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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. Ali v Form Group NSW Pty Limited [2020] NSWWCCPD 64
2. Strooisma v Coastwide Fabrication and Erection Pty Limited [2020] NSWWCCPD 65
3. Reljan-Music v Secretary, Department of Community and Justice [2020] NSWWCCMA 160
4. Sands v Flour Distribution and Transport Pty Ltd [2020] NSWWCC 377
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WCC – Presidential Decisions

Factual determination – whether material facts were overlooked or given too little weight – failure to cross-examine & rejection of evidence that is not the subject of cross-examination – application of common knowledge and experience

Ali v Form Group NSW Pty Limited [2020] NSWWCCPD 64 - Deputy President Wood – 3/11/2020

On 21/06/2017, the appellant suffered a significant fracture to his right tibia as a result of a fall at work, which required surgery and insertion of an intermedullary nail. The respondent accepted liability.

On 5/03/2019, the appellant claimed compensation under s 66 *WCA* for 28% WPI, comprising assessments of the cervical spine, lumbar spine, right upper extremity, right knee and right foot. However, the respondent disputed liability for the lumbar spine.

Arbitrator Sweeney decided that he was not satisfied that the appellant injured his lumbar spine as a result of the incident at work and he entered an award for the respondent in relation to that injury. He remitted the other disputes to the Registrar for referral to an AMS.

The appellant appealed against that decision and alleged that the Arbitrator erred: (1) in fact by failing to find as a matter of fact that he suffered an injury to his back on 21/06/2017, in view of the contemporaneous clinical records and the consistent clinical notes of Dr El Skafi of 19/8/17; (2) in law by: (a) failing to properly understand or apply the correct test and standard for a finding of injury; (b) failing to have regard to all of the evidence, including all references to back pain while the appellant was in hospital, and the word “worsening” in the

clinical note of Dr El Skafi of 19/8/17; (c) embarking on an impermissible process of reasoning; (d) failing to have regard to the primacy of contemporaneous clinical records; (e) failing to give adequate reasons; (f) denying procedural fairness to him by determining the cause of his paraesthesia without evidence; (g) in the alternative to (f), determining the cause of his paraesthesia on the basis of apparently personal knowledge, and (h) reasoning illogically or unreasonably in regard to the perceived inconsistency regarding the subject injury and the motor vehicle accident of 18/8/17; and (3) in the exercise of his discretion by reasoning illogically or unreasonably in accepting the report of Dr Powell over that of Dr Dias.

Deputy President Wood determined the appeal on the papers. She noted that as the finding of injury was a factual determination, the principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 apply. Roche DP recited these principles in *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25 and the Court of Appeal considered them in the context of the Commission's powers on appeal in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255, as follows:

> A fortiori, if a statutory right of appeal requires a demonstration that the decision appealed against was affected by error, the appellate tribunal is not entitled to interfere with the decision on the ground that it thinks that a different outcome is preferable: see *Norbis v Norbis* [1986] HCA 17; 161 CLR 513, at 518-519, per Mason and Deane JJ.

Wood DP stated that for the appellant to succeed, 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.

Wood DP rejected ground (1). She noted that the appellant argued that the presence of paraesthesia between two toes of the left foot and reduced sensation in the right foot was evidence of a lumbar spine injury. The Arbitrator felt there could be a number of explanations for these symptoms, but the appellant argued that there could be no other cause for the paraesthesia in the left foot other than that it arose from an injury to his lumbar spine. He also argued that the Arbitrator was not entitled to apply his personal knowledge in the absence of expert opinion.

Wood DP described this argument as "*somewhat circular*" and it was not supported by any medical evidence suggestive of lumbar radiculopathy or referred leg pain and the Arbitrator was entitled to draw on his own experience and determine the issue based on common sense. None of the evidence suggested that the appellant inured his lumbar spine injury in the fall, although there was evidence that he complained of back pain the next day and of mild sacroiliac tenderness on day after that. The Arbitrator noted that what is required to establish an injury under s 4 *WCA* is an *"injury simpliciter*" involving pathological change or an injury by way of a disease or aggravation of a disease. He held that the reference to back pain was not sufficient to establish that an injury to the lumbar spine occurred in the fall.

Wood DP noted that the only diagnosis of back injury was provided by Dr Dias, who diagnosed "*chronic non-specific lumbar spine pain secondary to an acute musculoligamentous strain.*" The Arbitrator did not accept his opinion, principally because it was dependent on the history provided by the appellant, which was unreliable, and there was no other evidence that would assist him in identifying that a pathological change occurred in the lumbar spine as a result of the fall, or that there had been a contraction or aggravation of a disease. The radiological investigations conducted in March 2017 (before the fall) and in the hospital on 21/06/2017, were both reported as normal.

Wood DP rejected ground 2 (a). She held that the manner in which the Arbitrator considered the evidence, and the reasons provided for accepting or rejecting that evidence were consistent with an assessment of whether the appellant discharged his onus of proof to the civil standard. An Arbitrator is not required to spell out the standard of proof they are applying, provided that their assessment of the evidence and the reasons given are consistent with the appropriate civil standard.

