Bulletin

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. Marks v Secretary, Department of Communities and Justice [2021] NSWSC 306
2. Hunter v Insurance Australia Ltd trading as NRMA Insurance [2021] NSWSC 623
3. Marks v Secretary, Department of Communities and Justice (No 2) [2021] NSWSC 616
4. Marsh v Insurance Group Limited t/as NRMA Insurance Limited [2021] NSWSC 619
5. Finney Pty Ltd t/as Cut Price Car Rentals v Chequer [2021] NSWPICPD 13

Supreme Court of NSW – Judicial Review Decisions

Jurisdictional error – subordinate legislation – scope of empowering provisions – whether the guidelines are inconsistent with the primary legislation – whether the guidelines are beyond power

Marks v Secretary, Department of Communities and Justice [2021] NSWSC 306 – Simpson AJA – 31/03/2021

The plaintiff suffered a psychological injury due to harassment and vilification at work. He claimed compensation under s 66 *WCA* and the claim was referred to Dr Shaikh to assess permanent impairment. The evidence before the AMS included the plaintiff's statements dated 27/07/2018 and 17/03/2019. In the former, he stated that he was previously a retained fireman employed by "*Fire Rescue NSW*", but he did not mention previous employment in the NSW Police Force. He disclosed that he about ten years previously, he suffered PTSD, which had abated, but said that due to a confidentiality agreement, he was precluded from speaking about the circumstances of the injury that gave rise to that condition, or his employer at the time. In the latter statement, he emphasised that the condition had resolved and was "*completely irrelevant*" to the condition for which he was seeking compensation and said that he was not at liberty to discuss the details of the previous condition "*due to a gag order*". He stated that before commencing work with the first defendant he was required to complete rigorous psychological testing.

The plaintiff relied upon a report of Associate Professor Robertson, who also recorded a previous history of PTSD but thought that this occurred in 2001. He diagnosed an adjustment disorder with anxiety and depressed mood with some cross-cutting features of PTSD or an exacerbation or recrudescence of the previous (presumed) PTSD which was sustained in circumstances ostensibly unrelated to this employment.

On 24/10/2019, Dr Shaikh issued a MAC, which diagnosed "*major depressive disorder*" and assessed 21% WPI. He noted that the plaintiff had previously suffered from PTSD "*from witnessing a traumatic event in the past*", but while he had "*had a couple of sessions*" with a psychiatrist, he had not received any treatment in the years preceding this injury. He found that the treatment received for this depressive illness led to an improvement in the plaintiff's mental health and a significant reduction in impairment. In recognition of "*the treatment effect*", for which cl 1.32 of *the Guidelines* (see [10] above) provides, he added 2% to the assessment, but he declined to make any deduction under s 323 (1) *WIMA* because whilst there was evidence of past PTSD, the plaintiff's mental health was seemingly stable prior to the nominated work issue.

Under s 329 (1) (a) *WIMA* the first defendant sought a referral for further medical assessment on the basis that another employer and insurer failed to comply with directions for production of documents regarding the plaintiff's previous claim. On 10/01/2020, a delegate of the Registrar referred the matter to the AMS for further assessment, together with additional material which showed that, in 2011, the plaintiff made a similar claim for compensation arising out of his service with the NSW Police Force. He had been (or perceived that he had been) threatened with a gun by a colleague. In 2011 Dr Lana Kossoff (AMS) diagnosed PTSD and assessed 22% WPI. Dr Kossoff opined that the plaintiff's condition had become chronic and was unlikely to remit or significantly improve, despite further treatment.

The plaintiff provided a further statement dated 31/01/2020, in which he said that when he began work with the first defendant, he "…*felt like I was in a great place in life, and had moved on a[nd] recovered from the 2009 workplace incident [sic]. I stopped receiving any psychological treatment and/or medication in 2012 and did not suffer from any relapse. I feel like I made a full recovery*."

The first defendant sought a deduction under to s 323 (1) *WIMA.* On 14/04/2020, the AMS issued a further MAC which certified that the evidence confirmed that the plaintiff had suffered PTSD in the past and had received treatment for it and there was no evidence to suggest the experience of psychiatric disturbance, or receipt of psychiatric treatment in the years preceding the current injury. He did not alter his previous views.

