Bulletin

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Independent Review Office

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. Allianz Australia Insurance Limited v Yangzom [2025] NSWCA 104
2. Abdal v Insurance Australia Limited t/as NRMA Insurance [2025] NSWSC 478
3. Yandell v SAE Institute Pty Ltd [2025] NSWPICPD 38
4. AAI Limited t/as AAMI v Shoyeb [2025] NSWPICMP 122

Court of Appeal Decisions

MAIA (2017) - Primary judge erred in finding that the MA fell into jurisdictional error or error of law on the face of the record and in holding that the President's Delegate fell into jurisdictional error or error of law on the face of the record in concluding that he was not satisfied that the medical assessment was incorrect in a material respect

Allianz Australia Insurance Limited v Yangzom – Leeming, Kirk & Stern JJA - 16/05/2025

The claimant was hit by a utility vehicle on 13/06/2018 whilst on a pedestrian crossing. Shortly afterwards, she submitted a claim for personal injury benefits under the MAIA 2017 (NSW) and a dispute arose between her and the insurer as to the percentage of WPI resulting from her injuries.

On 29/08/2023, the medical dispute was referred to a MA under s 7.20 of the MAIA. The injuries referred for assessment included the cervical spine, the shoulders, the arms and buttocks. The MA found that the injuries gave rise to 4% WPI, which meant that the claimant could not be awarded damages for non-economic loss.

The claimant applied for review of the medical assessment.

On 10/01/2024, a delegate of the President of the PIC concluded that he was not satisfied that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application. This precluded the application for review of the medical assessment being referred to a review panel.

The claimant successfully sought judicial review of both the medical assessment and the delegate's decision (Schmidt AJ), who set aside both decisions.

As regards the medical assessment, Schmidt AJ identified multiple failures by the MA to comply with the Motor Accident Guidelines issued by SIRA and found that the MA failed to comply with the approach required by the decision of Hall J in *Nguyen v Motor Accidents Authority of New South Wales* [2011] NSWSC 351 ("*Nguyen*").

Her Honour found that the delegate also fell into legal error in not properly evaluating whether the errors alleged in the claimant's submissions had been made.

The principal issues on appeal were whether the primary judge erred in finding:

(1) that the MA erred in law by failing to comply with the requirements in cll 6.120 and 6.121 of the Guidelines as regards a report of a cervical MRI scan in January 2021;

(2) that the MA erred in law by failing to comply with the requirement in cl 6.41 of the Guidelines in not bringing inconsistencies to the claimant's attention;

(3) that the MA erred in law by not recognising the presence of pain in assessing whether there was impairment of the arms and buttocks, and in failing properly to apply the principles in *Nguyen*;

(4) that the MA erred in law by giving inadequate reasons; and

(5) that the MA erred in law by failing to comply with applicable guidance in converting upper extremity impairment to WPI.

In relation to the delegate's decision, the issues were:

(6) whether the delegate erred in law by failing to recognise that the MA erred in stating that there were no imaging studies to review; and

(7) Whether the delegate erred in law by failing to recognise that the MA misunderstood how the Guidelines deal with pain and erred in the application of the *Nguyen* principles.

The Court (Stern JA, Leeming and Kirk JJA agreeing) allowed the appeal.

In relation to ground (1), it was more likely that the MA found that the cervical MRI report was not relevant to his assessment of WPI than that he failed to consider it. That was a matter for him and was neither an error nor a failure to comply with cll 6.120 and 6.121 of the Guidelines. A failure by the MA to have regard to this report would not have constituted a constructive failure to exercise jurisdiction: *Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244; *Rodger v De Gelder* [2015] NSWCA 211, applied.

In relation to ground (2), the fact that the MA recorded the claimant's explanation for the identified "*inconsistent movement at multiple body regions*" led to the inference that this was drawn to her attention, such that cl 6.41 of the Guidelines was complied with, Further, the differences between the MA's findings and those of earlier reports were not inconsistencies that had to be drawn to her attention under cl 6.41 at a medical assessment that took place approximately 17 months after the latter of those reports. Differences in findings could readily be explicable on the basis of a change in presentation over time.

