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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:

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Supreme Court of NSW – Judicial Review Decisions

Judicial review - Jurisdictional error – failure to apply the correct approach to causation

Findlater v Insurance Australia Limited t/as NRMA Insurance [2020] NSWSC 1407 – Harrison AsJ – 14/10/2020

On 22/01/2014, the plaintiff was injured in a motor cycle accident. The Insurer admitted liability for the accident. However, there was a dispute as to whether the plaintiff's permanent impairment is greater than 10% WPI and this was referred to a Medical Assessor.

In September 2015, the Medical Assessor issued a certificate which determined that the cervical spine injury did not give rise to a degree of permanent impairment of greater than 10%.

In August 2019, the plaintiff applied for a further assessment of the permanent impairment dispute, which was accepted by SIRA. However, the power to refer a matter for further medical assessment under s 62 (1) (a) of the *MACA* is qualified by s 62 (1A). this provides that a matter may not be referred again for assessment by a party to the medical dispute on the grounds of deterioration of the injury or additional relevant information about the injury unless the deterioration or additional information is such as to be capable of having a material effect on the outcome of the previous assessment.

The plaintiff underwent an intervertebral disc replacement at the C4/5 level and therefore suffered a multi-level compromise in accordance with the expanded definition in c. 1.145 of the Guidelines. He argued that he qualified for a permanent impairment rating based on DRE category IV or V, either of which yields a greater than 10% permanent impairment, provided that the surgery in August 2018 is related to the cervical spine injury caused by the accident.

The Guidelines provide that causation must be determined by a medical assessor, as follows:

> **Causation of injury**
>
> 1.5 An assessment of the degree of permanent impairment is a medical assessment matter under clause 2 (a) of Schedule 2 of the *Act*. The assessment must determine the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident. A determination as to whether the injured person's impairment is related to the accident in question is therefore implied in all such assessments. Medical assessors must be aware of the relevant provisions of the *AMA4 Guides*, as well as the common law principles that would be applied by a court (or claims assessor) in considering such issues.
>
> 1.6 Causation is defined in the Glossary at page 316 of the *AMA4 Guides* as follows:
>
> > Causation means that a physical, chemical or biologic factor contributed to the occurrence of a medical condition. To decide that a factor alleged to have caused or contributed to the occurrence or worsening of a medical condition has, in fact, done so, it is necessary to verify both of the following:
> >
> > 1. The alleged factor could have caused or contributed to worsening of the impairment, which is a medical determination.
> >
> > 2. The alleged factor did cause or contribute to worsening of the impairment, which is a non-medical determination.
> >
> > This, therefore, involves a medical decision and a non-medical informed judgement.
>
> 1.7 There is no simple common test of causation that is applicable to all cases, but the accepted approach involves determining whether the injury (and the associated impairment) was caused or materially contributed to by the motor accident. The motor accident does not have to be a sole cause as long as it is a contributing cause, which is more than negligible. Considering the question 'Would this injury (or impairment) have occurred if not for the accident?' may be useful in some cases, although this is not a definitive test and may be inapplicable in circumstances where there are multiple contributing causes.

Therefore, the medical assessor needed to determine whether the disc replacement surgery was related to the cervical spine injury that was caused by the accident. Treatment is related to an injury caused by a motor accident if the accident makes a material contribution to the need for treatment. In determining causation, the assessor must consider whether the treatment would not have arisen but for the occurrence of the accident: *AAI Limited t/as AAMI v Phillips* [2018] NSWSC 1710 at [29] per Davies J.

The plaintiff relied upon medical reports from Dr D'Urso and Dr Barold. Dr D'Urso opined that the accident caused a worsening of his pre-existing cervical spine injury, which caused the need for the disc replacement surgery.

On 31/12/2019, the medical assessor certified that the plaintiff's rib fractures and cervical spine injury gave rise to a degree of permanent impairment that was not greater than 10%. In his reasons, he referred to a well-documented history of cervical spine complaints relating to the plaintiff's employment in the Australian Navy and while there was no quantifiable assessment previously with regards to the impairment, he considered it plausible that the accident aggravated a pre-existing condition.

The medical assessor diagnosed a soft tissue injury to the cervical spine and an aggravation of degenerative changes as a result of the accident. He noted that in late 2016, the plaintiff experienced a significant deterioration of his cervical spine injury after a heavy lifting incident at work. He opined that the heavy lifting incident ultimately resulted in the need for the surgery. He also stated:

> Although not mentioned at all in any of the subsequent documentation. It is to be noted that he has had surgery and that the surgery was funded and liability was accepted by the Department of Veteran's Affairs.
>
> That being the case, there is a clear acknowledgment by his previous employer that his employment has been a very substantial contributing factor to the need for surgery.
>
> In that respect, I consider liability has been accepted and causation has been identified…
>
> In this instance, there is no evidence that surgery would have been required if not for subsequent events – that his employer – the Navy has since accepted full liability.

The Plaintiff applied to the Supreme Court of NSW for judicial review.

Associate Justice Harrison noted that the grounds centre upon the medical assessor's approach to causation and she summarised them as follows:

> (1) In determining causation, the medical assessor took into account an irrelevant consideration - that in paying for the surgery, the plaintiff's previous employer had clearly acknowledged that his employment had been a "*very substantial contributing factor to the need for surgery*";
>
> (2) There was no evidence that the plaintiff's previous employer had clearly acknowledged that his employment had been a "*very substantial contributing factor to the need for surgery*". This is an error of law on the face of the record;
>
> (3) The medical assessor did not employ the proper test to determine whether the surgery related to the injury caused by the motor accident. The proper test involved asking whether or not the motor accident made at least a material contribution to the need for surgery. Further, the medical assessor should have considered whether the surgery would not have arisen but for the accident.
>
> (4) The plaintiff was denied natural justice or procedural fairness. He was not given the opportunity to respond to the argument that the surgery did not relate to the cervical spine injury caused by the motor accident on the basis that his employer had paid for the surgery;
>
> (5) Failure to apply cl 1.7 of the Guidelines, which recommends consideration of the question – "*Would this injury have occurred if not for the accident?*" The medical assessor asked himself the wrong question and, as a consequence, considered the payment for the surgery, which was irrelevant; and
>
> (6) Failure to apply ccl 1.31 and 1.34 of the Guidelines by failing to calculate pre-existing and subsequent and unrelated impairment.

Her Honour noted that the plaintiff required an extension of time to bring the proceedings. The basis for the extension is that it was appropriate for the plaintiff to first exhaust his review rights under the *MACA 1999* before commencing proceedings in the Supreme Court. This approach was recently endorsed by the Court: see *Slade v Insurance Australia Limited t/as NRMA* [2020] NSWSC 1031 at [22] per Wright J, citing *Rodger v De Gelder* (2011) 80 NSWLR 594; [2011] NSWCA 97 at [91] to [92]. Accordingly, she granted the extension.

Her Honour upheld ground (1) and noted that the Guidelines on causation make no reference to considering who paid for the surgery as a relevant factor and the fact that the Navy paid for it does not, according to the Guidelines, have any role to play in determining causation. Therefore, the medical assessor considered an irrelevant consideration that was decisive in his determination on causation. By so doing, the medical assessor misunderstood the Guidelines and applied the wrong test, which was a constructive failure to exercise jurisdiction: *Ex parte Hebburn :td; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416.

Accordingly, her honour set aside the medical assessor's decision and remitted the matter to SIRA for determination in accordance with law.

Judicial review - diagnostic conundrum - perplexing factual landscape - Bloomsday hearing – jurisdictional ping pong - workers compensation - somatic symptom disorder - severe depressive disorder - secondary psychological injury - whether MAP bound by agreement between the parties - procedural fairness - where MAP examines injured worker for itself - whether MAP required to provide report to parties - no general obligation to provide report - turns on circumstances of the case - circumstances required disclosure - limited nature of appeal process - where report raised matters outside grounds advanced by the parties - where worker had no memory of incident - whether lack of memory means any psychological injury is a secondary one

Chhay Lim v Kaybron Pty Ltd [2020] NSWSC 1447 – Hamill J – 22/10/2020

On 30/11/2008, the plaintiff suffered a number of fractures to his face and skull when he fell at work. His physical injuries resolved over time with treatment, but he continued to suffer pain and developed a major depressive disorder. There is a body of evidence that the plaintiff suffers from a somatic symptom disorder, although the doctors use different expressions to identify or describe that condition, and a solid body of evidence supporting a diagnosis of a major depressive disorder.

