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ISSUE NUMBER 40

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.

Supreme Court of New South Wales – Judicial Review

Judicial review – Court made consent orders that quashed a decision of a MAP and COD based upon the decision in Hunter Quarries Pty Limited v Mexon

Agricultural and Development Holdings v Parker (Unreported: 2017/368011) – Adamson J – 20 May 2019

In Hunter Quarries Pty Limited v Mexon (Mexon), the Court of Appeal held that "permanent impairment" involves some lasting diminution in a worker's function and did not include an impairment resulting from a serious injury from which the worker died "within a short time." In that matter, the worker had died approximately 3 minutes after he was injured.

In **Agricultural and Development Holdings v Parker**, the worker was pronounced dead approximately 16 hours after being injured at work. Medical opinion suggested that the worker's brain had died within half an hour of the frank injury occurring.

The deceased worker's executor claimed compensation under s 66 *WCA,* but the insurer disputed the claim. On 16 May 2017, Dr Lahz (AMS) issued a MAC, which assessed 100% WPI due to the deceased's injuries. The Plaintiff appealed against the MAC, but on 5 September 2017, a MAP confirmed the MAC.

The Plaintiff then applied for judicial review by the Supreme Court of the MAP's decision.

Adamson J noted the Court of Appeal's decision in *Mexon.* She also noted that in an email to the Plaintiff's solicitors 15 May 2019, the first defendant's solicitors accepted that *Mexon* required that the MAP's decision be quashed and that in lieu thereof: (1) the MAP should be directed to issue a MAP that certified that there was no permanent impairment resulting from the injury; and (2) the Commission should be directed to issue a COD entering an award for the respondent (the Plaintiff in the Supreme Court proceedings).

Her Honour confirmed that the proceedings were resolved on that basis. She quashed the MAP's decision dated 5 September 2017 and in lieu thereof, directed the MAP to issue a MAC certifying there is no permanent impairment resulting from injury. She also directed the Commission to issue a COD that entered an award for the respondent and ordered each party to pay its own costs of the proceedings.

Judicial review – need to make out jurisdictional error or error of law on face of record – significance of distinction – MAP empowered to rely on medical examination by one of its members – significance of "clinical judgment" – application dismissed

Gray v Geoff Groom Building Pty Ltd [2019] NSWSC 1081 – Leeming JA – 22 August 2019

On 21 October 2015, the plaintiff injured his left hand at work. He claimed compensation under s 66 *WCA* and on 31 July 2018, an AMS issued a MAC, which assessed 13% WPI. However, the plaintiff's solicitor had qualified Dr Meares, who assessed 22% WPI (13% + 9% for scarring).

The plaintiff appealed against the MAC. The MAP determined that the worker should be examined by one of its members and he was examined by Dr Giles on 6 February 2019. Dr Giles assessed 4% WPI for scarring and, based upon his report, the MAP issued a MAC, which assessed 14% WPI (10% + 4% for scarring).

The plaintiff applied for judicial review of the MAP's decision by the Supreme Court.

Acting Justice Leeming stated that the amended summons failed to distinguish between jurisdictional error and error of law on the face of the record. The distinction is important, and arises at the outset, because (aside from anything else), it affects the material to which the Court may have regard. The Court of Appeal has repeatedly emphasised this: see, without attempting to be exhaustive, *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302; [2012] NSWCA 13 at [19] ("These considerations require the applicant to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record"); *Henderson v QBE Insurance (Australia) Ltd* [2013] NSWCA 480; 66 MVR 69 at [85] and *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; 77 MVR 348 at [45] ("As has been repeatedly emphasised, the distinction is important"). It also failed to identify the errors of which the plaintiff complains with any particularity. It did not comply with the obligation to state "with specificity, the grounds on which the relief is sought": UCPR r 59.4(c).

His Honour referred to the submissions "as developed" during the hearing. I have summarised his findings below.

- *The examination by Dr Giles*

The plaintiff argued that the other members of the MAP were unable to use clinical judgment in applying the TEMSKI categories, as the photographs reproduced in Dr Giles' report were insufficient. However, his Honour held that there are at least four obstacles to this submission:

> (1) it seeks to elevate cl 14.9 into a rule of law, whereas it is a clause in a Guideline given limited force by the WIM Act. Even if a provision that an assessor "should use clinical judgment" is regarded as mandatory and is not complied with, it does not without more follow there has been any error of law.