In relation to ground (3), the MA's statement that "*[t]he presence of pain in a body region is not indicative of an injury to that body region*" should be construed as conveying that pain in a body region does not, of itself, establish that there is an injury to the body region. The MA did not err in saying this: *Mandoukos v Allianz Australia Insurance Limited* [2024] NSWCA 71, applied.

There was no error in the MA relying on there being no assessable impairment in the arms or buttocks in making his conclusion about the causation of those injuries. This was reinforced by his finding that there was no direct effect of spinal symptoms in the cervical or lumbar spine causing permanent impairment in another body part, which was consistent with no permanent impairment being identified in these body regions.

In relation to ground (4), the MA's reasons did not indicate that he failed to follow the decision of Hall J in *Nguyen*. The natural reading of the MA's findings was that the arm and buttock symptoms did not constitute permanent impairment and his reasons are apparent from a reading of the MAC as a whole: *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231; *Zahed v IAG Limited t/as NRMA Insurance* [2016] NSWCA 55, applied.

The MA complied with *Nguyen* when assessing shoulder impairment and it was apparent that he repeated his assessments of range of motion, and followed cl 6.50(d) of the Guidelines when he found those movements to be inconsistent due to pain.

In relation to the Delegate's decision, the Court found that he correctly identified cl 6.121 of the Guidelines and that the MA's findings did not suggest impairment greater than DRE Category I for all spinal regions. While this reasoning was sparse, it disclosed that he considered that there was no possible failure to comply with the Guidelines suggested by the MA's approach to the relevant reports of radiological findings. The primary judge erred in concluding that the delegate should have identified possible error in the MA observing that there were no imaging studies to review. There was no legal or jurisdictional error in the delegate's finding that the claimant's contentions to the contrary did not indicate possible error.

There was also no legal or jurisdictional error in the delegate's reasoning regarding the arm and buttock injuries and in construing and applying *Nguyen*. The MA's conclusion that there was no assessable impairment to the arms or buttocks necessarily answered the claimant's submissions before the delegate in contending that the MA had so erred.

Supreme Court of NSW – Judicial Review Decisions

MAIA (2017) - MA's determination of WPI as a result of psychiatric injury –the MA erred and considered an irrelevant consideration (no overt cognitive difficulties noted was wrongly assigned to "concentration, persistence and pace" as defined in the Guidelines – MA's decision set aside – MA erred by not obtaining necessary information to assess WPI due to the category of "Concentration, consistency and pace" – assessment based on considerations that did not provide a basis for distinguishing between classes 2 and 3 – Decision revoked

Abdal v Insurance Australia Limited t/as NRMA Insurance [2025] NSWSC 478 – Wright J – 16/05/2025

The plaintiff applied for judicial review of two decisions arising out of medical assessment regarding a medical dispute about a claim for injuries suffered in a MVA, particularly the assessment under PIRS for "*concentration, persistence and pace*".

The plaintiff was entitled to compensation under both MAIA and the WCA. In the workers compensation proceedings, he qualified Dr Argyle, who diagnosed PTSD and possible mild neurocognitive disorder due to a traumatic brain injury and assessed 20% WPI (19% under PIRS, including class 3 for "*concentration, persistence and pace*", and 1% for the effect of treatment in relation to sleep).

The employer qualified Dr Kumar, who disagreed with Dr Argyle's diagnosis of a mild neurocognitive disorder and traumatic brain injury, and he assessed 19% WPI. He made no allowance for the effects of treatment.

The plaintiff insurer declined to concede the 10% WPI threshold.

On 23/10/2023, Dr Chow (treating psychiatrist) provided a report on the plaintiff's psychiatric condition.

On 20/11/2023, the plaintiff lodged an application for a medical assessment, which his injuries as "*Psychiatric injury as detailed in the reports of Dr Mukesh Kumar, Dr Frank Chow and Dr Nicholas Argyle*".

On 14/02/2024, a MA (Dr Sidorov) examined the plaintiff and on 25/02/2024, he issued a MAC, which assessed 8% WPI for PTSD. This included a class 2 rating for "*concentration, persistence and pace*".

On 25/03/2024, the plaintiff applied for a review under s 7.26 of the MAIA. However, on 19/06/2024, the President's Delegate dismissed the review application.

