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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. Wharram v CIC Allianz Insurance Limited [2020] NSWSC 1144
2. Calvary Home Care Services Ltd trading as Calvary Silver Circle v Vernon [2020] NSWWCCPD 54
3. Seles v State Transit Authority of NSW [2020] NSWWCCPD 55
4. Galal v University of New South Wales [2020] NSWWCC 275
5. Gallagher v Falconers Pty Ltd trading as Northern Rivers Hotel (deregistered) – [2020] NSWWCC 285
6. Bokan v Coles Supermarkets Australia Pty Ltd [2020] NSWWCCR 8
7. Kochel v Ready Workforce (a Division of Chandler Macleod Pty Ltd) [2020] NSWWCCR 7

## Supreme Court of NSW – Judicial Review Decisions

***Jurisdictional error – Assessor and Proper Officer of SIRA failed to determine causation correctly – Assessor failed to declare his path of reasoning***

**Wharram v CIC Allianz Insurance Limited [2020] NSWSC 1144 – Davies J – 1/09/2020**

On 28/10/2016, the plaintiff was injured in a MVA. He alleged that a trailer attached to a vehicle that was being driven on the opposite side of the road crossed the centre line and knocked him off his motor-cycle. The first defendant disputed that version of events. The plaintiff suffered multiple injuries including fractured ribs and injuries to his neck, back, both shoulders, head, digestive tract and right patella. He also suffered a grade V laceration, which required surgery, and post-operative splenetic vein thrombosis.

The impairment dispute was referred by the Medical Assessment Service to Dr Cameron. On 18/08/2019, Dr Cameron issued his certificate and reasons and he assessed 3% WPI (2% for scarring to the abdomen and 1% for the digestive tract) and he found that the rib fractures, right patella and thrombosis injuries had healed without impairment. He found that gross soft tissue injuries to the neck, back, both upper extremities, a closed head injury and a staph infection in the blood were not caused by the MVA.

On 24/09/2019, the plaintiff applied for a review by the Review Panel. However, on 11/11/2019, the Proper Officer of SIRA dismissed the application and determined that there was no reasonable cause to suspect that the medical assessment was incorrect in a material respect.

The plaintiff applied to the Supreme Court of NSW for judicial review of the decision. His Honour noted that counsel for the Plaintiff distilled the 6 grounds set out in the Summons and identified 3 bases for challenging the Assessor's decision, namely:

> (1) An error in relation to the causation of the injuries. The plaintiff argued that the Assessor failed in properly undertaking the task required of him under the medical and non-medical determinations set out in clause 1.6 of the Permanent Impairment Guidelines and he proceeded on the basis that the purported absence of contemporaneous record of complaint in clinical material was determinative of causation and the occurrence of significant injury to the neck and back. This was an incorrect basis for fact finding;
>
> (2) The Assessor failed to engage with his clearly articulated argument that he sustained injuries to his neck and back in the accident and he therefore failed to apply the Guidelines; and
>
> (3) The Assessor's report did not set out the actual path of reasoning to show the decision arrived at. There was no probative evidence to support the decision maker's negative causation finding and the injuries to the neck and back were accepted by the first defendant's medico-legal expert.

His Honour described the Assessor's report as "*economical*" and he held that when the issue at the assessment concerned particularly whether there was permanent impairment to the neck and back, a failure to record what injuries the plaintiff claimed to have suffered in the accident impacts on any assessment of causation, and represents a defect in the path of reasoning to the Assessor's conclusion. His Honour stated:

> 32. A further reading of section 6 of the Assessor's report leads me to conclude that his conclusion "that significant injuries did not occur in the neck or back related to the subject accident" was based on what was contained in section 6 of the report and nothing else. The introductory word, "Thus", tends to support that construction of the Assessor's conclusion.
>
> 33. If it was based on anything else, the Assessor did not set out a line of reasoning to assist in such a conclusion. The term "significant injuries" is not a term of art in the assessment of permanent impairment. It seems clear that the Assessor was looking in the contemporaneous material to see if there were significant injuries because he says that there was no evidence contemporaneous with the incident that the plaintiff sustained significant injuries. Having made reference to the time when any complaints associated with the neck or back appeared, he concluded that "significant injuries" did not occur in those parts of the body related to the accident…
>
> 35. Where none of those matters is mentioned or referred to in section 6 of the report, it is reasonable to conclude that the Assessor's conclusion in section 6 is based only on the matters discussed in that section of the report. If he intended that that conclusion took into account all of those other matters, the Assessor has failed to disclose his path of reasoning: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [48].
>
> 36. The Assessor's focus on contemporaneous records has deflected the Assessor from undertaking the causation enquiry that he was bound to undertake. The danger of fact finding based on contemporaneous material was highlighted by Basten JA in *Mason v Demasi* [2009] NSWCA 227 at [22]:

> [22] First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in the *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:
>
> (a) the health professional who took the history has not been cross-examined about:
>
> (i) the circumstances of the consultation;
>
> (ii) the manner in which the history was obtained;
>
> (iii) the period of time devoted to that exercise, and
>
> (iv) the accuracy of the recording;
>
> (b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;
>
> (c) the record did not identify any questions which may have elucidated replies;
>
> (d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording; and
>
> (e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history.

37. In a similar vein, Campbell J said in *Owen v Motor Accidents Authority of NSW* [2012] NSWSC 650 at [52]:

> Moreover, the juxtaposition between the statement that the material provided by the parties had not provided any evidence to indicate that the ***claimed lumbar spine injury was causally related to the subject accident*** with the following analysis of contemporaneous documentation persuades me that the Review Panel identified a wrong issue, namely, did treatment providers in the first month or so following the motor accident make a record of complaints of symptoms in the lumbar spine? Undoubtedly, it was relevant to consider that material in the process of determining the right question, but it was wrong to treat this consideration as decisive, not least because ***[e]xperience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury***: *Davis v. Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]). The medical histories were taken in furtherance of a purpose which is not identical with the purpose of resolving the medical assessment matter before the Review Panel: *Container Terminals Australia v. Huseyin* [2008] NSWCA 320 at [8]; *Mason v. Demasi* [2009] NSWCA 227 at [2] and *Gulic v. O'Neill* [2011] NSWCA 361 at [24]. These statements were made in the context of the exercise by the Court of Appeal of its powers of rehearing pursuant to s.75A *Supreme Court Act 1970*. But they are apposite to the exercise by the Review Panel of its powers under s.63 of the Act, especially subs. (3A). In my judgment the identification of this wrong issue was jurisdictional error. **(emphasis in original)**

