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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 – Arbitrator Decisions

Arbitrator awards worker s 60 expenses for deep vein thrombosis following a period of 4 days of sedentary work

Traynor v AMP Services Pty Limited [2019] NSWWCC 251 – Arbitrator Bell – 23 July 2019

The worker alleged that he suffered a deep vein thrombosis (DVT) and an associated primary psychological injury on 30 June 2016. However, the insurer disputed the claim.

At the conciliation and arbitration on 2 July 2019, the worker discontinued his claim under s 66 *WCA* with respect to the DVT.

Arbitrator Bell identified issues as being: (1) Whether the worker suffered injury of DVT arising out of or in the course of his employment with the respondent or, alternatively, a disease or the aggravation, acceleration, exacerbation or deterioration of a disease?

He referred to the High Court's decisions in *Zickar v MGH Plastic Industries Pty Ltd* and *Military Rehabilitation and Compensation Commission v May*, which confirmed that there can be an overlap between a disease and a personal injury. He noted that in *Kennedy Cleaning Services v Petkoska*, Gleeson CJ and Kirby J held that *"if something can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an 'injury' in the primary sense of that word."* Their Honours also stated that,

> *Consideration [must] be given to the precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change accepted at trial. If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an 'injury' in the primary sense of that word.*

The Arbitrator held that the worker suffered the injury of DVT (arising) out of his employment with the respondent under s 4 (a) *WCA*, but it was not a disease or the aggravation, acceleration, exacerbation or deterioration of a disease. He stated:

> 24. Applying these principles to the facts of this matter, it seems to me that the physiological event for Mr Traynor was a personal injury. The thrombosis developed over a relatively short period overnight, and comprised a "sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state" resulting in the pain symptoms. There was no "disease" of DVT stretching from the event 20 years ago to the present or commencing at some point prior to the June 2016 DVT. The earlier event also required the additional factor of an immobilised leg for the DVT to occur…
>
> 27. For an injury to arise out of the employment requires "a certain degree of causal connection between the accident and the employment": (*Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Aust Pty Ltd* (2009) NSWCA 324). The employment must to some material extent contribute to the injury. I am satisfied that Mr Traynor's immobility sitting at the work computer for the hours shown in the employer's log satisfy this test.
>
> (2) Whether the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration?

Given the finding in relation to issue (1), it was not necessary to determine issue (2).

> *(4) Whether employment was a substantial contributing factor to the injury?*

The Arbitrator held that employment was a substantial contributing factor to the DVT, as there was no evidence that the worker undertook sedentary activities at home involving long periods of immobility and the relevance of periods of immobility in his work to the type of injury he suffered gave the overall impression that it is a real factor of substance among the other factors.

> (3) Whether the worker suffered a primary psychological injury arising out of or in the course of his employment with the respondent on 30 June 2016?
>
> (5) Whether that injury was a "secondary psychological injury"? and
>
> (6) Is the worker entitled to be assessed pursuant to for lump sum compensation under s 66 *WCA?*

The Arbitrator determined that the psychological injury was secondary to the DVT and he is therefore precluded from being referred for an assessment of permanent impairment under s 66 *WCA.*

> *(7) Whether the worker is entitled to medical expenses under s 60 WCA.*

The Arbitrator awarded the worker compensation under s 60 WCA with respect to the DVT injury. However, he entered an award for the respondent with respect to the allegation of primary psychological injury.

Psychological injury - Arbitrator awards compensation under s 66 WCA without referral to an AMS

Monahan v R. H Anicich & A J Deegan & Others T/as Sparke Helmore Lawyers [2019] NSWWCC 265 – Arbitrator Homan – 5 August 2019

The worker commenced employment with the respondent as a solicitor on 4 February 2008. However, she ceased work on 22 March 2017. On 23 March 2017, she gave notice of a psychological injury (anxiety/depression) as a result of workplace bullying. The insurer accepted liability and approved payments of compensation.

On 21 January 2019, the worker's solicitors made a claim under s 66 *WCA* for alleged 22% WPI, based upon an assessment from Dr Bertucen. On 22 March 2019, the respondent's solicitors requested further and better particulars of the claim, which were provided to them on 28 March 2019.

On 30 April 2019, an ARD claimed compensation under s 66 WCA. On 23 May 2019, the worker attended the respondent's IME. During a teleconference on 28 May 2019, the respondent was granted leave to issue directions for production and to file late documents, including a supplementary report from its IME. The matter was then to be remitted to the Registrar for referral to an AMS to assess permanent impairment.