In March 2015, the plaintiff claimed compensation under s 66 *WCA* for a physical injury to his central or peripheral nervous systems and ear, nose and throat injury. Dr Davies assessed 17% WPI, but there was an appeal in 2016 and A/Prof Boyce, neurologist, found no evidence of injury to the central or peripheral nervous systems and assessed 0% WPI.

In 2018, the plaintiff claimed compensation under s 66 *WCA* with respect to his psychological illness(es). On 17/04/2019, Dr Mason issued a MAC, which contained contradictory and irreconcilable WPI assessments - In the body of the report, the WPI is said to be 26%, while the MAC itself and the more formal calculations place the WPI at 44%.

The defendant appealed and a MAP (Arbitrator McDonald, Professor N Glozier & Dr J Parmegiani) quashed the MAC. Based upon a further examination of the plaintiff and all of the material before it, the MAP assessed 0% WPI on the grounds that the somatic symptom disorder was not assessable under the Guidelines and no compensation was payable for the major depressive disorder because it was a secondary psychological injury as defined in s 65A *WCA*.

The plaintiff applied for judicial review on the following grounds: (1) The MAP erred in point of law when it failed to follow the binding agreement of the parties noted by the Arbitrator that he had suffered from a primary psychological injury and a secondary psychological injury; (2) The MAP erred in point of law when it held that the AMS, and therefore itself, was not bound by the agreement expressed in the COD because the nature of his condition was a medical dispute as defined by s 319 *WIMA*; (3) The MAP erred in point of law when it decided that there was no primary psychological injury in circumstances where that had not been advanced by either party and he was not afforded an opportunity to be heard on the issue; (4) The MAP erred in point of law when it failed to give reasons for adopting the conclusion of Dr Julian Parmegiani; and (5) The MAP erred in point of law when it considered that the Major Depressive Disorder was a secondary psychiatric injury because it was a result of another psychiatric condition being a Somatic Symptom Disorder.

The defendant argued that the MAP was not bound by the parties' earlier agreement and this was, in any event, ambiguous and not as prescriptive as the plaintiff contends. It noted relies on the fact that the plaintiff said the agreement was not binding in his submissions to the MAP and that the MAP was correct to decide that his major depressive disorder was a secondary psychological injury, and that the somatic symptom disorder was excluded from the assessment of permanent impairment under the relevant guidelines.

Hamill J stated:

> 8 At the heart of the case, although not necessarily a matter to be determined by this Court, is a dispute about the nature, aetiology and correct categorisation of the plaintiff's psychological condition. There is no dispute that Mr Lim suffered both a somatic symptom disorder and a major depressive disorder but there is a significant dispute as to whether those conditions are "*primary*" or "*secondary*" conditions as those qualifiers are used in s 65A of the *Act*. If the defendant's submission is correct, and I believe it is, the somatic symptom disorder is to be excluded from an assessment of WPI pursuant to the relevant guidelines. If that disorder is the only "*primary psychological injury*" the plaintiff is not entitled to compensation. Similarly, if the major depressive illness is a "*secondary psychological injury*", it is not compensable under the Act. At the risk of oversimplification, that was the position taken by Appeal Panel. On the other hand, if the major depressive disorder was a primary psychological injury, Mr Lim was entitled to compensation if the WPI was at least 15% in accordance with s 65A (3) of *the Act*. That was Dr Mason's view as well as the view of a number of doctors who provided earlier reports. Similarly, a number of doctors assessed the WPI at 0% for reasons not dissimilar to those adopted by the Appeal Panel.
>
> 9 However, as I have said, these are not the issues before this Court. The legislation vests the responsibility of determining those issues in an AMS, the Appeal Panel, or (perhaps) an arbitrator. It is not for this Court to substitute its opinion in that regard and it is not qualified to do so in the absence of a hearing in which those issues are ventilated by experts. The limited role of a court reviewing the exercise of an administrative discretion must be respected; it is not for a court undertaking judicial review of an administrative decision to substitute its own opinion for that of the decision maker: see, for example, *Minster for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 (Mason J); [1986] HCA 40. The question for this Court is whether the Appeal Panel's determination is affected by legal error on the face of the record. In coming to a conclusion one way or another on that issue this Court ought not examine the reasons of the Appeal Panel with an eye attuned to error or to parse the detail of the reasons provided by the Panel: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272 (Brennan CJ, Toohey, McHugh and Gummow JJ); [1996] HCA 6.

His Honour rejected grounds (1) and (2).

His Honour upheld ground (3) and stated:

> 69 Neither the grounds of appeal nor the submissions made by the defendant to the Appeal Panel suggested that there was no primary psychological condition, or that the AMS erred in finding that the plaintiff's major depressive disorder was a primary psychological condition.
>
> 70 Rather, the argument was that the AMS erred by (1) failing to apportion the percentage WPI between the major depressive disorder and the somatic symptom disorder and (2) failing to apportion the impairment resulting from the major depressive disorder between the secondary and primary injury. The Appeal Panel, at [21], noted the defendant's submission was that "*the appropriate result was to apportion the assessment of 26% as to 50% to each of the somatic symptom disorder and major depressive disorder, so that the assessment attributable to the major depressive disorder was 13% WPI*". Nowhere was it suggested that the WPI was 0% because the psychological injuries were secondary to the resolved physical injury and ongoing somatic symptom disorder, which was the effect of the Appeal Panel's finding. Of course, the result is the same; if the plaintiff's WPI is less than 15% it is not compensable: s 65A (3) of *the Act*.
>
> 71 In spite of the limited grounds and submissions advanced by the defendant, the Appeal Panel acted on its own finding that the major depressive disorder was a secondary psychological condition. Putting aside the adequacy of its reasons for this conclusion, the approach did not accord with the restrictive nature of the review permitted by s 328 (2) of *the WIM Act*.
>
> 72 Further, because the Application to Appeal and the submissions accompanying that application did not raise the issue, Mr Lim had no opportunity to address the issues that arose. The report of Dr Parmegiani was not provided to the parties. The plaintiff was not afforded the chance to argue either, that the approach was not open as a matter of construction and operation of s 328 of *the WIM Act*, or that the approach was factually or medically wrong.
>
> 73 In the submissions filed after the hearing, the defendant relied on a number of authorities to assert that there was no denial of procedural fairness in the Appeal Panel relying on the report and opinion of Dr Parmegiani without providing it to the parties. However, the cases relied on were decided on their own facts and did not provide authority for what occurred in the plaintiff's case.
>
> 74 In *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* [2006] NSWSC 235, Studdert J held that the worker was not denied procedural fairness when an appeal panel did not provide an adverse report prepared by one of its members. The only real issue in the case of *Brockmann* was the extent of the impairment. That was an issue upon which the parties had the opportunity to address the panel and the examination and report undertaken as part of the appeal process went only to the issue that had been ventilated.
>
> 75 The decision of Studdert J was considered by the Court of Appeal in *Maricic v The Registrar, Workers Compensation Commission* [2011] NSWCA 42. The Court accepted that it was not a universal or general requirement of procedural fairness that an adverse report prepared by a member of an appeal panel be made available to the parties. However, the judgment of Hodgson JA made it clear that it depended on the circumstances of the case. His Honour said at [35]-[38]:

