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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. AAI t/as Suncorp Insurance v Patten & Anor [2020] NSWSC 1547
2. Robson v QBE Insurance (Australia) Ltd [2020] NSWSC 1558
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Supreme Court of New South Wales Decisions

Motor Accident (Lifetime Care and Support) Act 2006 – Plaintiff applied for the first defendant's participation in the Lifetime Care and Support Scheme – Application not yet determined when SIRA decided to proceed with a CARS assessment – Held: SIRA's decision was unreasonable in the circumstances - interlocutory injunction granted as the balance of convenience favoured the relief sought

AAI t/as Suncorp Insurance v Patten & Anor [2020] NSWSC 1547 – Bellew J – 28/10/2020

On 22/02/2012, the first defendant suffered multiple injuries in a motor vehicle accident including a brachial plexus injury that resulted in total loss of use of his right arm. He claimed damages against the plaintiff and asserted that he has a significant need for ongoing care and assistance.

The Motor Accident (Lifetime Care and Support) Act 2006 (NSW) (*the LCS Act*) creates the *Lifetime Care and Support Scheme* (*the Scheme*). *The Scheme* applies to all motor accidents occurring on or after 1/10/2007. One of its primary purposes is to provide for the care and treatment needs of persons who suffer catastrophic injury as a consequence of such accidents. A person is eligible for participation in *the Scheme* if his or her injuries satisfy the criteria specified in the *Lifetime Care and Support Guidelines*. Under s 58 of *the LCS Act*, Guidelines are issued from time to time by the *Lifetime Care and Support Authority of NSW* (*the LCS Authority*).

An application for participation in *the Scheme* may be made by the injured person, or the insurer and the bringing of an application by an insurer does not require the injured person's consent. If an injured person satisfies the eligibility criteria, *the LCS Act* mandates that they will become a participant and participation is not optional if the criteria for eligibility are met.

On 17/10/2019, the plaintiff's solicitor lodged an application with *the LCS Authority* for the first defendant to be accepted as a participant in *the Scheme*. However, on 9/12/2019 *the LCS Authority* replied that the first defendant had not been accepted as a participant because the application was made more than 3 years after the accident.

The plaintiff applied to *the LCS Authority* for an extension of time and it applied to the CARS Assessor to defer the proposed Assessment Conference, on the basis that the first defendant's damages could not reasonably be assessed until the *LCS Authority* had finally assessed its application for an extension of time. However, the CARS Assessor refused that application and he concluded (inter alia):

> I consider that the balance of competing interests, on the one hand the Insurer which wishes to explore further avenues of having the Claimant admitted to the LTCS and will be bound by my determination, and on the other hand the Claimant who will experience further delay in having his claim determined, to favour the Claimant who was injured some eight and a half years ago. There seems to have been a delay of perhaps 9 months in the Insurer making what now appears to have been an unsuccessful application to the LTCS and there will be further, perhaps considerable, delay in the current application.
>
> The Claimant suffers a very serious injury which affects him in every aspect of his life and will continue to do so for the balance of his life expectancy. It is entirely my view to have his claim redetermined as expeditiously as possible noting the object of CARS is to provide a timely fair and cost-effective system for assessing claims. To again defer the assessment of the application to enable the Insurer to again make application to the LTCS would be contrary to those objects.
>
> The Insurer has had ample opportunity to address the issue of delay noting that the LTCS Authority letter dated 09.12.2019 had indicated the first application was unsuccessful due to delay, and in any event the Insurer ought to have been aware of the possibility of such an outcome having regard to the report of Dr Zeman of 13.01.2015 and a reading of the relevant Guidelines.

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The plaintiff applied to the Supreme Court of NSW for prohibition, or alternatively an injunction, preventing SIRA and a medical assessor from conducting a CARS Assessment Conference until the final determination of the proceedings.

Bellew J noted that the plaintiff' argued that:

> (1) *the LCS Authority* did not ask itself the correct question, namely, whether it was reasonable for a party in its position, having received the advice that it did from its solicitor, to delay in making an application for the first defendant's participation in *the Scheme* until after *the 2018 Guidelines* came into effect;
>
> (2) *the LCS Authority* wrongly considered that the question was whether its solicitor was correct or incorrect in his view as to whether or not the first defendant satisfied of the relevant eligibility criteria; and
>
> (3) the Panel's conclusion regarding the adequacy or otherwise of the explanation provided was not within the ambit of its statutory function.

The plaintiff also argued that the CARS Assessor's refusal to adjourn the Assessment Conference was legally unreasonable, illogical and plainly unjust as if conference proceeded, and an award of damages was made, the first defendant would be rendered ineligible to participate in *the Scheme.* This would result in it being exposed to a liability to pay considerable damages that it would not otherwise have to pay and the balance of convenience lay squarely in favour of granting injunctive relief. The Plaintiff stated that it had made (and continued to make) an unsolicited offer to advance a sum of $100,000 to the first defendant under s 84A of the *MACA* and an injunction would not cause financial hardship.

The second and third defendants emphasised the seriousness of the injury and the fact that the accident occurred in 2012 and argued that these circumstances supported the dismissal of the current application. It argued that by refusing to adjourn the Assessment Conference it had balanced the interests of both parties.