The first defendant appealed against the MAC and asserted that it contained a demonstrable error, namely that the AMS: (a) Failed to engage with the historical medical evidence, including the MAC of Dr Lana Kossoff dated 17/01/2001; (b) Failed to obtain a detailed history of the plaintiff's symptomatology and level of functioning following his PTSD injury … so as to delineate, when assessing impairment utilising the PIRS, between disabilities flowing from the earlier injury and those alleged to arise due to the injury the subject of this claim; and (c) Failed to have regard to the evidence of the worker's significant pre-existing psychiatric condition when considering the application of s 323 of the [WIM] Act.

On 14/08/2020, a MAP found demonstrable error in that the AMS failed to give adequate reasons for his approach to s 323 *WIMA* and that his failure to specifically refer to the evidence relevant to the previous PTSD indicated a failure to consider its contents. It also found that the AMS applied the wrong test by considering that the fact that the plaintiff was asymptomatic before the subject injury was determinative of whether a deduction should be made under s 323 (1) *WIMA.* It revoked the MAC and assessed 19% WPI (if did not adopt the allowance of an additional 2% WPI for the effects of treatment), but applied a deductible of 25% under s 323 *WIMA.* It issued a fresh MAC which assessed 14% WPI, which did not entitle the plaintiff to compensation under s 66 *WCA.*

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

Acting Justice Simpson noted that the real issue was whether the MAP was correct in identifying that the relevant error by the AMS was his application of the wrong test. If, in revoking the MAC and issuing a new MAC, the MAP itself applied a wrong test, it was in jurisdictional error. Only 2 issues emerged on the hearing of the application: (1) the basis on which the MAP determined that a deduction of 25% from the assessment of whole person impairment should be made under s 323 (1) *WIMA;* and (2) the decision of the MAP, contrary to the decision of the AMS, that no allowance for "*the treatment effect*" should be made.

The plaintiff principally focused on the decision in *Wills* and the MAP's refusal to apply Guideline 11.10 of Chapter 11 of *the Guidelines.* Her Honour stated that the reasoning in [58] and [59] of *Wills* is not entirely easy to follow. The MAP appears to interpret s 323 (1) as dictating a sequence, or a series of four steps, to be taken in the determination of whether any deduction should be made, namely: (i) determine whether any whole person impairment is caused by the injury; (ii) if so, the extent or degree of that impairment; and (iii) whether a pre-existing condition has relevantly contributed to that impairment; and (iv) if so, the quantification of the contribution. A fifth step would be the deduction from the determined level of impairment made under step (ii) of the contribution made by the previous condition quantified under step (iv) to yield the degree of permanent impairment resulting from the injury in question.

However, the MAP considered that application of Guideline 11.10 dictates a different sequence, being: (i) assessment of the claimant's "*pre-injury level of functioning*" – to produce an assessment of pre-injury impairment; (ii) assessment of the current level of permanent (or whole person) impairment; (iii) subtraction of (i) from (ii), to produce the "*percentage of permanent impairment directly attributable to the work-related injury*". On that basis, an earlier injury, condition or abnormality that was asymptomatic immediately prior to the injury in question could not be taken into account for the purposes of the s 323 (1) assessment. That, presumably, results from the requirement to begin by assessing the claimant's "*pre-injury level of functioning*"; if the claimant is asymptomatic, there is no "*pre-injury impairment*" to assess, and nothing to subtract from the current, or, post-injury, level of impairment.

Her Honour stated that this would deny the relevance of any contribution that might be made by a pre-existing, but dormant, condition that, for example, rendered the claimant more vulnerable to the injury that precipitated the impairment under assessment. To take that vulnerability into account in the assessment of permanent impairment caused by the injury suffered in the defendant's employ would, on the MAP's reasoning, be entirely consistent with s 323 (1) but not in accordance with Guideline 11.10.

The plaintiff argued that s 322 (1) is unequivocal in requiring the AMS (and the MAP) to assess the degree of permanent impairment in accordance with Guideline 11.10. So much, it was contended, was the inevitable consequence of the requirement in s 322 (1) that the assessment "*is to be made*" in accordance with the Guidelines, reinforced by s 323 (4) empowering the Authority to make specific Guidelines for the determination of any deduction to be made under s 323 (1). That left no room for the MAP to decline to apply Guideline 11.10 because of what it perceived to an anomalous outcome. However, the first defendant argued that the Guidelines do not subsume or take precedence over the legislation; the provision that empowers the making of guidelines at sub paragraph (4) [sic – subs (4)] cannot be said to override the legislative purpose mandated at s 323(1)-(3).