In the judicial review proceedings, the plaintiff argued that the MA's decision should be set aside, because:

1. He misunderstood, and misapplied, the PIRS category of '*concentration, persistence and pace*', as he did not make findings about factual matters that distinguished between the ratings for classes 2 and 3;
2. He erred by finding that there being '*no overt cognitive difficulties noted during the assessment*' was material, and determinative, when overt cognitive difficulties are not distinguishing features between Classes 2 and 3 ratings, and cognitive factors are relevant to a different category ('travel') or to the application of the clinical dementia rating scheme. He therefore considered an irrelevant consideration and misapplied facts to determine the rating;
3. He did not provide reasons for why a class 2 rating was appropriate; and
4. He erred by failing to engage with a clearly articulated case presented through the contemporaneous medico-legal reports of Dr Argyle and Dr Kumar. In doing so, he denied the plaintiff procedural fairness.

In relation to the Delegate's decision, the Plaintiff argued that they erred by failing to form a state of satisfaction that the MA's decision was incorrect in a material respect.

Wright J upheld the summons with respect to the MA's decision and his reasons included:

- Whilst a MA must exercise a degree of clinical judgment and experience in assigning a class of severity in respect of each area of PIRS, the characterisation of conduct or ability as going to the "*concentration, persistence and pace*" area of impairment is not a matter of discretion: *Ballas v Department of* Education (2020) 102 NSWLR 783; [2020] NSWCA 86 (*Ballas*) at [93] (Bell CJ and Payne JA, Emmett AJA agreeing).
- The MA's reasoning for assessing class 2 for "*concentration, persistence and pace*" was that there was evidence of mild impairment, but this is merely another way of stating the conclusion that the class rating was 2, as explained in Table 6.15, and he did not otherwise explain that conclusion. His findings that the plaintiff reported difficulty with focus and concentration and becoming more forgetful were entirely general and did not, and without more could not, provide justification for either a class 2 or class 3 rating.
- There were two more-fundamental problems with the MA relying on the plaintiff's reports of "*difficulty with focus and concentration*" and "*that he has become more forgetful*" for the purposes of determining the rating. There was no evaluation of these reports and no determination of their validity and relevance and, even if those reports were accepted as reliable, they do not clearly relate to conduct or ability which went to the relevant area of functional impairment.
- Put another way and applying the reasoning in *Ballas* at [94], by effectively assigning his observation of the lack of overt cognitive difficulties during his interview with the plaintiff to the "*concentration, persistence and pace*" area of functional impairment, the MA took into account an irrelevant consideration, given the definition of the "*concentration, persistence and pace*" area of functional impairment in cl 6.209 and the illustrative descriptors in Table 6.15 of the MA Guidelines. This conclusion may also receive some limited support from the fact that "cognitive impairment.
- Clause 6.18(a) required the MA to review and evaluate the medico-legal reports, but there was no indication in his reasons that these opinions and evidence were directly relevant to the severity of impairment in respect of the "*concentration, persistence and pace*", rather than just being noted.

His Honour concluded that it was not necessary to consider the other grounds of review.

PIC - Presidential Decisions

Commutation of "full liability" includes liability for past gratuitous domestic assistance under s 60AA WCA

Yandell v SAE Institute Pty Ltd [2025] NSWPICPD 38 – DP Wood – 2/05/2025

The appellant suffered a work-related psychological injury. The respondent accepted liability and paid weekly payments, s 60 expenses and a lump sum compensation under s 66 WCA. It also paid compensation for gratuitous domestic assistance that was provided to the appellant under s 60AA WCA from and after 16/11/2020.

The appellant subsequently made a claim for gratuitous domestic assistance that was provided to her between 31/05/2018 to 15/11/2020.

However, the respondent disputed this claim on the basis that there was insufficient evidence to support that the provider of the assistance had forgone employment (s 60AA(3) WCA) and that the 15% WPI threshold was not satisfied before Dr Wilmot's assessment on 16/11/2020.

On 13/02/2024, the appellant entered into a signed Commutation Agreement with the respondent for $750,000. On 26/03/2024, the PIC registered the Agreement and the settlement monies were paid to the appellant on 10/04/2024.