38. Similarly in *Bugat v Fox* [2014] NSWSC 888 R Hulme AJ said:

> [30] What Dr Ryan had said in his Certificate concerning causation was merely:-
>
> > The documents which are germane in determining the presence or absence of an injury are those most contemporary with the time of the accident. The contemporary documents appear to be the report of the ambulance (Healthcare Record J487987, 12 July 2009), the discharge summary from Royal North Shore Hospital Emergency Department (12 July 2009), Dr Jayne Crew, Senior Resident Medical Officer.
> >
> > Based on the evidence in these documents I conclude that Ms Bugat injured her cervical spine, thoracic spine, chest and left knee in the index motor vehicle accident.
>
> [31] One of the pivotal questions for the Panel was whether the injuries of which the Plaintiff complained had been caused (or materially contributed to) by the motor accident she alleged. To that question the presence or absence of contemporaneous evidence of injury was relevant but not determinative in circumstances where there was other evidence, in particular the Plaintiff's claim form made but 15 days later, the remarks of Dr Hor in his report of 13 July 2011, and the Plaintiff's statements which the Certificate discloses were made to the Panel to the effect that at the time of the accident she suffered "*pain in her neck going out to both shoulders*".
>
> [32] While I accept that, as an administrative decision maker, the Panel's reasons should not be subjected to "minute and detailed textual criticism in the hope of finding something on which to base an argument" - *Allianz Australia Insurance Limited v Motor Accident Authority of NSW* (2006) 47 MVR 46; [2006] NSWSC 1096 at [36] - in expressing themselves the way they have, the Panel have clearly shown that they have regarded what they perceived as the absence of contemporaneous evidence as determinative on the issue of causation. In doing so they erred, the error being one apparent on the face of the record.

39. The focus by the Assessor on contemporaneous records seems to have been misplaced because of the way the relevant doctors recorded matters. The first visit by the plaintiff to his GP after the accident was on 21 November 2016. As with a number of subsequent visits to this GP on 24 November, 2 December, 7 December, 19 December, 3 January 2017, 23 January, 1 February, 2 February, 6 February and 10 February, the doctor did not record any reason for the visits. All that was recorded was “surgery consultation”. The first time any reasons for contact were recorded was by a different GP on 3 March 2017 where “back pain – buttock” was recorded. That method of record keeping only highlights the dangers, emphasised in the authorities to which I have referred, of making findings of fact or drawing firm conclusions from contemporaneous records.

40. Further, it is not illogical to accept that a person may not suffer what might be described as a significant injury in an accident but might, as a result of how that injury manifests in disability, result in permanent impairment. In that way, the focus on whether significant injuries were suffered was an illegitimate way of dealing with the issue of causation and amounted to the Assessor asking himself the wrong question. These matters demonstrate that the Assessor fell into error when assessing causation.

His Honour rejected the plaintiff's argument that the Assessor failed to respond to a clearly articulated case concerning his neck and back, but he held that the Plaintiff is entitled to have his assessment carried out correctly where the Assessor gives proper consideration to matters of causation and adequately explains his path of reasoning in his conclusions. The Assessor had not carried out his statutory task and his Certificate is void and of no effect.

Accordingly, his Honour set aside the Certificate and statement of reasons dated 18/08/2019 and the decision and statement of reasons of the Proper Officer dated 11/11/2019. He ordered the first defendant to pay the plaintiff's costs.

## WCC – Presidential Decisions

### *Alleged factual error – the weight of evidence – procedural fairness*

**Calvary Home Care Services Ltd trading as Calvary Silver Circle v Vernon [2020] NSWWCCPD 54 – Deputy President Snell – 27/08/2020**

The worker was employed by the appellant as a casual support worker. In February 2013, the worker suffered pain in her right shoulder while she was vacuuming at work. After treatment and periods of restricted duties, she resumed normal duties but said that her shoulder continued to bother her. On 3/07/2014, she suffered a significant deterioration in her shoulder symptoms while vacuuming at work. She lost time from work, had periods on restricted duties and underwent rehabilitation. She ceased work in April 2015 and underwent right shoulder surgery on 23/08/2017. She alleged that after the surgery, she relied heavily on her left arm and suffered pain in her left shoulder. Dr Osborne recommended surgery, but she declined this.

On 10/04/2019, the appellant disputed the claim for consequential injury to the left shoulder.

The worker claimed compensation under s 66 *WCA* for 18% WPI based on assessments from Dr Patrick (9% right upper extremity and 10% left upper extremity). However, the appellant disputed the claim based on an opinion from Dr Wallace (no work-related injury to the left shoulder and 0% WPI of the right shoulder).

On 28/04/2020, ***Arbitrator Peacock*** issued a COD, which determined that the worker suffered a consequential injury to her left shoulder. She remitted the s 66 dispute to the Registrar for referral to an AMS to assess permanent impairment of both upper extremities.

***Deputy President Snell*** granted the appellant leave to appeal against the interlocutory decision under s 352 (3A) *WIMA* on the basis that it was necessary to do so for the proper and effective determination of the dispute.

The appellant alleged that the Arbitrator erred in fact and law as follows: (1) in accepting the opinion of Dr Patrick regarding causation of the left shoulder condition; (2) in determining credit in the respondent's favour because the respondent was not cross-examined; and in finding the respondent first noticed left shoulder symptoms approximately two months following right shoulder surgery and the failure to give proper reasons. It also asserted that the Arbitrator erred in fact and law in failing to properly assess the evidence regarding any causal connection between the right shoulder injury and the left shoulder condition.

Snell DP rejected ground (1). He noted that the Arbitrator stated that she reached her conclusion on causation weighing all of the evidence in the balance and this was clearly appropriate. He held that on a fair reading of Dr Osborne's reports in their entirety, they support the Arbitrator's conclusion that they were consistent with the reporting of pain and restrictions in the right shoulder. It is clear from Dr Osborne's reports that the worker did not at any time experience a full recovery for her right shoulder symptoms.

