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ISSUE NUMBER 74

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. Ceccato v Australian Steel Mill Services Pty Ltd [2020] NSWWCCPD 58
2. Ballas v Department of Education & Communities [2020] NSWWCCMA 143
3. Bakir v Littore Packers Pty Ltd [2020] NSWWCC 303
4. Gotcha! Pty Ltd v Workers Compensation Nominal Insurer (iCare) & others [2020] NSWWCC323
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WCC – Presidential Decisions

Section 11A (1) WCA – reasonable action with respect to the provision of employment benefits

Ceccato v Australian Steel Mill Services Pty Ltd [2020] NSWWCCPD 58 – Deputy President Snell – 14/09/2020

The appellant suffered a psychological injury at work on 22/05/2017, due to alleged bullying and harassment and he claimed weekly compensation from 22/05/2017 to 10/05/2018 and continuing weekly payments from 2/05/2019.. The respondent conceded that he suffered a psychological injury, but argued that it was wholly or predominantly caused by reasonable action with respect to the provision of employment benefits. It did not dispute incapacity and the parties ultimately agreed that PIAWE is $2,287.74.

Arbitrator McDonald entered an award for the respondent. She held that the overwhelming tenor of the evidence was that the issues that led to the injury and caused the appellant to cease work were related to the introduction of a new employment contract by the respondent. She held, relevantly:

177. …The desire to update employment contracts is not, or itself unreasonable. Mr Bartkowiak said that it was necessary to bring all employees under the same terms and conditions. He explained that the contract had included a car before Fringe Benefits Tax was implemented and that the provision of the car had become expensive. Mr Ceccato was given a choice of annual salary increases or the car and he kept the car. When he no longer had the car, he was paid salary increases, while he was off work on sick leave.

178. Mr Bourke described the commencement of consideration regarding phasing out company cars for private use in 2013 and the decision to change the policy in 2015. He described the process of communicating the company's decision and the initial discontent about the new employment contracts. He said that he discussed signing the letter briefly with Mr Ceccato in November 2016 and suggested it was in his interests to sign…

The Arbitrator found that neither the action in renegotiating the terms of the contract nor the way in this was done were unreasonable and the injury was predominantly caused by reasonable conduct with respect to the provision of employment benefits.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) in law by finding that the provision of employment benefits was the predominant cause of the injury; (2) in law by finding that the conduct of the respondent's staff in the provision of employment benefits was reasonable; (3) in fact by finding that he had not started seeing a medical practitioner about how he was feeling before he ceased employment; and (4) in applying her discretion by preferring the evidence of the respondent over his evidence.

Deputy President Snell determined the appeal on the papers. He noted that the appeal was lodged out of time and that an extension of time under r 16.2 (5) is required if it is to proceed. The appellant also sought to rely on fresh or additional evidence, which the respondent opposed.

The appellant argued that the "*fresh*" evidence are documents that were "*unable to be located by the Arbitrator when making her decision*". They were "*available between the parties*", but were not included in the ARD, and as they were provided by the respondent, they do not take it by surprise. He argued that their exclusion may have "*a significant impact*" on the prospects of success and that the interests of justice favour their admission.

The respondent argued that s 352 (6) *WIMA* was not satisfied and that the documents are not fresh evidence because they were in the possession of the appellant's solicitor at the time of the arbitration. There is no explanation for the appellant's failure to adduce the evidence and it disputed that it was in possession of some of the further documents.

Snell DP referred to the decision of Barrett JA (Macfarlan JA agreeing) in *CHEP Australia Ltd v Strickland* regarding s 352 (6) *WIMA*. His Honour stated:

27. In the s 352 (6) context, there are two threshold questions. They arise as alternatives and are set out in the second sentence of the provision. The first goes to the issue of availability in advance of the proceedings. The second entails an assessment of whether continued unavailability of the evidence '*would cause substantial injustice in the case*'. The discretion to admit becomes available to be exercised only if the Commission is satisfied as to one of the threshold matters…

30. Counsel for the appellant submitted that the Commission misdirected itself in law in construing the '*substantial injustice*' criterion in s 352 (6). It was submitted that that criterion may be satisfied in circumstances where it is not possible to say that availability of new evidence would have produced a different result; and that the criterion will be satisfied if the evidence is compelling and might have influenced the outcome even though it cannot be said that it would certainly have done so.

31. …The part of s 352 (6) concerning '*substantial injustice*' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence '*would cause*' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that '*would*' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion.

Further, in *Drca v KAB Seating Systems Pty Ltd* , Roche DP stated:

> The legal profession is reminded, yet again, that it will only be in the most exceptional case where a party will be permitted to tender on appeal evidence that, with reasonable diligence, was readily available at the arbitration. Arbitrations are not a dress rehearsal where the parties can await the outcome and then attempt to tender, on appeal, evidence that could and should have been tendered at the arbitration, as if the arbitration was merely a preliminary hearing. (emphasis in original)

Snell DP held that the first threshold issue in s 352 (6) *WIMA* was not satisfied. The second issue is the only potential avenue to enliven the discretion and this requires that the new evidence would have produced a different result. The submissions do not go that far and the appellant argues only that the additional evidence would or may have a significant impact on the appeal's prospects of success. *Strickland* provides that this is insufficient.

Snell DP noted that the appellant argued that refusal to grant leave would cause "*substantial injustice*", but there are no specific submissions dealing with s 352 (6) *WIMA,* the discretion is not enlivened and he refused the application to adduce fresh evidence. There is also no apparent basis on which the further evidence would change the result.