His Honour stated that in considering the application, he is required to address: (1) the apparent strength of the plaintiff's case in terms of the issue(s) to be tried and (2) the balance of convenience. The former requires the plaintiff to invoke a recognised principle and have sufficient probability of success to justify the interlocutory order that is sought. He stated:

> 27 In order to obtain the relief sought, the plaintiff does not have to satisfy me of the likely outcome of the principal proceedings, and it is not my function to make a final determination of any issue. What I am required to do is undertake an assessment of the probability of the plaintiff being successful in the proceedings. That assessment is an impressionistic one, which takes into account the apparent sufficiency of the plaintiff's evidence, and which is guided both by the nature of the proceedings and the nature of the order sought. Ultimately, what the plaintiff must establish is the existence of a real question to be tried.
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> 28 In assessing the balance of convenience, a number of factors may be relevant, including:
>
> > (i) whether the relief sought would overturn, or merely maintain, the status quo;
> >
> > (ii) the effect on the respective positions of the parties of the grant, on the one hand, or the refusal, on the other, of the relief sought; and
> >
> > (iii) the existence and/or sufficiency of alternative ways in which the position might be addressed.

His Honour held that there is a real question to be tried and he stated:

> 29 It is the plaintiff's case that the decisions of the third defendant to reject its applications for an adjournment of the assessment conference were legally unreasonable. The concept of legal unreasonableness has been the subject of considerable judicial consideration. In *Minister for Immigration and Citizenship v Li* the plurality (Hayne J, Kiefel J (as her Honour then was) and Bell J) made a number of observations regarding the standard of legal unreasonableness, including the following:
>
> > (i) specific errors in decision-making may be seen as being encompassed by unreasonableness;
> >
> > (ii) a court may infer that in some way there has been a failure to properly exercise the relevant discretion if, upon the facts, the result is unreasonable or plainly unjust;
> >
> > (iii) the reasoning in (ii) above may apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts, and from the matters falling for consideration in the exercise of the statutory power; and

(iv) even where reasons have been provided, it may nevertheless not be possible for a court to comprehend how the decision was made. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

30 The first defendant seeks substantial damages under a number of heads. If the assessment conference were to go ahead and conclude at this point, it would be incumbent upon the third defendant to issue a certificate assessing the first defendant's damages pursuant to s 94 (4) of *the MACA.* That certificate would (inter alia) have a binding effect on the plaintiff under s 95 of *the MACA*, pursuant to which the plaintiff would be required to pay the entirety of the damages assessed. More significantly, the first defendant would at that point become automatically ineligible to be a participant in *the Scheme* because he had received damages for treatment and care needs relating to his injury. Conversely, if the first defendant is admitted as a participant in the scheme, the plaintiff will be relieved of liability to pay substantial damages.

31 It follows that if the assessment conference were to go ahead, and if an assessment certificate were to issue (as it must), the first defendant could not become a participant in *the Scheme*, resulting in the final determination of the plaintiff's application to *the LCS Authority* being foreclosed. The consequences of those circumstances to the plaintiff will be self-evident.

His Honour was also satisfied, largely for the same reasons, that the balance of convenience is squarely in favour of the plaintiff as the potential effect on the plaintiff of a refusal of the relief sought would be substantial, in circumstances where there is no other remedy that it can pursue. That is to be contrasted with position of the first defendant who has been offered an advance of $100,000.00 and who, whatever the outcome of the current dispute, will either: (a) be awarded substantial damages; or (b) have the entirety of the cost of his future care met by *the Scheme*.

Accordingly, his Honour made an order restraining the second and third defendants from conducting a CARS Assessment Conference in proceedings involving the first defendant pending further order of the Court. He listed the matter for further directions on 5/11/2020.

Supreme Court of New South Wales – Judicial Review Decisions

Jurisdictional error

Robson v QBE Insurance (Australia) Ltd [2020] NSWSC 1558 – Wright J – 5/11/2020

On 16/05/2012, the plaintiff was injured in a motor vehicle accident. On 17/02/2015, he lodged an application with the Medical Assessment Service (MAS) to determine a dispute as to whether a disc rupture at the C5/6 level and nerve compression gave rise to permanent impairment in excess of 10%.

On 15/05/2017, the plaintiff underwent a C5/6 anterior cervical discectomy and fusion. On 5/09/2018, the insurer lodged an application for assessment by the MAS of a treatment dispute, as to whether that surgery was reasonable and necessary and whether it related to any injury caused by the accident.

On 15/02/2019, Dr Truskett undertook an assessment of the plaintiff. On 22/02/2019, he issued three certificates under s 61 (1) *MACA*, certifying that: (1) the injury described as "*Cervical spine – aggravation of disc degenerative disease, significant disc bulging at C5/6 with non-verifiable radicular complaint*", caused by the motor accident, gave rise to a permanent impairment which was greater than 10%; (2) the treatment by way of C5/6 anterior cervical discectomy and fusion surgery on 15 May 2017 related to the injuries caused by the motor accident; and (3) such treatment was reasonable and necessary in the circumstances.

However, the insurer applied for a review of Dr Truskett's assessment and a proper officer of the MAS referred the matter to a Medical Review Panel (MRP). The MRP decided that a re-examination of the plaintiff was necessary.

