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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.

WCC – Medical Appeal Decisions

AMS erred in certifying that the degree of permanent impairment was fully ascertainable – MAC revoked

Field v WH Health, ML, EC, MH, TA, JR [2019] NSWWCCMA 18 – Arbitrator Jane Peacock, Dr R Pillemer & Dr G McGroder – 11 February 2019

The appellant injured his lumbar spine on 31 January 2000. The Registrar referred the matter to an AMS to determine whether the degree of permanent impairment was fully ascertainable in accordance with s 319 (g) *WIMA* with respect to the lumbar spine and scarring.

On 14 December 2018, Dr McKee (AMS) issued a MAC, which certified that the degree of permanent impairment was fully ascertainable. However, on 8 January 2019, the appellant appealed against the MAC worker and asserted that the MAC contains a demonstrable error (s 327 (3) (d) *WIMA*). The respondent opposed the appeal. The Registrar referred the appeal to the MAP.

The MAP expressed the view that the AMS had not given sufficient reasons for his decision to certify that the degree of permanent impairment was fully ascertainable. It held that three (3) criteria need to be considered, namely: (1) the length of time since the injury; (2) the length of time since the last surgery/significant treatment; and (3) whether any further treatment is being carried out or planned.

The MAP held that criterion (1) was satisfied. However, with respect to criterion (2), the appellant last underwent surgery 8 months ago and that it is usually suggested that after spinal surgery at least 12 months should be given before a final assessment is made and it was relevant that the AMS' clinical findings show that the appellant was still recovering from the surgery. In relation to criterion (3), it noted that the appellant was to have a further CT-guided nerve block injection "in the near future" and that a spinal fusion may be necessary. It stated, relevantly:

> 24. …Given what the AMS specifically said in this regard, the AMS clearly erred when he came to the conclusion that "the degree of permanent impairment is fully ascertainable". This conclusion could only be reached if no further treatment was being contemplated, which is obviously not the case.

Accordingly, the MAP revoked the MAC and certified that the degree of permanent impairment as a result of the injury on 31 January 2000 is not yet fully ascertainable.

AMS did not err in certifying that the degree of permanent impairment was not fully ascertainable due to insufficient treatment – MAC confirmed

Kitchingham v State of New South Wales [2019] NSWWCCMA 38 – Arbitrator Marshal Douglas, Dr J Parmegiani & Professor N Glozier – 14 March 2019

The appellant was employed by the respondent as a paramedic. On 16 April 2005, he suffered a psychological injury as a result of an incident at work (the suicide of a work colleague). On 24 July 2018, he claimed lump sum compensation under s 66 *WCA* for 19% WPI. However, the insurer disputed the claim. He then filed an ARD.

On 11 October 2018, ***Arbitrator Graeme Edwards*** issued a COD – Consent Orders, which remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment as a result of the psychological injury. This indicated that the dispute was confined to the degree of permanent impairment that resulted from the injury.

On 12 December 2018, Dr P Morris (AMS) issued a MAC, in which he noted that the appellant: (1) had never been referred to a psychiatrist; (2) had not seen a psychologist since 2017; (3) he had not been on any medication for his psychiatric conditions for the past 18 months; and (4) was not presently receiving any treatment. He expressed the view that maximum medical improvement had not been reached. He stated, relevantly:

> I believe that Mr Kitchingham has not received adequate treatment for his psychiatric conditions. He has not taken any antidepressant medication for 18 months and has not had any psychological therapy since early 2017. In my opinion Mr Kitchingman requires intensive treatment by a psychiatrist, including management of his medications, and intensive psychological therapy from a clinical psychologist including cognitive-behavioural therapy and exposure-based therapy. I believe that his condition is likely to change substantially in the next year if he has this recommended psychiatric and psychological treatment.

The AMS certified that the degree of permanent impairment was not fully ascertainable and declined to assess permanent impairment. However, on 7 January 2019, the appellant appealed against the MAC under s 327 (3) (d) *WIMA* (demonstrable error). He argued that the AMS erred by obtaining an incorrect history regarding the treatment that he had received and by failing to properly consider that he had trialled antidepressants in 2006, 2009, 2014 and 2016 and had not taken any anti-depressant medications for 18 months. He alleged that these errors resulted in him wrongly concluding that there had been insufficient treatment and that his impairment was likely to substantially change in the coming 12 months.

The respondent opposed the appeal. It submissions included that the AMS provided a proper and adequate explanation for his opinion that psychological and psychiatric treatment would substantially change the appellant's impairment.

The MAP conducted a preliminary review and decided to determine the matter on the papers. It decided that the ground of appeal was not established and that as it could not revoke the MAC, its power to require the appellant to be re-examined was not enlivened: *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013]

NSWSC 1792. It referred to paras 1.16 and 1.32 of the *Guidelines.* It noted that the AMS' conclusions, including that the appellant had never been referred to a psychiatrist and had not seen a psychologist since 2017, are sound and unchallenged on appeal. The AMS expressed his view that the appellant required intensive treatment by a psychiatrist, including management of medications, but as he had not been offered such treatment he could not have refused it and para 1.34 of the *Guidelines* does not apply.

The MAP accepted that different assessors may have come to a view, that it is unlikely that the appellant would undergo or would respond to further treatment, and may have concluded differently to the AMS regarding the benefit that the appellant is likely to obtain from the additional and different treatment that he outlined. However, it was open to the AMS to reach that conclusion and his opinion is consistent with para 1.16 of *the Guidelines*, that maximum medical improvement has not been achieved, and he was able to decline to make an assessment under s 322 (4) *WIMA.*

The MAP also held that the factual errors made by the AMS regarding the history do not affect or render wrong his view, which was based upon the exercise of his clinical judgment, that the additional treatment that he proposed was likely to benefit the appellant. In forming that opinion, he had proper regard to the appellant's history of taking anti-depressant medication in the past.

Accordingly, the MAP confirmed the MAC.