Snell DP upheld ground (2). He stated, relevantly:

> 72. In *JB Metropolitan Distributors Pty Ltd v Kitanoski* Roche DP said
>
> > Subject to the relevant issues having been fully and fairly ventilated in the documentary evidence, and the parties having had a reasonable opportunity to make appropriate submissions on those issues, it is open to an Arbitrator to form a view about the credit of a witness or a party even if that witness or party has not given oral evidence or been cross-examined (*New South Wales Police Force v Winter* [2011] NSWCA 330 from [81]).
>
> 73. Both parties accept that a failure to cross-examine in the Commission does not preclude an adverse credit finding. It does not militate against such a finding in appropriate circumstances. This is subject to principles of procedural fairness that are inherent in the above passage.
>
> 74. In *Seltsam Pty Limited v Ghaleb* Ipp JA (Mason P agreeing) summarised a number of authorities dealing with procedural fairness and said:
>
> > 78. These cases illustrate the general principle that although the basis on which the parties conduct a trial does not bind the judge, if the judge contemplates determining the case on a different basis he or she must inform the parties of this prospect so that they have an opportunity to address any new or changed issues that may arise.
> >
> > 79. A failure so to inform the parties will ordinarily result in a denial of procedural fairness. A new trial will be ordered if a party is not afforded a fair trial in circumstances where a properly conducted trial might possibly have produced a different result. It will not ordinarily be necessary to lead evidence to prove that the denial of procedural fairness had the potential to affect the outcome; in most cases the facts will speak for themselves.
>
> 75. The appellant submits, and I accept, that the respondent's credit was put in issue. The respondent properly accepts this. The respondent properly accepts that it did not raise a failure to cross-examine in its submissions before the Arbitrator. That the Arbitrator might contemplate relying on a failure by the appellant to cross-examine, as a matter relevant to her determination of the credit issue, was not raised with the parties during the running of the arbitration hearing. In those circumstances, neither party made submissions at first instance on this topic. Consistent with authority there was a breach of the rules of procedural fairness.
>
> 76. In *Stead v State Government Insurance Commission*, the High Court stated:
>
> > Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.
> >
> > And:
> >
> > All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.
>
> 77. In *Boral Besser Masonry Ltd v Jabarkhill* it was said:

> To succeed in setting aside a judgment on the natural justice ground it will not always be sufficient for an appellant to show a denial of natural justice. Occasionally it may appear that it was highly likely that the same judgment should have been arrived at in any event, so that it would be pointless to order a new trial. When that appears sufficiently clearly the court may refuse to uphold the appeal; but that position would have to [be] very clear before the court would withhold relief.

78. The respondent argues that the reference to a failure to cross-examine was not determinative, the same result would have prevailed in any event. The appellant submits "*the absence of cross-examin[ation] was clearly a factor that was considered by the Arbitrator and formed part of her reasoning process*".

79. The absence of cross-examination was referred to twice, in the passages set out at [67] above. On its face, it was a factor relied on by the Arbitrator in accepting the respondent's evidence set out in those passages. The Arbitrator relied in part on acceptance of the respondent's evidence in her fact finding (see [61] and [63] above). One could not conclude that "*a properly conducted trial could not possibly have produced a different result*".

Snell DP held that it was not necessary to determine ground (3).

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

### *Findings of fact – adequacy of reasons – acceptance of and weight to be afforded to the evidence*

**Seles v State Transit Authority of NSW [2020] NSWWCCPD 55 – Deputy President Wood – 27/08/2020**

On 22/05/2012, the worker suffered a fracture of her right radial head of the elbow joint when she fell down 2 steps at work. She claimed compensation and the insurer accepted the claim. She resumed work 3 weeks later and continued to work until early 2014, when she commenced maternity leave and she was then a full-time carer for her 2 children.

On 1/03/2018, the worker was lifting her daughter into a low chair when her arm locked, after which she felt numbness. She claimed weekly payments and treatment expenses and asserted that these symptoms resulted from the 2012 injury, but the insurer disputed the claim.

On 7/04/2020, ***Senior Arbitrator Bamber*** found that she was not satisfied that there was a causal connection between the symptoms that commenced on 1/03/2018 and the work injury in 2012. She noted numerous issues in relation to the medical evidence and stated that determining the issue of causation was not straightforward and that the medical experts needed to have an understanding of the precise nature of the 2012 injury in order to assist her in determining that issue. She discussed the medical evidence in detail and ultimately preferred the opinion of Dr O'Sullivan, as he was the only doctor who actually considered the causal connection in any detail and he had correctly described the 2012 injury.

The Senior Arbitrator discussed the decision of Kirby P (as his Honour then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 and she applied it in reaching her decision. She noted that no medical expert had been qualified to provide an opinion regarding causation on behalf of the appellant and she held that she was not actually persuaded that a causal connection was established. Accordingly, she entered an award for the respondent.

On appeal, the appellant alleged that the Senior Arbitrator erred as follows: (1) in fact, by failing to find a causal link between her injury sustained on 1/03/2018 and the accepted work injury on 22/05/2012; (2) mixed error of fact and law in failing to provide any or any adequate reasons for preferring the medico-legal opinion of Dr O'Sullivan over the numerous opinions expressed by her treating doctors; (3) error of law by giving any or undue weight to the opinion of Dr O'Sullivan; and (4) error of fact by drawing an adverse inference against the appellant in respect of her perceived failure to qualify a medical opinion to counter that of Dr O'Sullivan, which led to an error of law by failing to properly exercise her discretion.