On 30/07/2019, an email from a Case Manager (on behalf of the proper officer of the MAS) advised the parties that the MRP was inclined to find that an injury to the cervical spine did not occur in the accident due the lack of contemporaneous documentation and invited the parties to make submissions.

On 30/01/2020, the MRP revoked Dr Truskett's certificates and certified that:

> (1) The following injuries caused by the motor accident give rise to a whole person impairment which, in total, IS NOT GREATER THAN 10%:
>
> (2) Nil injuries related to the motor accident;
>
> (3) The following treatment, namely:
>
> (4) C5/6 anterior cervical discectomy and fusion surgery performed by Professor Owler on 15 May 2017
>
> (5) DOES NOT RELATE TO THE INJURIES caused by the motor accident; and
>
> (6) The following treatment, namely:
>
> (7) C5/6 anterior cervical discectomy and fusion surgery performed by Professor Owler on 15 May 2017
>
> (8) IS NOT REASONABLE AND NECESSARY in the circumstances.

The plaintiff applied to the Supreme Court for judicial review of the MRP's decision on the grounds that: (1) it was affected by jurisdictional error on the face of the record; and (2) the MRP impermissibly treated the contemporaneous medical material or absence thereof as a decisive or determinative factor when making their determination of causation of injury.

Wright J noted that the MRP's certificates are liable to be set aside either for jurisdictional error or error of law on the face of the record: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 (*Wingfoot*) per French CJ, Crennan, Bell, Gageler and Keane JJ. His Honour stated:

> 45. Jurisdictional error embraces different types of error but, relevantly for present purposes, includes failing to afford each party procedural fairness: *Kioa v West* (1985) 159 CLR 550 at 587; [1985] HCA 81. Jurisdictional error may be established by any admissible evidence that is relevant for that purpose: *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229 (McGiffen) at [45] (Meagher, Simpson, Payne JJA).
>
> 46 By way of contrast, if relief is to be granted as a result of an error of law within jurisdiction, the error must be identified "*on the face of the record*": *McGiffen* at [69]. In this case, the "record" included the review panel's reasons which were set out in the certificates viewed by the panels, as required by the combined operation of ss 61(9) and 63(6) of *the MAC Act*: *Rodger v De Gelder* [2015] NSWCA 211 at [73].

His Honour noted that the plaintiff argued that the MRP denied him procedural fairness as it did not notify him of its intention to rely upon the study "*Epidemiology of Cervical Radiculopathy, Brain (1994)…"* in making their determination.

His Honour upheld ground (1). He stated:

> 75 At a general level, procedural fairness requires a decision-maker such as the review panel:
>
> > (1) to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power; and

(2) to advise a party of any adverse conclusion which would not obviously be open on the known material:

Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594; [2011] HCA 1 (SZGUR) at [9]; *Kioa v West* (1985) 159 CLR 550 at 587; [1985] HCA 81.

76 Beyond that, however, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision: *SZGUR* at [9].

77 Where a person is entitled to procedural fairness, that person will generally be entitled to be made aware of, and have the opportunity to address any adverse information that is credible, relevant and significant to the decision to be made: *Kioa v West* (1985) 159 CLR 550 at 629 (Brennan J) (and note also Mason J at 587).

78 How those general principles are to be applied in a context such as the present, where the administrative decision making body is comprised of persons with relevant medical expertise, was considered by Ashley JA in *North v Homolka* [2014] VSC 478. At [104], it was held:

> … A panel is an expert tribunal. It is entitled to rely upon its expertise in making its determination. Here, the Panel's expertise was in part the expertise of Dr Homolka, an occupational physician. She might be expected to understand a good deal about job descriptions. It would go too far, and the authorities do not require it, to say that every resort by a panel to its own knowledge and expertise, not communicated to a party, will constitute want of procedural fairness. It will, I think, be a matter of fact and degree in every case, but speaking generally a want of procedural fairness is likely to be disclosed where a finding by a panel is unexpected, could not have been reasonably anticipated, or would not obviously be open on the known material …

79 In the present case, the Minnesota 1976 – 1990 Study was expressly referred to under the heading "*Review of File Material*" in section B of part 3 of the review panel's reasons. As already noted, to the extent that this indicated that the study was part of the "*File Material*", this was incorrect…

86 Given the parts of the Minnesota 1976 – 1990 Study to which the review panel drew attention in their reasons and their "*comments*" relating both to the nature of the accident and general cervical degeneration, it appeared to me that the study was likely to have influenced the review panel to a significant degree to reach the conclusion that Dr Dixon's opinion should be rejected.

87 I am also satisfied more generally that the conclusions in the Minnesota 1976 – 1990 Study to which the review panel drew attention and which were potentially applicable to Mr Robson's particular circumstances, constituted adverse information that was relevant to and significant for the decision to be made. The review panel considered the information sufficiently credible to quote it in their reasons. In those circumstances, Mr Robson was entitled to be made aware of, and have the opportunity to address, the study including the particular aspects identified by the review panel. Notwithstanding this, the review panel did not at any stage bring to the attention of Mr Robson the existence of the Minnesota 1976 – 1990 Study or that the review panel might rely to a greater or lesser extent on that study in determining the review adversely to him.