Wood DP rejected ground 2 (b). She noted that the Arbitrator concluded that the appellant's evidence that he was not injured in a motor vehicle accident was unreliable and he did not reach the conclusion that the appellant alleged. The references to sacroiliac tenderness and "worsening" of back pain after the motor vehicle accident are not probative evidence of the fact in issue and any failure by the Arbitrator in dealing with that evidence could not affect the ultimate conclusion. Therefore, there is no basis for disturbing his final determination.

Wood DP rejected ground 2 (c). She held that the Arbitrator did not conclude that the appellant had not suffered a lumbar injury before he gave consideration to the hospital records. He clearly included the hospital records in his evaluation of the evidence that led to his conclusion. This approach was logical and properly reasoned.

Wood DP also rejected ground 2 (d). She held that for the reasons explained in Ground 2 (b) of the appeal, the evidence relied on in the hospital records does not constitute probative evidence of the fact in issue, and there was no error on the part of the Arbitrator in the manner in which he dealt with that evidence. There is no reason why the Arbitrator ought to have afforded the evidence greater weight in circumstances where the evidence was not supportive of the appellant's case.

Wood DP rejected ground 2 (e). She held that considering the Arbitrator's observations of the evidence, his reasons as a whole are sufficient to satisfy the necessary degree of adequacy required by s 294 (2) *WIMA.*

Wood DP rejected grounds 2 (f), 2 (g) and 2 (h), for similar reasons.

Wood DP also rejected ground 3. She stated that while the appellant asserted that the Arbitrator's acceptance of Dr Powell's opinion over that of Dr Dias was illogical, incomprehensible and unreasonable, that factual finding will not normally be disturbed on appeal if it has rational support in the evidence. The Arbitrator considered the relevant evidence and provided proper, evidence-based reasons for concluding that he preferred Dr Powell's opinion over that of Dr Dias. It was open to him to come to that conclusion and there is no basis for the Commission to interfere with it.

Accordingly, Wood DP confirmed the COD.

Clause 28C of Sch 8 of the Workers Compensation Regulation 2016

Strooisma v Coastwide Fabrication and Erection Pty Limited [2020] NSWWCCPD 65 – Deputy President Snell – 10/11/2020

The Arbitral decision in this matter was reported in Bulletin no. 34, but the following summary is provided by way of background.

On 23/09/2003, the appellant injured his low back at work and he has not worked since ceasing employment with the respondent in 2006. On 12/06/2013, the insurer made a WCD that the appellant currently had no work capacity. It made weekly payments until 25/12/2017, when s 39 *WCA* applied. It accepted that the appellant had no current work capacity.

On 6/08/2018, the appellant underwent spinal fusion surgery at the L5/S1 level and on 12/10/2018, Dr Davis issued a MAC, which certified that the appellant has not attained a position of maximum medical improvement and that the degree of permanent impairment is not fully ascertainable.

The respondent resumed making weekly payments from 12/10/2018, but not for the period from 26/12/2017 to 11/10/2018, on the basis that neither the requirements of cl 28C nor s 39 (2) *WCA* were satisfied during that period. The appellant filed an ARD claiming weekly payments for the disputed period.

Arbitrator Sweeney conducted an arbitration on 21/02/2019, during which the respondent sought leave to refer a question of law to the President. The Arbitrator reserved his decision and the decision was reserved, the decision of President Phillips DCJ was delivered in *RSM Building Services Pty Ltd v Hochbaum* (*Hochbaum no. 1*). That decision raised generally similar issues of construction, although involving s 39 *WCA* rather than cl 28C.

On 16/05/2019, the Arbitrator issued a COD, which declined the application to refer a question of law to the President. He applied the reasoning of the President in *Hochbaum No. 1* and entered an award for the respondent.

On appeal, the appellant alleged that the Arbitrator erred in law in his construction of cl 28C of Pt 2A, Sch 8 of *the Regulation* and therefore erred in finding that he was not entitled to weekly payments during the disputed period.

SIRA intervened in the appeal under s 106 *WIMA.* Meanwhile an appeal to the Court of Appeal in *Hochbaum No. 1* was pending the appeal in this matter was stood over pending the determination of that appeal. SIRA withdrew its intervention before the appeal was determined.

On 17/06/2020, the Court of Appeal's decision in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* (*Hochbaum no. 2*) reversed that of the President.

The Arbitrator then considered whether he should reconsider his earlier decision (reconsideration application). The parties filed written submissions on this application and on 11/08/2020, the Arbitrator declined to reconsider his earlier decision. He referred to the decision in *Hochbaum No. 2* and stated, relevantly:

> 2. On reviewing the matter, however, it is apparent that this case concerned Clause 28C of Part 2A of Schedule 8 (Savings and Transitional Provisions) of the *Workers Compensation Regulation 2016.*
>
> *3.* While Clause 28C employs similar language to Section 39, the structure and content of the provisions are different. It is arguable that the determination of 16 May 2018 [sic, 2019] is correct on grounds other than those expressed in my reasons for the decision...