***Deputy President Snell*** rejected ground (1). He stated:

> 102. The Senior Arbitrator considered all of the medical evidence and formed a preference for the opinion of Dr O'Sullivan over that of Dr Presgrave and Dr Granot, a preference which was open to her for the reasons she provided. It cannot be said that other probabilities so outweigh that chosen by the Senior Arbitrator that it can be said that her conclusion was wrong or that material facts have been overlooked or given too little weight, as required by the principles enunciated in *Whiteley Muir*.
>
> 103. The appellant also refers to the Senior Arbitrator's observation that Dr Granot did not express a view about the relationship between the CRPS and the 2012 injury and submits that the observation was inconsistent with the opinion expressed by Dr Granot in his report dated 24 September 2018 [sic, 2019], reproduced at [59] above. In fact, the Senior Arbitrator made the following observations:
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> > Dr Gronot [sic], in his report to Ms Seles' solicitors dated 24 September 2018 [sic, 2019], states that the original injury caused some trauma to the ulnar nerve as evidenced by symptoms of intermittent hand numbness and persisting medial elbow pain between the time of the 2012 injury and 2018. He opines that this was then exacerbated during her injury of March 2018, which worsened her symptoms causing her current presentation with CRPS, and
> >
> > In his report dated 29 March 2019 Dr Gronot [sic] says, '*She likely has CRPS*' and he was waiting a review by the Pain Clinic. He did not express a view about the relationship between any CRPS and the 2012 injury.
>
> 104. The Senior Arbitrator correctly observed that in one of his reports, Dr Granot did not express a view on causation. That does not lead to a conclusion that the Senior Arbitrator erred when she:
>
> > (a) clearly took into account Dr Granot's opinion expressed in the report dated 24 September 2018 [sic 2019];
> >
> > (b) gave it consideration, and
> >
> > (c) concluded that she could afford it little or no weight because it was based on an assumption that there had been persistent medial pain since the 2012 injury, which was not made out on the evidence.
>
> 105. The appellant has failed to establish error on the part of the Senior Arbitrator in respect of her determination that she was not persuaded on the balance of probabilities that there was a causal connection between the symptoms arising from 1 March 2018 and the work-related injury on 22 May 2012.

Snell DP also rejected ground (2) and he stated:

> 109. A useful summary of the principles enunciated in various authorities as to the adequacy of reasons was provided by McColl JA (with Ipp JA and Bryson AJA agreeing) in *Pollard v RRR Corporation Pty Ltd*, in which her Honour said as follows (citations omitted):

> The Court is conscious of not picking over an ex tempore judgment and, too, of giving due allowance for the pressures under which judges of the District Court are placed by the volume of cases coming before them. However a trial judge's reasons must, '*as a minimum ... be adequate for the exercise of a facility of appeal'. A superior court, 'considering the decision of an inferior tribunal, should not be left to speculate from collateral observations as to the basis of a particular finding'*.
>
> The giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes 'a sense of grievance' and denies 'both the fact and the appearance of justice having been done', thus working a miscarriage of justice.
>
> The extent and content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties.
>
> The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted … it is necessary that the primary judge '*enter into*' the issues canvassed and explain why one case is preferred over another.

110. It is necessary to take into account the whole of the decision. The Arbitrator's reasons are not required to be lengthy or elaborate. In *Roncevich v Repatriation Commission*, Kirby J said:

> [t]he focus of attention is on the substance of the decision and whether it addressed the 'real issue' presented by the contest between the parties.

111. There is no failure to give reasons if the steps in the judge's reasoning were readily apparent…

116. All of the facts identified by the Senior Arbitrator were founded in the evidence. The above exposition of the Senior Arbitrator's reasons for concluding that she preferred the opinion of Dr O'Sullivan discloses that the reasons were readily apparent. The reasons were sufficient to address the issue presented by the appellant's case and the contest between the parties, as discussed in Pollard, and were sufficient to discharge the Senior Arbitrator's statutory obligations pursuant to s 294 of the *1998 Ac*t and r 15.6 of *the Rules*.

Snell DP rejected ground (3). He held that the Senior Arbitrator acceptance of Dr O'Sullivan's opinion was rational and open to her for the reasons that she enunciated.

Snell DP also rejected ground (4). He stated that the Senior Arbitrator's conclusion must be considered in the context in which her findings were made. He held that it was not apparent from the reasons that the Senior Arbitrator drew any adverse inference of the kind asserted by the appellant.

Accordingly, Snell DP confirmed the COD.

## WCC – Arbitrator Decisions

### *PHD student with a Commonwealth Scholarship was not a worker or deemed worker of the university while it reserved the intellectual property of his study and paid his stipend*

**Galal v University of New South Wales [2020] NSWWCC 275 – Arbitrator Bell – 14/08/2020**

The applicant completed a Bachelor of Medical Science in 2016 and a Bachelor of Science (Honours) in 2017 and was employed as a casual worker by the respondent as a time in 2017. In November 2017, she was offered a place in the University's PhD program and In February 2018, she was granted a Commonwealth stipend to cover living expenses for the period of study.

On 9/05/2018, the applicant was injecting a virus into a mouse's tail at work when the viral fluid sprayed into her face. She washed her face and continued, but the same thing happened again. She put on goggles, but the same incident recurred. She subsequently suffered debilitating symptoms, possibly of chronic fatigue syndrome, and attempts to return to her course failed. As a result, her PhD course was terminated. She claimed compensation with respect to the injury on 9/05/2018, but the respondent disputed it.

***Arbitrator Bell*** identified the issues in dispute as: (1) whether the applicant was a worker for the purposes of s 4 *WCA*?; (2) Whether the applicant was a deemed worker under Schedule 1 *WIMA*?; (3) If so, did nay incapacity result from the work injury?; and (4) if so, is the applicant partially or totally incapacitated and what is her entitlement to weekly compensation?

The applicant argued that her relationship with the University as a PhD student was one of worker and employer as the stipend that she was receiving under the scholarship was subject to satisfactory progress and the offer of the scholarship was contingent on her performing research at the University. The funding was paid from the time the study began and was linked to her performing the tasks of a research student. The documents setting out the payment of the stipend indicate a contract with the University requiring her to perform tasks of research of benefit to the University. Her research could attract funding, so she should be taken as performing work from which the University makes money.

The applicant argued that the indicia used to establish whether someone is a worker as discussed in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1 (*Stevens*) only require an element of control and direction and this is established on the evidence. The University controls the field of study and access to the scholarship and who is a full-time student. If the student is part-time, the scholarship becomes part-time, with a minimum of 35 hours per week required to maintain payment. Alternatively, she argued that she is a deemed worker under Sch 1, cl 2 *WIMA* as she had to do the work of research at the University personally.

The applicant argued that she has no current work capacity and she relied upon medical evidence that it can take up to 5 years to recover from CFS.

The respondent argued that the applicant is a student and not a worker and in the absence of a scholarship, the applicant would be taken as a student. The scholarship defrayed the costs of tuition and provided a stipend to cover living costs while studying. There was no contract under which the University required anything specific from the applicant, although there was a contract of enrolment, which enabled the applicant to obtain a degree. There was no contract of service because the applicant did not – as a student – provide any service and her work was not of benefit to the University. While the ultimate copyright may be owned by the University, the work was being done towards the degree, which does not place the applicant under the definition of "*worker*".