However, on 8/04/2024, the appellant commenced PIC proceedings that claimed payment of the disputed domestic assistance. The respondent disputed the claim based on the issues previously raised, but it also relied on the Commutation Agreement.

Member Homan determined that any liability of the respondent to the pay the disputed domestic assistance had been commuted in the lump sum that was paid to the appellant on 10/04/2024.

On appeal, the appellant asserted that the Member erred in finding that the commutation extinguished her right to claim compensation for medical and related expenses and that it extinguished both past and future rights in relation to medical and related expenses.

Deputy President Wood dismissed it the appeal for reasons that included the following:

- The Member reviewed the history of the legislative provisions and the observations made by Neilson CCJ in *Bradshaw* in relation to of the former s 51 WCA, which provided that a commutation primarily removed liability for weekly payments but also made provision for commutation of liability for treatment expenses and lump sum compensation.
- The Member correctly identified that the current legislation specifically provides for the commutation of liability for weekly payments and medical, hospital and rehabilitation expenses (s 87E WCA).
- The appellant suggested that s 87K may create a lacuna in the legislation, as it allows for a commutation of weekly benefits, but there is no similar provision in respect of medical treatment or domestic assistance.
- Wood DP rejected that submission, as s 87E clearly provides for medical and hospital treatment to be included in a commutation of liability. The Member explained the absence of reference in s 87K to compensation in the form of treatment expenses. She considered that it was a "*clarifying*" provision "*in relation to the effect of a commutation or redemption of liability to pay weekly payments under the current scheme or its predecessor*."
- The appellant argued that there is ambiguity in the provisions relevant to the commutation of liability for a lump sum, and that "*the lump sum replaces the liability of the respondent to pay [weekly payments], but the legislation does not expressly or by necessary implication provide that payment of a commutation for medical expenses has the same effect.*"
- Wood DP rejected that argument as s 87E clearly provides that liability for both weekly payments and compensation for medical, hospital and rehabilitation expenses may be commuted to a lump sum.
- The appellant argued that '*full liability*' referred to in Part 3 of the commutation agreement must mean the future liability and not liability that existed prior to the agreement. The Member concluded that the commutation agreement included full liability for all entitlements, as:
    (a) Part 3 of the commutation agreement expressly indicated that the appellant would receive $750,000 in order to commute "*the employer's full liability for compensation (including weekly benefits, medical expenses and lump sum compensation)*" under the WCA;
    (b) the box indicating that the agreement was only for partial liability to be commuted was not ticked;
    (c) the parties could have indicated that only future liability was to be commuted;
    (d) the parties could have indicated that the commutation agreement did not include past liability payable under s 60AA, and
    (e) because the application proceeded on the basis that there was no liability dispute between the parties, the appellant must have accepted the respondent's determinations identified in the dispute notices issued pursuant to s 78 of the 1998 Act, which included the dispute about liability for gratuitous domestic assistance.

- The appellant relied upon written legal advice that was provided to her, that the agreement would buy out her future entitlements, and the commentary in the SIRA Guidelines. Neither of those documents was probative evidence of what constituted the actual agreement between the parties. The SIRA commentary was in broad, generalised form as was the legal advice.
- As the Member observed, if the appellant had misunderstood the legal advice, then perhaps that was a matter for another forum. Further, the Member was not required to adopt the SIRA commentary in circumstances where it did not constitute delegated legislation.
- Nothing in the appellant's submissions disclosed error by the Member in her rational and logical reasons or her conclusion that the commutation agreement included the provision of past gratuitous domestic assistance. Otherwise, the appellant made no material submission as to why that reasoning and the Member's conclusion were erroneous.

PIC Medical Review Panel Decisions

MAIA (2017) – "reasonable and necessary" medical treatment in the circumstances

AAI Limited t/as AAMI v Shoyeb [2025] NSWPICMP 122 – 26/02/2025

The claimant was involved in a MVA on 26/11/2021. He alleged that he injured his neck, back and right knee in the MVA and claimed statutory benefits. A medical dispute about treatment (MRI scans for the neck, back and right knee) arose and the dispute was referred to the PIC for assessment.