On 11/09/2020, Dr Mastroianni issued a MAC, which certified that the appellant's condition had stabilised, and that he suffered 20% WPI as a result of the injury. His degree of permanent impairment resulting from the injury was not "more than 20%".

Deputy President Snell determined the appeal on the papers. He rejected the appeal and his reasons are summarised below:

- In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* the plurality said:

  > 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.

- In *Master Education Services Pty Limited v Ketchell* the High Court said:

  > It may be useful to read together regulations and the Act with which they were made, in order to identify the nature of a legislative scheme which they comprise. That is not a warrant for the use of the Code to construe, and expand, the terms of s 51AD, in particular by reference to the nature of the language of cl 11(1). Regulations are to be construed according to ordinary principles of construction. That requires that they be placed in their statutory context. In the case of regulations that includes the legislation under which they are enacted and with which they are required to be consistent. (excluding footnotes)

- In *ADCO Constructions Pty Ltd v Goudappel* the plurality, dealing with the construction of what is now cl 10 of *the Regulation*, said:

  > The appropriate enquiry in the construction of delegated legislation is directed to the text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the construction that, according to established rules of interpretation, best serves the statutory purpose…
  >
  > It can be accepted, as was put by counsel for Mr Goudappel, that the [1987 Act's] remedial character reflects a beneficial purpose which requires a beneficial construction, if open, in favour of the injured worker. But to accept the beneficial purpose of the [1987 Act] as a whole does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially. The purpose of the provision must be identified.

- The appellant satisfies the requirements of cl 28C (a) of *the Regulation*; neither s 39 nor cl 28C indicate that the consequence of this is that he is to be treated as if his permanent impairment exceeded 20%, "*thereby engaging s 39 (2)*". On the plain words of the section, he never satisfied the requirements of s 39 (2). The question is what are the consequences of the appellant's satisfaction of cl 28C (a)?

- In *Hochbaum No. 2* Brereton JA said:

  > There is no temporal element in s 39 (2). Ultimately, there can be only one degree of **permanent** impairment resulting from an injury, even though it may not be immediately ascertainable. Permanent impairment, once ascertained, dates from the injury. Section 39(2) poses the simple question, what degree of permanent impairment results from the injury; if that degree is greater than 20%, the worker is in the exempt class, and s 39 never applies to him or her. (emphasis in the original)

- Satisfaction of cl 28C (a) requires that an injury has resulted in permanent impairment and that an assessment of the degree of permanent impairment for the purposes of the Workers Compensation Acts is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable. There is no dispute that these criteria were satisfied from 12 October 2018 (the issue of Dr Davis' MAC).

- The appellant argued that cl 28C is "*clearly beneficial*" and should be read in that context, but in *Hochbaum No. 2* Brereton JA dealt with an argument that s 39 should be construed on the basis it was beneficial and said:

> I have also found it unnecessary and unhelpful to endeavour to characterise s 39 (2) as beneficial or remedial (as the appellants urged), or exceptional (as the President of the Commission found and the respondents submitted): in the context of a provision which has, as the Second Reading Speech reveals, multiple objects, such characterisation is not possible, and does not assist.

- It is apparent from its subject matter that Pt 2A is of a beneficial nature. This is also consistent with the Explanatory Note to *the 2016 Regulation*. It is appropriate that cl 28C be construed on the basis it has a beneficial purpose.
- The Court of Appeal in *Hochbaum No. 2* declined to construe s 39 by reference to cl 28C. This was essentially on the basis that a transitional provision in *the Regulation* did not "*provide a sound basis for interpreting the principal provisions of the Act*". Similar concerns are not raised when a provision of the primary Act is used to assist in the interpretation of cl 28C (see the passage of *Ketchell* quoted at [39] above). Clause 28C and s 39 interact in the scheme of the legislation, as was discussed by White JA in *Hochbaum No. 2*:

  > Where the degree of permanent impairment resulting from the injury has not been ascertained after 260 weeks by an assessment under Pt 7 of Ch 7 of *the 1998 Act* it does not follow that the worker is to be taken as not then having had a 20 per cent or greater degree of permanent impairment resulting from the injury. If the insurer and the worker are agreed that the worker has suffered that degree of permanent impairment resulting from the injury, then there is no need for an assessment. If they are not agreed, then there will be a medical dispute that can be determined under Pt 7 of Ch 7 of *the 1998 Act*. If the degree of permanent impairment cannot then be ascertained, then s 39 does not provide for the continuation of payment of weekly benefits, although cl 28 of *the Workers Compensation Regulation 2016* does. If the worker's degree of permanent impairment is later assessed to be more than 20 per cent then it will have been ascertained that the worker was always entitled to the confirmation of weekly benefits. Even if the worker did not suffer a degree of impairment of 20 per cent or more at the expiry of the 260-week period in s 39 (1) such a later assessment will have determined that the degree of permanent impairment resulting from the injury was more than 20 per cent.