The respondent also argued that the applicant is not a deemed worker because the only contract between the parties was to reach the standards necessary for the award of the degree and there was no contract to perform work. the whole purpose of Sch 1 Cl 2 *WIMA* is to catch people who should in the circumstances be deemed to be workers, but the applicant was not doing anything for a trade or business. The clause is not meant to capture the relationship of student and University.

The respondent argued that the applicant is not totally incapacitated and it rejected the applicant's alleged PIAWE on the basis that there were no earnings, but only the payment of a scholarship stipend.

***Arbitrator Bell*** held that the applicant was a full-time student at the time of the injury and not a worker. He stated, relevantly:

> 61. …The nature of the relationship between Ms Gagal (sic) and the University was one in which she sought and was offered enrolment in the PhD program in her own interest using the laboratory facilities and other resources of the University as well as the expertise of the University's academic supervisors. The indicia from the authorities relied upon for Ms Galal do not apply to this student/ institution relationship in which Ms Galal enrolled in a course of study offered to gain the academic qualifications sought.
>
> 62. The fact that Ms Gagal (sic), after being offered enrolment in the University's PhD course, then achieved a Commonwealth scholarship including a stipend to assist with living expenses does not alter her status from a student studying and researching for a PhD into a paid worker for the University.
>
> 63. It is submitted for Ms Gagal (sic) that Ms Law in her statement calls the scholarship an "award" and the leave entitlements set out are consistent with a worker's "*award*". I do not accept this submission. In my view the term "award" in this context has its general meaning and simply refers to the giving of the scholarship, not to some form of industrial award. The types of "*leave*" set out in the scholarship documents are not leave from employment, but a set of protocols to deal with illness or breaks in study during which the student's stipend may be continued.
>
> 64. That the stipend payments were made fortnightly does not make them a wage in return for service. This was merely the means for transfer of the Commonwealth Scholarship monies to the Ms Galal as recipient student as she studied.
>
> 65. The "*control*" element relied on for Ms Gagal (sic) is not consistent with a work situation. The control is over the progress of the student through the program to ensure the academic standards are being met. The subject matter of the PhD research was negotiated, and progress had to be satisfactory, both for her continuation in the course toward the PhD and in her case for the continuation of the scholarship. This is not "control" in the sense of paid work for the University as part of a contract of service. The evidence is that the area of research is jointly agreed between the student and the University. There is no evidence that the University dictated the topic of research or the way Ms Gagal (sic) conducted that research to lead to a financial or other beneficial outcome for the University.
>
> 66. It is apparent that students in the higher research area use the laboratories and equipment of the University and this is clearly a main offering by the University for students, as well as the academic expertise and knowledge accessed through academic supervision. This is not a worker being provided with tools by an employer in terms of the "worker" indicia but a student being provided with teaching and learning facilities like that provided by any educational institution. It is completely unlike "factory work", contrary to the submission for Ms Galal.

67. It is submitted for Ms Galal that only an element of control and direction by the University is required to establish an employment relationship. There was a degree of control and direction of Ms Galal as a student in the PhD research program, but that control and direction was completely within the context of student activity and progress in a higher education setting. As noted above, the University did not dictate to Ms Galal the area of research for her course. This was a matter of negotiation involving no doubt such factors as the interest area of the student, the University's resources available, time limitations, the relevance to the current world of academic research, and other factors. It seems that all of this applied to all students in such courses whether on a scholarship stipend for living expenses or not.

68. The retention of intellectual property rights referred to by Ms Galal in her statement are not detailed in the materials and in all likelihood such rights are reserved generally for all higher degree students, not only in regard to scholarship stipend recipients. This may well include property rights over knowledge of the University and staff to which students have access during study. This factor is not something that establishes a "worker" relationship with the University.

69. It is submitted for Ms Galal that it was the University that controlled who was a full-time student and who received a scholarship stipend, not a third party. It also required a minimum of 35 hours of study per week and this was also required for continuation of the stipend.

70. However, the hours of study required are the same for all students in the research PhD program. The enrolment and scholarship were only to continue while Ms Galal continued satisfactorily in the course, including the minimum hours per week. This is a feature of a higher degree student relationship with a teaching body, not of an employee.

71. The fact that the stipend was paid by the Commonwealth is a relevant factor here in my view. As Ms Galal submits, it was the University which chose who receives the scholarship stipend, but the money was provided by the Commonwealth for a specific purpose; that is, for allocation to some students after a competitive process to cover living expenses while studying. The money was transferred to the University to administer for this purpose, as the Commonwealth Guidelines verify. The University did not tie the grant of the stipend to the student doing work as directed by it for its benefit. There is nothing in the material which supports that conclusion. Ms Galal studied beside others not receiving the stipend. The grant of the stipend changed nothing about the relationship between the University and Ms Galal. It was a student/educational institution contract when she enrolled in the PhD course, and remained so when the offer of the scholarship stipend was accepted and beyond.

72. There must be an identifiable employment contract before there is employment. The contract must involve work done by a person under a contractual obligation to another party to whom the person delivers the work and skill of the "worker". There must be a mutual intention to create legal relations in this regard, and there must be consideration in the form of a wage or remuneration in return for doing the work. There must also be the creation of an obligation on one party to provide work which is then undertaken by the other party.

73. The evidence falls short of establishing any of the above elements for the employment of Ms Galal by the University. The evidence is of Ms Galal as a PhD student using the educational facilities provided by her University…

75. The High Court held In *Australian Woollen Mills Pty Ltd v Commonwealth* [1954] HCA 20, "*[i]t is of the essence of a contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty*". Following that authority, Roche DP in *Secretary, Department of Family and Community Services v*

*Bee* [2014] NSWWCCPD 66 found there must be real consideration "*for the agreement*". Roche DP affirmed that,

> To prove a contract, it must be established that the 'statement or announcement which is relied on as a promise was really offered as consideration for doing the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement' (*Australian Woollen Mills* at 456). In other words, there must be a quid pro quo ('one thing in exchange for another; something in exchange' Butterworths Concise Australian Legal Dictionary, 3rd ed).

76. The scholarship provided to Ms Gagal (sic) by the Commonwealth Government and administered by the University was not consideration under a contract of employment on the above authorities. On the overwhelming weight of evidence, it was a stipend to help cover living expenses for a full-time PhD student.