(2) the Medical Dispute Assessment Guidelines proceed on the basis that one member of the Panel will be an arbitrator who need not be medically qualified and therefore will be unable to exercise clinical judgment.

(3) cl 14.9 is directed to determining the exact impairment value within a range. But the Plaintiff was assessed pursuant to Table 14 at 4%, at the very top of the range. Clause 14.9 is not directed to identifying the correct category; that is addressed by cl 14.8.

(4) it requires one to form the view that in the particular case of the Plaintiff, it was not possible lawfully to determine to have a further medical examination by one member of the Panel. Indeed, it is far from clear how it could be said that even if there was a further assessment hearing (pursuant to cl 5.17.3) an arbitrator who lacked medical qualifications could nonetheless apply clinical judgment.

His Honour noted that in *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Ltd* [2006] NSWSC 235, Studdert J said: *"the Appeal Panel was entitled to draw upon the expertise of one of its members, as plainly it did in this case".* Studdert J also agreed with and relied upon what had been said by Beaumont J in *Minister for Health v Thomson* (1985) 8 FCR 213, to the effect that it was reasonable to assume that the defendant was at all times on notice that the members of the committee would be likely to make use of their own expertise and experience in such matters.

His Honour held that this ground was not made. The MAP was empowered to proceed pursuant to cl 5.17.2, with one of its members undertaking a further medical examination of the plaintiff, and the Panel as a whole informing itself based on the doctor's report.

- *Procedural fairness/constructive failure to exercise jurisdiction*

The plaintiff argued that the MAP failed to deal with a significant element of his case, namely that Dr Meares had assessed 9% WPI for scarring.

His Honour found that the MAP not only said that had considered all the original documents and the written submissions, it also summarised the essence of the plaintiff's submission. He held, relevantly:

29. … The very points highlighted by Mr Romaniuk in oral submissions were referred to, expressly, under the heading "Scarring", especially at [54] and [55], when summarising the submissions. It is quite plain, even in the dispositive paragraphs [70]–[72], that the Panel had regard to Mr Gray's submission that (in accordance with Mr Meares's opinion) the scarring fell within the 5% – 9% range, rather than the range found by the original assessor. I do not accept that the submission was not dealt with. The submission was a basic one, and the gravamen of the determination addressed it squarely, by applying Chapter 14 and reaching conclusions which were inevitably inconsistent with those expressed by Professor Meares.

Accordingly, this ground was not made out.

- *Failure to make findings and provide reasons*

His Honour stated:

37. As noted above, Mr Gray submitted that it was open to an assessor to "put up" the outcome of the application of table 14.1 in circumstances where a claimant satisfied some, but not all, of the criteria in a particular column. It is far from clear to me that that is the case. The application of the principle of "best fit" may indeed, in some cases, have that effect. But it does not by any means follow that in all cases, or indeed in Mr Gray's case, that there was some discretion which needed to be considered and addressed with "detailed reasons" in order to conclude that the

> appropriate category in which he fell was the only category in which he satisfied all the criteria. The Guidelines required detailed reasons when another category was regarded as appropriate. While that is what Mr Gray sought, it did not mean that there was an obligation to give detailed reasons when the Panel determined not to place his scarring within a category in which he did not satisfy all the criteria…
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> 40. However, the shorter and equally dispositive proposition is that there is no error of law, still less jurisdictional error, in the Panel giving the explanation that it did in making the finding that it did concerning the absence of a restriction to his grooming or dressing.

- *Error of law in applying the Guidelines*

The plaintiff argued, in essence, that the failure to apply Ch 14 and Table 14.1 of the Permanent Impairment Guidelines was an error of law on the face of the record.

His Honour held that this argument failed to attend to the proposition that even if there were a misapplication or misconstruction of this part of the Guidelines, it does not follow that the error is one of law. However, for the reasons already given, no misapplication or misconstruction of the Guidelines was established.

Accordingly, his Honour dismissed the summons with costs.