- The primary rationale of the reasoning in *Hochbaum No. 2* is that the criterion for the engagement of s 39 (2) is present from the date of injury. There is never a time thereafter when that requirement is not satisfied, providing there is ultimately permanent impairment that is greater than 20 per cent.
- Unlike s 39 (2), there is a temporal element in the satisfaction of the criteria for the application of cl 28C (a). Satisfaction of cl 28C (a) requires the occurrence of certain events. It is necessary that an assessment of the degree of permanent impairment "*is pending*". An AMS must have declined to make an assessment of permanent impairment "*on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable*". The respondent refers to the "i*nherent impermanence of the status described by cl 28C (a)*."
- The alternative construction, if there is no temporal element in cl 28C (a), is that once the requirements of the clause are satisfied, s 39 does not apply and it follows that the 260 week bar never had, and never would have, application. Such a construction would have the effect that weekly compensation was recoverable during the closed period claimed in these proceedings, notwithstanding that the requirements of cl 28C (a) were not satisfied until 12 October 2018. He rejected this construction for the following reasons:

61. The plain words of cl 28C do not suggest that it prevents the application of s 39 (1) at a point in time before the requirements of the subclause are satisfied. The subclause speaks in the present tense, "is pending". For the appellant's claim to succeed, it is necessary that cl 28C (a) apply in respect of that period, notwithstanding that the assessment of permanent impairment was not pending during the period, nor had an AMS at that time declined to make an assessment for the reasons set out in cl 28C (a). The plain words governing engagement of the clause do not support the alternative construction. This view is not inconsistent with the approach taken in *Hochbaum No. 2*. In that case the requirements of s 39(2) were satisfied at all relevant times from the date of injury, as liability for permanent impairment (which was ultimately determined to be greater than 20 per cent) dated from the injury date.

70. If the alternative construction was that intended by the Legislature, it could have been achieved without the presence of the words "*is pending and*" in cl 28C (a). In *Project Blue Sky Inc v Australian Broadcasting Authority*, the plurality stated:

> Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was '*a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent*'. (footnotes removed)

71. The alternative construction does not give meaning to the requirement in the subclause that an assessment "*is pending*".

72. The construction which I prefer is more consistent with the role of cl 28C(a) in the statutory scheme, as described by White JA in *Hochbaum* at [10] (see [52] above). His Honour's description envisages that cl 28 applies, when "*the degree of permanent impairment cannot then [following 260 weeks]* ***be ascertained****, then s 39 does not then provide for the continuation of weekly benefits, although cl 28 of the Workers Compensation Regulation 2016 does*. (emphasis added)

73. The appellant has now undergone assessment of permanent impairment, and a MAC dated 11 September 2020 certified that his condition had stabilised and his whole person impairment was 20 per cent, it was not "*more than 20%*" (see [9] above). The alternative construction is that s 39 does not apply to the appellant at a time outside the period when the appellant's assessment was pending, because he had satisfied the various requirements of the clause at one point in time. If this were accepted, cl 28C (a) could have the ongoing effect that s 39 did not apply and the entitlement to weekly payments continued, notwithstanding that the appellant's impairment has now been found to be stable and his permanent impairment to be not more than 20 per cent. Such a result could not, in my view, have been intended by the Legislature. It is a construction that is avoided if the words of the subclause are given their plain meaning, described at [58] to [59] above.[54]

WCC – Medical Appeal Panel Decisions

Psychological injury – AMS assessed 9% WPI by video link & applied 1/10 deductible under s 323 WIMA – Appellant alleged prejudice by being examined in her home and that she was pre-judged as coming from the Balkans and alleged 20 instances of incorrect history taking – MAP not satisfied of either pre-judgment or prejudice to the appellant & found that parts of the MAC were misread – MAC confirmed

Reljan-Music v Secretary, Department of Community and Justice [2020] NSWWCCMA 160 – Arbitrator Rimmer, Dr D Andrews & Dr P Morris – 2/11/2020

The appellant suffered a psychological injury on 13/02/2007 (deemed). On 9/07/2020, Professor N Glozier issued a MAC, which assessed 7% WPI (8% less a 1/10 deduction under s 323 *WIMA*), which did not satisfy the threshold under s 65A *WCA.* The appellant appealed against the MAC under s 327 (3) (d) *WIMA.*

The MAP determined the appeal on the papers.

The MAP noted that the appellant alleged that he told the AMS that she suffered depression in 2000, but treatment finished immediately after. She separated from her husband in 2001, but they got back together by the end of that year. Therefore, the finding of a pre-existing psychiatric condition is not based on a reasonable examination of material that she provided. She asserted that the AMS referred to Dr Kecmanovic's report and stated that "*he helped many people from the Balkans*", but while she lived in Croatia, Bosnia and Serbia, she never identified herself as "Balkan" and she felt that she was pre-judged.

The worker also alleged that she was also prejudiced by being assessed in her own home and that the objectivity of the examination was lost as she was unable to be examined in the usual way. She also asserted that Prof. Glozier took a history that was incorrect in 20 instances (which I have not extracted in this report) and that his findings are based on an incorrect history.