In relation to the extension of time, Snell DP stated that the decision of McHugh J in *Gallo v Dawson* [I think we need the citation for this one, Michelle, since McHugh, J quotes the page reference in Ratnam and it might be confusing that we do not quote the page reference in Gallo] has been consistently applied in the Commission. His Honour stated:

> This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v. No.2 Public Service Appeal Board* (1973) 2 NZLR 86, at p 92; *Jess v. Scott* (1986) 12 FCR 187, at pp 194-195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v. Grigg* [1967] VicRp 113; (1967) VR 871, at p 872; Hughes, at pp 263-264; *Mitchelson v. Mitchelson* (1979) 24 ALR 522, at p 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has '*a vested right to retain the judgment*' unless the application is granted: *Vilenius v. Heinegar* (1962) 36 ALJR 200, at p 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in *Ratnam v. Cumarasamy* (1965) 1 WLR 8, at p 12; (1964) 3 All ER 933, at p 935:
>
> > The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.

The appellant argued that a delay in securing ILARS funding for the appeal was an "*exceptional circumstance*", Snell DP held that there is no evidence of any unusual delay in the grant of funding and both the appellant's solicitors and WIRO appear to have acted with commendable haste and '*exceptional circumstances*' are not established.

Snell DP held that grounds (1) and (2) did not have reasonable prospects of success and his reasons are summarised below:

<u>The causation issue</u>

- The appellant argued that because Dr Whetton did not set out what documents he was given to review when he examined and reported on the appellant, his report failed to comply with the requirements of *Makita* and it "*cannot be regarded*". He then reviews the medical evidence without any regard for Dr Whetton's opinion, and concludes that "*the Arbitrator could not lawfully have found the predominant cause of the [appellant's] injury was related to the provision of employment benefits on the evidence before her*".
- 95. In *Hancock v East Coast Timber Products Pty Limited* Beazley JA (as her Honour then was) said:

  > 82. Although not bound by the rules of evidence, there can be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. As the authorities make plain, even in evidence-based jurisdictions, that does not require strict compliance with each and every feature referred to by Heydon JA in *Makita* to be set out in each and every report. In many cases, certain aspects to which his Honour referred will not be in dispute. A report ought not be rejected for that reason alone.

- In a non-evidence-based jurisdiction such as the Commission, question of the acceptability of expert evidence will not be one of admissibility but of weight. This was made apparent in *Brambles Industries Limited v Bell* [2010] NSWCA 162 at [19] per Hodgson JA. That is the way that Keating DCJ dealt with Dr Summersell's evidence in this case, so that is not the relevant error.
- The appellant did not make any submission based upon *Makita* at the arbitration and the appellant cannot make that argument on appeal.
- In *Brambles Industries Limited v Bell*, Hodgson JA said:

  > … the obligation to give reasons has to be considered in the light of the issues raised for consideration by the parties.

  In that matter, McColl JA said:

  > … a failure to address a matter which was not raised before the Deputy President as an identifiable issue is not a matter in respect of which an error in point of law can be identified in this Court. As was said in *Watson v Qantas Airways Limited* [2009] NSWCA 322 at [13], if a matter was not raised before the Deputy President, he could not commit an error of law in failing to deal with it. A similar observation was made recently by Heydon J in *Republic of Croatia v Sneddon* [2010] HCA 14 at [88].

- In *Metwally v University of Wollongong*, the High Court stated:

  > It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

The '*reasonableness*' issue

- The Arbitrator said that "*none of the correspondence or statements*", other than those of the appellant himself, appeared to raise any possibility that he risked termination.
- The Arbitrator dealt with multiple matters going to the reasonableness of the respondent's actions regarding the provision of employment benefits to the appellant. She referred to negotiation and consultation with the workforce, the desire to update employment contracts, the need to bring all employees under the same terms and conditions, and a consideration of the cost of supplying vehicles following implementation of FBT. The appellant does not argue that she applied a wrong test.
- In *Department of Education & Training v Sinclair* (a '*discipline*' case) Spigelman CJ said: "*More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.*" In the circumstances of the current matter, it is necessary to have regard to the whole of the employer's relevant conduct. In *Sinclair* Spigelman CJ continued:

  > His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation 'reasonable action with respect to discipline'. In my opinion, a course of conduct may still be 'reasonable action', even if particular steps are not.

- The appellant does not identify any steps that are allegedly unreasonable. Even if some specific steps could be regarded as other than reasonable this would not, of itself, lead to a conclusion that the course of the respondent's conduct viewed as a whole was not reasonable. It is necessary to have regard to the whole of the process.
- The question of whether an employer's actions or proposed actions are reasonable, for the purposes of s 11A (1), involves a broad evaluative judgment. In *Northern NSW Local Health Network v Heggie*, Sackville AJA (Ward JA agreeing) said:

  > 71. It is not necessary in this case to explore the precise limits of an appeal under s 352 (5) of *the [1998] Act* seeking to challenge findings of fact. However, as Roche DP pointed out in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25, at [20], the observations of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2)* need to be borne in mind, particularly (I would add) where the challenge is to an evaluative judgment such as the reasonableness of actions by an employer with respect to discipline. Allsop J said, in relation to the application of the principle in *Warren v Coombes*, (at [28]) that:
  >
  > > in [the] process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.

- The appellant's challenge to the Arbitrator's finding on '*reasonableness*' does not establish error.

Snell DP held that ground (3) does not have reasonable grounds of success, as ground it is based on a blatant misreading of the Arbitrator's findings and there is no coherent submission dealing with how the reasons involve error by the Arbitrator (ground (4)).

Accordingly, Snell DP refused to extend the time in which to appeal.

WCC – Medical Appeal Panel Decisions

Psychological injury – AMS erred by characterising solitary gambling at a club and otherwise seeing a friend as falling within the PIRS scale for "Social and recreational activities" – claim re-assessed on the papers – MAC revoked & 17% WPI assessed

Ballas v Department of Education & Communities [2020] NSWWCCMA 143 – Arbitrator Harris, Dr J Parmegiani & Dr D Andrews – 4/09/2020

This matter has a lengthy history and was previously reported in Bulletins numbered 31 and 63, respectively. However, by way of summary, the appellant suffered a primary psychological injury at work between 2011 and 2016 and she claimed compensation for permanent impairment. The respondent disputed the degree of permanent impairment and the dispute was referred to Dr Hong (AMS). He issued a MAC, which assessed 8% WPI including an assessment of class 2 for "*social and recreational activities*". He noted, amongst other things, that the appellant "*[g]ambles on poker machines… spends around 1 hour at the club*".