> [35] In my opinion *Brockmann* was correct, insofar as it decided that the relevant requirement to afford procedural fairness did not generally require disclosure to an applicant of an adverse report to an appeal panel by a member of that appeal panel who has, as an approved medical specialist, carried out a further medical examination for the purposes of an appeal to that appeal panel.
>
> [36] However, in my opinion it should not be read as deciding that in no circumstances would failure to provide such a report be a denial of procedural fairness; and in my opinion, if it were to be so read, it would be an error. For example, if such a report were to reject an applicant's case on a basis not previously raised and not addressed in material provided by the applicant, procedural fairness may well require that the applicant be given an opportunity to deal with it: cf *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116.
>
> [37] In the present case, the issue of whether the applicant's complaints, including her complaints about her ability to move her neck, were genuine, had been squarely raised, for example in Dr Mathieson's report. When the applicant through her solicitor requested a further medical examination, it must have been apparent, at least to the applicant's solicitor, that one issue to be addressed would be whether the applicant's complaints concerning her ability to move her neck were genuine, and that the approved medical specialist would be observing the behaviour of the applicant during the examination in order to come to a view about this. The circumstance that the approved medical specialist's observation extended to his observation of the applicant talking to her husband just after the examination does not in my opinion make a significant difference.
>
> [38] In those circumstances, I do not think this case is one of those cases where procedural fairness required that there be a report shown to the applicant and an opportunity given for the applicant to contest it.
>
> [39] It is true that this has the effect that other members of an appeal panel may receive material adverse to an applicant, which has the considerable weight of a report and opinion of a co-member of the appeal panel, which the applicant has no opportunity to contest. However, where as in this case the material relates to an issue previously raised, on which the applicant has had an opportunity to put evidence and submissions, this does not in my opinion amount to a denial of the measure of procedural fairness which the WIM Act mandates.

76 In my view, this was clearly "*one of those cases where procedural fairness required that there be a report shown to the applicant and an opportunity for [him] to contest it*". This was particularly so because of the limited nature of the appeal process and the fact that the defendant's grounds did not assert that that there was no primary psychological condition or that the AMS had erred in finding that the major depressive disorder was such a condition. There was also the fact that the approach taken by Dr Parmegiani gave rise to a difficult question as to the meaning of "secondary psychological condition" in s 65A (5). This is referred to below in dealing with ground 5 at [84]-[91]. However, it is also relevant that neither party requested a further examination or an oral hearing.

77 In the particular circumstances of the case, procedural fairness required the plaintiff to be given notice of these matters so that arguments could be addressed as to the factual findings upon which the Appeal Panel proceeded, whether the Appeal Panel was acting beyond the limited power of review and the grounds advanced by the defendant, and the issues of statutory construction that arose. These were not matters upon which the plaintiff had focussed his submissions in the proceedings before the Appeal Panel: cf *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 at [11]-[12] and [103]-[104].

His Honour rejected ground (4) and stated that the MAP's reasons were adequate for the reader and plaintiff to understand the basis of the decision.

However, his Honour upheld ground (5) and he stated:

> 89 I do not accept that, in every case where an injured party has no memory of the event itself, it necessarily follows that any subsequent psychological illness is secondary to the physical injuries. That must be a matter for quite particular expert evidence. It was a matter that required more detailed consideration or argument before the Appeal Panel, particularly when the issue was not central to grounds of appeal or submissions before the panel and was not subject to any, or any extensive, argument. It is easy to imagine a case where a party's psychological injury is caused, not by the physical injury itself, but by the unexpected nature of the event albeit that physical injury also results.
>
> 90 Further, it is difficult to conclude that the somatic symptom disorder is a "*physical injury*" as that expression is used in the definitions in s 65A (5). If it was that (psychological) disorder that caused the depression, on a literal interpretation of the definition of "*secondary psychological injury*", the major depressive disorder was, at least in part, a "*primary psychological injury*". The question may have become whether the somatic symptom disorder arose as a consequence of, was caused by, or was secondary to the anterior physical injuries. If so, it may be that both psychological injuries were secondary injuries. However, that was not a ground or submission upon which the appeal before the Appeal Panel was based: cf s 328 (2) of *the WIM Act*. Given that there were (at least) two possible resolutions to this question, it was important for the Appeal Panel explain its reasons for coming to the conclusion that it did: *Campbelltown City Council v Vegan & Ors* (2006) 67 NSWLR 372; [2006] NSWCA 284 at [121] (Basten JA).
>
> 91 It follows that, while it was open to the Appeal Panel to reach its ultimate conclusion that the major depressive disorder was a secondary psychological injury, it erred in law in its approach to that question. It approached the matter on a basis that had not been argued in the grounds and written submissions. It failed to identify the physical injury and how the depression arose as a consequence of, or was secondary to, that physical injury whether "via" the somatic symptom disorder or otherwise.

Accordingly, his Honour quashed the MAP's decision and remitted the matter to the Commission for further consideration. He concluded:

> 94 …Whether the application proceeds before another Appeal Panel or is referred to an Arbitrator will be a matter for the Registrar of the Commission, depending on the position taken and submissions made by the parties. I say this noting that the parties before this Court seemed to agree that the matter could be determined by an arbitrator. However, I have not reached any conclusion as to the issue beyond the determination that the MAC that resulted from the proceedings before the Appeal Panel cannot be permitted to stand…

WCC – Presidential Decisions

Calculation of PIAWE where a worker has 2 or more employers and was injured prior to 21/10/2019; Schedule 1.1 of the Workers Compensation Legislation Amendment Act 2018 – jurisdiction of the Commission to determine a WCD

Sinitsky v Workpac Constructions Pty Ltd [2020] NSWWCCPD 61 – Deputy President Wood – 6/10/2020

On 24/11/2017, the appellant injured his right wrist at work with the respondent. However, he held concurrent employment at the Great Central Hotel, where he worked in exchange for accommodation and meals, but he did not receive any monetary reward. He suffered a prior injury to his right arm in a motor cycle accident in 2015, which required multiple surgeries and involved a complex recovery.

The respondent paid weekly compensation at varying rates and s 60 expenses, but it did not include the value of the concurrent employment in its calculation of PIAWE. However, on 4/03/2019, it disputed liability on the grounds that: (1) the work-related aggravation of the right wrist condition had resolved; (2) the appellant was not incapacitated for work as a result of the injury; and (3) no treatment expenses were reasonably necessary as a result of the injury.

The appellant commenced proceedings claiming continuing weekly payments and s 60 expenses, including the costs of proposed wrist surgery and on 17/05/2019, Senior Arbitrator Bamber issued a COD, which determined that the proposed surgery was reasonably necessary as a result of the injury in 2017. However, the appellant discontinued the claim for weekly payments.

The appellant then commenced further proceedings in which he alleged both the right wrist injury and a psychological injury and he claimed continuing weekly payments from 24/11/2017, at the rate of $2,101.70 per week, which included his pre-injury earnings with the respondent and the value of his concurrent employment.

Arbitrator Harris issued a COD on 13/05/2020, in which he made findings in respect of PIAWE. He held that the *Workers Compensation* Legislation *Amendment Act 2018,* which amended the provisions regarding the calculation of PIAWE, do not apply to injuries suffered before 21/10/2019 and therefore do not apply to this matter. He therefore assessed PIAWE under s44E *WCA* as it existed prior to the 2018 amendments. This provided that ordinary earnings include any non-pecuniary benefit which is to be calculated under s 44F *WCA* and he noted that the appellant's non-pecuniary benefit in concurrent employment was in return for an average of 32.5 hours of work per week. He held that s 44F required the value of this benefit to be included in the calculation of PIAWE, but item 8 of schedule 3 *WCA* requires that the ordinary hours be averaged to obtain the earnings for 38 hours per week.

The Arbitrator held that there is no inconsistency between ss 44E and 44F and item 8 of Sch 3 and, consistent with the decision in *Commissioner of Police v Eaton* [2013] HCA 2; 252 CLR 1; 87 ALJR 267; 294 ALR 608*,* the general provision (s 44E) must give way to the specific provision in item 8 Sch 3, when a worker works for 2 or more employers for more than the prescribed 38 hours. He determined that PIAWE during the first 52 weeks was $1,947.86 and $1,398.02 thereafter.