The Arbitrator also held that the applicant was not a deemed worker under Sch 1 cl 2 *WIMA.* He stated:

> 82. I have already found that there was no contract between Ms Gagal (sic) (sic) and the University to perform work. There was no work exceeding $10 in value. Ms Galal was not carrying out work in a trade or business, but was a student, as found above. There was no intention to create legal relations, mutuality, or contractual consensus for employment between Ms Galal and the University

***Complying agreement entered under s 66A WCA for a psychological injury based upon a deemed date of injury – worker then claimed lesser compensation under s 66 WCA for a frank physical injury – Held: worker precluded from recovering compensation for the physical injury***

**Gallagher v Falconers Pty Ltd trading as Northern Rivers Hotel (deregistered) – [2020] NSWWCC 285 – Arbitrator Harris – 21/08/2020**

On 24/10/2013, the worker was injured when she fell down a set of stairs at work. On 21/12/2019, she claimed compensation under s 66 *WCA* for 19% WPI for a primary psychological injury on 24/10/2013.

On 14/05/2020, the respondent's solicitors placed an offer under s 66 WCA for 19% WPI and noted the provisions of s 65A (4) *WCA* and that Dr Ridhalgh assessed 0% WPI for the physical injuries.

On 22/06/2020, the worker's solicitors accepted the offer of 19% WPI, but argued that the worker suffered separate physical injuries and that she relied upon the decision in *Tokich v Tokich Holdings Pty Ltd* [2015] NSWWCCPD 72.

On 29/06/2020, the worker signed a complying agreement for 19% WPI for psychological injury that occurred on 24/10/2013. She later claimed compensation under s 66 *WCA* for physical injuries to her lumbar spine and right lower extremity.

***Arbitrator Harris*** noted that the principal issue was whether the settlement of the psychological injury claim raised the operation of s 65A (4) *WCA* in respect of the current s 66 claim. He stated that the starting point for interpreting the complying agreement is that it refers to a date of injury without referring to a deemed date. The wording of the agreement is contrasted with the worker's letter of claim, which clearly distinguished between the injury on 24/10/2013 and the deemed date of injury due to traumatic circumstances over an extended period. He stated:

64. The complying agreement is seen in the context that the parties clearly communicated, expressed in the letter of offer and the letter of acceptance, that the provisions of s 65A (4) were applicable to the agreement. This is because the letter of offer expressly referred to "*the provisions of s 65A (4) (b) of the 1987 Act*" and the letter of acceptance referred to the decision in *Tokich*.

65. The decision in *Tokich* involved the worker suffering both a physical injury and a primary psychological injury arising from the same incident. Mr Tokich resolved the permanent impairment claim for the physical injury following a determination by an Approved Medical Specialist. A further claim for the psychological injury was subsequently brought following the resolution of the s 66 claim for the physical injuries.

66. On appeal, the Deputy President held that the s 66 (1A) did not preclude the worker from bringing separate claims for the psychological injury and the physical injuries. The Deputy President stated:

> However, different ("special") provisions apply to a psychological/psychiatric injury or injuries that arise out of the same incident in which the worker has also suffered a physical injury or injuries. In that situation, the legislation expressly acknowledges that a primary psychological injury is a separate and distinct injury from a physical injury. The degree of permanent impairment that results from the psychological/psychiatric injury (or injuries) must be assessed separately from the physical injury (or injuries). In addition, a different threshold needs to be satisfied before any permanent impairment compensation is payable for a primary psychological injury (or injuries).
>
> It follows that, for the relevant provisions to work in harmony, when dealing with a primary psychological injury to which s 65A applies, the reference to "*an injury*" in s 66 (1A) must distinguish between a primary psychological injury and a physical injury. In other words, a claim for permanent impairment compensation for the permanent impairment that has resulted from a physical injury or injuries arising out of one incident (that is, multiple pathologies from the one injurious event) is different from and separate to a claim for permanent impairment compensation for permanent impairment that has resulted from a primary psychological injury or injuries arising out of the same incident.

67. *Tokich* stands as authority for the proposition that a worker can bring a separate permanent impairment claim for the physical injuries and a separate claim for the psychological injury arising from the same incident. The case has nothing to do with separate claims being brought for different impairments arising from different incidents.

68. As the applicant's counsel submitted, *Tokich* "*is the leading decision on s. 65A and its operation*". Whether it is the "*leading case*", the decision is only relevant to the issue of s 65A( 4) as impacted by s 66 (1A), where a worker has received a physical injury and a psychological injury arising out of the same incident.

69. If the applicant suffered a psychological injury from one incident and a physical injury from a different incident, recourse to *Tokich* is not required to support the proposition that the worker is entitled to bring and prosecute separate claims for permanent impairment. Indeed, s 65A has no application if the psychological injury arose from one incident and the physical injury arose from a separate incident. That is because s 65A (4) is only relevant where the primary psychological injury and the physical injuries arises "*out of the same incident*".

70. The reference by the applicant's legal representatives in the acceptance letter to *Tokich* is only relevant if they are suggesting that the worker can pursue a separate claim for the physical injury arising from the same incident. The reference by the applicant's solicitor to the decision shows that he was aware and communicated to the respondent in the correspondence that physical injury and the primary psychological injury arose from the same incident.

71. To the extent that the applicant refers to the words in the offer "*said to have occurred*", as creating some ambiguity, that words of the offer must be contrasted with the fact that the offer refers to s 65A (4) and it only refers to a injury on 24 October 2013 and not a deemed date. I do not accept that any ambiguity arises from the use of those words in the offer…

73. However, the letter of offer and the complying agreement does not reference the opinion of Dr Blom but rather the opinion of Dr Wilmot. I am not required to determine injury, which is otherwise admitted. I am required to construe the agreement considering the principles discussed above.

74. Dr Wilmot's opinion associates the "*impairment*" as "*a result of the events triggered by the accident*". This opinion associates the condition with both the traumatic events at work and the specific accident on 24 October 2013. It is trite law that a condition can have multiple causes. I consider that Dr Wilmot was attributing the psychological injury to both the traumatic events at work and the incident on 24 October 2013…

77. I accept that Dr Wilmot associates the post-traumatic stress disorder to the fall at work. In that respect I agree with the respondent's submissions that Dr Wilmot's opinion supports the view that the primary psychological injury arises "*out of the same incident*" as the physical injury.