On 8/06/2018, the appellant sought to appeal against the MAC under ss 327 (3) (c) and (d) *WIMA,* on the basis that when making the assessment for "*social and recreational activities*". She argued that her social and recreational activities were "*directed to solitary activities that do not involve interactions with other people*" and that his consideration of her attendance at the RSL club monthly, to gamble on the poker machines for one hour, was not "*relevant to the assessment of social and recreational activities*". Therefore, he did not properly apply the Guidelines and made a demonstrable error and should have assessed class 3, which would have resulted in an assessment of 17% WPI.

On 17/07/2018, delegate Gamble refused the application to appeal. She held that the PIRS categories "*are generic and general in description*", and to some extent were "*overlapping*" and that the "*categorisation of which category applies is a matter within the AMS's discretion based on his or her clinical assessment*".

On 22/08/2018, an Arbitrator issued a COD under s 294 *WIMA*, which determined that the appellant suffered 8% WPI as a result of the psychological injury suffered on 24/10/2016 (deemed) and that she was not entitled to permanent impairment compensation. The Commission then refused an application to reconsider its decision to issue the COD.

The appellant sought judicial review of the Delegate's decision by the Supreme Court of NSW. However, Wright J refused that application: [2019] NSWSC 234. His Honour held that the Delegate had not misunderstood the appellant's submissions, nor had she failed to address them and she did not err in her observation regarding the generality of the PIRS categories and that the application of such categories in accordance with the Guidelines involved the AMS using his or her professional expertise and judgment.

The appellant appealed to the Court of Appeal and on 6/05/2020, the Court (Bell P and Payne JA, Emmett AJA agreeing) allowed the appeal with costs. The Court held that the delegate misconstrued the "*gatekeeper*" nature of the task ascribed by s 327 (4) *WIMA* to the Registrar and, rather than looking to whether the appeal grounds were capable of being made out, she erred in proceeding to determine the appeal, a role which is instead to be performed by a MAP: [70]-[73] (Bell P and Payne JA); [151] (Emmett AJA).

The Court also held that Wright J erred in failing to hold that the delegate's decision was infected by jurisdictional error as the delegate had erred in her application of s 327 (3) *WIMA*, had conflated the concepts of "*scales*" and "*classes*" in the Guidelines, and had misconstrued the nature of the error that the appellant had identified as a "*demonstrable error*", within the meaning of s 327 (3) (d): [73], [75]-[76] (Bell P and Payne JA); [151] (Emmett AJA).

Further, neither the COD (issued under s 294 *WIMA*) nor the WCC's refusal to reconsider its decision to issue the COD, placed the delegate's decision beyond the Court's supervisory jurisdiction under s 69 (3) of the *Supreme Court Act*. The COD and the reconsideration determination were affected by jurisdictional error and should be set aside: [104]-[105], [128] (Bell P and Payne JA); [151] (Emmett AJA).

Upon remitter, a delegate of the Registrar decided that the grounds of appeal had been made out and referred the appeal to a MAP.

The MAP determined the appeal on the papers. It stated, relevantly:

> 31. In *Ballas*, the plurality stated:
>
> > The 'social and recreational activities' scale looks to the injured worker's degree of participation in such activities. This scale, it was argued, was directed towards an assessment of an injured worker's interaction with other people, and not a solitary activity such as gambling on poker machines. As was put in the submissions to the Delegate, when one examined the examples that were given for classes 1-5 in Table 11.2 of *the Guidelines*, all involved some degree of interaction with others, to a greater or lesser degree and on a sliding scale. It was plainly arguable in our opinion that that was the case, and this being so, the requisite level of satisfaction under s 327 (4), as explained earlier in these reasons, should have been held to have been met…
>
> 36. The AMS has erred because he considered an irrelevant consideration, a solitary activity, in support of the conclusion that the appellant has a mild impairment. The respondent's submissions otherwise did not address the appellant's submission that the AMS considered an irrelevant consideration when basing the assessment for this Psychiatric impairment rating scale (PIRS) partly on a solitary activity.
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> 37. The AMS also erred because he characterised seeing a friend, a matter that falls within social functioning, as relevant to the PIRS scale for social and recreational activity…
>
> 39. The meaning of incorrect criteria was discussed by the Court of Appeal in *Marina Pitsonis v Registrar of the Workers Compensation Commission* applying the observations of Basten JA in *Campbelltown City Council v Vegan* when his Honour stated that it "*must refer to such matters as the tests set out in the Guidelines, where they are applicable*".

The MAP held that the AMS applied incorrect criteria by improperly considering matters within the PIRS scale for social and recreational activities and the matter requires reassessment according to law: *Drosd v Nominal Insurer*. It adopted all aspects of the MAC except the classification for social and recreational activities. It accepted the appellant's argument that there is little in the way of evidence that she is involved in social and recreations activities. The attendance at the RSL club playing the poker machines does not satisfy the meaning of an activity relevant to the scale for social and recreational activities. The history recorded by the AMS shows that the appellant attends family activities around Christmas and the MAP accepted that her behaviour and condition support an assessment of Class 3, which is consistent with Dr Rastogi's opinion.

Accordingly, the MAP revoked the MAC and issued a fresh MAC, which assessed 17% WPI.

WCC – Arbitrator Decisions

Purported claims under ss 66 & 67 WCA made prior to 12/06/2012 – Further claims made in 2018 – Worker not entitled to compensation under s 67 WCA

Bakir v Littore Packers Pty Ltd [2020] NSWWCC 303 – Senior Arbitrator Capel – 7/09/2020

The worker suffered a psychological injury on 3/09/2002.