88 This involved practical injustice to Mr Robson. The relevance and reliability of the Minnesota 1976 – 1990 Study were far from unassailable. Although self-described as an "epidemiological survey", the study related only to 561 persons from one town in Minnesota, with a population of about 70,000 persons, treated at one clinic over a

period of 14 years from 1976 to 1990: see p 325. Only 14.8%, or 83 persons, had a history of physical exertion or trauma preceding onset of symptoms and, of those:

> [t]he most frequently encountered types of physical exertion which precipitated radicular symptoms were shovelling snow in winter and playing golf in summer. Cervical radiculopathy due to a spinal fracture or root avulsion resulting from a motor vehicle accident occurred in 17 patients (3.1%); however, no patient had a disc prolapse precipitated by an automobile accident. An antecedent history of cervical radiculopathy was obtained in 31% of cases and lumbar radiculopathy in 41% of cases … [at p 328]…

90 The Minnesota 1976 – 1990 Study was not before the review panel by any of the processes provided in Chs 12 and 16 of the Medical Assessment Guidelines nor was it otherwise brought to the attention of Mr Robson or QBE. It was not obvious, nor would it have been reasonably anticipated, on the material known to Mr Robson to be before the review panel (which did not include the study), that the review panel might proceed on the basis that it had been established that rear end collisions did not, or were unlikely to, cause intervertebral disc extrusion and that the major cause of cervical radiculopathy is degenerative disease of the spine, having regard to the passages from the Minnesota 1976 – 1990 Study adopted by the review panel.

91 The decision of Button J in *Pascoe v Mechita Pty Ltd* [2019] NSWSC 454 is similar to the present case. In *Pascoe*, a medical appeal panel relied on ISO tables 1999 to 2013 with regard to progressive hearing loss induced by noise in the process of calculating whole person impairment as a result of hearing loss for the purposes of *the Workplace Injury Management and Workers Compensation Act 1998* (NSW). In that case, the plaintiff had no notice that ISO tables could play a role in the subsequent adverse determination. It was held that the plaintiff had been denied procedural fairness. In considering the situation of an expert panel as an administrative decision maker, Button J stated, at [73] and [74]:

> 73. Speaking more generally, it is true, of course, that experts – whether in coming to an opinion, or giving evidence, or sitting on a Panel such as this – are permitted to take into account previously unmentioned material if it is unassailable, or can be understood to be within common knowledge, including that of the parties. For example, as I remarked in discussion with counsel, an expert is entitled to take into account the propositions that the sun rises in the East, or that gravity causes items to fall towards the ground, or that, other things being equal, locations are darker in the night time than they are in the day. And they can do so without elaboration, and without providing notice that they will do so.
>
> 74. But I do not believe that that characterisation can apply to the ISO [tables]. It can hardly be equated to propositions such as those; indeed, its provenance is unclear on the evidence before me, and its use by the Panel is complex to a layperson.

92 A similar approach was adopted in *Briggs v IAG Limited t/as NRMA Insurance* [2020] NSWSC 1318 by Harrison AsJ at [60].

93 I have already explained why the Minnesota 1976 – 1990 Study was not "*unassailable*". Nor can the conclusions of the study relied on by the review panel be said to be common knowledge. The fact that the study did not determine the outcome in the present case but was part of a multi-factorial analysis, if that be the case, does not, however, establish that the aspects of the study identified by the review panel were not a more than minimal factor in the review panel's conclusions, such as to attract the obligation to disclose the study to Mr Robson and allow him the opportunity to respond it.

His Honour noted that ground (2) is based upon the type of error identified by the Court of Appeal in *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; 77 MVR 348 (McGiffen). At [64] – [65] Meagher, Simpson and Payne JJA said:

> 64. The question that the review panel was required to address was not simply whether there was any contemporaneous evidence of complaint about an injury to the lumbar thoracic spine. It included whether Mr McGiffen's lumbar thoracic spinal injury was causally related to the "gait derangement", itself caused by the accident. That is, was the accident a contributing cause of a lumbar thoracic spinal injury by reason of the gait derangement caused by the accident?
>
> 65. In deciding causation solely on the basis of the existence or otherwise of contemporaneous evidence of complaint of injury to the thoracic spine the review panel only partially addressed the question posed by s 58 (1) (d). For that reason the decision recorded in the panel's certificate must be treated as a purported and not real exercise of its statutory function under s 58(1)(d), leaving that function unexercised, and the Authority and the panel liable to the relief granted by the primary judge for jurisdictional error.

His Honour stated that on a fair reading of the MRP's reasons as a whole, it appears that it regarded the absence of documentation such as clinical notes made immediately after the accident, referring to symptoms in or related to the plaintiff's neck, as the determinative factor in reaching their conclusion as to causation. In substance, the MRP addressed only the question of whether there was contemporaneous documented complaint of injury to the cervical spine and did not address the actual question posed by s 58 (1) (d), namely what was the degree of permanent impairment as a result of the injury caused by the accident. He stated:

> 117 For these reasons, I conclude that the review panel made the type of jurisdictional error identified in *McGiffen* and *Owen*, referred to above. In addition, in my view, the following comment of R S Hulme AJ in *Bugat v Fox* [2014] NSWSC 888 at [32] are also applicable in the present case:
>
> > in expressing themselves the way they have, the Panel have clearly shown that they have regarded what they perceived as the absence of contemporaneous evidence as determinative on the issue of causation. In doing so they erred, the error being one apparent on the face of the record.