The respondent opposed the appeal.

The MAP held that the AMS did not err in assessing a pre-existing condition, as he conducted a very detailed and thorough examination and reviewed all of the evidence. It found no reference in the MAC to Dr Kecmanovic having helped "*many people from the Balkans*" and the only reference to the Balkans was in Part 4 of the MAC, where the AMS wrote – "*When war broke out in the Balkans she escaped to Belgrade with her daughter*". The AMS did not actually state that the appellant was from the Balkans and the fact that he referred to the Balkan region was irrelevant to the actual assessment of WPI and the ratings in the PIRS categories. The allegation of pre-judgment was without foundation.

The MAP noted that the appellant provided no basis for her submission that the AMS' examination lacked objectivity. It was significant that the AMS did not outline any difficulties with the method of assessment and indeed stated that the assessment via video was entirely appropriate as the appellant was '*focused, orientated and concentrated well throughout the assessment, and had no problems using the information technology*.' The appellant consented to an assessment via video conferencing and she could have elected to be added to the examination pending list and wait for a face-to-face examination with an AMS. She did not request a re-examination by the MAP and the MAP inferred that there were no issues with the AMS' assessment.

In any event, the appellant did not identify any technical difficulties or other unforeseen factors that caused her to be denied procedural fairness and it is significant that she made no complaint about the way in which the examination was conducted immediately or shortly after it took place. Any complaint should have been made at that stage, when any complaints could have been addressed by the AMS, rather than after the issue of the MAC.

The MAP rejected the assertion that the AMS did not consider the accumulated incidents preceding the deemed date of injury. As to whether the AMS erred in assessing the appellant as Class 2 for concentration, persistence and pace, the MAP held that it is important to consider whether the findings fell into Class 2 or Class 3 are a difference of opinion about which reasonable minds may differ. In *Parker v Select Civil Pty Ltd* [2018] NSWSC 140 (Parker) Harrison AsJ at [66] said:

> 66. In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense…
>
> 70. To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.
>
> 71. The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene…

The MAP held that a Class 2 rating for concentration, persistence and pace was open to the AMS given his examination findings and there was no demonstrable error. The AMS' examination and the available evidence do not demonstrate any major cognitive impairment and many of the matters complained of were irrelevant to the PIRS rating. The appellant failed to identify how these alleged errors impacted on the assessment of WPI and, in any event, any errors were inconsequential and were not material to the assessment.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Section 38 WCA – worker assessed as having current work capacity - weekly payments ceased in 2013 as s 38 (3) was not satisfied – In 2017, the worker was assessed as "worker with high needs" – In 2019, the worker sought reinstatement of weekly payments and insurer made payments from the date of the MAC – Worker claimed from the date of cessation in 2013 to the date of the MAC and relied upon the decisions in Hochbaum v RSM Services Pty Ltd and Melides v Meat Carter Pty Ltd – Award for the respondent entered

Sands v Flour Distribution and Transport Pty Ltd [2020] NSWWCC 377 – Arbitrator McDonald – 2/11/2020

On 11/09/2008, the worker injured his left knee and he did not return to work. The insurer paid weekly payments until 21/09/2013, when it made a WCD under s 38 (3) *WCA* and reduced payments to NIL. On 12/10/2017, Dr Lewington issued a MAC that assessed 30% WPI. The worker claimed weekly payments from 21/09/2013 under s 38 (3) *WCA* on the basis that he was a worker with highest needs and the insurer agreed to reinstate payments from the date of the MAC. The worker pursued a claim from 21/09/2013 until the date of the MAC.

Arbitrator McDonald issued a COD on 2/11/2020 and refused to award weekly payments. Her reasons are summarised below.

On 3/06/2020, the insurer determined that the worker was not entitled to weekly payments before the date of the MAC. This was based upon her decision in *O'Donnell v Abroandco Pty Ltd* [2016] NSWWCC 129 (which dealt with s 38A) and the President's decision in *Hee v State Transit Authority of NSW* [2018] NSWWCCPD 6.

On 11/06/2020, the worker's solicitors referred the insurer to cl 34 of Pt 3 of Sch 8 of the *Workers Compensation Regulation 2016* (*the Regulation*), but the insurer disputed that this applied. The worker then relied upon the Court of Appeal's decision in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW;*

The insurer argued that s 38 is intended to extend the entitlement to compensation to a worker with high needs as defined in s 32A after the second entitlement period and ss 36, 37, 38 and 39 *WCA* contain a temporal component: see *Melides v Meat Carter Pty Ltd* (*Melides*). Based upon the principles of statutory interpretation, s 38 cannot apply until a worker has satisfied the definition of a worker with high needs and this occurred when the MAC was issued. Before then, the worker was assessed as having current work capacity.