On 7/12/2006, the worker's solicitor advised the insurer that the worker intended to claim medical expenses and compensation under ss 66 & 67 WCA with respect to that injury, but he did not particularise that claim or serve any supporting medical evidence.

On 26/08/2009, the worker's solicitor served a report from Dr Pollock on the insurer and stated that a claim would be made under ss 66 & 67 *WCA*. However, Dr Pollock did not provide a WPI assessment. On 11/09/2009, Dr Pollock assessed 22% WPI and although the worker's solicitor served that upon the insurer on 29/10/2009, he did not particularise any claim for lump sum compensation.

On 31/12/2209, the insurer advised the worker's solicitor that he had not indicated whether Dr Pollock was a WorkCover approved assessor of permanent impairment. It arranged for the worker to be examined by Dr Akkerman and on 1/06/2010, he assessed 10% WPI.

The insurer subsequently arranged for the worker to be examined by Dr Lee and on 20/03/2012, he diagnosed paranoid schizophrenia and a possible developmental disorder, which was not work-related, and he concluded that there was no permanent impairment.

On 6/05/2014, the worker's solicitor served a tax invoice and report from Dr Rose dated 1/04/2014 upon the insurer. Dr Rose assessed 38% WPI, but the letter did not particularise a claim for lump sum compensation and merely sought payment of the report fee.

On 15/08/2014, the insurer issued a dispute notice and declined to make a settlement offer on the grounds that Dr Lee assessed no permanent impairment and Dr Rose had not complied with the Guidelines.

On 12/09/2014, the worker's solicitor sought a review of the insurer's decision based upon a further report from Dr Rose, which assessed 22% WPI. However, the insurer maintained its decision to dispute the claim on the basis that the permanent impairment was not due to the work injury and it otherwise disputed the claim under ss 4, 9A, 11A (3), 59 and 60 *WCA*.

On 21/09/2018, the worker's solicitor served a permanent impairment claim form on the insurer and a report of Dr Athey, which assessed 24% WPI. However, the insurer maintained its decisions to dispute liability.

The worker filed an ARD, which claimed weekly payments from 2/09/2015 to 6/11/2019 and compensation under ss 66 & 67 *WCA.*

At a teleconference on 13/02/2020, the dispute under s 66 *WCA* was referred to an AMS and on 15/05/2020, Dr Baker issued a MAC, which assessed 26% WPI due to the psychological injury in 2002.

On 30/07/2020, ***Senior Arbitrator Capel*** issued an amended COD, which awarded the worker weekly payments under s 37 *WCA* from 12/11/2014 to 1/09/2015 and compensation under s 66 *WCA* for 26% WPI. In the event that the worker intended to pursue a claim under s 67 *WCA,* he directed the parties to file and serve written submissions and any supporting evidence. The worker pursued that claim and the Senior Arbitrator determined it on the papers.

The Senior Arbitrator noted that the primary issue is whether the worker make a valid claim before 19/06/2012.

The worker's solicitor conceded that whilst Dr Pollock may not have been a WorkCover Approved Assessor of Permanent Impairment as at the time of his assessment on 11 September 2009, the worker was examined by Dr Akkerman who was such an assessor. The insurer offered to have the worker assessed and that offer was accepted. A notice of claim was served before 19/06/2012 and the worker was assessed by a WorkCover Approved Assessor of Permanent Impairment. Accordingly, he is entitled to compensation under s 67 *WCA.*

The worker argued that the worker made a claim for lump sum compensation upon the insurer by letter on 26 August 2009 and while the letter did not comply with *the Guidelines*, as required by s 260 *WIMA*, the inexperience of his solicitor in NSW and the provision of otherwise adequate details to assess the claim provided in the report of Dr Pollock, coupled with the subsequent claims handling by the insurer, enlivened the exceptions provided in ss 260 (5) and 260 (6) *WIMA*. By reason of its referral to Dr Akkerman on 10/05/2010, the insurer accepted that a valid claim for permanent impairment had been made, or alternatively, it waived compliance with the Guidelines.

The worker also argued that the assessment of less than 10% WPI by Dr Akkerman does not go to the question of a claim being made, but to the question of whether that claim gives rise to an entitlement to compensation. The assessment of 26% WPI impairment in the MAC validated the claim for impairment previously made in accordance with the Court of Appeal's decisions in *Hochbaum v RSM Building Services Pty Ltd and Whitton v Technical and Further Education Commission t/as TAFE NSW*.

The respondent argued that based upon the principles discussed in *Woolworths Ltd v Stafford*, the worker did not make a claim under ss 66 or s 67 *WCA* and s 322 (1) *WIMA* before 19/06/2012. He is therefore caught by the amendments effective from that date and consistent with the High Court's reasoning in *ADCO Constructions Pty Ltd v Goudappel,* he is not entitled to compensation under s 67 *WCA.* The purported claim in 2009 was deficient because Dr Pollock was not a WorkCover trained assessor of permanent impairment and she did not certify that MMI had been reached, the claim was not made on a permanent impairment claim form, details of all prior employment was not provided and there was no description of the effect of the impairment on the worker's ADLs.

The Senior Arbitrator held that the worker did not make a claim under s 66 *WCA* before 19/06/2012 and he entered an award for the respondent with respect to the claim under s 67 *WCA.* His reasons are summarised below:

- In *Goudappel No.2*, the High Court confirmed that the 2012 amendments to s 66 *WCA* extended to a claim for compensation made before 19/06/2012, but not to a claim that "*specifically sought*" compensation under s 66 *WCA*. This is consistent with cll 10 and 11 of the *2016 Regulation*. It was also confirmed that cl 15 of Pt 19H of Sch 6 *WCA* is to be read subject to cll 10 and 11 of the *2016 Regulation*. Therefore, as Mr Goudappel had not made a claim for lump sum compensation before 19/06/2012, the 2012 amendments applied and he had no lump sum entitlement because his claim was under the 10% threshold.
- The insertion of cl 11 of the *2016 Regulation* clarified the law and confirmed that a worker, who made a claim for lump sum compensation before 19 June 2012, was entitled to make one further claim. Therefore, the meaning of the words in the legislation is clear and unambiguous, and their interpretation has been clarified by the High Court in *Goudappel No.2*, namely, an injured worker, who has made a concluded claim for permanent impairment prior to 19/06/2012, is not precluded from making one further claim after 19/06/2012 (cll 10 and 11 of the *2016 Regulation*, and cl 15 of Pt 19H *WCA*).