However, during a further teleconference on 10 July 2019, the worker objected to the referral to an AMS and asked the Arbitrator to determine that she had suffered 22% WPI. The respondent objected to the s 66 claim being determined without a referral to an AMS. The Arbitrator ordered the parties to file and serve written submissions as to how the claim should be resolved without a formal conciliation and arbitration hearing.

Arbitrator Homan noted that both qualified specialists had assessed 22% WPI, but the respondent disputed this and said that it did not rely upon its IME's report. Instead, it sought to rely on evidence from Dr Phillips, psychologist, who concluded that the worker's performance in psychometric testing indicated that she was either potentially malingering or suffering from an acquired brain injury. There was no allegation of brain damage and the report raised an issue regarding the consistency of her presentation to Dr Bertucen. It was therefore appropriate for the dispute be determined by an AMS.

The Arbitrator stated that in many cases, it will still be appropriate for an Arbitrator to remit the matter for referral for an assessment by an AMS. However, that course was not appropriate in this matter, for reasons that included:

- The only remaining issue concerned the amount of the worker's entitlement under s 66 *WCA*;
- The respondent arranged an IME in order to address the worker's claim and that IME provided a WPI assessment, which was filed and served. As the respondent chose not to rely upon it Dr Bertucen's report was the only qualified opinion on permanent impairment;
- The respondent argues that Dr Bertucen's report should not be accepted based upon Dr Phillips' evidence, but as he is a psychologist, he is not qualified under the Guidelines to assess permanent impairment resulting from a psychological injury.
- Dr Phillips' evidence did not persuade her that there is not a fair climate of fact to accept Dr Bertucen's assessment of permanent impairment. While it is not clear whether Dr Bertucen considered Dr Phillips' report, it was considered by Dr Whetton (the respondent's expert) and he explained that the worker's performance in that psychometric testing is not inconsistent with her diagnosed psychological injury.

- It has not been suggested that Dr Bertucen's report does not comply with the Guidelines for assessment of permanent impairment and he is qualified to make it.

The Arbitrator held:

> 58. In circumstances where there is no qualified evidence as to the degree of permanent impairment to contradict the assessment of Dr Bertucen, I am satisfied that his assessment provides an appropriate and reliable basis on which to determine the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.
>
> 59. I consider that this is an appropriate case for an award of compensation to be made without a referral to an AMS. The matters raised by the respondent, including the absence of regulations made pursuant to s 321A of the 1998 Act, do not persuade me that the further delay and costs associated with a referral to an AMS are warranted. This is so particularly in a case such as the present where to require the applicant to be examined by a third independent examiner has the potential to cause the applicant further, unwarranted, distress.

Accordingly, the Arbitrator awarded compensation under s 66 *WCA* for 22% WPI.

Psychological injury - Arbitrator not satisfied that there was a fair climate to accept the worker's medical evidence – award for the respondent entered

Wood v Woolworths Limited [2019] NSWWCC 266 – Arbitrator Homan – 5 August 2019

The worker was employed by the respondent as a store person. On/about 13 January 2018, he alleged that he suffered a psychological injury as a result of bullying and harassment. The insurer disputed the claim. He had previously claimed compensation for psychological injuries and the insurer disputed those claims on 3 November 2015 and 19 September 2016.

On 27 August 2018, the worker claimed weekly compensation, s 60 expenses and lump sum compensation under s 66 *WCA.* The insurer issued a further dispute notice in response.

During a teleconference on 1 May 2019, ***Arbitrator Homan*** ordered the worker to file an amended ARD that omitted irrelevant material and an amended ARD was lodged on 12 June 2019.

The Arbitrator conducted a conciliation and arbitration hearing on 1 July 2019, during which the parties agreed the amount of PIAWE. She identified the issues in dispute as: (1) whether the worker suffered a psychological injury, as alleged; (2) the extent and quantification of any resulting incapacity; (3) the entitlement to s 60 expenses; and (4) the entitlement under s 66 *WCA.*

In statements dated 31 January 2018, 20 October 2018 and 17 April 2019, the worker denied any prior diagnosis of depression, anxiety, stress or any psychological condition. However, these allegations were largely disputed by the respondent.

The Arbitrator referred to the principles for determining causation in psychological injury cases, which Roche DP summarised in *Attorney General's Department v K,* namely:

> 52. The following conclusions can be drawn from the above authorities:
>
> *(a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in Chemler at [40]);*
>
> *(b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in Chemler at [54]);*
>
> *(c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in Chemler at [69]);*
>
> *(d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in Sheridan);*
>
> *(e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in Wiegand at [31]), and*
>
> *(f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered…*
>
> 54. The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances.