Her Honour identified an important underlying issue, which was not addressed by the parties and possibly the key to the MAP's approach. She said that one way of understanding the MAP's reasoning is that it took the course it did (in both *Wills* and in the present case) because it considered that Guideline 11.10 is inconsistent with s 323 (1). That could, at least potentially, raise an issue as to the validity of Guideline 11.10. Two questions arise: (i) is there a relevant inconsistency?; and (ii) if so, what is the effect of that inconsistency? Specifically, under which provision is the assessment to be made? She stated:

> 57. As to the second question the decision of the Court of Appeal in *Henderson v QBE Insurance (Australia) Ltd* [2013] NSWCA 480 ("*Henderson*") needs to be considered. That was a decision with respect to the *Motor Accidents Compensation Act 1999 (NSW)* ("*MAC Act*") which established a procedure for the medical assessment of injuries suffered in motor accidents, and, by s 44, permitted the relevant authority to issue Guidelines with respect to the assessment of the degree of permanent impairment of a person so injured. A clear discrepancy was discernible between a statutory provision and a clause in the Guidelines. Section 62 permitted a second (or subsequent) referral for assessment on the grounds of the deterioration of the injury or additional relevant information about the injury but only (by s 62 (1A)), where the deterioration or additional information is such as to be capable of having a material effect on the outcome of the previous assessment. By contrast, the relevant Guideline provided:
>
> > 14.7 If the Proper Officer is not satisfied that the deterioration of the injury or the additional relevant information about the injury would have a material effect on the outcome of the application, the Proper Officer may dismiss the application.
>
> 58. Of that discrepancy Beazley P (with whom Tobias AJA agreed) said:
>
> > 25. … cl 14.7 states a different requirement from s 62 (1A). That difference is not material in this case, but could be vital in different factual circumstances. The statutory provision must, of course, prevail…

60. It is possible, as the Appeal Panel apparently considered, that Guideline 11.10 does not accurately reflect what was contemplated by the legislature in enacting s 323 (1), which does not depend upon pre-injury level of functioning, but encompasses (or potentially encompasses) pre-existing causal factors that are not, at the time of assessment, operative to produce symptoms, but may nevertheless contribute to the overall impairment (see *Cole* and *Elcheikh*). If that is so, a question arises, or might arise, as to whether Guideline 11.10 is beyond power.

61. On one view it is not possible to escape the plain language of the relevant legislation. Sections 376 and 323 (4) respectively empower the Authority to issue Guidelines with respect, inter alia, to the assessment of permanent impairment, and to the determination of the deduction required by s 323 (1). As the plaintiff emphatically pointed out, s 322(1) states, unequivocally, that the assessment of permanent impairment is to be made in accordance with those Guidelines. On that view, if Guideline 11.10 is, as is perceived by the Appeal Panel, "*at odds*" with what the legislature had in mind in the formulation of s 323 (1), it is the Guideline that is to be applied. Moreover, the Authority has made a deliberate and considered decision, authorised by the legislation, to exclude the application of AMA5 (including Guideline 1.28) from the assessment of psychiatric and psychological conditions, and has crafted its own Guideline.

Her Honour stated that on that view, the MAP's decision evidenced both jurisdictional error (by directing its attention to the wrong question) and error of law of the face of the record (by the misconstruction of the relevant legislation). On an alternative view, *the Guidelines* must be seen as subservient to the legislation. If Guideline 11.10 is, as the MAP appears to consider, inconsistent with s 323(1): see also *Frost v Kourouche* [2014] NSWCA 39 at [45], it must, as Beazley P held in *Henderson*, give way to the statute. She stated:

64. The proposition that a Guideline that is inconsistent with a statutory provision can nevertheless take effect is difficult to countenance. True it is that s 376 does not have the proviso, common in provisions authorising delegated legislation, that the delegated legislation be "*not inconsistent with*" the authorising Act. Nevertheless, the issue of a guideline that is inconsistent with any provision of the authorising statute is unlikely to survive challenge.

Her Honour directed the parties to make submissions on the following issues: (i) whether Guideline 11.10 of the Workers Compensation Guidelines is inconsistent with s 323 (1) WIMA; and (ii) if so, (a) the consequence of that inconsistency and, (b) specifically, whether Guideline 11.10 is beyond power.

Otherwise, the allowance for *"the treatment effect"* was not challenged on appeal and the MAP did not notify the plaintiff that it might be disturbed. Her Honour found that the plaintiff was denied procedural fairness.