On 11/09/2024, Medical Assessor Shahzad (the MA) proposed scans related to the injuries caused by the MVA and was "*reasonable and necessary in the circumstances*".

The insurer applied for a review of that decision. The claimant did not respond.

On 21/11/2024, a Delegate of the President determined there was reasonable cause to suspect a material error in the assessment and allowed the Review. On 27/11/2024, the delegate convened the Review Panel (RP).

Statutory benefits payable by the "*relevant insurer*" in accordance with Part 3 of the MAI Act include: (a) weekly loss of income benefits for "*earners*" under Division 3.3, and (b) treatment and care benefits under Division 3.4. The only mechanism for the claimant to recover the cost of treatment and care they say was caused by the accident is through the statutory benefits claim.

Section 3.24(1) provides, "*An injured person is entitled to statutory benefits for the following expenses (treatment and care expenses) incurred in connection with providing treatment and care for the injured person - (a) the reasonable cost of treatment and care.*"

Section 3.24(2) provides that, "*No statutory benefits are payable for the cost of treatment and care to the extent that the treatment and care concerned was not reasonable and necessary in the circumstances or did not relate to the injury resulting from the motor accident concerned.*"

The insurer argued that while the MA summarised its submissions, he did not engage with them and he did not deal with its argument that the claimant had scans in 2022 and that the fact that Dr Deshpande did not refer to the original radiology suggests that she never had access to them.

In *Sydney Trains v Batshon*, the Court of Appeal stated that in a review of a medical assessment under the MAIA, the default position is that the review '*should generally include a re-examination of the claimant*'. However, the review '*is not limited to a review only of that aspect of the assessment that is alleged to be incorrect*', but rather '*is to be by way of a new assessment of all the matters with which the medical assessment is concerned*': Motor Accidents Compensation Act 1999 (NSW), s 63(3A); Motor Accident Injuries Act 2017 (NSW), s 7.26(6). However, that case concerned a medical dispute in the workers compensation scheme about the degree of WPI and the decision does not mandate a re-examination in every motor accident.

The RP noted that the treatment in dispute is three MRI scans, the cost of which is between $1,000 and $2,100 and it considered the 550 pages of documents provided by the parties. It decided that it could undertake a just assessment of the dispute based on the existing evidence. This was relayed to the parties and the claimant did not object.

The RP was satisfied that the claimant sustained some form of injury to his neck and lower back and developed symptoms in his right knee and that the requested MRI scans are related to the injuries resulting from the MVA.

As to whether the MRI scans constituted "*reasonable and necessary in the circumstances,*" the RP noted that there were no decisions of District or Supreme Courts regarding that phrase, but there are several workers compensation cases, which give rise to the following principles:

(a) treatment is considered necessary if its *"purpose and potential effect is to alleviate the consequences of injury*" see *Rose v Health Commission* (NSW) (*Rose*) at 48A;

(b) treatment will be "*reasonably necessary*" if it is essential and should not be withheld from the injured worker. See *Rose* at 48B;

(c) in deciding a treatment dispute, regard must be had to:

"*...medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition*."

See *Rose* at 48C;

(d) the dictionary definition of "*necessary*" involves being "*indispensable, requisite, needful, that cannot be done without*" or something "*that cannot be dispensed with*". See *Clampett v WorkCover Authority (NSW)* (*Clampett*) at [23] and [24];

(e) the phrase "*reasonably necessary*" is a composite phrase where the word "*reasonable*" qualifies or tempers the idea of necessity. See *Diab v NRMA* (*Diab*);

(f) the phrase "*reasonably necessary*" does not mean "*absolutely necessary*". See *Moorebank Recyclers Pty Limited v Tanlane Pty Limited* at [154] and *Diab* at [86] where Deputy President Roche noted that if something is "*necessary*", as in indispensable, it will be "*reasonably necessary because reasonably necessary is a lesser requirement than "necessary;"* and

(g) indicia for reasonableness set out by Burke CCJ in *Rose* at [76] and cited in *Diab* at [86] include, but are not limited to:

  (i) the appropriateness of the particular treatment in dispute;

  (ii) the availability of alternative treatments, and the potential effectiveness of the alternatives;

  (iii) the cost of the treatment;

  (iv) the actual or potential effectiveness of the disputed treatment, and

  (v) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

In *Diab*, Deputy President Roche at [86] considered that the phrase "*reasonable and necessary*" was a "*significantly more demanding test*" than the equivalent phrase in the workers compensation legislation. Therefore, the RP must consider whether the treatment that the claimant wants is reasonable and whether it is necessary.