In relation to the issue of work capacity, the Arbitrator referred to the decisions of the High Court of Australia in *Calman v Commissioner of Police* [1999] HCA 60 and the Presidential decision in *McCarthy v Department of Corrective Services* [2010] NSWWCCPD 27, in which Roche DP stated (citations omitted):

> It is trite law that a loss can result from more than one cause. The authority of Calman is also instructive on this issue. The Court held (at [38], excluding footnotes):

> Once the appellant established that his underlying anxiety disorder was an injury within the meaning of the Workers Compensation Act, he was entitled 'to compensation ... under [that] Act' upon proof that his total or partial incapacity for work resulted from that injury. The question then for the Tribunal was whether the appellant's incapacity was causally connected to the underlying anxiety disorder. It has long been settled that incapacity may result from an injury for the purposes of workers' compensation legislation even though the incapacity is also the product of other - even later - causes. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later, non-employment cause. Thus, in *Conkey & Sons Ltd v Miller*, Barwick CJ, with whose judgment Gibbs, Stephen, Jacobs and Murphy JJ agreed, held that it was open to the Workers' Compensation Commission to find from the medical evidence in that case 'that the death by reason of myocardial infarction when it did ultimately occur, 'resulted' from the work-caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work-caused injury.

The Arbitrator considered the respondent's argument that the appellant had a prior psychological condition and a drug problem and the appellant's argument that his incapacity was solely caused by the work injury. He held that the relevant question was whether the work injury materially contributed to the incapacity. Based upon the medical evidence, he determined that the worker: was unfit for his pre-injury duties because of the injury; had an initial period of no capacity after the injury; and he had some capacity for work from 23/02/2018 until early 2019, and he has capacity to earn $750 per week in suitable work. He therefore awarded the appellant continuing weekly payments from 24/11/2017, at varying rates, with credit to the respondent for payments made.

On 11/06/2020, the appellant sought to appeal on 2 grounds, namely: (1) error of law in the calculation of PIAWE, and (2) error in the assessment of his capacity for work. However, he was not legally represented and he attempted to appeal by writing to the President and a delegate of the Registrar advised him that he needed to lodge the appeal in the correct form and seek an extension of time with reasons explaining why the application was out of time.

On 12/06/2020, the appellant lodged a substantially-compliant appeal and indicated that he had no option but to represent himself as he was unable to find a lawyer within the WIRO funding scheme who was willing to bring the appeal on his behalf. He also said that he could not retain a lawyer outside that scheme because of financial constraints and he cited medical grounds for failing to comply with the required timeframes. The respondent opposed the appeal, but it did not specifically oppose the request for an extension of time.

Deputy President Wood determined the appeal on the papers and refused to grant an extension of time to appeal. Her reasons are summarised below:

- Rule 16.2 (5) requires consideration of whether exceptional circumstances exist. In *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 at [66], Campbell JA considered this expression and concluded (citations omitted):

  > (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered;
  >
  > (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors;

(c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional;

(d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision, and

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case."

- Applying these principles, Wood DP was satisfied that the appellant's circumstances are exceptional. The respondent did not appear to dispute the appellant's allegation that he is suffering from a psychological condition, he is unrepresented and otherwise does not appear to have sophisticated knowledge of the legal system. However, she must also consider whether, in those exceptional circumstances, a substantial injustice would occur if she declined to extend the time limit for filing the appeal.
- In *Bryce v Department of Corrective Services*, Allsop P (with Beazley and Giles JJA agreeing) said that whether there are exceptional circumstances and whether the party seeking an extension can show demonstrable or substantial injustice would occur if leave were not granted, is "*a composite expression in the rule to be dealt with within jurisdiction.*" This requires consideration of whether a refusal to extend the time to appeal would cause a substantial injustice to the appellant, which in turn requires consideration of the merits of the appeal.
- The appellant alleged that the meals and accommodation that he received in concurrent employment were valued at $770 per week until 23/11/2017 (when he last worked for that employer). He asserted that he has no current work capacity and that he suffered anxiety and depression as a result of being verbally attacked and allocated menial tasks when he attempted to resume alternate duties with the respondent. He alleged that he had attempted to take his own life and suffered from night terrors, which he had not experienced since ceasing military service.
- The appellant's challenge to the Arbitrator's decision regarding his work capacity is limited to whether he had jurisdiction to determine that issue before liability was declined on 4/03/2019 and the Arbitrator's finding that he had some capacity for work from 23/02/2018 and 4/03/2019. In the absence of sufficient evidence from the appellant to address the matters referred to in s 32A *WCA*, the Arbitrator drew assistance from the histories provided to the medical experts.
- The Arbitrator determined PIAWE using the approach required by item 8 of Sch 3 *WCA* and he did not err in doing so. Further, the appellant did not establish any inconsistency between ss 44E and 44F and item 8 Sch 3 *WCA.* Accordingly, ground (1) was not established.
- In relation to ground (2), the appellant complained that the Arbitrator has no jurisdiction to make a WCD. This argument appeared to be based upon s 43 *WCA* as it existed prior to *the 2018 Amendment Act.* However, from 1/01/2019, s 105 *WIMA* vests the Commission with jurisdiction to hear and determine all matters arising under the *WCA* and *WIMA*, subject to any specific prohibition. Accordingly, there is no bar to the Commission determining the appellant's work capacity.
- The appellant argued that the Arbitrator did not have power to "*back date*" the decision on his capacity to a period before the respondent raised any dispute regarding his capacity. However, in order to assess his entitled to compensation from 24/11/2017, it was incumbent upon the Arbitrator to consider the extent of his work capacity. As Mason P stated in *NSW v Moss* [2000] NSWCA 133*:*

where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task.

- The Arbitrator's finding regarding incapacity is a finding of fact. There was a paucity of evidence regarding this issue between 23/02/2018 and 4/03/2019 and in *Swann v Spiropoulos* [2006] NSWSC 860, Campbell J (as his Honour then was) observed that, when faced with a paucity of evidence, the appropriate approach was to put himself in the position of a juror and assess as best as he could the extent of the compensation payable.
- The Commission has consistently applied the principles enunciated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr*, which Roche DP summarised in *Raulston v Toll Pty Ltd* as follows:

  > An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if '*other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that [the] conclusion was wrong*'.
  >
  > Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the '*fact of the [Arbitrator's] decision must be displaced*'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
  >
  > It may be shown that an Arbitrator was wrong '*by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong*'.

- Therefore, in order for the appellant to succeed on this point he must establish that material facts were overlooked or given too little weight, or that the available opposite inference is so preponderant that the decision must be wrong. However, he has not pointed to any evidence that the Arbitrator failed to consider, or any material fact that was overlooked or afforded too little weight. In the absence of any direct evidence from the appellant about the work he performed, it was open to the Arbitrator to draw an inference that he had some capacity for some work between 23/02/2018 and 4/03/2019.
- The Arbitrator's determination of the appellant's work capacity was within jurisdiction and consistent with the evidence and the appellant has not shown that the Arbitrator erred in the manner required by s 352 (5) *WIMA.*
- Accordingly, the appeal grounds have no prospects of success and the failure to extend the time in which to appeal would not result in a substantial injustice to the appellant as required by s 352 (4) *WIMA.* Therefore, an extension of time is refused.

WCC – Medical Appeal Panel Decisions

Video and audio assessment by AMS was conducted in an appropriate manner

Manildra Flour Mills (Manufacturing) Pty Ltd v Meyers [2020] NSWWCCMA 150 – Senior Arbitrator Bamber, Dr J Parmegiani & Dr P Morris – 1/10/2020

On 19/05/2018, the worker suffered a psychological injury at work. On 17/05/2020, Dr Glozier issued a MAC, which assessed 19% WPI, but the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and sought a re-examination by a member of the MAP. The worker opposed the Appeal.

The MAP determined that it was not necessary to re-examine the worker because there was no error by the AMS and there was no lack of procedural fairness to the parties.