The Arbitrator was satisfied that the worker had repeatedly and significantly failed to disclose his relevant medical history in the context of this claim and stated, relevantly:

> 163. In making factual findings as to the events relied on by the applicant as causative of a psychological injury, all of the evidence must be weighed. In *Brines v Westgate Logistics Pty Ltd* Keating P said:
>
> > Where a worker has given untruthful evidence, the Arbitrator must carefully assess the rest of his evidence in order to determine its honesty and reliability. Some of the evidence may have been acceptable because other independent or objective evidence confirmed it. However, where a worker's evidence was not independently supported it clearly must be assessed with great care to determine whether it could properly be accepted as proof of any matter that was in issue in the proceedings (see *Malco Engineering Pty Ltd v Ferreira and others* (1994) 10 NSWCCR 117 and *Divall v Mifsud* (2005) NSWCA 447).

The respondent's statements tended to confirm that some of the alleged workplace events were real, but the worker's second statement made a number of serious allegations, including criminal conduct. She stated that in the absence of any corroboration, and having regard to her concerns about the worker's credibility, she was not satisfied that each of those particular events was real. She was satisfied that the worker perceived these events

as *"…creating an offensive or hostile workplace, whether or not that perception was rational, reasonable or proportionate…"* However, the question is whether the real events caused, and were the main contributing factor to, the worker contracting a psychological injury. She noted that the ARD alleged the contraction of a disease, and not the aggravation, acceleration, exacerbation or deterioration of a disease.

The Arbitrator stated that she was not satisfied that there was a fair climate of fact to accept the opinions of Dr Ayliff and Dr Oldtree Clark and she cited the decision of Samuels JA in *Paric v John Holland (Constructions) Pty Ltd.* She also noted that those doctors had considered the effect of the termination of the worker's employment upon his current condition, but she was not satisfied that the worker had claimed, or that the respondent had disputed, a psychological injury caused wholly or partly by the termination of employment or the circumstances surrounding it. Therefore, she did not place weight upon their opinions regarding causation.

The Arbitrator held that the worker had not discharged his onus of proving a psychological injury "as pleaded" and she entered an award for the respondent.

Industrial deafness – hearing aids - worker failed to discharge his onus of proving noisy employment on relevant principles from Dawson v Dawson, Lobley and Makita

Lindsay v ISS Property Services Pty Limited [2019] NSWWCC 269 – Arbitrator Bell – 6 August 2019

The worker was employed by the respondent as a cleaner from 19 September 2011 until October 2012. He was required to use a backpack vacuum cleaner, which he alleged was significantly louder than a domestic vacuum cleaner and that it was *"so loud that he would have to turn it off in order to hear anyone trying to speak with him*". He alleged that he used this for at least 2 hours per shift (and up to nearly 4 hours per shift), but the respondent denied that the vacuum cleaner was noisy based upon the product specification of 67+3Db(a) and it asserted that the worker only used it for 2 hours per shift.

Arbitrator Bell discussed the evidence and case law and made the following findings:

> 12. … The test of the nature of the employment for hearing loss claims does not require strict causation but only that it was "of a type which could give rise to the injury in fact suffered".
>
> 13. To satisfy this test the worker does not require evidence from an independent expert such as an acoustic engineer to establish the noise levels to which the worker was exposed. The worker's evidence together with appropriate medical evidence may be sufficent.
>
> 14. It is not enough for a worker to state that the employment was "noisy", but it may be sufficient for an expert medical practitioner who obtains a history consistent with the worker's evidence with enough detail to form the opinion that the employment concerned had the capacity to cause hearing loss.
>
> 15. The weight given to the expert medical opinion is dependent on the degree of correlation between the history upon which the expert opinion is based and the evidence overall…
>
> 22. The submission of the respondent with which I agree concerns the history taken by Dr Malouf. There is nothing in his history that refers to the level of noise. Mr Lindsay describes the difficulty with conversation and compares the noise to other machinery but there is nothing to suggest that Dr Malouf took this into account. The

statements were both made after the examination by Dr Malouf, so were not before him as part of the documentation he acknowledges.

23. In *Dawson v Dawson* Roche DP said,

> Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence (if no acoustics expert is to be ruled on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the "tendency, incidents or characteristics" of that employment are such as to give rise to a real risk of boilermaker's deafness.