Accordingly, his Honour set aside the certificates issued by the MRP and remitted the matter to the second defendant for referral to a different MRP for review and determination according to law. He also ordered the first defendant to pay the plaintiff's costs.

Review of a certificate of a medical assessor – Failure to respond to a substantial and clearly-articulated argument – Failure to take into account relevant considerations – Failure to provide adequate reasons – Review dismissed

AAI Limited t/as GIO v Zaroual [2020] NSWSC 1563 – Harrison AsJ – 5/11/2020

The defendant made a claim for damages under the Motor Accidents Compensation Act 1999 (NSW) ("*the MAC Act*") arising from a motor vehicle accident which occurred on 12/05/2014. He alleged that he suffered injuries to his neck and back.

The defendant was referred to a neurosurgeon, Dr McKechnie, for review. An MRI scan revealed that he suffered from an underlying degenerative condition which Dr McKechnie diagnosed as myelomalacia of the spinal cord. Dr McKechnie recommended a multilevel cervical laminectomy from the C3 to C7 intervertebral discs ("*the surgery*").

However, the plaintiff filed an application for a treatment dispute pursuant to s 58 of *the MAC Act* for a determination as to whether the surgery was reasonable, necessary and related to an injury caused by the motor accident. There is an issue that the defendant suffered from the underlying degenerative condition. The plaintiff argued that the degenerative condition was not caused by the accident and that the proposed surgery was not reasonable and necessary, as a result of any injury caused by the accident.

On 28/10/2019, the Medical Assessor issued a certificate and statement of reasons determining that the motor vehicle accident had aggravated the underlying degenerative process leading to the need for the surgery, and that the treatment was reasonable and necessary.

The plaintiff applied for a review of the Medical Assessor's determination under s 63 of *the MAC Act*, claiming that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect. The Proper Officer of SIRA dismissed the application for review.

The plaintiff sought judicial review on the grounds that the Medical Assessor: (1) failed to accord procedural fairness and natural justice by failing to respond to a substantial and clearlyarticulated argument; (2) constructively failed to exercise jurisdiction by failing to consider and respond to its contentions; (3) fell into jurisdictional error by failing to take into account relevant considerations; and (4) failed to provide any (or any adequate) reasons for his determination.

Harrison AsJ stated that each of the grounds traverse the same reasoning of the Proper Officer. Her Honour noted that prior to determination of the medical treatment dispute, the defendant was assessed by Medical Assessor Home in 2016 as having suffered 5% WPI. She noted that the Medical Assessor in this dispute identified the issues as being whether the surgery related to the injuries caused by the motor accident and whether it was reasonable and necessary in the circumstances.

Her Honour rejected grounds (1) and (2). She stated that an administrative decision maker has an obligation to consider and respond to a substantial and clearlyarticulated argument putby a party to the dispute. A failure to do so constitutes a failure to accord procedural fairness and natural justice, and amounts to a constructive failure to exercise jurisdiction: see *Drachnichikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389; [2003] HCA 26 at [24] *("Dranichnikov"); Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244; 61 MVR 443 per Basten JA at [19]-[22] *("*Cervantes*"); Rodger v De Gelder* [2015] NSWCA 211 per Gleeson JA at [89] - [96], [109] *("De Gelder"); AAI Ltd t/as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229 at [66] *("McGiffen").*

Her Honour held that the Medical Assessor correctly identified that in this dispute, his statutory task was to determine whether the surgery related to the injuries caused by the accident and whether it was reasonable and necessary in the circumstances. She stated:

> 81 A Medical Assessor's statutory task was to form and to give his own opinion on the medical question referred for his opinion. As stated in *Wingfoot*, it goes too far to conceive the function of the Medical Assessor as being either to decide a dispute, or to make up its mind by reference to competing contentions or competing medical opinions. The function of a Medical Assessor is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. Rather, the function is in every case to form and to give its own opinion on the medical question referred to him by applying his own medical experience and expertise.

> 82 In my view, for the reasons stated above, this is precisely what the Medical Assessor did. The Medical Assessor applied his own medical experience and expertise to give his opinion that the accident caused aggravation of the underlying degenerative process which led to Mr Zaroual's need for surgery, which he concluded was reasonable and necessary. By so doing, the Medical Assessor correctly carried out his statutory task. The Medical Assessor has considered and responded to the insurer's argument about whether the plaintiff's injury was due to a constitutional and degenerative condition not related to the accident, and whether the accident aggravated this underlying degeneration. As such, he provided procedural fairness to both parties. Grounds 1 and 2 of the judicial review fail.

Her Honour rejected ground (3). She stated that this ground can only be made out if the decision maker was bound to take into account the relevant consideration. However, the Medical Assessor considered the opinions of Dr Sekel and Dr Slezak and the engineer.

Her Honour also rejected ground (4) and stated that the Medical Assessor has exposed the actual path of reasoning by which he arrived at his decision. His reasoning meets the standard required, allowing a reader to determine whether his decision involved an error of law. Therefore, the decision does not involve an error of law.