The appellant argued that the AMS failed to conduct a reliable assessment of the worker due to the failure to sustain video throughout the assessment and that the worker failed to provide an appropriate internet connection to sustain an assessment for a 1 to 2 hour period. The AMS failed to consider the inadequate conditions of the assessment and failed to adequately assess the worker by not performing formal cognitive testing. The AMS also failed to address and consider the significant medical and other evidence that it relied upon and he failed to consider and give any weight to the impact of the worker's pre-existing condition and to make a deduction under s 323 *WIMA.*

The appellant referred to the "*Guide to attending by AMS video assessment*", which is a document that the Commission issued administratively to provide guidance to the parties regarding the conduct of an assessment by video. However, the MAP held that the Guides do not have the status of the WCMDA Guidelines issued under ss 331 and 376 *WIMA.*

The MAP held that there is no legislative requirement regarding the assessment environment and, prima facie, it is up to the AMS to satisfy himself as to the most appropriate way to conduct his examination of a worker. The legislation does not provide that if a worker does not have in place any of the matters referred to in the Guides, the AMS' assessment falls into error and/or the MAC is vitiated.

The MAP held that there was no demonstrable error or failure to apply the correct criteria because of the "*environment*" factors raised by the appellant. It was satisfied that the parties were afforded procedural fairness because the AMS disclosed the technical difficulties in the MAC, but he was nonetheless able to proceed with the assessment of permanent impairment.

The appellant argued that the AMS failed to apply correct assessment criteria because he was unable to conduct a formal cognitive test in the setting (he had not prepared the aural version). However, the MAP held that it is not mandatory for an AMS to conduct a cognitive test and the failure to do so does not equate to a demonstrable error or failure to apply correct criteria.

The MAP stated that the appellant's main points regarding its argument that the AMS failed to address the evidence and consider significant medical and other evidence can be grouped under headings of the AMS' treatment of inconsistencies, the AMS' PIRS ratings and his treatment of Dr Miller's opinion.

The MAP held that the ground of "*inconsistencies*" was not made out because the AMS approached Dr Takyar's opinion in a considered way and was pointing out that Dr Takyar had not identified the inconsistencies that he found.

The MAP rejected the ground regarding the "*PIRS ratings*" because it is evident that the AMS independently assessed the worker and did not just adopt Dr Takyar's assessment. This is evidenced by the AMS' detailed and thorough history taking, his detailed mental status assessment and his comments in the PIRS ratings. It held that it is not appropriate for the appellant to take one line from the MAC and use it to base what is a rather general submission.

The MAP held that the AMS' treatment of Dr Miller's opinion does not disclose any error. It regarded Dr Miller's opinion as being at odds with the weight of the evidence, including the treating practitioners' opinions and Dr Takyar's opinion.

The MAP also held that the AMS did not err in failing to apply a deductible under s 323 *WIMA* as he did not believe that the worker's prior adjustment disorder contributed to the PTSD that he suffered on 19/05/2018.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Employer's application for reconsideration of a MAC refused – no compelling evidence that the worker's condition had materially improved and no probative evidence that the worker was not telling the truth

Ewins v CSR Limited [2020] NSWWCC 351 – Arbitrator Young – 6/10/2020

This matter has a lengthy prior history and has been reported in Bulletins numbered 27 (Arbitrator Harris), 29 (Arbitrator Harris), 42 (MAP) and 64 (Supreme Court of NSW - Adamson J). The background is summarised as follows:

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

On 14/05/2019, the Plaintiff instructed investigators to conduct surveillance of the worker, "*to expose video footage of her engaging in activities*" and "*to confirm the current activities*". The investigators conducted surveillance over 4 days in May 2019, during which the worker was seen to collect a young child and go to church on 2 occasions, but she was not otherwise sighted.

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

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

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

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

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

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

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

The MAP rejected the Plaintiff's application for an oral hearing and determined the appeal on the papers. It dismissed the appeal and confirmed the MAC.

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

Adamson J rejected grounds (1) and (2). Her Honour held that reasons for decision must be read fairly and as a whole. In order to determine whether the ground under s 327 (3) (b) *WIMA* was made out, the MAP was required to apply the statutory test – whether the report constituted additional relevant information that was not available to, or could not have reasonably been obtained by, the Employer before the assessment by the AMS.

Her Honour held that it was a matter for the MAP whether it chose to start by determining relevance or to determine whether the report was not available to, or could not reasonably have been obtained by, the Employer before the AMS' assessment. If it decided either of those issues against the Employer, it was not necessary to proceed further to determine the other matter. It is plain from the SOR that the MAP was satisfied that the surveillance report was not information that was not available to, or could not reasonably have been obtained by, the Employer before the AMS' medical assessment. In any event, the discretionary threshold to receive the evidence under s 328 (3) *WIMA* was not reached because of the MAP's finding that the evidence would not qualify for reception in any event.

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

> 54. …There are limits to the extent to which such broad objects and objectives ought be taken into account by those who are bound by legislation. In Russo v Aiello (2003) 215 CLR 643; [2003] HCA 53, Gleeson CJ said, in the context of notification of claims under the Motor Accidents Act 1988 (NSW), at [7]:

> The various statements as to the objects of the legislation show that the legislature made its own evaluation of the importance of prompt notification of claims, and constructed a statutory scheme around that evaluation. It is not for a court to re-assess that policy on a case by case basis.
>
> 55. The statement also applies to the Panel. The Panel was bound to act in accordance with the Act and, in particular, ss 327 and 328. It had no authority to use the system objectives to undermine the express words of those sections on the basis of its understanding of the term "fair". The Panel applied the terms of ss 327 and 328 to its task in a way which does not demonstrate legal error.
>
> 56. The Employer cannot complain of the Panel's conclusions when it failed to make submissions to the contrary, having availed itself of the opportunity to do so in its submissions dated 20 June 2019. While the Panel may have said more than it needed to on the contents of the report, it said enough to show that it applied s 327 (3) (b) and s 328 (3) in accordance with their terms. For the reasons given above, I am not satisfied that either of grounds 1 or 2 is made out.

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

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

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

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

Accordingly, her Honour dismissed the Summons and made a costs order against the Plaintiff.

On 17/06/2020, the employer applied for reconsideration of the MAC, based upon the surveillance evidence obtained in May 2019. It argued that the worker gave inaccurate, incorrect and misleading information to the AMS. Alternatively, it argued that the worker's condition subsequently and immediately improved after the examination by the AMS.

The worker opposed the application for reconsideration. She argued that the MAP's decision was the subject if a determination by Adamson J and that this application was an abuse of process in circumstances where the employer has made broad assertions about her having been inaccurate, incorrect or misleading. There is no medical evidence that supports the employer's assertions and the decision of Garling J in *Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 633 supports the view that the opinion of the AMS involves assessment in a clinical environment on the day of the assessment and the employer has already appealed, unsuccessfully, against the MAC.

Arbitrator Young refused the application for reconsideration. His reasons are summarised below:

- The decision in *Target Australia Pty Limited v Mansour* [2006] NSWWCCPD 286 confirms the fact that a matter has been referred to a MAP does not prevent the Commission from exercising its discretion to refer a matter to an AMS for further assessment. In *Mansour*, Roche DP observed that s 329 decisions to refer a matter for reconsideration are not limited by the grounds of appeal set out in s 327 (3) *WIMA.*
- The Arbitrator stated:

  > 17. In the exercise of this wide discretion it is, in my view, permissible to have regard to some of the matters which are relevant to the exercise of discretion generally. In my view, those considerations include the following. First, I give consideration to the relevance and probity of the new information relied upon. In my view it defies logic to suggest that because the applicant was able to attend church on 19 and 26 May 2019 she was not telling the truth to Dr Mason when he examined her on 5 April 2019. The direct evidence is of a history given to Dr Mason that the applicant was not attending church when she saw Dr Mason. In the absence of contemporaneous contradictory evidence sufficient to establish that she was attending church when she saw Dr Mason, there is insufficient evidence in my view which is relevant nor has any probity sufficient to justify a reconsideration by an AMS at all.

