood, lethargy, lack of libido, inability to enjoy activities, being more isolative and withdrawn, passive suicidal ideation and engaging in reckless behaviours with little regard for his health and such symptoms were attributable to the work injury.

48. In conclusion, the Appeal Panel considered that there has been an incorrect application of relevant assessment criteria, that is, the Guidelines and a demonstrable error in the AMS' assessment. The Appeal Panel makes a deduction of one-tenth pursuant to s 323 of *the 1998 Act* and Clause 11.10 of *the Guidelines*. Therefore, a deduction of 1.7% (which is rounded up to 2% WPI) is applied to the assessment of 17% WPI. This results in a total assessment of 15% WPI as a result of the injury deemed to have occurred on 17 August 2017.

Accordingly, the MAP revoked the MAC and issued a fresh MAC, which assessed 15% WPI as a result of the work injury.

WCC – Arbitrator Decisions

Dispute as to whether s 44D (2) WCA applies to the worker where there was no agreement regarding her hours of work after her return from maternity leave – Respondent refused leave to dispute the issue of current work capacity

AZ v State of New South Wales [2020] NSWWCC 155 – Arbitrator Rimmer – 15/05/2020

The worker was employed by the respondent as a full-time Occupational Therapist (Mental Health Professional).

The insurer issued previous WCDs dated 12/07/2019 and 3/09/2019, which were the subject of previous WCC proceedings. On 28/10/2019, that dispute was resolved before ***Arbitrator Harris*** on terms that the Application was discontinued; the respondent withdrew its WCDs and it agreed to pay weekly compensation based upon PIAWE of $1,543.31, with credit for payments made.

On 11/12/2019, the worker requested a review of PIAWE and on 18/12/2019, the insurer advised that it would review PIAWE by 8/01/2020. On 8/01/2020, it wrote to the worker under ss 43 (1) and 44B *WCA*.

On 17/01/2020, the worker filed an application seeking to rescind the orders made by Arbitrator Harris on 28/10/2019 and to have the matter heard by that Arbitrator. She applied for reconsideration based upon matters that arose after the arbitration, including evidence that she had obtained after that date and the further WCD dated 8/01/2020.

However, Arbitrator Harris refused the application to reconsider the Consent Orders and he held that there was no logical reason to reinstate the proceedings to enable a contest on the previous WCDs that the insurer had withdrawn. He noted that the worker was entitled to dispute the further WCD and could file an application in the normal course.

On 6/02/2020, the worker lodged an Application for Expedited Assessment in respect of the WCD dated 8/01/2020.

Arbitrator Rimmer noted that the issues for determination were: (1) whether the reduction in ordinary hours worked during the period from 14/04/2019 to 3/07/2019 was "voluntary" within the meaning of s 44D (2) *WCA*; and (2) capacity and entitlement to weekly benefits.

The worker argued that the respondent denied her request for working Sunday to Wednesday and that this matter is currently before the Anti-Discrimination Board. She disputed that she voluntarily reduced her working hours to 28 hours per week. The parties ultimately agreed that PIAWE is $1,782.97 if it was found that there was no voluntary alteration of working hours.

The Arbitrator considered the meaning of "*ordinary hours of work*" in s 44D (2) (a) *WCA.* She referred to s 44H (a) *WCA* and did not accept that an alteration made by a worker in respect of the particular days of work complies with s 44D (2) (a). She stated, relevantly:

> 105. … It is clear in my view that the ordinary hours of work are the number of hours worked by the applicant each week and not the particular hours or shifts worked by a worker. In this case, a request to alter the particular days worked or shifts did not amount to voluntary alteration in the ordinary hours of work or the nature of the work performed. This approach is consistent with the other provisions in Division 2 of the 1987 Act relating to the calculation of PIAWE.