The MRI imaging was requested by Dr Siddiqui who was in practice with Dr Lim and who appears to have access to the 2022 MRI images and reports. He requested "*updated imaging*" due to "*worsening right knee pain*" and "*worsening back pain*". The request for the three images was supported by Dr Deshpande, pain specialist who said they were needed "*to investigate and formulate the diagnosis for ongoing right knee pain and axial pain that has been worsening*."

The claimant's right knee pain had been investigated with an MRI in March 2022 and his axial spinal pain had been investigated by MRIs in January 2022. Dr Deshpande did not refer to the 2022 MRI images in her communications with the GPs and it was not clear to the RP that she had viewed them or whether she was provided with copies of other documents such as the report of Dr Khong.

The clinical judgment of the Medical Assessors was that the fundamental reason for performing an investigation is to inform further management of the patient's medical problems. The utility of any investigation is enhanced by there being a high probability of the sought pathology in the population being tested. Performing investigations, especially imaging, without a specific diagnostic possibility or hypothesis being tested is a poor strategy, fraught with the problem of false positive findings.

Dr Khong diagnosed axial spinal pain, which is spinal pain without neurological symptoms. The clinical judgment of the Medical Assessors is that the disputed MRI scans of the spine are not indicated for the investigation of axial spinal pain alone, unless specific conditions are suspected, and confirmation or exclusion being sought. A non-exhaustive list of these possible conditions would include suspected infection, tumour or inflammatory disease. None of these conditions are suspected in this case.

The Medical Assessors noted that there is a high prevalence of abnormalities such as disc bulges, facet joint arthritis and degenerative disc disease in the asymptomatic population (people with no symptoms), meaning that the implication of pain symptoms from any particular structure is virtually impossible to determine. If a patient is complaining of new or changed neurological symptoms (confirmed with neurological testing) then cross-sectional imaging, such as CT or MRI scanning, can confirm the site of any neural compromise. This has important therapeutic utility where symptoms are new, unexpectedly persistent or progressive and surgical or other invasive intervention is being contemplated. In such a setting these investigations are reasonable and necessary.

The RP noted that Dr Khong saw the claimant twice in 2022 and did not wish to see him again. He did not request repeat scans.

The RP also noted that Dr Wallace recorded in May 2023 "*no current pain*" in the lumbar spine and the resolution of symptoms in the right buttock and thigh to the knee.

The claimant did not report the development of neurological symptoms or changed symptoms in October or November 2023 to Dr Deshpande. While his pain was said to be continuing, he had no neurological symptoms (only axial pain in his neck and lower back) and separate right knee pain. The lumbar spine examination was normal.

In March 2024, Dr Bodel recorded intermittent lower back pain but no right leg or knee pain.

Based on this evidence, the RP decided that there was no clear evidence that the claimant's spine and right knee symptoms have changed, or changed significantly enough to warrant further scans.

Similar principles applied to the disputed MRI scan of the right knee. MRI scans of the knee are indicated where there are concerns over specific processes such as the healing of a fracture, the progress of infection, inflammation (such as rheumatoid arthritis) or tumour, or where there is concern over an intra-articular derangement that may require surgical intervention such as loose cartilage, meniscal tear, or ligament rupture.

In this matter, the claimant had a totally normal MRI scan in March 2022 and there was no clear evidence of change in symptoms, although pain allegedly increased. In the clinical judgment of the Medical Assessors, this did not suggest any new pathology to warrant repeating prior investigations.

The RP also noted that when Dr Wallace examined the claimant on 15 May 2023, there was no reference to any current complaints of right knee pain or lower limb symptoms.

Therefore, the RP was not satisfied that the MRI scan of the right knee is reasonable or necessary in the circumstances.