Her Honour noted that the last issue to be determined is whether the Proper Officer applied the correct test in dismissing the plaintiff's application for review. She stated:

> 119 The Proper Officer addressed the insurer's complaints in detail and concluded that the decision of the Medical Assessor was not only clear, but also well justified. The Proper Officer stated that Dr McKechnie had recommended the surgery, and after considering all the evidence, the Medical Assessor had determined that the surgery was reasonable and necessary and causally related to the accident. For the reasons given in relation to the four grounds of judicial review above, the Medical Assessor was right to do so. The Proper Officer was not satisfied that there was reasonable cause to suspect the medical assessment was incorrect in a material respect.
>
> 120 In my view, the Proper Officer's decision has been properly formed according to law. The Proper Officer applied the correct test. This ground of judicial review fails.

Accordingly, her Honour dismissed the Summons and ordered the plaintiff to pay the defendant's costs.

WCC – Medical Appeal Panel Decisions

Demonstrable error

Shrestha v RSL Care RDNS Ltd [2020] NSWWCCMA 158 – Arbitrator Perrignon, Dr J Parmegiani & Dr P Morris – 28/10/2020

The appellant claimed lump sum compensation for 26% WPI with respect to a psychological injury as a result of an assault at work on 7/03/2018.

The respondent disputed the claim and on 30/03/2020, ***Arbitrator Isaksen*** determined that the appellant had suffered both a primary and a secondary psychological injury as a result of the assault at work on 7/03/2018. He found that the appellant experienced psychological symptoms soon after the assault, that his primary psychological injury took the form of a post-traumatic stress disorder and that his secondary injury took the form of a major depressive disorder. He found that most of the symptoms resulted from the secondary psychological injury. He remitted the dispute to the Registrar for referral to an AMS to assess permanent impairment in respect of the primary psychological injury.

On 28/05/2020, Dr Roberts issued a MAC which assessed 0% WPI as a result of the primary psychological injury. He found that the appellant suffered a primary psychological injury in the form of an adjustment disorder and that some months after the assault, he suffered a

secondary psychological injury in the form of a major depressive disorder. He found that the symptoms of the latter subsumed those of the former and that the primary psychological injury did not contribute to any permanent impairment.

The worker appealed against the MAC and alleged that the AMS erred because he failed to assess impairment resulting from both the primary and psychological injuries and to deduct the latter from the former. He argued that:

> (1) Contrary to the principle in *Mercy Connect Limited v Kiely* [2018] SNWSC 1421, the approved medical specialist failed to assess the aggregate impairment resulting from primary and secondary psychological injury, and to deduct from it that part which results from primary psychological injury. He did not assess whole person impairment of any kind.
>
> (2) In finding that the symptoms of the secondary psychological disorder subsumed those of the primary, Dr Roberts has impliedly found that the latter are included in the former, and are therefore identifiable and separately assessable. Nevertheless, he has failed to rate impairment resulting from primary psychological injury using the Psychiatric Impairment Rating Scales as required by the Guidelines.
>
> (3) The PIRS form which forms part of the Medical Assessment Certificate demonstrates error because it contains a material contradiction – namely, a finding on the one hand that impairment resulting from "Adjustment Disorder with Mixed Anxiety and Depressed Mood" (the primary psychological injury) is permanent, and on the other that, in respect of each of the six rating scales, there is "no ongoing impairment attributable to this condition".
>
> (4) In assessing each of the six scales, the approved medical specialist has failed to apply the rating criteria specified in the Guidelines.

The respondent argued that:

> (1) Though the approved medical specialist has not assessed impairment resulting from secondary psychological injury, that omission does not affect the result, because he has diagnosed both primary and secondary psychological injury, and assessed nil impairment resulting from primary psychological injury.
>
> (2) Though he said that the symptoms of the latter were subsumed by the former, he found that the primary psychological injury 'did not affect the Appellant's functioning'.
>
> (3) In respect of the PIRS form, the approved medical specialist explained that he found no impairment resulting from primary psychological injury because the worker's functioning was not affected until he suffered secondary psychological injury.

Following a preliminary review, **the MAP** identified error by the AMS and referred the worker for re-examination by Dr Morris.

The MAP upheld ground (1). It stated, relevantly:

> 19. In *Kiely*, the Supreme Court found as follows:
>
> > The statutory scheme comprising of the WIM Act and the Workers Compensation Act creates a two-step approach in assessing the degree of WPI for a psychological injury. The assessor must first calculate the entire degree of psychological injury in line with the PIRS categories. The secondary psychological injury must then be assessed and deducted in accordance with s 65A of the Workers Compensation Act, leaving the primary psychological injury remaining.
>
> 20. As indicated, Dr Roberts did not calculate the aggregate whole person impairment attributable to primary and secondary psychological injury, or make a deduction for the latter.

> 21. For the reasons given below in respect of the second ground of appeal, it is no answer to say, as the respondent does, that it would make no difference to the result. The omission demonstrates error on the face of the certificate, and the certificate must be set aside.