- The Arbitrator agreed with the MAP's conclusion that the surveillance might have been obtained before the AMS' assessment and he stated that if the surveillance had occurred shortly before that assessment, it may well have been of increased relevance.
- The surveillance material does not compel a conclusion that the worker was not telling the truth, only that a little over 7 weeks after the assessment she could attend church.
- The public interest requires that matters not continue indefinitely. In *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31, Lord Bingham of Comhill said:

  > The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole

- The duty of the Commission is to ensure that both parties interests are served having regard to the substantial merits of the information which has been obtained. Because the surveillance material is not contemporaneous, it does not have any substantial merit. What is not clear on the evidence is the extent to which the worker was able to attend church after 26/05/2019.
- The results of continued investigation and scrutiny beyond the conclusion of the AMS process, whilst not prohibited, is a matter that should only be allowed where potentially persuasive evidence supports the need for reconsideration. Put simply, it may well be that there is a perfectly plausible explanation for the worker to be able to attend church 7 weeks after the examination by the AMS.

Calculation of PIAWE during first 52 weeks – meaning of "shift allowance payment"

Alavanja v PT Labour Services Pty Ltd (in Liquidation) [2020] NSWWCC 348 – Arbitrator Harris – 6/10/2020

The worker suffered an injury at work on 4/04/2019 (deemed).

Arbitrator Harris stated that during a teleconference on 26/08/2020, the parties resolved most of the issues in dispute and he made orders to the following effect: (1) the respondent pay the worker compensation for 23% WPI (including an uplift under s 66 (2A) *WCA)*; (2) Declaration under s 162 *WCA* that the respondent entered into a policy of insurance in force as at the date of the accident; (3) the worker claims continuing weekly payments from 5/04/2019 at the rate of $2,300 per week with credit for payments made. He noted that the only remaining issue in dispute was the construction and application of the meaning of "*shift allowance*" in the former s 44C *WCA.* He directed the respondent to file and serve any further evidence by 11/09/2020 and listed the matter for arbitration hearing on 21/09/2020.

Following oral submissions on 21/09/2020, the Arbitrator made additional orders to the following effect:

> 2. The respondent pays the worker continuing weekly compensation at the rate of $1,141.92 from 4/04/2020 under s 37 *WCA*.
>
> 3. The issue of the worker's entitlement to weekly compensation for the period from 4/04/2019 to 3/04/2020 is reserved noting the following agreements:
>
> > (a) the worker's base rate of pay is $1,427.40 per week; and
> >
> > (b) the worker's overtime is $305.48 per week.
>
> 4. The dispute is limited to the calculation of any "*shift allowances*" payable for the first 52 weeks. The parties agree that this figure is assessed based on the "*allowances*" paid to the applicant for the previous 30 weeks.
>
> 5. The parties are to file an agreed schedule of the allowances paid for the 30 weeks from 11/09/2018 to 2/04/2019, together with the supporting documentation, by close of business, 25/09/ 2020. In the absence of agreement, the parties are to file and serve respective schedules by close of business, 25/09/2020.

After the arbitration, the respondent filed payslips covering the period from 5/09/2019 to 26/03/2019 (sic – 2020). The worker filed a list setting out the payments over the 30-week period. Neither party averaged the various entitlements over the 30-week period.

The worker argued that the normal meaning of "*shift allowance payment*" was that it covered any payment for working in a shift. Section 44C *WCA* should be given an expansive and beneficial construction, which was favoured by previous authorities, but he did not refer to any specific authorities.

However, the respondent submitted that the section would not be given a beneficial construction because the purpose was to limit a worker's entitlement to weekly compensation. This purpose contrasted with the sections in previous versions of the *WCA* which based weekly compensation entitlements on "*average weekly earnings*" and "*current weekly wage rate*". It relied on the definition of "*shift allowance payment*" in the "*iCare PIAWE Handbook*".

The respondent argued that the words in s 44C should be read in the context of the word "*overtime*" and only apply for the shift of working overtime. It was submitted that the only payment covered by the words was a payment for specifically working an overtime shift. It also argued that the worker had not satisfied the onus of proof that any "*shift allowance payment*" would likely have been paid to him in the first 52 weeks as required by s 44C (5) *WCA*. It could not be inferred that the worker would have continued to receive the benefits he had previously received as "*anything could happen such as COVID*" which may have affected his entitlements but for the work injury.

The respondent referred to the definition of "*base rate of pay*" in s 44G *WCA,* which excludes various payments including "*overtime or shift allowances*" and other payments including "*monetary allowances*". It argued that "*monetary allowances*" included those amounts that the worker claimed and therefore were not a "*shift allowance*". It also argued that the "*productivity*" allowance was an "*incentive based payment or bonuses*" as defined in s 44G (1) (a) and therefore was not an "*overtime or shift allowance payment*".

The respondent argued that the worker had otherwise not discharged the onus of proof because it was unclear why the various payments were made in the absence of the award or enterprise agreement and was it otherwise unclear from the evidence before the Commission. The meal allowance could have been paid for the regular hours worked by the applicant and did not necessarily relate to any overtime.

The respondent accepted that the base rate of pay was $1,417.40 and that, for the first 52 weeks, the allowance for overtime was $305.48 per week. However, it did not refer to any decision in the Commission on the meaning of the relevant words.

The Arbitrator rejected the respondent's argument that the worker could not establish that he would have been likely to receive overtime or carried out work that "*attracted a shift allowance payment*" in the first 52 weeks within the meaning of s 44C (1) (b) *WCA.* He noted that the respondent accepted that the worker was entitled to overtime during that period and the evidence is that the worker was engaged to work on a building site, had an excellent work history and was otherwise healthy. It accords with logic and common sense that the work situation would continue if the worker was otherwise not injured. Further, the presumption of continuity is another reason for finding that the worker's earnings would have continued into the foreseeable future over the 52-week period.

With respect to the construction of "*shift allowance payment*", the Arbitrator noted that in *Military Rehabilitation Commission v May* [2016] HCA 19 at [10], the plurality of the High Court stated that "*the question of construction is determined by reference to the text, context and purpose of the Act*", citing the decisions in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [69]-[71] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41. He stated (citations excluded):

> 35. In Grain Growers Limited v Chief Commissioner of State Revenue (NSW) Beazley P stated that "*the starting point and end point is with the text of the provision*". Her Honour cited the comments of the High Court in *Alcan* when the plurality stated:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Footnotes omitted)
>
> See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].

The Arbitrator stated that the changes to weekly compensation introduced by the *2012 Amendment Act* were, in some respects, not beneficial to workers. However, this must be contrasted with the fact that the worker is entitled to weekly payments for the first 52 weeks based on earnings that include "*overtime and shift allowance payment*" in addition to his ordinary earnings. That allowance is an increase to the base rate.

The Arbitrator held that "*shift allowance payment*" must be read in context with the surrounding words and the contextual reference with other sections, but he rejected the respondent's argument that the immediately preceding words "*any overtime*", limits the meaning of the phrase to only those payments attributable to overtime. He stated (citations omitted):

> 45. The test for reading words into a statutory provision is articulated in Taylor v The Owners Strata Plan No 1156416 where the plurality stated:
>
> > The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills '*gaps disclosed in legislation*' or makes an insertion which is '*too big, or too much at variance with the language in fact used by the legislature'*.
>
> 46. The principles set out in *Taylor* has been applied by the Court of Appeal in two appeals concerning the construction of *the 1987 Act* and *the Workplace Injury Management and Workers Compensation Act, 1998 (the 1998 Act)*: *State of NSW v Chapman-Davis* and *Cram Fluid Power Pty Ltd v Green*.

The Arbitrator stated that the respondent's submissions failed to articulate, consistent with the test articulated in *Taylor*, why the word "*overtime*" should be read into the words "*shift allowance payment*" in s 44C of *the 1987 Act*. He expressed reservations that s 44G (1) *WCA* provides the answer to the issue of interpretation of what is and what is not included in the meaning of "*shift allowance payment*".

The Arbitrator held that the iCare PIAWE Handbook was irrelevant absent any provisions that incorporated it into the *WCA.* He noted that in *Tan v NAB* [2008] NSWCA 198, the Court of Appeal referred to the Guidelines issued under s 260 *WIMA* when it concluded that they do not affect the "*proper construction of the Act*". He therefore gave the Handbook no weight in interpreting the relevant words of the section.

The Arbitrator stated (citations omitted):

> 61. Consistent with s 8 of the *Interpretation Act, 1987*, that the singular can be read as the plural, I do not accept that "shift allowance payment" is only limited to a payment for one type of shift allowance.
>
> 62. It is difficult to analyse, based on the submissions, how far the section extends. In my view, the relevant words must be read contextually but not restricted to "*overtime*".