24. The requirements noted above for both the nature and the extent of the noise exposure were met in the case of Mr Dawson.

25. By contrast, Roche DP in *Combined Civil Pty Ltd v Rikaloski* [2007] NSWWCCPD 181 (*Rikaloski*) found against the worker because there was *"…no evidence of the noise level to which Mr Rikaloski was exposed, the period of exposure, and whether those two factors were sufficient to result in his employment being employment to the nature of which boilermaker's deafness is due."…*

27. What is missing in Dr Malouf's history is evidence as to noise levels, either consistent with Mr Lindsay's statements or otherwise, that shows he considered any such history in arriving at his conclusion about the nature of the work in relation to potential hearing loss.

28. Mr Lindsay has detailed evidence in his supplementary statement, but unfortunately this does not appear to have been before Dr Malouf to consider in forming his opinion as to the nature of the noise exposure.

29. For these reasons the onus has not been discharged on the relevant and Mr Lindsay's claim must fail.

The Arbitrator held that the worker had not discharged his onus of proof based upon the relevant principles from *Dawson v Dawson, Lobley and Makita* and he entered an award for the respondent.

Application for reconsideration of a MAC declined

Blackie v Australian Jockey Club [2019] NSWWCC 273 – Arbitrator McDonald – 13 August 2019

The worker suffered hernia injuries as a result of the nature and conditions of her employment between 1 July 2003 and 30 December 2005. She claimed compensation under s 66 *WCA* and an AMS assessed 0% WPI. However, she appealed against that MAC and on 19 November 2010, a MAP revoked the MAC and issued a fresh MAC that assessed 10% WPI (9% for recurrent hernias and 1% for ilioinguinal neuralgia).

In 2012, the worker commenced WCC proceedings claiming further compensation under s 66 *WCA* and the dispute was referred to Dr Dixon-Hughes (AMS) for assessment. On 1 May 2012, he issued a MAC that assessed 11% WPI (9% for recurrent hernias, l% for left ilioinguinal nerve damage and 1% for right ilioinguinal nerve damage.

On 14 June 2012, a COD issued, which reflected an agreement reached at a teleconference that the worker would receive compensation under s 66 *WCA* for a further 1% WPI and compensation for pain and suffering.

On 3 September 2013, Dr Garvey issued a further MAC, which was for the purpose of determining whether further surgery was reasonably necessary. He was not asked to assess WPI, but he assessed 23% WPI. He later issued an amended MAC that deleted that assessment.

On 25 June 2019, the worker's current solicitor sought reconsideration of the MAC dated 1 May 2012.

Arbitrator McDonald conducted a teleconference on 23 July 2019, during which the worker's counsel stated that she actually sought reconsideration of the COD dated 14 June 2012. The respondent opposed reconsideration. The Arbitrator directed the parties to file and serve written submissions and decided to determine the application on the papers.

The worker argued that Dr Dixon-Hughes was in error to *assess "bilateral inguinal and femoral hernias with more than one recurrence, now satisfactorily repaired with permanent restriction of activity (lifting): - 9%"*, and he should have assessed 9% WPI for each hernia based upon para 1.6. of the *Guidelines.*

Counsel for the worker stated that the worker was represented by different solicitors in the 2012 proceedings and it was not known why those consent orders were entered into and why an appeal against the MAC was not considered. He also asserted that the assessment of 23% WPI made by Dr Garvey should have alerted the previous solicitors to the possible error in the 2012 MAC, after which they referred the worker to Dr Kumar. On 2 February 2018, Dr Kumar assessed 21% WPI and stated that Dr Dixon-Hughes erred in assessing impairment for a single hernia.

The Arbitrator stated, relevantly:

> 13. The submissions state that Ms Blackie instructed her current solicitors on 13 February 2018 who took over conduct of the file on 15 March 2019. The latter date appears to be an error because Ms Blackie said that she commenced further proceedings (the 2018 proceedings) seeking further permanent impairment compensation which were part heard by a Commission arbitrator on 17 December 2018 and stood over to 6 February 2019. On that date, counsel briefed for Ms Blackie "became aware of the possible error" in the MAC issued by Dr Dixon-Hughes. The matter was again stood over to attempt settlement of the claim and to ask the Registrar to correct an "obvious error" in the MAC issued by Dr Dixon-Hughes under s 325 (3) of the *Workplace Injury Management and Workers Compensation Act 1998* (*the 1998 Act*).
>
> 14. That request was made on 3 April 2019 and on 30 May 2019, the Registrar informed Ms Blackie that the MAC did not contain an obvious error and that she should seek a reconsideration of the MAC.
>
> 15. The 2018 proceedings were again listed before the arbitrator on 3 June 2019 and discontinued. Because Ms Blackie is "out of time" to bring an appeal in respect of the MAC issued by Dr Dixon-Hughes, she sought that the matter be referred to "an AMS" under s 329 of the 1998 Act for reconsideration.
>
> 16. The submissions attached four MACs and the Medical Appeal Panel decision and Dr Kumar's report. None of the other correspondence or documents referred to were attached.