The MAP upheld ground (2). It noted that the AMS found that the symptoms of Major Depressive Disorder subsumed those of Adjustment Disorder. It interpreted this to mean that the symptoms of Major Depressive Disorder were markedly more serious and disabling than those of Adjustment Disorder. That accords with general clinical experience, and with the fact that the appellant was able to work notwithstanding his Adjustment Disorder, becoming incapable of working only after he experienced symptoms of Major Depressive Disorder. However, it does not necessarily follow that the Adjustment Disorder was at all times asymptomatic, that it became so after the onset of Major Depressive Disorder, that the Adjustment Disorder had resolved before the onset of Major Depressive Disorder, or that for some other reason the chain of causation between Adjustment Disorder and symptoms experienced 6 months after injury was severed. The AMS did not make any such findings. On the contrary, he found at [7] that the worker was '*significantly distressed*' by the effects of Adjustment Disorder. In the PIRS form, he also found that there was at the date of assessment impairment of a permanent nature resulting from the Adjustment Disorder.

The MAP stated:

> 24. The only available conclusion is that symptoms of Adjustment Disorder persisted, despite the onset of Major Depressive Disorder and in parallel with the more serious symptoms of that disease. The absence of any finding that the causal nexus between Adjustment Disorder and symptoms experienced after the onset of Major Depressive Disorder had been broken, either because the Adjustment Disorder had resolved or for some other reason, gave rise to a duty to identify what symptoms of Adjustment Disorder persisted, and to assess whether they contributed to impairment. That task was not undertaken. The failure to do so amounted to a failure to give adequate reasons for the assessment that was made, and demonstrates error.

The MAP also upheld grounds (3) and (4). It stated that it was not possible to reconcile the finding on the PIRS form, that impairment resulting from the adjustment disorder was permanent, with the assessment in respect of each of the 6 ratings scales being that there was "*no ongoing impairment attributable to this condition"*. That contradiction is material and demonstrates an error of reasoning. The AMS also omitted to apply the criteria for each scale to the impairment resulting from both injuries, in accordance with the principle in *Kiely*. That process would have resulted in an assessment of permanent impairment resulting from both injuries, from which a deduction should then be made for that part of the impairment that does not result from the primary psychological injury. The failure demonstrates error.

The MAP stated:

> 28. If, having assessed the aggregate impairment from both injuries, 100 percent were deducted for the effects of Major Depressive Disorder, the same result would have been achieved using the proper method, but it would require a finding that the effects of the Adjustment Disorder have now resolved, or that for some other reason the disorder does not contribute to permanent impairment. As we read it, the Medical Assessment Certificate contains no such reasoning.

Dr Morris diagnosed a Major Depressive Disorder with Anxious Distress with melancholic features, which is clearly under-treated. He assessed 41% WPI resulting from a combination of primary and secondary psychological injuries, of which the 90% (36.9% WPI) results from the latter. Therefore, he assessed 4.1% WPI as a result of the primary psychological injury.

The MAP revoked the MAC and issued a new MAC, which assessed 4% WPI after rounding. This will not entitle the appellant to compensation under s 66 *WCA.*

WCC – Arbitrator Decisions

Work capacity dispute – psychological injury – medical evidence identified a single barrier to a return to work (contact with a particular employee) – Held: worker capable of undertaking suitable employment at a different work location where he is not exposed to a risk of further contact with that employee

Locker-Cole v Woolworths Group Limited (incorrectly sued as Philip Leong Stores Pty Ltd) [2020] NSWWCC 359 – Arbitrator Read – 22/10/2020

The worker is employed by the respondent as a forklift operator. On 10/10/2019, he suffered a psychological injury after witnessing another employee committing an act of self-harm. On 25/02/2020, he resumed pre-injury duties on night shift, but experienced difficulties relating to occasional contact with that employee.

On 22/05/2020, the NTD certified the worker as having no current work capacity.

On 26/05/2020, the insurer issued a WCD, which assessed the worker as having current capacity to work in suitable employment for up to 40 hours per week. The decision came into effect on 22/05/2020.

The worker claimed continuing weekly payments from 22/05/2020.

Arbitrator Read conducted a teleconference and directed the parties to file written submissions. He noted that the worker's claim was within the second entitlement period and was subject to s 37 *WCA.* He stated:

> 59. The task of determining whether a worker may return to work in suitable employment requires the identification of whether there are any "*real jobs which the worker is able to do, having regard to the matters in subsection (a) of the definition of 'suitable employment', regardless of whether those jobs are available to the worker or in the employment market generally*" (see *Giankos v SPC Ardmona Operations Limited* [2011] VSCA 121 at [102]); *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55 at [63] (Dewar)).
>
> 60. In Dewar Roche DP stated:
>
> > However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that '*suitable employment*' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's '*inability arising from an injury*'. Suitable employment means '*employment in work for which the worker is currently suited*'.
>
> 61. The WCD identified the real job for which Mr Locker-Cole was currently suited as being work as a Team Member/Store Person (ARD page 20). Mr Locker-Cole undertook this work for over 11 years prior to his injury on 10 October 2019.
>
> 62. Mr Locker-Cole submitted that the nature of his incapacity is severe and as a consequence of the protagonist's actions (GM's actions) reports he has no capacity to undertake suitable employment (applicant's submissions at [24]).
>
> 63. Mr Locker-Cole also submitted that he ought to be deemed to be incapacitated for employment under section 47 of *the 1987 Act* due to the risk of recurrence of injury from exposure to GM (applicant's submissions at [16]-[19]).
>
> 64. It is not in dispute that Mr Locker-Cole is unable to return to his pre-injury employment. The medical evidence supports that Mr Locker-Cole's psychological symptoms may be triggered if he comes into contact with GM. Mr Locker-Cole cannot return to his pre-injury role on the day shift where GM is or may be working.