- Further, an injured worker who made a claim before 19/06/2012, which was withdrawn or otherwise was not finally dealt with, is not precluded from bringing that claim after 19/06/2012, and will still be able to bring that claim as well as one further claim for permanent impairment. In these circumstances, s 66 (1A) *WCA* does not apply.
- A claim is not validly made until relevant particulars are provided that are sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement. This was confirmed in *Goudappel v ADCO Constructions Pty Limited & Anor*, when President Keating stated:

  > I accept the applicant's submission that a separate claim form is not required to initiate a claim for lump sum compensation. However, that is merely a matter of form. In substance, a claim for lump sum compensation is not validly made until the requirements of s 282 of the WIM, and the particulars and supporting documents required by the Guidelines, are provided.

- The first letter dated 7/12/2006 foreshadowed that a claim would be made under ss 66 and 67 WCA, but no claim was particularised, the worker's solicitor did not attach a permanent impairment claim form, which was mandatory under the 2006 Guidelines, and there was no report attached to the correspondence. It could not be said that the claim made by the worker on 7/12/2006 constituted a "*valid claim*". The same can be said about the purported claim in the letter dated 26/08/2009. While it is true that the claim referred to a lump sum compensation, no claim was particularised that "*specifically sought*" compensation pursuant to ss 66 and 67 *WCA* and Dr Pollock's report did not contain an assessment of permanent impairment or confirm that the applicant had reached maximum medical improvement. The worker's solicitor stated that a claim for lump sum compensation under ss 66 and 67 would be made, suggesting that a claim would be made later.
  - There is no evidence that the insurer was satisfied that the injury resulted in permanent impairment before the worker's solicitor wrote to it on 26/08/2009 and it was not under any obligation to arrange an IME to assess of WPI in accordance with the Part 5 of the *2009 Guidelines*. The worker's solicitor did not particularise the claim under ss 66 and 67 *WCA,* as required by s 282 *WIMA* and Part 5 of *the Guidelines* and his letter foreshadowed that a lump sum claim would be made. This seems to have occurred on 29/10/2009, but again full particulars were not provided, no permanent impairment claim form was served, the worker's solicitor did not advise whether the condition had reached MMI, he did not provide a report that complied with *the Guides*, Part 5 of *the Guidelines* and s 322 (1) *WIMA* and he did not provide a description of the effect the impairment had on the worker's ADLs or indicate the proportion of the maximum amount of compensation under s 67 *WCA* that was claimed.

The Senior Arbitrator noted that there is no evidence from the worker's solicitor that his failure to make a claim in accordance with s 260 *WIMA* was occasioned by ignorance, mistake, other reasonable cause or because of a minor defect in form or style. Further, the insurer raised issues with Dr Pollock's qualifications on 31/12/2009, and the worker's solicitor did nothing to address this until Dr Rose was qualified in 2014. It could not be said that the insurer waived the requirements under the legislation and it was not obliged to determine the claim in accordance with s 281 *WIMA* until it had received a report that complied with the legislation. He also noted that the insurer arranged a re-examination with Dr Akkerman "*in order to update your medical condition and need*" and not to respond to a lump sum claim. He also stated:

> 111. If I am wrong and it could be inferred from QBE's actions that it had waived the applicant's compliance with the legislation, the applicant still has to overcome the fact that any claim made prior to 19 June 2012 must have been capable of being paid.
>
> 112. When one has regard to the principles discussed in *Stafford, Goudappel No. 1* and *Goudappel No.2*, it could not be said that the applicant's claims made on 26 August 2009 and 29 October 2009 were capable of payment in accordance with the 1987 Act. Those claims were based on the assessment of Dr Pollock, who was not a WorkCover Approved Assessor of Permanent Impairment. Such a requirement is mandatory under the Guides and the Guidelines. Mr Barter referred to the decision of *Stafford* and *Goudappel No. 2*, but he chose not to make any submissions regarding the principle that a claim must be capable of payment in order to be considered a valid claim.
>
> 113. Ms Zigouras' submission that the applicant's claim made prior to 19 June 2012 was valid because he had been examined by Dr Akkerman, who assessed 8% whole person impairment, is without merit and can be rejected. The assessment provided by Dr Akkerman was less than the threshold provided in s 65A (3) of *the 1987 Act*, so again it was not capable of payment.

Nominal Insurer issued a valid recovery notice to the employer under s 145 WCA as the worker's employment in NSW was not a temporary arrangement as defined in s 9AA (6) WCA and the state of connection was NSW under ss 9AA 93) (a) and (b) WCA

Gotcha! Pty Ltd v Workers Compensation Nominal Insurer (iCare) & others [2020] NSWWCC323 – Arbitrator Harris – 15/09/2020

On 6/01/2020, the worker suffered an injury at work. The employer was not insured in NSW, but held insurance in Queensland. The worker's employment was terminated effective from 14/02/2020, during her probation period. WorkCover Queensland rejected the worker's claim on the basis that her employment was connected to NSW and the Nominal Insurer made payments to the worker totalling $22,172.79. On 1/06/2020, it issued a notice to the employer under s 145 *WCA* seeking recovery of those payments.