63. In *E-Dry Pty Ltd v Ker* Keating P collected various authorities where inferences could be drawn based on matters described as "*common knowledge*", "*ordinary human experience*" and "*ordinary powers of human reason in light of human experience*".

64. I consider it a matter of common knowledge based on normal human experience that many awards include allowances payable for working extra shifts such as an overtime shift or for working evening shifts, night shifts and/or weekend shifts. Those payments are in addition to the base rate and in my view fall within the meaning of a "*shift allowance payment*".

65. I also consider that as a member of a specialised tribunal, the Commission has general knowledge of award entitlements. I discuss this matter in more detail later in the Reasons.

66. Whilst the meaning of the words is unclear and in the absence of authority, there is in my view no reason to limit the ordinary meaning of "*shift allowance payment*" to only an allowance paid for working an overtime shift. The shift allowance payment is the allowance payable by an employer for working further shifts in addition to normal business hours such as overtime and when a worker receives a specific allowance for working evening, night-time and/or weekend shifts. The meaning may also extend to other types of "*shift allowances*".

67. The interpretation of the words "*shift allowance payment*" reads them contextually with the word "*overtime*" without unnecessarily limiting the plain meaning of the words.

68. This interpretation is inconsistent with both the applicant's and the respondent's submissions and is an interpretation between what was two extremely diverse positions. On issues of statutory construction, I am not bound by the parties' submissions and "*can adopt a construction that has not been argued by the parties*": *Coleman v Power*…

71. There is clear Presidential authority based on settled appellant authority that the Commission has knowledge of the labour market and wages. In *Woolworths Ltd v Salam* Snell DP analysed the authorities when he concluded:

79. Compensation Court of New South Wales was a specialist tribunal, taken to have knowledge of the labour market and wages: *Cowra Shire Council v Quinn* [1996] NSWSC 143; (1996) 13 NSWCCR 175 per Handley JA (Meagher and Cole JJA agreeing) at 179D. In *Akawa Australia Pty Ltd v Cassells* (1995) 25 NSWCCR 385 Rolfe AJA (Kirby P and Priestley JA agreeing) at [23] said:

> The Compensation Court is a specialised tribunal the judges of which are well qualified by their experience and knowledge of matters in the labour market and wages paid to make the type of assessment Burke CCJ was called on to make in this case. This has been recognised by appellate courts for many years. In *Australian Iron & Steel Pty Limited v Elliott* (1966) 67 SR (NSW) 87, Sugarman JA said words, which are equally applicable to this case, at 94:
>
> > The parties do not seem to have raised the question of quantum, or to have placed before his Honour any evidence on which he might determine either the amount of the "*difference*" mentioned in s11 (1), or the amount proper to be awarded under the circumstances of the case, being content, apparently, to leave all questions of quantum to his Honour's decision in reliance on the fund of information as to the conditions of employment and rates of pay which the Commission should be taken to possess...
>
> In *J & H Timbers Pty Limited v Nelson* [1972] HCA 12; (1972) 126 CLR 625, Barwick CJ referred to similar considerations: see at 632–633.

> 80. These principles similarly apply in the Commission, which is a specialist tribunal, taken to possess such specialist knowledge: *Goktas v Goodyear Australia Pty Limited* [2007] NSWWCCPD 1 at [32], *Forests NSW v Hancock No.2* [2007] NSWWCCPD 191 at [76], *Perkins v Ceva Materials Handling Pty Ltd (previously TNT Materials Handling Pty Ltd)* [2011] NSWWCCPD 32 at [75].

The Arbitrator found that the site allowance, productivity allowance and inclement weather allowance fall outside the meaning of a "*shift allowance payment*". He stated that it was difficult to discern, in the absence of the award, why the meal and travel allowances were paid, but it is unlikely – based on the payslips – that these are only paid when the worker worked that amount of overtime. Accordingly, he held that the worker is only entitled to the amount agreed for overtime of $305.48 per week.

Threshold dispute for WIDs – Anshun estoppel – Worker estopped from seeking a combined assessment from an AMS for an accepted injury and an alleged consequential condition because he made separate claims and brought previous proceedings alleging separate injuries on different dates

Maher v Duncan Foster Engineering Pty Ltd [2020] NSWWCC 353 – Arbitrator Burge – 7/10/2020

On 1/05/2001, the worker injured his right shoulder. In these proceedings he also alleged that he suffered a consequential condition in his left shoulder on 7/05/2003. He brought proceedings with respect to a threshold dispute for WIDs.

On 18/09/2003, the parties entered into a complying agreement with respect to the right shoulder injury. On 11/02/2005, they lodged Consent Orders indicating a further complying agreement with respect to the left upper extremity injury in 2003.

On 1/03/2017, the worker's solicitors gave the insurer notice of a further claim under s 66 *WCA* with respect to both injuries, as follows: (1) 35% permanent loss of efficient use of the right arm at or above the elbow (less 13% previously awarded); and (2) 8% WPI for the left upper extremity (less 6% previously awarded).

In 2017, the worker commenced WCC proceedings, in which he alleged that the left shoulder injury occurred due to overuse as a result of the nature and conditions of employment.

On 28/08/2017, Dr Harrison issued a MAC, which assessed 20% permanent loss of efficient use of the right arm at or above the elbow (2001 injury) and 10% WPI of the left upper extremity (2003 injury).

The worker's solicitors then wrote to the Commission noting that the ARD indicated a threshold dispute for WIDs and asking whether a separate MAC was being issued in relation to this dispute. The Commission responded that this dispute had not been referred to the AMS because there was no medical evidence supporting an assessment of 15% WPI or any evidence that the claim was made in accordance with s 282 *WIMA.*

On 6/09/2017, the worker's solicitors wrote to the respondent's solicitors, seeking their consent to the issue of a MAC dealing with the threshold dispute for WIDs. However, the respondent's solicitors did not consent and they asserted that the worker is estopped from alleging that the left upper extremity injury is a consequential condition arising from the right upper extremity injury because the parties entered into multiple settlements that dealt with each upper extremity as separate injuries and conducted previous proceedings on that basis.

Arbitrator Burge noted that the only issue for determination is whether the worker is entitled to allege that his left upper extremity condition is a consequential condition. On 7/10/2020, he issued a COD, which entered an award for the respondent. His reasons are summarised below:

- The worker cannot resile from the position which he has taken in multiple claims and proceedings that the left and right shoulders are separate injuries which took place on separate occasions. This is not a matter where the worker can be said to have been unaware of the suggestion the left upper extremity injury may be a consequence of the injury to the right shoulder. That much is mentioned in multiple source documents and in earlier medical reports. Yet on multiple occasions his position (and indeed that of the respondent by virtue of the Complying Agreements and Consent Orders) has been the injuries are separate.
- He accepted that the history taken by Dr Lim is that the worker had returned to normal work duties after the right shoulder injury and that the nature and conditions of that work was of a nature which would contribute to the development of symptoms in his left shoulder.
- In *Lagana v Australian Retirement Partners Realty Pty Ltd* [2015] NSWWCCPD 55, Deputy President Roche dealt with the question of whether a subsequent fall was as a result of an earlier injury. In that matter, the worker suffered an injury in 2010, then in 2012 suffered a fall which was attributed to numbness in her heel brought about by the earlier injury. At [46] and following, the Deputy President said:

  > It does not matter that the numbness in Ms Lagana's right heel played a role, even a substantial role, in causing Ms Lagana to fall. Nor does it matter that she had fallen in January 2012 because of the numbness in her right heel. It is trite law that an injury can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236...)
  >
  > 47 Ms Lagana fell at work on 23 October 2012 while doing her normal work duties and sustained injury to her back and other parts of her body. She fell partly because of the numbness in her heel, which contributed to her clipping her heel on the stairs, and partly because she was carrying two bags of garbage (one in each hand) and could not save herself from falling, and because of the general circumstances of her duties, which required her to carry garbage down steep, narrow stairs. That is undoubtedly a s4 injury that was received in the course of her employment...
  >
  > 49 A work injury is still a s4 injury though a previous work injury may have contributed to the particular injurious event (in this case, the fall down the stairs) for which compensation is claimed. Employers take their employees as they find them… It therefore makes no difference that Ms Lagana's 2010 injury played a part in her 2012 fall.