The Arbitrator was satisfied that the applicant requested a return to work from maternity leave on a full-time basis and that she initially requested a return to full-time work (40 hours per week) over a 4 day week. Her email to the employer dated 31/01/2019 supports this finding. She also accepted that when she returned to work after maternity leave, the worker requested that she work 32 hours a week from Sunday to Wednesday. Her employer offered her Monday to Wednesday shift and a Saturday or Sunday shift every second weekend, which amounted to an average of 56 hours a fortnight or 28 hours a week. No agreement was reached between the parties concerning the hours of work as her employer was unwilling to allow her to work the days she had requested. She then entered the dispute resolution procedure outlined in her Award and the matter was referred to the Anti-Discrimination Board and maintained that she had requested additional weekend shifts, but was not provided with those shifts.

While the respondent argued that the legislation does not require that the reduction in hours be voluntary, but rather that the alteration in ordinary hours of work which may lead to reduced hours be voluntary. However, the Arbitrator held that the respondent must show that the alteration was "*voluntarily*". She held that "*voluntarily*" is used in the sub-section in the context of "*alters*". To fall with the meaning of the sub-section the worker must either: (a) Voluntarily alter the ordinary hours of work, or (b) Voluntarily alter the nature of the work. She stated:

> 117. The parties referred to the decision on Arbitrator Harris in *Robert Whaley v Upper Hunter Shire Council* [2016] NSW WCC 280. Although the facts in that case were quite different as it related to a redundancy the respondent in that matter submitted that the word "*voluntarily*" was defined by the words that appear in the following brackets and that there was no requirement that the worker chose to reduce his hours and be pleased by the development.

118. Arbitrator Harris noted that the word "*voluntarily*" has been the subject of significant discussion at the highest judicial levels and that in *Attorney-General v Ellis* (1895) 2 Q.B. 466 (at 470) Lord Russell of Killowen C.J. and Charles J. construed the word "voluntarily" as meaning "freely" or under "no obligation". There is an extensive analysis on the meaning of "freely and voluntarily" by Campbell J. in *Tonkiss v Graham & Ors* [2002] NSWSC 891. After referring to various decisions (including decisions of the High Court), his Honour concluded (at [78]):

> 78. Of course, given the vastly different contexts in which the judicial statements which I have just been quoting about when an act is free and voluntary have been made, one cannot expect to transfer those statements directly into the context of section 13 of the Wills, Probate and Administration Act. They serve, though, to remind one that the notion of acting 'freely and voluntary' is one which has a relationship implicit in it. One acts "freely and voluntarily" when one acts free from circumstances constraining one's actions. The sort of circumstances which the cases I have quoted recognise as being ones which can, sometimes, result in action not being free and voluntary included duress, intimidation, persistent importunity, sustained or undue insistence or pressure, harassment, force, threats, fear, fraud, being induced by a threat or promise or some offered advantage, undue influence, and being deprived of relevant information or advice. However, as the discussion and the quoted extract from Meissner shows, the mere fact that an action occurs in a context where the actor is subject to one or more of these types of constraints, an action is not always sufficient, in itself, to lead to the conclusion that the actor has not acted freely and voluntary. One legal context in which one enquires whether an action is done 'freely and voluntarily' might require the absence of a different range of constraining conditions to a different legal context in which one enquires whether an action is done "freely and voluntarily". Or one such legal context might call for those factors to be weighted differently to the way they are weighted in a different legal context. Further, as the quoted extract from Cleland shows, whether an action is in fact not free and voluntary depends on the interaction of the constraining circumstances with the particular actor…

120. Seen in context, the meaning of "*voluntarily*" with respect to the applicant's decision to alter the hours or nature of the work is more closely aligned to a decision made by the worker's free will and free from circumstances constraining one's own actions.

121. This meaning of "*voluntarily*" fits in with the purpose of the section noting a beneficial construction…

123. A worker who has sought an alteration in ordinary hours and is "advised" that her hours will be reduced below what was requested, is usually under no compulsion to accept the change. However, in this case the applicant was bound by the terms of her award and required to work the hours that the respondent decided that she would work.

The Arbitrator held that the alteration in the worker's ordinary hours of work was not voluntary. Section 44D (2) applies when the alteration of hours and duties has occurred prior to injury and the change is one properly described as "*voluntarily*", but it does not apply to this matter.