The employer filed a Miscellaneous Application seeking orders halting any demand for payment and that the Nominal Insurer does not have jurisdiction to accept the claim. It amended the application to join the worker as a party.

Arbitrator Harris identified the sole issue for determination as being whether the worker was entitled to compensation under the *WCA* under s 9AA *WCA.*

The employer argued that the worker's employment is connected with Queensland under s 9AA (3) (c) where it holds insurance. Section 9AA *WCA* provides, relevantly:

> (1) Compensation under this Act is only payable in respect of employment that is connected with this State.
>
> (2) The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
>
> (3) A worker's employment is connected with—
>
>> (a) the State in which the worker usually works in that employment, or
>>
>> (b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or
>>
>> (c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located…

> (6) In deciding whether a worker usually works in a State, regard must be had to the worker's work history with the employer and the intention of the worker and employer. However, regard must not be had to any temporary arrangement under which the worker works in a State for a period of not longer than 6 months.

The worker stated that she commenced employment on 16/09/2019. Her duties involved managing 2 studios in western Sydney and another in the Newcastle/Central Coast region and she was required to travel to various shopping centres in those areas. She was also responsible for recruitment within NSW. Apart from training that she undertook in WA and 3 trips to Queensland, her duties were exclusively within NSW. In October 2019, she was also allocated a studio in WA, but she did not travel to WA because it was doing well. She was specifically employer as “the New South Wales Coach”.

Mr Johnstone, Chief Operating Officer of the employer, stated that he understood the intention of the parties were that the worker would be initially engaged as State Coach for NSW and WA and, upon successful performance, she would transition to the role of National Studio Manager responsible for managing photography studios in all States and Territories of Australia.

However, due to behavioural and performance concerns, the worker only reach the first of these stages and she did not transition to the tole of National Studio Manager. The worker was required to attend monthly management meetings in Queensland and was expected to perform her duties in WA on a far more regular basis.

Ms Ross stated that she is a State Coach of the employer and oversaw all the States and Territories in Australia. She said that it is customary for an employee holding the position of “State Coach” to be responsible for multiple jurisdictions and to regularly cross state lines in the performance of their duties. She also said that the worker has having considerable difficulty in performing her role in line with required expectations and, as a result, she did not leave NSW.

The Arbitrator held that the worker carried out all work in NSW with the exception of a period of training in Western Australia and attending 3 meetings in Queensland. While she was allocated a studio in Western Australia in late-October 2019, all of her work was undertaken remotely from NSW by email and telephone. He rejected the employer’s assertion that the worker became the manager of Western Australia, as Mr Johnstone stated that she was only running one studio there. He also rejected the employer’s argument that the parties intended the worker to become the National Manager, as this was not supported by the evidence. Although a representation was made to the worker, it was subject to her proving herself and there was no written promise to her that she would become the National Manager and the intention was not confirmed in the contract that the parties later signed.

The Arbitrator held that the fact that the employer terminated the worker’s employment during her probationary period meant supported a finding that it was not satisfied with her performance in the lesser role of State Coach.

The Arbitrator rejected the employer’s argument that the initial engagement for work in NSW was a temporary arrangement for less than 6 months within the meaning of s 9AA (6) *WCA.* He held that the contract was for an indefinite period that could be terminated by the employer upon one week of notice within the probationary period and that the worker was contracted to work in NSW in accordance with her roster. The parties did not intend this arrangement to be temporary. He stated:

> 136. In *Klemke*, President Keating stated that the provision in s 9AA (6) can only apply where "*any temporary arrangement contemplated by that provision must be seen as part of a longer or indefinite period of employment.*" *Klemke* was referred to and approved by the Supreme Court of NSW in *Weir Services Australia Pty Ltd v Allianz Australia Insurance Ltd* (*Weir Services*).
>
> 137. Consistent with the observations in *Klemke*, I reject the employer's submission that the work undertaken in New South Wales was a temporary arrangement within the meaning of s 9AA (6).

With respect to s 9AA (3) (a) *WCA,* the Arbitrator held that the evidence clearly shows that the worker usually works in NSW. He stated:

> 148. The facts of this case are compelling. Other cases where workers spent a degree of time in two or more separate States does not provide any guidance to the facts in this case. The State in which the worker usually works in this employment was New South Wales. Indeed the decision in *Avon Products* confirms that this clause directs attention to where the work is done and not where the worker is required to work.
>
> 149. Having rejected the employer's submission that the worker "*would*" become the National Manager and that was relevant in ascertaining the intention of the parties, the evidence is otherwise particularly lacking as to what that role would entail in terms of travel. Whilst Ms Ross provided some evidence on this matter based on her position, the state of the evidence is highly speculative as to what it involved.
>
> 150. Given my factual finding that the suggestion of promotion was only a possibility and otherwise based on the employer being satisfied on the worker's performance, I am not prepared to speculate on where the work would have been undertaken. However, I would observe, although I do not consider it particularly relevant, that the worker was studying in New South Wales. That is just one factor suggesting that there was no present intention on the worker's part to relocate from New South Wales.

The Arbitrator stated that if he is wrong in relation to s 9AA (3) (a) *WCA*, the contract of employment clearly indicated that the worker's duties were to be performed as per her roster and the roster intended her to work almost exclusively in NSW. He held:

> 163. Section 9AA (3) (b) does not require a worker to be based in a particular location within a State. Rather the clause requires the identification of a State "*in which the worker is usually based*".
>
> 164. The facts of this matter are compelling. The worker was employed for just under five months. She received one week of training in Western Australia and attended three meetings in Queensland which lasted four days. The rest of the employment, consistent with the Contract, was undertaken In New South Wales which involved attending various locations at shopping centres in Western Sydney or on the Central Coast.
>
> 165. I am clearly satisfied that the worker was usually based in New South Wales for the purposes of the employment.

Accordingly, the Arbitrator found that the worker's employment was connected with NSW within the meaning of s 9AA (3) *WCA*. He held that the Nominal Insurer validly made payments totalling $22,172.79 under the *WCA* and he dismissed the employer's application.