Her Honour she stood the matter over for further hearing.

MACA 1999 - Review panel decided that injury sustained by medical treatment was not caused by the MVA - Issue of causation — Original injury carries some risk that medical treatment administered by reason of it will cause further harm — An indirect, but foreseeable, consequence is sufficient to establish causation — Application of incorrect legal test amounts to an error on the face of the record

Hunter v Insurance Australia Ltd trading as NRMA Insurance [2021] NSWSC 623 – Adamson J – 2/06/2021

On 29/11/2016, the plaintiff suffered injuries, including to his left foot and leg, in a MVA. In 2017, he underwent surgery to his left foot, after which he was given access to a patient-controlled analgesia device, but he suffered an overdose, which caused him to become unconscious and unresponsive. He was taken to the Intensive Care Unity and suffered significant anxiety. Ultimately, he made a claim for psychiatric injuries suffered as a consequence of what occurred at the hospital and for the physical injuries that he suffered.

The claim was referred to Dr Virgona for assessment under s 60 *MACA* and he found that there was no diagnosed psychiatric injury related to the MVA.

The plaintiff sought a review of that decision and SIRA referred the matter to a review panel. The review panel concluded that the plaintiff suffered PTSD as a result of the incident at the hospital and noted the plaintiff's belief that it occurred as a consequence of a medical error. The panel's key finding was that the MVA did not cause the PTSD because it was directly caused by the traumatic events at the hospital.

Adamson J stated:

> 16. The Panel was obliged to apply the PI Guidelines with respect to causation which, as set out above, incorporated common law principles of causation. It is well established at common law that for there to be a causal link between a consequence and a cause it is not necessary that the consequence be a direct consequence of the cause as long as it is reasonably foreseeable. This principle is illustrated by *Mahony v J. Kruschich (Demolitions) Proprietary Limited* (1985) 156 CLR 522; [1985] HCA 37. In that case, a worker sued his employer for damages for personal injuries suffered by him in the course of employment. The employer cross claimed against the worker's doctor, alleging that his negligent treatment of the worker had caused or contributed to the worker's injuries and incapacity. The trial judge struck out the cross claim on the ground that it disclosed no reasonable cause of action. The Court of Appeal restored the cross claim. The doctor's appeal to the High Court was dismissed.
>
> 17. The High Court (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ) held that if a plaintiff acts reasonably in seeking medical treatment for injuries sustained as a result of negligence, and is further injured by the medical treatment, the original tortfeasor will be liable for the consequences of the medical treatment. The original injury is regarded as carrying some risk that medical treatment administered by reason of it will be negligently administered.
>
> 18. The principles of causation were also addressed in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 in which Mason P described the approach of the common law on causation and said, of present relevance, at 317D-E:
>
> > It can be demonstrated that the common law is not unsympathetic to the plight of plaintiffs who are faced with multiple defendants yet uncertain as to which of them was legally responsible, where it appears that not all of them were. First, proof that any defendant caused or contributed to injury or damage by negligent breach of a duty of care will suffice to impose liability on that defendant. In other words, the law readily embraces the notion that several persons may bear legal responsibility for the one injury.
>
> 19. Thus, if the common law test of causation is applied to the present case, the injury sustained by the plaintiff at the hospital, PTSD, can readily be seen to have been caused by the motor vehicle accident since it was a reasonably foreseeable consequence of the physical injuries sustained by the plaintiff in the accident that the plaintiff would undergo surgery in a hospital and be subject to the associated risks. It does not follow from the circumstance that the hospital might also be liable to the plaintiff in negligence, that the negligent driver who caused the motor vehicle accident did not also cause the PTSD sustained as a result of what happened in the hospital.
>
> 20. By requiring that the PTSD be a direct consequence of the motor vehicle accident, the Panel applied the incorrect legal test, since an indirect, but foreseeable consequence, was sufficient to establish causation. The application of the incorrect legal test, which is evident from the Panel's reasons, amounts to an error of law on the face of the record since the reasons form part of the record, as they are required to be included in the certificate: s 61(9) of the Act.

Accordingly, her Honour set aside the review panel's decision and remitted the matter for determination according to law.