Further, s 38 has a temporal connection with the assessments to be conducted by the insurer and does not apply these are made and it is distinguishable from s 39, as considered in *Hochbaum,* because s 38 (2) requires an assessment by the insurer that a worker has no current work capacity that is likely to continue indefinitely. Therefore, the entitlement under s 38 (2) cannot pre-date the assessment of "*high needs*" and cl 34 of Pt 3 of Sch 8 of *the Regulation* does not assist because it provides that the 2012 amendments do not apply to any period of incapacity before 17/09/2012 and the current dispute is for the period from 24/04/2013 to 11/10/2017.

The worker argued that the legislative purpose of s 38 (3A) is that workers with high needs should receive ongoing payments after the second entitlement period. The entitlement arose at the moment of the jurisdictional fact of injury and the assessment or permanent impairment was merely a quantification of that entitlement. In this case, it vested on 11/09/2008.

The temporal element in s 38 (3A) is the use of the present tense "*is*" which does not indicate any historical enquiry and the insurer's construction made payment contingent on the date of the impairment assessment, rather than the existence of the impairment. This is inconsistent with the decisions in *Hochbaum* and *Melides*, which are authority for the proposition that the entitlement to compensation vests and accrues when the injury occurs and the assessment of impairment is merely a quantification of the entitlement.

The proposition that liability under s 38 is contingent on an assessment of impairment was, in effect, rejected by the Court of Appeal in *Hochbaum* as being inconsistent with longstanding authority that the entitlement to compensation arises with the jurisdictional fact of injury. Based upon *Melides,* there is one relevant jurisdictional fact and it is not the assessment of impairment;

The proposition that there is a temporal element in s 38 connected with the assessments to be conducted by the insurer does not arise from a fair reading of the text. All that s 38 (3A) requires is for the worker to satisfy that he is a worker with high needs at the time of the assessment. The contention that there is a temporal element related to the extent of permanent impairment is inconsistent with *Hochbaum*, where Brereton JA held that the s 39 limit on payments never applied where the worker had permanent impairment exceeding 20%.

The insurer conceded that he is entitled to payments under s 38 because he was a worker with high needs and that there was nothing in the text of the section to limit that entitlement to the period after the MAC. On a plain reading of s 38 (1), it either applies or not and, consistent with the reasoning in *Hochbaum,* whenever a worker becomes a worker with high needs, the intent and purpose of s 38 (3A) is that they should receive extended payments.

In *Hochbaum*, Simpson AJA arrived at the same conclusion as Brereton and White JJA, but held that an entitlement based upon the date of the assessment of impairment, rather than the existence of impairment, was unfair because of the delays involved. Her Honour's reasoning regarding s 39 *WCA* equally applies to s 38 *WCA*. Further, Parker ADP's reasoning in *Melides* is instructive and applies to the determination of this dispute. Parker ADP said that the purpose of s 38A was that workers with highest needs should receive a special payment and that the purpose would not be advanced by limiting the payment to the time after the assessment that the worker had highest needs.

The Arbitrator held that the entitlement under s 38 *WCA* depends on the insurer's work capacity assessment and not on the classification of a worker as having high or highest needs. As Keating J said in *Lee v Bunnings Group Limited*, the "*unambiguous terms*" of s 38 provide that he entitlement depends on an assessment by the insurer. This shows that the worker's position is untenable as his rights depended on an application for weekly payments to continue supported by appropriate evidence and a work capacity assessment by the insurer.

The decision in *Melides* confirms that s 38 has a temporal component and the decision does not assist in the interpretation of s 38 or the determination of the worker's entitlements. Further, the decision in *Hochbaum* does not assist the worker. While the worker relied on Simpson AJA's comments, he omitted to consider them in context. Her Honour said:

> Delay in seeking or obtaining medical assessment certificates may come about for a variety of reasons, including dilatoriness on the part of either party (or both), congestion in the administration of medical assessment in accordance with Ch 7, Pt 7 of the WIM Act, or others. Such delays may be beyond the control of the injured worker and may, plainly, operate unfairly to applicants for continuing weekly compensation payments, and particularly so if an entitlement to compensation depends on the date of assessment rather than the date of injury or the date at which permanent impairment is suffered.
>
> Adverse or unintended consequences may not, however, be a sufficient reason to construe s 39 in the way for which the appellants contend if the language of the section supports the interpretation given by the President.
>
> In my opinion, the language of the section does not support that interpretation. It is necessary to go no further than the text of s 39 itself: see *Alcan (NT) Aluminium Pty Ltd v Commissioner of Territory Revenue (Northern Territory)…*
>
> If it were necessary to go beyond the text of s 39, resort to principles of statutory construction would support the approach I take. The unfairness of the result, in the event that delays (however caused) prevented assessment before the expiration of the 5-year period would suggest that the legislature did not intend to make entitlement of a worker suffering the relevant degree of permanent impairment resulting from a work injury subject to the vagaries of processes and procedures in the system of assessment or obstacles that might be thrown in the way of assessment.

Her Honour's comments were obiter dicta and the question of potential unfairness does not assist in the interpretation of s 38.