65. However, the issue is not whether Mr Locker-Cole is able to return to work in his pre-injury employment but whether he is able to undertake suitable employment in the role of Team Member/Store Person.

The Arbitrator was comfortably satisfied that the worker is unable to return to his pre-injury employment, but he was not satisfied that the instances of contact with the employee who self-harmed or the event described by the worker on 11/05/2020, caused a deterioration in his condition so as to cause him to have no capacity to undertake suitable employment. He stated:

73. The only barrier Dr Lim placed on Mr Locker-Cole's return to work was potential contact with GM. It follows that if GM was removed from the equation, Mr Locker-Cole would have capacity to undertake the suitable employment. Therefore, the evidence from Dr Lim supports that Mr Locker-Cole is fit for alternative work that does not expose him to GM, i.e. work as a Team Member/Store person at a different distribution centre of the respondent or a separate employer altogether (cf. applicant's submissions in reply at paragraph [9]).

74. Dr Lim does not appear to have taken into account whether Mr Locker-Cole would be able to undertake suitable employment at another distribution centre where contact with GM would not occur, an option which was given to Mr Locker-Cole by the respondent in April 2020 but rejected by him. As pointed out by the respondent, the definition of suitable employment excludes considering the nature of the pre-injury employment, the availability of the employment and the worker's place of residence…

81. The weight of medical opinion evidence supports that Mr Locker-Cole has some capacity for work and the barriers in a return to work relate to the MDC workplace where there is potential contact with GM. However, consideration of whether Mr Locker-Cole can undertake suitable employment identified by the respondent does not include the availability of the employment, the nature of the pre-injury employment and the location. It does not relate to a particular job at a particular location with particular people but to work to which Mr Locker-Cole is currently suited.

The Arbitrator held that on a realistic assessment of the matters in s 32A WCA, the worker is able to undertake a real job in employment for which he is suited, that being a Team Member/Store Person role. He did not accept the worker's submission that he is deemed to be incapacitated for work by operation of s 47 WCA. He stated:

87. Section 47 provides that a worker who, as a result of injury is unable to, without substantial risk to further injury, engage in employment of a certain kind because of the nature of that employment shall be deemed to be incapacitated for employment of that kind.

88. In this instance, the "kind" of employment is in a role of Team Member/Store Person. The term "nature of the employment" refers to the particular duties required to be undertaken by a person at work. It is not a requirement of the role of a Team Member/Store Person for Mr Locker-Cole to have contact with GM.

89. The parties did not make submissions concerning the applicability of the other factors in section 32A, for example Mr Locker-Cole's age, education, skills and work experience. Mr Locker-Cole is a relatively young man (33 years old). Prior to his injury on 10 October 2019 he had undertaken work for Woolworths for over 11 years as a Storeman and Forklift operator. I would have expected that Mr Locker-Cole's age, transferrable skills and work experience would place him well to undertake the suitable employment identified by the respondent.

Accordingly, the Arbitrator entered an award for the respondent.

COD issued in error after worker discontinued claim – Application for reconsideration dismissed because the COD was a nullity and there is nothing to reconsider

<u>Antoniak v The Star Entertainment Group Ltd t/as The Star</u> [2020] NSWWCC 368 – Arbitrator Wynyard – 28/10/2020

On 23/07/2020, Wood DP determined an appeal by the respondent (*The Star Entertainment Group Ltd t/as The Star v Antoniak* [2020] NSWWCC PD 46) against the COD issued by ***Arbitrator Wynyard*** on 9/10/2019, which awarded the worker s 60 expenses and ordered the parties to file written submissions regarding the weekly payments claim by 11/10/2019. The appeal was dismissed as the monetary threshold under s 352 (3) (a) *WIMA* was not satisfied.

The parties duly filed submissions, but on 14/10/2019, the worker discontinued the claim for weekly payments, and on 4/11/2019, the respondent filed its appeal. However, the Arbitrator was not advised that the weekly payments claimed was discontinued and on 5/112/2019, he issued a COD that awarded the worker weekly payments.

On 14/07/2020, the worker applied to the Commission for reconsideration of the COD dated 5/12/2019, on the basis that the decision was "*incompetent*" because the claim for weekly payments had been discontinued.

The Arbitrator stated that the crux of this case is as to whether the provisions of s 350 (3) *WIMA* give him authority to exercise the powers that are therein conferred. The worker argued that words "*any matter that has previously been dealt with by the Commission*" are sufficient to enable him to make a determination on the Reconsideration Application.

However, the Arbitrator rejected that argument and stated that once the Notice of Discontinuance had been lodged, any further determination of the issues raised therein was null and void. The effect of the discontinuance was that there was no longer any dispute for the Commission to decide. If by the Notice of Discontinuance his subsequent determination had become null and void, then it ceased to exist, a nullity. The powers conferred on the Commission by virtue of s 350 (3) *WIMA* have no effect, as the section presupposes that the Commission had jurisdiction to entertain an application for reconsideration in the first place. In the present case, there was nothing to reconsider.

Accordingly, the Arbitrator dismissed the application for reconsideration.