<u>Marks v Secretary, Department of Communities and Justice (No 2)</u> [2021] NSWSC 616 – Simpson AJ – 4/06/2021

Her Honour considered the parties' written submissions and stated, relevantly:

> *Inconsistency*
>
> 15. The plaintiff's submissions denying inconsistency between s 323 (1) and Guideline 11.10 avoided the real issues. It was contended (correctly) that it is not every case in which a pre-existing condition can be identified that will result in a deduction under s 323 (1). It is always a matter for assessment whether any proportion of the impairment assessed is due to such a pre-existing condition. So much is uncontroversial and has long been recognised: see *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; (2000) 21 NSWCCR 34; *Cole v Wenaline Pty Ltd* [2010] NSWSC 78; *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254; *Ryder v Sundance Bakehouse* [2015] NSWSC 526.
>
> 16. The more important question, which the plaintiff's submissions did not address, is whether a pre-existing condition, notwithstanding that it is asymptomatic at the time of the injury in respect of which the assessment is undertaken, may, nevertheless, contribute to the degree of impairment. In respect of physical injuries, it has long been held that it can: *Government Cleaning Service v Ellul* (1996) 13 NSWCCR 344; *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; (2000) 21 NSWCCR 34; *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liquidation)* [2013] NSWSC 365 at [91] and [95].
>
> 17. In the light of this consistent line of authority, s 323 (1) must be construed as requiring deduction from the assessment of the degree of permanent impairment of any proportion of the impairment that is due to "*previous injury … or … pre-existing condition or abnormality*", whether or not the pre-existing condition or abnormality is symptomatic at the time of injury. As noted in the preliminary reasons, the cases which have previously considered this question all related to physical injury. However, as was observed on behalf of the first defendant, s 323 (1) does not distinguish between physical and psychiatric or psychological injuries. It applies to all injuries equally.
>
> 18. Guideline 11.10, with its focus on "*pre-injury level of functioning*", does not allow for deduction from the assessment of impairment in cases where an asymptomatic pre-existing condition contributes to the degree of permanent impairment assessed. To the extent that Guideline 11.10 excludes consideration of any contribution to the permanent impairment that might be made by an asymptomatic pre-existing condition, it is inconsistent with s 323 (1).
>
> 19. Moreover, if it were to be accepted, as was asserted on behalf of the plaintiff in submissions in reply, that Guideline 11.10 determines that an asymptomatic condition does not materially contribute to the subsequent condition, or, as is asserted in the relevant paragraphs of those submissions (extracted at [13] above), does not do so unless it was causing "*an assessable impairment*" prior to the injury in respect of which the assessment is made, the conclusion that Guideline 11.10 is in conflict with s 323 (1) is reinforced. As was submitted on behalf of the first defendant, s 323 (1) makes no distinction between physical and psychiatric/psychological injury. There may be good reason to issue, in respect of the latter, a guideline that prescribes a different procedure from a guideline with respect to the former. But that can be done only in conformity with the legislation. There is nothing in s 323 (1) that authorises exclusion of asymptomatic pre-existing conditions as causative or partially causative of a subsequent impairment.
>
> 20. On the assumption that the authorities identified in [16] above were correctly decided (and it has not been suggested that they were not), the same reasoning must apply to psychiatric/psychological injury.

Her Honour held that the proposition that a guideline inconsistent with statute could take precedence is contrary to authority and she stated, relevantly:

> 28. The submission was maintained that s 322 (1) "*gives precedence*" to the Guidelines. There is nothing in either s 376 or s 323 (4) that authorises the issue of guidelines that are inconsistent with any provision of *the WIM Act*. It is implicit, even if not expressly stated, in any conferral of power to make regulations, guidelines, or any other kind of delegated legislation (if that is what guidelines are) that the exercise of the power be consistent with the provisions of the legislation under which the power is conferred. So much is explicit in s 323 (4), on which the plaintiff placed some weight. Subsection (4) authorises the State Insurance Regulatory Authority to make provision "f*or or with respect to the determination of the deduction* ***required by this section***" (emphasis added). That leads inexorably back to subs (1), construed in accordance with established authority.
>
> 29. I have therefore concluded that Guideline 11.10 of *the Workers Compensation Guidelines* is, to the extent that it excludes, in the application of s 323 (1) of *the WIM Act* to any psychiatric or psychological impairment, consideration of any contribution made to the impairment by a pre-existing but asymptomatic condition, inconsistent with s 323 (1) and invalid.
>
> 30. Apart from the issue of the "treatment effect", with which I dealt in the preliminary reasons ([66]-[69]), the only basis for the challenge made to the decision of the Appeal Panel was that it failed to make its determination in accordance with Guideline 11.10. The consequence of my conclusions above is that that there was no error in the Appeal Panel taking that course.