Calculation of PIAWE – WCC's role as a specialist tribunal with respect to the value of work in the labour market – employer's assessment held to be correct

Sarheed v C1 Formwork Group Pty Ltd [2020] NSWWCC 326 – Arbitrator McDonald – 15/09/2020

The worker was injured on 17/01/2020 and the insurer accepted liability and paid weekly compensation based on PIAWE of $1,009.31 (as adjusted). However, the worker alleged that PIAWE was $2,475. The dispute turned on the terms of his oral contract with the respondent and whether he was employed as a form worker or formwork labourer.

On 15/09/2020, ***Arbitrator McDonald*** issued a COD, which determined that PIAWE was $1,009.31. Her reasons are summarised as follows:

- The determination depended solely on whether she accepted the evidence of the worker or the employer. The worker bears the onus of proof and to find in his favour, she must feel an actual persuasion that his version of the facts existed.
- The Commission may accept or reject evidence that is not tested by cross-examination. In *JB Metropolitan Distributors Pty Ltd v Kitanoski* [2016] NSWWCCPD 17, Roche DP stated:

  > 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]).

- The single bank statement that the worker produced under a Notice for Production suggested that he received Centrelink payments while he was working for the respondent. The employer stated that the worker asked to be paid in cash and this request could indicate that he did not intend to disclose his earnings to Centrelink.
- While the worker alleged that he had not been paid for his second week of work, the employer disputed this. It would have been a simple matter for the worker to prove by producing further bank records, but he did not do so.
- The worker did not obtain a statement from his friend who told him about the work that was available with the respondent or any evidence from the other workers with whom he shared accommodation, although the circumstances suggest that they may have been retained on a similar basis.
- She drew an inference that evidence from the worker's friend would not have assisted his case and she preferred the evidence of the employer where it differed from the worker's evidence.
- The PIAWE alleged by the worker is very high and the Commission is a specialist tribunal and is taken to possesses specialist knowledge and experience of the value of work in the labour market: *Woolworths Limited v Salam* per Snell DP.
- It would be a very rare case that the PIAWE of a building worker would exceed the maximum weekly payment under s 34 *WCA* and it is unlikely that such a high PIAWE was agreed. The contract was made by telephone and the employer had not met the worker before making the offer of employment. If the employer needed a formwork labourer to clean up for a short period, it may well be the case that he would offer a position at the award rate for someone he had not met. It is improbable that a position as a form worker at a very high rate of pay of an ongoing basis would be offered as a result of a telephone discussion.

- The employer stated that he terminated the worker's employment on 16 January at the request of the site supervisor. The worker denied the conversation but did not deal with the letter in his statements.
- The worker's evidence about the tasks of a form worker is not persuasive. With the assistance of his solicitor and an interpreter, he had the opportunity to explain his experience more thoroughly than he did and his description does not convey long experience in that role. In any event, the employer's evidence is that the worker was cleaning concrete when the injury occurred and that is consistent with the role of a formwork labourer.
- While the worker alleged that he was retained to work 55 hours per week, based on 10-hour days + 5 hours on Saturday, he did not include any meal breaks in that calculation and his assessment of the hours worked is improbable. She accepted the employer's evidence that he was paid on the basis of 37.5 hours per week.

Section 119 WIMA – worker was not required to submit herself to a medical examination under s 119 (1) WIMA – respondent was not entitled to suspend provisional weekly payments because of worker's alleged non-compliance

Lee v University of New South Wales [2020] NSWWCC 325 – Arbitrator Batchelor – 15/09/2020

This matter was previously reported in Bulletin no. 65 (*Lee v University of New South Wales* [2020] NSWWCC 184). In that matter, after Wood DP refused the worker leave to appeal against an interlocutory decision of Arbitrator Rimmer and remitted the matter to the Arbitrator for determination of remaining issues, the worker requested Arbitrator Rimmer to recuse herself on the basis of apprehended bias. Arbitrator Rimmer did so.

Arbitrator Batchelor identified the issue for determination as whether the respondent was entitled to suspend the worker's weekly payments. However, the respondent also sought to argue that the Commission lacked jurisdiction to determine the relief sought in the application.

The worker argued that the Commission has jurisdiction to determine the matter, as it did in the matter of *Taylor v State of New South Wales, 1353/20;* [2020] NSWCCR 5, which Arbitrator Rimmer referred to in the recusal decision. She argued that Part 7.1 of the 2020 Guidelines requires the employer to discuss the apparent inadequacy, unavailability or inconsistency of information from the treating medical practitioner(s) directly with the NTD, and all the respondent had to do was to contact the doctor and advise that it was not allowed to pay for a report, or do whatever was required to try to resolve the issue with the doctor.

However, there was no evidence that this had occurred and there is no evidence that the 2020 Guidelines have been complied with. Therefore, s 119 (4) *WIMA* applies and the worker is not required to submit herself for examination by the medical practitioner nominated by the respondent.

The respondent argued that the worker was effectively seeking declaratory relied before any determination has been made about injury, main contributing factor to injury, capacity for work and medical expenses. Accordingly, there is nothing for the Commission to order. Therefore, the Commission lacks jurisdiction to determine the application as it is not a Court.

The respondent argued that if the Commission does not accept that it lacks jurisdiction, it relies upon s 119 (1) *WIMA* to argue that where a worker has given notice of injury, if required by the employer they must submit themselves for examination by a medical practitioner that is provided and paid for by the respondent. In respect of s 119 (4) *WIMA,* the Guidelines are not delegated legislation and they do not have the same power, impact

or force of the legislation itself. The Guidelines are silent in relation to an employer's request under s 119 *WIMA* as opposed to a request by an insurer. In any event, where there is inconsistency between s 119 *WIMA* and *the Guidelines*, s 119 must be complied with and *the Guidelines* are not to be considered.