Clause 28C of the Regulation – Worker is not entitled to weekly payments for the period prior to the issue of the MAC

Meisenhofen v United Care Burnside [2020] NSWWCC 375 – Arbitrator Harris – 2/11/2020

On 19/09/2006 and 8/10/2009, the worker injured her lumbar spine. On 28/03/2012, the parties agreed that she suffered 14% WPI as a result of the injuries. The insurer paid weekly payments until 25/12/2017, when s 39 (1) *WCA* applied.

In July 2019, the worker underwent 2-level spinal fusion surgery. She filed an application for an assessment and finding by an AMS that the degree of permanent impairment was not fully ascertainable, but she did not make a further claim under s 66 *WCA.*

On 15/07/2019, Dr Meakin issued a MAC, which certified that the worker's condition had stabilised, and that permanent impairment was fully ascertainable within the meaning of s 319 (g) *WIMA.* However, the worker appealed against the MAC.

On 8/10/2019, the MAP revoked the MAC and issued a new MAC certifying that the degree of permanent impairment was not yet fully ascertainable.

Arbitrator Harris noted that the worker claimed weekly payments from 26/12/2017 to 29/05/2017 and from 22/08/2019 to 7/10/2019. The parties agreed that the worker had no current work capacity within the meaning of s 32A *WCA* and that PIAWE is $1,096.20. The dispute related to the interpretation of cl 28C of Sch 8 of the *Regulation* and whether the worker is entitled to weekly payments for any period before the date of the MAC.

On 2/11/2020, the Arbitrator issued a COD, which determined that the worker is not entitled to weekly payments under cl 28C of Sch 8 of *the Regulation* for any period before the MAC was issued and he entered an award for the respondent His reasons are summarised below.

Respondent's arguments

The respondent argued that the concept of permanent impairment is different from the notion that a worker has not attained maximum medical improvement and in *Hochbaum* the Court of Appeal noted that the concept of permanent impairment was inconsistent with a temporal element and incongruous with the concept of permanency.

The language in s 39 (2) specified the character of the relevant injury in terms of the resultant degree of permanent impairment, rather than notions of contemporaneity with the assessment of permanent impairment.

On its clear language, cl 28C only applied when certain criteria are met, including that the assessment is pending and has not been made because an AMS has declined to make the assessment on the basis that MMI has not been reached and the degree of permanent impairment is not fully ascertainable. The concepts in cl 28C (a) are "*by its nature, impermanent*". Conversely, in circumstances where the permanence of the status described by s 39 (2) was so critical, the opposite construction is appropriate when the relevant status is inherently impermanent.

The terms of cl 28C require an assessment to be made. In *Hochbaum* the Court of Appeal held that an assessment is not required to satisfy s 39 (2). This is very different from the construction of ss 39 (2) and (3) explained by Brereton JA in *Hochbaum.* It is only when the criteria of cl 28C (a) are met, and only during the period they both apply, that the worker is of the relevant '*exempt class'*.

The Arbitrator stated that Senior Arbitrator Capel's decision in *King v Metalcorp Steel Pty Ltd (King)* "*considered the operation of clause 28C in a single paragraph*". Further, in *Strooisma v Coastwide Fabrications and Erections Pty Ltd* (*Strooisma*) Arbitrator Sweeney expressed a provisional view contrary to that expressed in *King*.

Worker's arguments

Clause 28C operates "*retrospectively*" and the words in s 39 (2) *WCA* that "*this section does not apply*" were construed in *Hochbaum* as clear and not suggestive that the assessment was required before the bar in s 39 (1) was removed. The critical passages of Brereton JA's decision are at [59]-[62] and as the same words appeared in cl 28C, it should be given a similar construction.

The definition of "worker with high needs" and "*worker with highest needs*" in s 32A W*CA* contains the same test as cl 28C. She is treated as a worker with the highest needs.

The decision in *Hochbaum* emphasised that impairment is examined in the context of the initial injury. The application of s 39 (2) did not require a prospective interpretation and it applied "*retrospectively*" and did not apply a temporal element.

The words in cl 28C (a) "*has declined*" do not involve a temporal element. The requirement to have an assessment is only a procedural mechanism that the AMS has to carry out. Attention must be given to the previous words "*s 39 does not*". The temporal function having been performed, the section then "*does not apply*" for all purposes. When the AMS has performed the function under cl 28C then s 39 does not apply for all purposes. This is borne out by the reasoning of Simpson AJA at [89]-[90] *in Hochbaum*.

The temporal requirement is a confusion because the exception factor, if it is fulfilled, then means that one does not look any further as "*s 39 does not apply*". Either party could apply to subsequently have the AMS reconsider whether the worker remains as having not attained maximum medical improvement.

The Arbitrator noted that because of the surgery the worker is now classified as at least DRE Category IV under AMA5, but the MAP certified that the degree of permanent impairment was not yet fully ascertainable.

The Arbitrator held that cl 28C (a) operates to exclude the operation of s 39 when certain matters are satisfied, namely: (1) The worker suffers from permanent impairment; (2) The assessment of the degree of permanent impairment is pending; and (3) The assessment has not been made because an AMS "*has declined to make the assessment on the basis that maxim medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable*".