Her Honour determined that to the extent that the MAP varied the allowance by the AMS for the "*treatment effect*" under Guideline 1.32, the plaintiff was denied procedural fairness and the MAP's decision is, in that respect, void and of no effect, and she set aside that order. She ordered that the AMS' allowance for "*the treatment effect*" be restored.

Jurisdictional error – error of law on the face of the record – Section 69 (3) MACA 1999 – power requiring decision maker to consider whether there was reasonable cause to suspect material error in medical assessment –decision maker exceeded statutory role by determining asserted error on the merits

Marsh v Insurance Group Limited t/as NRMA Insurance Limited [2021] NSWSC 619 – Simpson AJ – 4/06/2021

In August 2012, the plaintiff was involved in a MVA. On 11/05/2020, the proper officer of SIRA rejected the plaintiff's application that an adverse medical assessment should be referred to a review panel.

In 2018, the plaintiff claimed damages for non-economic loss and he was referred to Dr Home for assessment under s 59 *MACA.* On 17/10/2018, Dr Home issued a MAC which diagnosed an aggravation of underlying degenerative changes as a result of the MVA and he assessed 5% WPI (cervical spine) as he did not detect any objective clinical signs of cervical radiculopathy. This did not entitle the plaintiff to damages.

The plaintiff also claimed costs of proposed treatment (cervical fusion and up to 12 GP consultations per year for the remainder of his life) and domestic assistance (60 minutes of paid assistance per week for the remainder of his life). However, the first defendant disputed the claim.

The first defendant applied to SIRA for assessment of the treatment dispute and the dispute was referred to Dr Truskett to determine whether the proposed treatment was reasonable and necessary in the circumstances and whether the treatment related to the injury caused by the MVA.

On 5/02/2020, Dr Truskett issued a MAC, which certified that the aggravation of degenerative change would have abated over the ensuing 6 to 12 months and that the ongoing neck pain is the result of the degenerative disease and is unrelated to the MVA. He also stated that the plaintiff's

disabilities predominantly relate to injuries to both shoulders and the left knee as a result of work injuries in 2010 and 2011, respectively. He concluded that the proposed treatments did not relate to injuries caused by the MVA and they are not reasonable and necessary in the circumstances.

The plaintiff applied for review of Dr Truskett's assessment under s 63 (1) *MACA* on the grounds that it was incorrect in a material respect, namely: (1) the approach to causation; (2) denial of procedural fairness in failing to draw to his attention differences in findings made at the time of his assessment and previous findings made by Dr Home and A/Prof Kleinman in 2018; and (c) asserted illogicalities in reasoning.

On 11/05/2020, the proper officer: rejected each contention; quoted from the judgment of Harrison AsJ in *Insurance Australia Limited (t/as NRMA Insurance) v Warren* [2019] NSWSC 1126 at [112]; and rejected that Dr Truskett's reasoning process was illogical. He was not satisfied that there was a reasonable cause to suspect that Dr Truskett's assessment was incorrect in a material respect and declined to refer the application to a review panel.

The plaintiff applied to the Supreme Court of NSW for judicial review of that decision.

Simpson AJ stated, relevantly:

> 38. Doing the best I can to untangle the substance of the plaintiff's complaint as expressed in these grounds, supplemented by written and oral submissions, it seems to me that the points sought to be made are:
>
> > (i) that in declining to refer the application to a review panel, the proper officer went beyond the function conferred on him by s 63 (3) (which, to repeat, is limited to determining whether there are reasonable grounds to suspect that the medical assessment was incorrect in a material respect), and decided that there was in fact no error (a determination that lies in the province of the review panel and not the proper officer) and therefore was in jurisdictional error (Grounds 1, 2, 4, 5, 7 and 8); and
> >
> > (ii) that the proper officer incorrectly rejected the plaintiff's claim that Dr Truskett had denied him procedural fairness (Ground 6).
>
> 39. Ground 3 as pleaded complained of the failure by Dr Truskett to apply the Permanent Impairment Guidelines issued under s 44 of the Act. As mentioned above, I understand this ground to have been abandoned.