The worker relied upon a Statutory Declaration in which she said that that she recalled being sent a copy of the MAC prepared by Dr Dixon-Hughes in 2012, but she denied being given any advice about the possibility or prospects of an appeal. She "vaguely" recalled attending the telephone conference on 14 June 2012 and that negotiations were conducted

about how much compensation she should receive for pain and suffering. She denied having any discussion about appealing the MAC, but recalled being advised that she had not exceeded the threshold to bring common law proceedings. Following the examination by Dr Garvey in 2013, she received a copy of his original MAC, but not the amended MAC. She recalled being advised that his WPI assessment was rejected because he was not instructed to assess it and that she was not able to make a further claim because of a change in the law. In about March 2015, she was advised that the law had changed again and that she could make a further lump sum claim and her previous solicitors then arranged for her to see Dr Kumar in February 2018.

The worker asserted that it was not until the second hearing date of the 2018 proceedings that she was told that there was an error Dr Dixon-Hughes' MAC and that an appeal should have been lodged. Efforts to settle the claim were unsuccessful and she understood that one reason why the 2018 proceedings did not proceed was to enable her to seek a reconsideration of that MAC.

Counsel for the worker referred to the decision of Roche DP in *Samuel v Sebel Furniture Limited* and asserted that while the delay was long, it was due to her legal advisers. While she noted that *Hurst v Goodyear Tyre and Rubber Co (Australia) Pty Ltd* is authority for the principle that a mistake or oversight by a legal adviser will not provide a ground for reconsideration, she argued that that case was distinguished in *Atomic Steel Constructions P/L v Tedeschi,* and he submitted:

> … Whilst it is conceded that the circumstances regarding the legal advisors error in this case differ from Tedeschi, it is submitted that the case of *Tedeschi* does demonstrate that a legal advisor's error does not prevent an injustice being corrected where it is in the interests of justice.
>
> In *Tedeschi*, it involved the overpayment of a worker in a Consent Award for weekly payments. It is submitted that in this matter, the injustice involved if the application for Reconsideration is refused, is a worker being denied her correct entitlements for lump sum compensation (including pain and suffering) and the ability to bring a Work Injury Damages claim.

The worker argued that the Commission is required to perform "a balancing act" between her rights and those of the respondent and as workers compensation is beneficial legislation, and as she has been deprived of her rights to lump sum compensation and common law damages, it should exercise its discretion in her favour.

However, the respondent argued that Dr Dixon-Hughes' MAC was correct and in any event, reconsideration is not appropriate given the length of the delay and the public interest that litigation ought not to continue indefinitely. The worker's submissions failed to take into account the fact that she had been in receipt of a consent award for seven years and that there was no offer to repay that award if reconsideration was granted. It also cited prejudice as a result of legal costs that it had incurred for the teleconferences and the arbitration of the 2018 proceedings (which were discontinued) including the cost of an IME.

The Arbitrator cited the principles that apply to the exercise of its discretion, which were summarised in *Samuel,* and confirmed that all of the relevant factors should be considered.

"Mistake"

In relation to this issue, the Arbitrator held that the decision in *Tedeschi* does not assist the worker. The failures to consider a medical appeal in 2012, to allow consent orders to be entered into in 2012 and to apply for reconsideration of those consent orders are all failures that are covered by the decision in *Hurst.*

Merits of the proposed medical appeal

The Arbitrator observed that the evidence in support of a proposed appeal “is scant“, but based on the differences between Dr Garvey’s first MAC and the report of Dr Kumar, there may be merit in the argument that the worker seeks to raise. She concluded:

> 49. The Commission is required to do justice between the parties. Apart from the possibility of the merits of the appeal, all of the other relevant factors weigh strongly against Ms Blackie’s application.

Accordingly, the Arbitrator declined the application for reconsideration.