The respondent attempted to raise the issue of work capacity during the arbitration, but it had not notified the worker that this issue was disputed. The Arbitrator directed the parties to file and serve written submissions on that issue.

The respondent argued that current weekly earnings should be the weekly amount that the worker was able to earn in suitable employment and not her actual gross earnings. However, the worker disputed the issue of jurisdiction in relation to the WCD pertaining to "current work capacity".

The Arbitrator did not accept that the insurer raised any issue other than the calculation of PIAWE in its WCD. She stated:

> 150. I consider that the comments made by Roche DP in *Mateus* concerning section 74 Notices would apply to other dispute notices issued by an insurer including a notice under ss 43 (1) and 44BB. I find that the Notice dated 8 January 2020 did not state in plain language that there was a dispute as to current work capacity. I find that the respondent did not notify the applicant that there was a dispute concerning the applicant's current work capacity relating to current weekly earnings and how that should be calculated in the Notice of 8 January 2020.

The Arbitrator held that the factors mitigating against her exercising discretion to grant leave to the respondent to raise the issue of work capacity outweighed those in favour. There was no attempt by the respondent to explain the significant delay in raising this issue and the worker was effectively ambushed at the arbitration. Accordingly, she refused to grant leave under s 289A *WIMA* and ordered the respondent to make continuing weekly payments to the worker based upon PIAWE of $1,782.97, with credit for payments made.

Worker exaggerated her evidence and her evidence was treated with a degree of caution, but contemporaneous and uncontradicted evidence established that she perceived she was bullied over the imposition of a number of RTW plans

Craig v Secretary, Department of Education [2020] NSWWCC 192 – Arbitrator Harris – 10/06/2020

The worker alleged that she suffered a psychological injury as a result of perceived bullying and harassment by the respondent. The respondent disputed the claim and the matter proceeded to arbitration over 3 days.

Arbitrator Harris noted that the respondent argued that the worker could not establish the underlying facts said to be causative of the injury and that her psychological injury was pre-existing and was aggravated by non-work causes. The worker claimed weekly payments from 11/06/2014 to 10/12/2016, a general order for payment of s 60 expenses and lump sum compensation under s 66 *WCA.* The parties agreed that PIAWE is $1,389.99 and while the respondent did not dispute that the worker had no current work capacity, it disputed the cause of that incapacity.

The Arbitrator noted that the respondent had concerns about the worker's diabetes condition and how this impacted on her capacity to perform duties and work rosters. It arranged for a medical examination and drafted various return to work plans, which were not agreed, after the Dr Cook provided reports.

The Arbitrator was satisfied that the worker suffered from a pre-existing psychological condition relating to her slight involvement as a co-worker with Ivan Milat. He rejected the worker's assertion that she had not suffered a previous injury, but noted that the worker asserted that this was an attempt by the insurer to muddy the waters. The worker admitted to redacting references to the Milat matter from clinical records. In relation to this matter, the Arbitrator stated:

289. I observe that if the matter had been previously raised as a pre-hearing issue before me then I would have had no hesitation in directing the general practitioner to provide a complete copy of his notes. I also observe that I am unimpressed that the applicant, through her legal advisers, believed that there was an entitlement to determine what can and cannot be disclosed in a contested matter by redacting evidence. However, there was no objection to the notes being admitted and the parties made submissions on what had not been redacted.

290. The redacting was a matter addressed in submissions on the basis that the respondent submitted that they show another cause or otherwise provide an incomplete picture as part of a submission that the applicant had failed to satisfy the onus of proof.

291. The respondent submitted that not all of the redacted information would relate to the Milat investigation although it was probable that portions of it did. The respondent observed that I could not draw the inference that all of the redacted information related to the Milat investigation because that was not the applicant's evidence and such an inference was not the most likely explanation.