Her Honour noted that the proper officer's role is that of a gatekeeper and is to determine whether a proposed challenge to a medical assessment will be permitted to proceed to a medical panel. In *Dominice*, Basten JA said that the role provides protection for a party satisfied with the initial assessment from frivolous or insubstantial challenges to that assessment. Her Honour stated:

> 56. That the decision depends on the formation of an opinion, or of satisfaction, of the proper officer does not render it immune from judicial review: *Jubb* at [34] and the cases there cited. It is reviewable on conventional administrative law grounds: *AAI Ltd (t/as AAMI) v Chan* [2021] NSWCA 19 at [27]-[28]. Those grounds include taking into account irrelevant considerations, failing to take into account relevant considerations, and failure to address the question entrusted to the decision-maker.
>
> 57. In *Meeuwissen* Basten JA said at [23], with respect to s 63(3):
>
> > …Where there is reasonable cause to suspect that a significant error has been made, fairness suggests that the review should be allowed to proceed. In other words, the injured party is entitled to a decision reached in accordance with a proper understanding of statutory scheme and the facts: where an important fact has been ignored, the assessment has not been properly undertaken and the statutory right subverted. Where a construction is available which would allow a full and proper assessment to occur, in place of a flawed assessment, that construction should be preferred.

58. The question that arises under s 63(3) is whether the proper officer's opinion has been formed according to law: *Jubb*, at [34], citing *Buck v Bavone* (1976) 135 CLR 110; [1976] HCA 24 at 118-119. In *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442 at [36] Basten JA framed the question as follows:

> … whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.

Her Honour found that there is merit in the plaintiff's argument that the proper officer mistook his function and determined the issues that would have arisen in a review by an appeal panel and that he exceeded the bounds of his authority. This was because there was significant material before him that demonstrated differences of opinion among medical practitioners and both opinions as to causation could not be correct. Either the plaintiff's symptoms were caused (or contributed to) by the injury suffered in the MVA or they were not. Her Honour stated, relevantly:

65. To conclude, as the proper officer did (at [14]), that Dr Truskett's opinion was open to him based on the evidence did not address the correct question. When confronted with competing opinions from practitioners specialised in their field, it is not the role of the proper officer to choose between them; that is a role for medical assessors constituting an appeal panel.

66. The inevitable result, when the proper officer is confronted with conflicting opinions of medical practitioners, is that there must be reasonable cause to suspect that the medical assessment is incorrect in a material respect. The proper officer went beyond his statutory role in considering whether there was reasonable cause to suspect material error in the medical assessment and determined the asserted error on the merits. That was jurisdictional error. It was also an error that appears on the face of the record, as contemplated by s 69 (3) of the Supreme Court Act.

Her Honour quashed the proper officer's decision and ordered that the medical assessment be referred to a review panel. She ordered the first defendant to pay the plaintiff's costs.

PIC - Presidential Decisions

Section 9AA WCA – connection with the State of NSW - procedural fairness - whether weekly payments made under Queensland scheme should be considered regarding entitlements under the NSW Scheme

Finney Pty Ltd t/as Cut Price Car Rentals v Chequer [2021] NSWPICPD 13 – Acting Deputy President Parker SC – 11/05/2021

The worker was a motor mechanic who worked at the appellant's workshop in Tweed Heads. He injured his right knee while dragging a vehicle across the workshop floor.

The appellant had business premises at Brisbane Airport, in Tweed Heads and in Bilinga (Queensland) and it held workers compensation insurance in Queensland, but not in New South Wales.

The worker claimed compensation under the Queensland scheme and was paid compensation. However, the Queensland WorkCover Authority then declined liability under s 9AA *WCA* and argued that the injury was connected to NSW. On 9/12/2019, iCare wrote to the worker advising that it would make payments under the NSW Scheme.

The issue for determination was whether the worker should be compensated under the NSW or Queensland Scheme

On 8/10/2020, ***Arbitrator Bell*** determined that the worker suffered an aggravation etc. of a disease in his tight knee, including a meniscus tear, and that employment was the main contributing factor. He found that the employment was connected with NSW under s 9AA (3) (b) or (c) *WCA* and worker was totally incapacitated and entered an award of weekly compensation from 18/11/2019 under ss 36 & 37 *WCA*.

The appellant appealed and argued that: (1) The Arbitrator failed to: (i) make a finding in respect of the credit issues raised in the evidence of the worker; and (ii) engage with its contentions and/or provide proper reasons when he did; (2) erred in fact and in law by disregarding its witnesses regarding where the worker usually worked for the purposes of his determination under s 9AA (3) (a) *WCA;* (3) erred in fact and in law by disregarding its witnesses regarding where the worker usually worked for the purposes of his determination under s 9AA (3) (b) WCA; and (4) erred in law by finding that the worker was entitled to weekly compensation after 13/06/2020.