Neither party raised the issue that the MAP's determination did not strictly satisfy the requirements of cl 28C. The difference in the concepts has been discussed by Appeal Panels: see *Narromine Shire Council v Sladek* [2019] NSWWCCMA 30. The respondent argued that the assessment of permanent impairment was only pending when the MAP issued its MAC and the worker did not contradict this. In the absence of further claim under s 66 *WCA* and any contrary submission, the Arbitrator accepted this argument.

In *Military Rehabilitation Commission v May* [2016] HCA 19 at [10], the "*question of construction is determined by reference to the text, context and purpose of the Act*"; citing *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 (*Alcan*).

In *Grain Growers Limited v Chief Commissioner of State Revenue* (NSW) [2016] NSWCA 359 Beazley P (as her Honour then was) 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 *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].

Section 39 (2) is clear in its operation that the bar imposed by s 39 (1) does not apply if, at any time, the worker establishes or is accepted as being over 20%. Clause 28C uses the same words at the commencement of the clause where it states that "*s 39 … does not apply*", but unlike s 39, it contains requirements in sub-cl 28 (a) that are not found in s 39.

The issue of whether an assessment is "pending" suggests a temporal concept and includes a requirement for an assessment, while s 39 does not. That assessment is not one of permanency but of *impermanency*". In this context, where a worker is found or agreed to be over 20%, that assessment is "*lasting or enduring*". The same cannot be said for the concept of a worker having not reached maximum medical improvement and that the degree of permanent impairment is not fully ascertainable.

The worker acknowledged that a finding that impairment is not fully ascertainable is open to reconsideration. At some stage there will be a determination or agreement as to the extent of the degree of permanent impairment. This is a relevant consideration in reading the section contextually because the Court in *Hochbaum* considered the notion of permanency as a relevant consideration in determining that there was no temporal connection between the satisfaction of the over 20% provided by s 39 (2) and the issue of whether payments were owed at all times.

The parties referred to various passages in *Hochbaum* as providing support for their respective positions. Brereton JA doubted that cl 28C provided a sound basis for interpreting the principal provisions of the *WCA*. The respondent suggested that there is an indication in the decision of White JA that cl 28C has a temporal element. His Honour referred to the "*temporal element in each of ss 36, 37, 38 and 59A and arguably s 38A*" and stated, albeit in the following paragraph:

> If the insurer and the worker are agreed that the worker has suffered that degree of permanent impairment resulting from an injury, then there is no need for an assessment. If they are not agreed, then there will be a medical dispute that can be determined under Pt 7 of Ch 7 of *the 1998 Act*. If the degree of permanent impairment cannot then be ascertained, then s 39 does not provide for the continuation of weekly benefits, although cl 28 of the *Workers Compensation Regulations 2016* does.

The parties did not agree on the meaning of the last sentence in the above passage. The respondent argued that White JA accepted that cl 28C had a temporal element, but the worker argued that the sentence must be read in the context of the passage and his Honour was referring to the need for a medical assessment when satisfying cl 28C. However, s 39 does not have that requirement. White JA acknowledged, at least, the differences between cl 28C and s 39, but he agreed with the worker's interpretation of that sentence.

In *Hochbaum* Brereton JA stated:

> Conformably with the view that there is no such "*temporal*" element, s 39 (2) does not provide that the section "*ceases to apply*" once a worker is assessed as having a permanent impairment above the 20% threshold. Nor is it expressed in terms of restoring or re-enlivening an entitlement of which the worker is otherwise deprived; it simply provides that the deprivation does not apply.

Simpson AJA expressed similar comments when her Honour stated:

> Nothing in any of the three subsections of s 39 states, explicitly or implicitly, that removal of the subs (1) bar is dependent upon the date of the assessment of the degree of permanent impairment as distinct from the existence of the degree of permanent impairment.

Clause 28C provides a temporal element through the additional concept that the medical assessor must decline to make an assessment because "*maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable*". The requirement that the AMS must make the assessment (unless the parties agree under sub clause (b)) provides the "*restoring or re-enlivening [of] an entitlement*". Without such a provision, the class of workers who fall within cl 28C would be deprived of weekly compensation, at least on a temporary basis, because there is no agreement that the over 20% had been reached. Accordingly, cl 28C brings forward an ongoing entitlement to weekly compensation whilst, following an assessment by an AMS, the worker has not reached maximum medical improvement and the degree of permanent impairment is not fully ascertainable.

The Arbitrator noted that cl 28C provides a benefit to workers who are existing recipients of weekly payments and in the circumstances contemplated by the clause there is no delay to a worker in receiving ongoing weekly payments before a final assessment of permanent impairment is made.

The Arbitrator concluded that he has reached a view contrary to that expressed in *King* and he noted that an appeal is pending in *Strooisma,* which will probably make his reasons redundant. However, he stated that if he is wrong regarding the effect of cl 28C, the worker is entitled to weekly payments at the rate of $876.96 per week during the periods claimed, as there is no dispute that this is the correct rate and that she had no current work capacity.