- The respondent argued the applicant was subject to the principles advanced by the High Court in *Anshun*. That case, and the line of authorities which follow from it holds that a party will be estopped from relying upon a cause of action or defence in later proceedings if the action or defence relied upon was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a case or defence if, having regard to the nature of the claim and its subject matter, it would be expected that the party would raise the claim or defence and thereby enable relevant issues to be determined in the one proceeding. The Court also adopted the long-held principle that a party will be estopped from bringing an action which, if it succeeds, will result in a judgement which conflicts with the older judgement.
- In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWWCCPD 53 (Israel), Deputy President Wood dealt with the question of whether a claim for section 66 entitlements in respect of a consequential low back condition from an accepted right knee injury should have been brought with an earlier claim. The respondent argued that the worker was estopped because it was unreasonable for her not to rely on her claim for

consequential condition in the original proceedings. However, The facts of this matter are somewhat different, as there was no omission of a body part by the worker; rather claims and agreements had been entered into on the basis the left upper extremity was a separate injury to the right upper extremity – a position directly at odds with that he seeks to advance in these proceedings.

- At [119] of the decision in *Israel*, Wood DP referred to the decision of Neilson J in *Bruce v Grocon Ltd* [1995] NSWCC 10 (*Bruce*). The Deputy President said:

> 119. A helpful summary of the early cases with respect to estoppel and its scope in the workers compensation jurisdiction was provided by Neilson J in *Bruce*. In that decision, after consideration of the relevant cases, Neilson J distilled the following relevant principles:
>
> '(a) The principle in the *Port of Melbourne Authority v Anshun Pty Ltd* extends to claims as well as defences…;
>
> (b) An estoppel will arise if in the second or further proceedings there would be a judgement inconsistent with a judgement in the first proceedings or the granting of remedies inconsistent with the remedy originally granted or the declaration of rights of parties inconsistently with the determination of those rights made in earlier proceedings;
>
> (c) The matter being agitated in the second or further proceedings must be relevant to the original proceedings; and
>
> (d) It was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case;
>
> (e) There is no 'cause of action' for workers compensation. The Act creates a number of rights which a worker is entitled to pursue independently of other rights.
>
> (f) Estoppel will arise if the relief claimed in second or subsequent proceedings was claimed in original proceedings.
>
> (g) Estoppel of the type referred to in the *Port of Melbourne Authority v Anshun Pty Ltd* will apply if there were alternative bases to ground the relief claimed but one of those bases was not pursued; *ADA's case*. An analogous situation to *ADA's case* is one where a person claimed to be a "worker" and failed in that allegation. Subsequently, he brought second proceedings seeking to allege that he was a "deemed worker" for the purposes of the Act.

- Arbitrator Burge accepted the respondent's argument that the principles outlined by Neilson, J in *Bruce* when applying *Anshun* are directly relevant to this matter. The remedy sought by the worker in these proceedings is inconsistent with the judgment of the Commission in the 2017 proceedings and with the position adopted by the parties in the earlier claims.

- This is not a matter where there was an absence of evidence linking the left upper extremity condition to the right shoulder injury. As long ago as 2003 in the respondent's report of injury, reference was made to overuse and that has been the case in the worker's statements and in various medical evidence over the years. The worker has brought various claims seeking different entitlements, and in each of them has asserted there were two separate injuries which took place on separate dates. The parties have not only entered into agreements to that effect but have referred the matter on that basis to an AMS who has also made findings of two separate injuries which in turn led to the 2017 Certificate of Determination of the Commission.

- Were the current proceedings referred to an AMS on the basis of the left shoulder condition being consequent upon the right shoulder injury, that referral and any outcome arising from it would be inconsistent with the previous determination and orders of the Commission. Therefore, the principles in *Anshun* apply.

WCC – Registrar Decisions

Work capacity dispute – suitable employment under s 32A WCA – A step down in a career is not a relevant consideration – IPD declined

Cotterill v Nine Network Australia Pty Ltd [2020] NSWWCCR 11 – Delegate McAdam – 12/10/2020

The worker worked in the film and television industry in various roles, most-recently as a technical producer. On 3/11/2017, he suffered a torn right biceps tendon at work. He then performed suitable duties until July 2019, when he accepted a redundancy package. He has not worked since.

On 16/06/2020, the insurer issued a WCD, finding the worker was fit for suitable duties as a technical producer for 40 hours per week. The worker disputed the WCD and the issue for determination was whether the vocational options were "suitable employment" as defined by s 32A *WCA.*

Delegate McAdam observed that the 2 relevant factors are the nature of the incapacity and the worker's age, education, skills and work experience. He noted that the worker's statement addressed matters such as the availability of work and that certain roles may be seen as a downgrade in his career. However, these are matters that are specifically excluded from consideration by the definition of s 32A *WCA.*

The delegate stated that the worker's incapacity has been stable for some time and his NTD has certified him fit for some type of employment for 40 hours per week, with a lifting/carrying/push/pull capacity of 12 kilos. There was no medical evidence that contradicted this certification.

The delegate noted that the worker is nearly 62 years old, but he did not necessarily see this as a relevant consideration and no submissions were made on that issue. He found that the worker has extensive experience in various roles in the film and television industry, his on-the-job experience is enviable and he reported being highly regarded by the employer. The delegate held that the worker's extensive skills and work experience make him a competitive applicant within the industry.

The delegate held that the role of technical producer is probably not suitable employment, but the role of floor manager is suitable employment. He stated:

> 48. The applicant did not make any submissions concerning this role during the teleconference. There is no medical evidence before me suggesting that this role would not be medically suitable for Mr Cotterill based on his current restrictions. The only material before me is the following in Mr Cotterill's statement, which is akin to a submission:
>
> > If I were to take on the role of a floor manager this would be a step down in my career and in my income, which is something that troubles me practically and psychologically. Even if I were able to trial a return to that work on a full time basis to see if I had capacity for that job, the insurer's report indicates that there were no jobs advertised in this occupation and therefore the likelihood of securing employment in that role is practically impossible.

> 49. There are a number of factors that must be unpacked in this statement. Firstly, I am unable to consider whether the role would be a step down in Mr Cotterill's career. That is regularly the case when dealing with suitable employment in workers compensation cases. Not all roles will necessarily be at the same level as previous employment. That does not make a role unsuitable.
>
> 50. Mr Cotterill suggests that a step down in his career will trouble him psychologically. There is no medical evidence before me concerning this. The applicant's solicitor did not take the opportunity to obtain more evidence addressing the medical issues present in this case, and the suggestion that there may be psychological sequalae due to working in a different role is not in evidence before me other than Mr Cotterill's statement. This suggestion also possibly also falls into "*the nature of the worker's preinjury employment*", being a comparison between the status of the two roles.
>
> 51. Whilst Mr Cotterill correctly identifies that the vocational assessment report was unable to find any jobs advertised in this occupation at the time of the report, I am unable to consider, according to section 32A, whether the work or the employment is available, and whether the work or the employment is of a type or nature that is generally available in the employment market.

The delegate noted that the worker did not specifically raise the case of *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55, but he stated that the work has to be a real and available job and not an illusory one, which may be a reference to that decision. In *Dewar*, Roche DP stated (at [60]):

> Therefore, the determination of whether a worker is "*able to return to work in suitable employment*" is not a totally theoretical or academic exercise and Mason P's reference to the "*eye of the needle*" test may still be relevant in many cases. To use his Honour's example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of *the 1998 Act*, and do not exist in any labour market in Australia, will be suitable employment.

The delegate held that the role of floor manager is not an illusory job and while there were no advertised positions at the time of the vocational assessment, that may simply reflect the competitive nature of the industry and the way in which those jobs are obtained. He therefore upheld the WCD and declined to make an IPD.