The respondent also stated that Dr Cosgriff issued 2 non-WorkCover medical certificates, which were inconsistent with a compensable injury and that he refused to supply the material requested without payment in advance. However, the SIRA Guide for medical practitioners states that pre-payment cannot be made for reports and it was therefore justified in not paying for the material as requested by Dr Cosgriff. The doctor could have sent an invoice with the requested documents. In any event, the requested material was unavailable and there was nothing for it to resolve with the doctor and the respondent was entitled to refer the worker to a psychiatrist for an opinion on the claim.

The Arbitrator stated that s 105 (1) *WIMA* provides that subject to the *Act*, the Commission has exclusive jurisdiction to examine, hear and determine all matters under that *Act* and the *WCA.* He held that it was clear from the correspondence that the respondent was disputing liability for the worker's claim for weekly payments and that under s 289 (1) *WIMA*, the worker was entitled to have that dispute referred to the Commission for determination. Therefore, the Commission has jurisdiction to determine the application.

As to the respondent's argument that the *2019 Guidelines* do not apply to it and that it is not bound to comply with them, the Arbitrator held that he did not see any inconsistency between those *Guidelines* and s 119 *WIMA,* other than the lack of any reference to an "*employer*". Subsections (5) and (6) refer to obligations placed on an employer or insurer to do certain things if the regulations so provide and the same obligation is placed on both. He rejected the respondent's arguments that the *2019 Guidelines* do not apply to it as a self-insurer and that under s 119 (1) *WIMA*, an employer is entitled to immediately request a medical examination once notice of an injury has been given to it, irrespective of whether or not it wants information from the general practitioner.

The Arbitrator held that Dr Cosgriff's clinical notes were not unavailable and all the respondent had to do was to pay the doctor's invoice. It could then have determined if the information was inadequate or inconsistent, but until it received the clinical notes, it could not explain to the worker why the information from the doctor was inadequate, inconsistent or unavailable (as required by Part 7.5 of the *2019 Guidelines*). He stated that the medical practitioners' Guide did not prevent the respondent from pre-paying for the clinical notes as it was not seeking a report from the doctor. In any event, the respondent did not comply with Part 7.7 of the *2019 Guidelines,* as it did not include in its advice of its decision the contact information for WIRO.

Accordingly, the Arbitrator held that the worker was not required to submit herself for the IME arranged by the respondent and he ordered the respondent to reinstate any provisional weekly payments due after 18/03/2020 up to the maximum period of 12 weeks under s 269 *WIMA*. However, he did not make an order for payment of interest under s 110 *WIMA.*

WCC – Registrar Decisions

Work Capacity Dispute – Suitable employment under s 32A WCA – Worker fit for suitable work for 24 hours per week – Roles identified by insurer are suitable employment – Interim payment direction declined

Hall v Crew Services Group Australia Pty Ltd [2020] NSWWCCR 9 – Delegate McAdam – 11/09/2020

On 3.04/2019, the worker injured her left knee at work. she had undergone a left ACL reconstruction in 2015 and she underwent a further ACL reconstruction on 24/06/2019.

On 6/05/2020, the insurer made a WCD that the worker had current work capacity in suitable employment in roles as a receptionist, concierge and call contact centre operator in which she was able to earn more than her PIAWE and that her weekly payments would cease.

Delegate McAdam noted that the issue for determination was whether the worker was capable of working in the suitable employment options identified by the insurer. He noted that on 24/03/2020, the treating GP approved those roles and that he certified the worker as having current capacity of for 24 hours per week in suitable employment.

The worker argued that she lacks the skills to perform the employment options identified by the insurer and that she had a residual capacity to earn $250 per week. As her PIAWE was $753 per week, she was entitled to $500 per week (in round figures).

The respondent argued that no formal qualifications are required for the roles that were identified and administrative skills that the worker has would be relevant. Further, the updated vocational report brought the worker's medical certification up to date and the employers that were contacted identified the worker as a suitable candidate for those roles.

The delegate noted that the medical evidence certified the worker as having current capacity for 24 hours per week in suitable employment and that the roles identified in the WCD are medically suitable for her. Section 32A *WCA* defines "*suitable employment*" and the matters that can and cannot be considered. In this matter, the relevant parts of that definition are: (1) the nature of the incapacity; and (2) the worker's age, education, skills and work experience.

The delegate was satisfied that the worker is physically capable of performing the identified toles. While the worker argued that she would struggle to work 6 hours per day, she did not explain why she would struggle or specifically, what is the state of her knee in comparison with the expert medical evidence relied upon by the parties. Also, her suggestion that she can only work a few hours a day is inconsistent with the medical evidence. While the worker referred to clinical notes that reported a history of anxiety and PTSD, he was unable to give much weight to those records as there was no report or explanation of those symptoms and whether they affect her work capacity. There is also no evidence that links the psychological symptoms to any work injury to the left knee.

The delegate noted that the worker is 21 years old and that she left school in year 11, but she has been continuously employed since 2012 in a number of different roles. The worker's pre-injury employment involved interaction with customers and members of the public, which provided her with relevant transferrable skills, including computer skills, prioritisation and time management skills and problem-solving skills. These skills are relevant to the vocational options identified in the vocational report.

The delegate stated:

> 62. The applicant suggested that she was capable of working some hours, perhaps earning up to $250 per week with a loss of $500. I am not sure what this submission was based on. It was not explained in great detail. Medically, she has been certified fit for 24 hours per week. The applicant points to no evidence that supports the suggestion that she can work less (by my calculation, probably around 10 hours per week). The substantial issue in this case concern whether the roles identified by the respondent were suitable for Ms Hall in terms of her age, skills and experience. If the roles were not suitable, she is entitled to continuing payments at the full amount under the legislation.

Accordingly, the delegate held that the worker has not discharged her onus of proving that she is not capable of working in the identified roles and he declined to make an IPD.