Acting Deputy President Parker SC determined the appeal on the papers.

Parker ADP upheld ground (1). He stated that the Commission is obliged to afford the parties and witnesses procedural fairness. He referred to the decision of Bryson JA (Handley JA & Bell J agreeing) in *Aluminium Louvres & Ceilings Pty Ltd v Zheng* [2006] NSWCA 34:

> An assessment of whether the Arbitrator's decision should be set aside for want of procedural fairness is no simple matter and could not be disposed of by applying any legal tests susceptible of clear statement relating to entitlement to cross-examine an applicant, or a witness. There is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission, and decisions whether to allow cross-examination or to limit it are discretionary decisions which must be made in a context of the legislation and practices which the Commission follows, and, at least as importantly, in the context of the facts and circumstances of the case under consideration.

In *New South Wales Police Force v Winter* [2011] NSWCA 330, Campbell JA stated:

> Section 354 [*of the 1998 Act*] permits proceedings in the Workers Compensation Commission to be conducted with less formality and more truncated procedure than applies to litigation in a court. Nevertheless, an Arbitrator in the Workers Compensation Commission is subject to obligations of procedural fairness: [citations omitted].
>
> However, s 354 influences the content of the obligations of procedural fairness in the Commission. In Aluminium Louvres & Ceilings Pty Ltd v Zheng [2006] NSWCA 34 at [20] Bryson JA (Handley JA and Bell J agreeing) said:
>
> > ... when a claim is made that natural justice has not been accorded, regard must be paid to the legal context in which the decision-maker operates and to the law regulating the conduct of the proceedings.

Parker ADP stated that these decisions show: (1) that in appropriate circumstances, leave to cross-examine should be sought and obtained; and (2) section 354 required the Commission to ensure that the parties are afforded procedural fairness and that the determination accords with good conscience. This required: (i) the findings of dishonesty, creating false and misleading evidence not be made until those allegations were put squarely to the witness; (ii) the Arbitrator should have advised the parties that he had formed a preliminary view regarding the witness' evidence; (iii) the Arbitrator should have re-convened the hearing; (iv) the parties should have been invited to make submissions as to the further course of the proceedings in view of the ''preliminary view''; and (v) the parties should have been permitted to make additional submissions addressing the findings that should be made and the terms in which the findings should be made.

Parker ADP noted that the appellant's case relied heavily upon the witness' evidence and the appellant was denied an opportunity of seeking to persuade the Arbitrator to another view regarding that evidence. He stated:

> 66. It is correct that the appellant does not in terms raise procedural fairness as a ground of the appeal. Furthermore, previously no complaint was advanced with respect to the particular findings adverse to Mr King's evidence. However, Ground One of the appeal squarely raises the question of credit, albeit in the context of the first respondent's evidence, nevertheless, it is inevitable that in considering the Arbitrator's finding favourable to Mr Chequer's credit it is necessary to consider the findings adverse to Mr King's credit.

67. More significantly, the decision in Hunt makes clear (at [60] quoted above) that the parties "*cannot by an agreement to which the court has acquiesced, authorise a course which denies elementary procedural fairness to a witness*." I do not believe the Personal Injury Commission is in any different position. In my view s 354 (3) in requiring the Commission to act according to "*equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms*" means that it must afford the parties and the witnesses in the case procedural fairness whatever position the parties themselves may adopt.

Accordingly, the matter should be remitted to another Member for re-determination.

Parker ADP rejected grounds (2) and (3). He stated that he was not satisfied that there was evidence of error by the Arbitrator and that the Arbitrator was entitled to find that the worker was usually based in NSW for the purpose of s 9AA (3) (b) *WCA.*

Parker ADP upheld ground (4). He found that the Arbitrator did not provide adequate reasons with respect to this aspect of the claim and that there does not seem to be any reason why if the worker received payments under the Queensland scheme, those payments should not be considered for the purpose of calculating the first and second entitlement periods. Under s 9AC (1) compensation is not payable under the NSW Wales legislation where it has been received by the worker "*under the laws of a place other than this State*". The worker plainly received compensation under the Queensland scheme and whilst he retains those payments, in s 9AC operates to preclude him obtaining payments after 13/06/2020.