78. I do not accept the respondent's principal submission that Dr Wilmot only attributes the primary psychological injury to the fall at work. His opinion clearly also attributes the psychological injury to the traumatic work events.

79. The construction of the complying agreement requires an analysis of the purpose and object of the transaction. On the one hand the applicant had made a s 66 claim for psychological injury based on a deemed date of injury. In that sense the settlement is said to support its argument that it was a settlement of that claim. On the other hand, the correspondence from the respondent clearly shows that it was using the settlement, in the context of s 65A (4) of *the 1987 Act*, to operate to prevent the prosecution of the s 66 claim for the physical injuries.

80. The offer, acceptance and complying agreement are all consistent with the conclusion that the s 66 compensation paid to the applicant was for psychological injury arising from the incident on 24 October 2014. The references to s 65A (4) and to *Tokich* reinforce this interpretation. The parties were clearly aware of the notion of a deemed date37 pursuant to the provisions of s 15 and/or s 16 of *the 1987 Act* and there was no attempt to add that word to the complying agreement.

81. I observe that the language used generally in the Commission by various legal practitioners to describe a date of injury in the making of claims and pleadings has often been less than satisfactory. However, the description of injury in these proceedings, as shown in the letter of claim, correspondence and complying agreement has been undertaken with care and reflect the experience of the legal practitioners involved.

The Arbitrator held that the worker recovered compensation under the complying agreement for the permanent psychological impairment resulting from the frank injury on 24/10/2013. He also made the following observations.

> 84. Even though it was not argued and not relied upon by either party and does not form part of my Reasons, the complying agreement was signed after the telephone conference in the context that the respondent was pursuing this defence as articulated in its Reply and as recorded in the directions at the telephone conference.
>
> 85. My conclusion, adopting the respondent's contention of the construction of the complying agreement, is that the applicant has not resolved its s 66 claim for the primary psychological injury based on a deemed date of injury. Given the respondent's successful argument, that claim is unresolved.

The Arbitrator held that the claim for the physical injuries is not barred. However, as the worker had recovered compensation for 19% WPI for the psychological injury, she was only entitled to pursue a s 66 claim for the physical injuries if the impairment exceeded 19% WPI. That condition was not satisfied.

The Arbitrator declined to enter an award for the respondent, but he dismissed the proceedings as "*lacking in substance"* under s 354 (7A) (b) *WIMA*, on the basis that the claim is for less than what has been paid for the primary psychological injury arising "*out of the same incident*".

## WCC – Registrar's Decisions

***Work capacity dispute – all medical evidence indicates that the worker has current work capacity – worker unable to find roles and suggested that there was no suitable employment based on his age, skills and experience – held: worker has current capacity for work in suitable employment – interim payment direction declined***

**Bokan v Coles Supermarkets Australia Pty Ltd [2020] NSWWCCR 8 – Delegate McAdam – 24/08/2020**

On 9/07/2015, the worker slipped on chicken fat while working in the delicatessen area and rolled his right ankle. He ultimately underwent surgery on 28/11/2016, in the nature of an arthroscopy, lateral talar dome debridement and repair peroneus brevis with tenosynovectomy. In April 2017, Dr Carmody reported that the ankle had recently given way without any clear reason and in November 2017, the doctor opined that the nature of the worker's job and his symptoms were not compatible.

On 31/10/2019, the worker's employment was terminated because he could not resume his pre-injury duties and no suitable duties positions were available.

On 23/04/2020, the insurer issued a s 78 Notice based upon a work capacity assessment and it reduced weekly payments to NIL from 3/08/2020. The worker applied for continuing weekly payments under s 38 *WCA* on the basis that he has no current work capacity.

***Delegate McAdam*** noted that medical evidence indicated that the worker had a poor result from the 2015 ankle surgery. However, the treating GP certified the worker fit for suitable duties for 4 hours per day, 4 days per week and in 2018, Dr Machart opined that he was fit for full-time work provided that it was predominantly sedentary. He noted that although the worker is 60 years old, he has extensive transferrable skills, including experience gained in managerial roles. He speaks and writes English at a fairly basic level, but he did not require the aid of an interpreter.

The Delegate stated:

79. The volume of evidence in this case is strongly in favour of the respondent, particularly medically. Dr Artinian, Mr Bokan's treating general practitioner, has consistently certified Mr Bokan as fit for suitable duties for an extensive period of time (from my understanding, since his employment was terminated with Coles). The certification of 16 hours per week means that were Mr Bokan employed (and earning more than $155), he would meet the requirements of section 38(3) of the 1987 Act.

80. Dr Artinian has also accepted the roles proposed in the labour market assessment as suitable, so long as his restrictions placed in the certificate of capacity are complied with.

81. Taking it further, Dr Machart has opined that Mr Bokan is able to work full time, presuming that he is not required to stand for more than 30 minutes. He suggested that Mr Bokan was fit for a customer service role with the provision of a stool. Dr Machart also assessed Mr Bokan as suffering from 4% whole person impairment, which in the scheme of workers compensation injuries, is relatively low. That is not to suggest that Mr Bokan's complaints of pain and ongoing symptoms are not real and significant. The assessment of impairment often does not reflect the disabling effects an injury can have on a worker.

82. The respondent, consistent with their obligations, has performed a number of assessments and relied on those in making their determination outlined in the section 78 notice. I have found the transferable skills analysis report to be quite thorough and well considered. The report acknowledges Mr Bokan's basic English literacy skills (particularly written) but also recognises that he has worked in roles dealing with people in the past. In each of the roles identified, the suitability of that role is considered in detail. The author also liaised with an occupational therapist who confirmed each role would be suitable, in consideration of his medical issues.

83. The report acknowledged that Mr Bokan failed to specify any administrative responsibilities in his roles with Coles, but based on a task analysis for each role, it was apparent that he would have performed duties consistent with those functions. The report concludes with the following:

> With the proposed sedentary vocational options, Mr Bokan is unrestricted in his physical capacity to perform the relevant duties. The roles do not require significant lifting or carrying, bending, twisting, pushing or pulling. All proposed vocations are primarily seated and does not (sic) require Mr Bokan to stand for lengthy periods at a time. The WorkCover Certificate of Capacity reported no cognitive restriction and Mr Bokan has presented strong mental abilities in his managerial and supervisory duties, making him a good candidate for the aforementioned job roles.