292. In *Caswell v Powell Duffryn Associated Collieries Ltd* (Caswell), Lord Wright stated:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty, as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

293. This passage has been frequently applied. Examples of its application in New South Wales include *Seltsam Pty Ltd v McGuiness* and *Council of the City of Liverpool v Turano & Anor*.

294. As Spigelman CJ stated in *Seltsam* citing *Layton v Vines* the "*test is whether, on the basis of the primary facts, it is reasonable to draw the inference*".

295. I conclude that significant portions if not most of the redacted information related to the Milat investigation and how that impacted on the applicant's pre-existing psychological condition. That conclusion is drawn from the applicant's statement, the fact that it is contained within the notes of the treating general practitioner and would likely relate to an explanation of the applicant's health. The timing of the redacted notes is otherwise consistent with the notes of the general practitioner and his reports in 2012 that there was an existing anxiety condition. The conclusion is otherwise consistent with statements made by the applicant in 2012 that she was still suffering anxiety due to the Milat investigation.

296. In these circumstances, I conclude that the redaction of various notes within Dr Robertson's clinical records only confirms my view that the applicant had an ongoing psychological condition over many years relating to the Milat investigation.

The Arbitrator also noted that the respondent made other submissions concerning the worker's credit and referred to some bizarre evidence that she provided, which tended to suggest that she was unreliable or paranoid, displayed improper behaviour in redacting evidence, refused to attend examinations and the uncooperative manner in which she was perceived to comply with examination requests. He stated:

> 298. I addressed the applicant's evidence above concerning her denial of the Milat investigation. There are other aspects of the applicant's evidence that suggest she is prone to exaggeration. The respondent referred to evidence that, when faced with a comment about her behaviour at school, the applicant responded that other people were lying. There was also contemporaneous evidence establishing that the applicant's interaction with students and the Principal was inappropriate. It was, as the respondent submitted, an insight into the applicant's character…
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> 300. I observe that it is not uncommon that opposing medical witnesses assert that a worker is uncooperative or exaggerating because the display of symptomatology is excessive and beyond the norms of a reasonable response. I have no doubt that the applicant portrayed herself as grossly ill and it is not surprising that there were comments by some practitioners that there was a degree of exaggeration. However. that submission must be considered in the context that the respondent accepted, for whatever reason, that the applicant had no current work capacity.
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> 301. The respondent also relied on the applicant's failure to attend appointments and the reasons which were provided. Some of these reasons proffered by the applicant appear inconsistent with the fact that she attended other organised appointments at around that time.
>
> 302. Whilst not accepting all of the respondent's submissions on this issue, I am cautious of accepting the applicant's evidence and have analysed it in the context of whether it has been corroborated to a degree by other evidence. By that I am not indicating that the applicant's evidence must be corroborated to be accepted although I have generally only accepted her evidence if it was corroborated or otherwise consistent with contemporaneous accounts.

The Arbitrator held that there was compelling corroborative evidence that the worker was subject to repetitive abuse and threats from students in her employ with the respondent. He also accepted her argument that the evidence supports her perception that her diabetes became a factor that influenced how she was treated by the Principal and Executive of the school. The worker was clearly anxious, distressed and upset by these interactions, which were real events. However, as s 11A *WCA* was not raised by the respondent, he was not required to determine whether the respondent used the return to work plans to intimidate, harass and bully the worker as part of an agenda to have her leave, or whether the respondent's actions were reasonable. He stated:

> 332. For these reasons I accept that the interaction between the Principal and the applicant concerning the management of the applicant's diabetes and how it impacted on her duties was an ongoing source of distress to the applicant. The applicant clearly believed that, because of how she was treated, she was bullied and harassed by the Principal. This is a critical finding because it is intimately connected with the issue raised by the respondent of whether various doctors had a fair climate to express an opinion.

Accordingly, the Arbitrator held that the worker suffered an aggravation of a pre-existing psychological condition to which her employment was a main contributing factor. He held that she has no current work capacity and the awarded the worker weekly compensation under ss 36 & 37 *WCA* and made a general order for payment of s 60 expenses. He remitted the s 66 dispute to the Registrar for referral to an AMS.