84. The respondent also relied on a labour market assessment report dated 4 February 2020. The applicant addressed submissions to the weight that could be placed on the report and to some extent I am in agreement with those submissions. I find it difficult to consider that Mr Joseph Lennon – Area Manager, Sydney Metro, is an "expert" in the commonly used sense of the word in this jurisdiction. He does not appear to have any special qualifications or skills that he relied on in the preparation of the report – rather he seems to have called a variety of prospective employers and recorded what they apparently told him. I am galvanized in this view by the repeated use of the following (indicating that apparently multiple contacts shared an identical view, expressed in identical words):

> The employer contact stated that Mr Bokan's 13 years of customer service experience at Coles where he progressed from floor staff to Duty Manager, effective communication skills and basic computer skills are suitable for the role.

85. However, aspects of the report are highly relevant to my consideration, namely the summary of duties required in each role and how they interact with Mr Bokan's medical restrictions.

86. Dr Artinian has signed off on the proposed roles identified in that report. The respondent indicated that he had been sent the entire report and considered it before adding his signature. Although the weight that can be given to the report in terms of the availability of jobs is quite low, the fact that the tasks required for each role are listed and have been considered by Dr Artinian gives greater weight to his approval. Had he not been provided with the list of tasks and duties, I am not sure how much weight I could give to his approval.

87. Having considered all of the evidence, I am satisfied that Mr Bokan has a "current work capacity" as defined in section 32A. He is able to return to work in suitable employment.

The Delegate held that the role of Customer Service Representative is suitable employment for the purposes of s 32A *WCA.* He noted that the worker had not tendered any contrary evidence and that the treating GP signed off on the vocational assessment, he found that the worker had not discharged his onus of proof. Accordingly, he declined to make an interim payment direction.

***Work capacity dispute – held that the worker has the requisite education, skills and experience to undertake suitable employment in the roles identified by the respondent – the presumption that an IPD for weekly payments in warranted is displaced because the claim has minimal prospects of success***

**Kochel v Ready Workforce (a Division of Chandler Macleod Pty Ltd) [2020] NSWWCCR 7 – Delegate Gamble – 2/09/2020**

On 18/02/2020, the worker injured his left knee at work. He received weekly payments from the insurer, but on 11/05/2020, the insurer issued a s 78 Notice, advising that it had made a WCD that: (a) he had current capacity to work in suitable employment for 35 hours per week based upon certificates of capacity issued by Dr Chiwara; (b) roles of Despatching and Receiving Clerk, Warehouse Administrator and Administration Officer were suitable employment based on the Vocational Assessment Report of Prestige Health Services dated 24/04/2020; (c) he was able to earn $1,195.95 per week in suitable employment; and (d) his PIAWE was $990.90 per week. Therefore, the worker was not entitled to weekly payments. The WCD came into effect on 21/05/2020.

The worker sought continuing weekly payments from 22/05/2020 under s 37 WCA. He did not challenge the insurer's decision that he has current work capacity, but he challenged the type of work that the insurer considers to be suitable employment.

***Delegate Gamble*** noted that on 4/05/2020, Dr Chiwara approved the vocational options as being suitable employment for the worker. She considered the following matters in determining whether the worker was able to engage in suitable employment of that type:

- The nature of the incapacity. Both Drs Chiwara and Biggs. Both doctors give evidence that the worker has capacity for some type of employment with restrictions of lifting up to 3kg, avoiding prolonged standing and avoiding pushing/pulling and his physical capabilities are consistent with the suggested vocational options;
- The worker's age (21 years). Whilst completing year 12 he obtained Certificate II in Outdoor Recreation and Certificate II in Tourism through NSW TAFE. In 2017 he completed Certificate III in Process and Manufacturing. He has demonstrated to have to applied himself to acquiring these certifications and it was inferred that completion of the courses required using computers;

- The worker's allegation that he has limited computer skills is not consistent with the vocational assessment report of Prestige Health Services, which records he confirmed he was computer literate and able to operate Microsoft Office applications and utilise search engines, email and smartphone applications. It is also inconsistent with Ms Lazaridis' report, which records that he has basic skills with Excel, intermediate skills with Word, intermediate skills with email and internet and basic skills with PowerPoint. According to Ms Lazaridis, he advised "*he is not familiar with any other software but is confident that if he were provided with training in any software, he could pick it up relatively quickly*" (Application page 36). Both vocational assessment reports record that he has provided assistance to family and friends with computers (Application page 36; Reply page 36);
- As a young man who has completed post-school education, including a Certificate III in process and manufacturing, the worker would have the requisite skills to be able to operate the basic computer programs required to perform the identified roles. The identified roles do not require a high level of technical ability or use of complex computer programs or systems. He has basic to intermediate computer skills and would be capable of acquiring knowledge about use of required programs to enable him to perform routine tasks such as documenting incoming stock onto Excel spreadsheets or entering data into a computer. Any shortcoming of computer skills is not a barrier to the worker undertaking suitable employment in the types of roles identified;
- While the worker does not have work experience in the identified roles, this is not a factor that weighs in favour of the roles not being suitable. The roles do require any formal qualifications or industry experience;
- The worker's argument that the need for him to undertake training to perform the identified roles proves the employment is not suitable was rejected. A lack of work experience in a proposed role does mean the role is not being suitable. The test under section 32A requires consideration of the nature of the proposed role, having regard to the worker's age, education, skills and work experience, regardless of the nature of the pre-injury employment; and
- Ms Lazaridis' opinion that the roles are not suitable for the worker were rejected. The lack of computer or data entry skills or previous employment is not a barrier to the roles being suitable and Ms Lazaridis also based her opinion on a number of irrelevant considerations, such as the limited availability of jobs on the open labour market.

The Delegate held that the worker has current work capacity and is able to return to work in suitable employment as a Despatching and Receiving Clerk, Warehouse Administrator, and Administrator Officer. His physical capabilities are consistent with these vocational options and she accepted the uncontradicted evidence that the average weekly earnings of the Despatching and Receiving Clerk and Warehouse Administrator exceed the worker's PIAWE. Therefore, the presumption that an interim payment direction for weekly payments of compensation is warranted is displaced, because the claim has minimal prospects of success (see: s 297 (3) (a) *WIMA*) and she decline to make an interim payment direction.