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.

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Court of Appeal Decisions

Referral of medical dispute to approved medical officer – whether approved medical officer is confined to an assessment of the body parts and systems specified by the Registrar in the Referral

Skates v Hills Industries Ltd [2021] NSWCA 142 – Basten, Leeming & McCallum JJA – 14/07/2021

On 7/06/2013, the appellant injured his left arm at work. On 8/08/2017, he applied to the WCC for compensation under s 66 *WCA* for 18% WPI and the dispute was referred to an AMS, Dr Machart. However, the AMS declined to make an assessment on the basis that the appellant was suffering from Chronic Regional Pain Syndrome (CRPS), diagnosis of which required that the condition be present for more than 12 months and be verified by more than one examining physician. Although he certified that the impairment was permanent and fully ascertainable, he deferred completing the assessment to allow a review in 12 months' time.

On 24/01/2019, the appellant's solicitors asked the WCC to restore the proceedings and on 13/03/2019, the dispute was again referred to the AMS. He assessed 61% WPI, comprising 60% for the left upper extremity and 1% for scarring.

The respondent appealed against the MAC and the appeal was referred to a MAP. On 27/09/2019, the MAP set aside the MAC and reassessed permanent impairment as 7% WPI. On 1/11/2019, a COD was issued based upon that MAC.

On 20/12/2019, the appellant applied to the Supreme Court of NSW for judicial review of the MAP's decision.

Adamson J set aside the MAP's decision and remitted the matter to the Registrar of the WCC. Her Honour noted that the Referral omitted reference to the left wrist and that while the insurer accepted that this was an error, which the MAP noted, it did not include an assessment of the wrist injury in its review. Her Honour set aside the MAP's decision, but she found that it was correct to determine that the AMS had gone beyond the terms of the Referral in assessing part of the upper limb other than the wrist and ring finger. She remitted the matter to the Registrar to be determined according to law.

On 1/10/2020, the appellant sought leave to appeal to the Court of Appeal. In an amended Notice of Appeal, the appellant sought to set aside order 2 (remittal to the Registrar).

Basten JA noted that her Honour set the MAP's decision on the basis that it MAP failed to assess the injury to the left wrist, an omission from the Referral that the insurer conceded was an error. Whether the MAP was correct to reject the AMS' assessment turned on both the proper construction of the Referral for assessment the Registrar's power to limit the scope of the assessment by the form and content of the referral. His Honour stated:

> 38. Leave should be granted for two limited purposes. The first is to make an order setting aside the decision of the arbitrator, so as to permit further steps to be taken in the Commission. The second is to remit the matter with a direction that any further referral to be made to an AMS should identify the left wrist as an affected body part. That is appropriate because it is likely that the Appeal Panel took a stricter view of its function, which did not allow it to extend the scope of the assessment required by the Registrar's referral, even with consent of both parties. It is not necessary to determine whether it was correct in that regard, because there is no challenge to the primary judge's finding that led to the setting aside of its decision. However, the Registrar's referral did not cover the full extent of the dispute. …
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> 40. The remittal should therefore be directed to the "new decision-maker", who is the President. The proposed direction may be made pursuant to the power in cl 14C (4) (b). The former Registrar properly submitted to the jurisdiction of the Court (except as to costs); it may be assumed that the President will adopt the same role. However, he will be notified of this judgment and if he wishes to be heard in relation to the variation in the orders made by the primary judge, he will be accorded that opportunity. To allow that opportunity, the orders should not be entered for 14 days, so as to allow a period of 28 days in which to seek a variation of the orders, subject to earlier entry of the orders if the President indicates at an earlier point that he does not wish to be heard.

Accordingly, his Honour set aside the Arbitrator's decision dated 1/11/2019 and directed the President to include the left wrist as a body part to be assessed in any Referral for a further medical assessment. He ordered the parties to pay their own costs of the appeal.

Leeming JA agreed with his Honour's reasons, but noted the different approach adopted by McCallum JA, and he stated, relevantly:

> 44 The starting point is a "*medical dispute*". That term is defined in s 319 of the *Workplace Injury Management and Workers Compensation Act 1998 (NSW),* reproduced in the other judgments. The term is defined by reference to the existence of a "*dispute between a claimant and the person on whom a claim is made*" about any of seven related subject matters including the degree of permanent impairment as a result of an injury, whether the impairment is permanent, whether it is partly due to a previous injury or pre-existing condition and whether it is fully ascertainable. It may be expected that as a consequence of the ordinary operation of the regime at least in most cases the dispute will have been identified by a written exchange of competing claims.
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> 45 In the present case Mr Skates' "*Application to Resolve a Dispute*" was received by the Commission on 8 August 2017. It described his injury as "*Injury to left wrist, ring finger and scarring*" and stated that he had a permanent impairment of 18% by reference to "*Left upper extremity, joint ring finger and scarring*". A medical report accompanying Mr Skates' application from Dr O'Keefe stated that the whole person impairment had been assessed according to the "*new WorkCover 4 guidelines*", and that insofar as it was based on his "*left upper extremity*" it comprised impairment to the wrist and ring finger by reference to particular figures in the AMA5 Guide. Mr Skates' application also included a letter from the workers compensation insurer dated 11 July 2017. The letter referred to the claim and Dr O'Keefe's assessment of whole person impairment of 18% based on "*Left upper limb (wrist, ring finger) 15% WPI*", "*Scarring 3% WPI*". The letter stated that it had arranged for Mr Skates to be examined by Dr Panjratan, whose assessment was "*Left upper limb (wrist, ring finger) 11% WPI*" and "*Scarring 1% WPI*" yielding a total of 12% WPI, and it made a settlement offer on that basis.

46 The dispute between Mr Skates and the insurer was crystallised by the correspondence attached to Mr Skates' application; indeed, it was why the documents setting out both sides' claims were attached. That was the dispute which was referred to the Commission pursuant to s 288. It was a "*medical dispute*" because the parties had made different claims about the degree of permanent impairment suffered by Mr Skates as a result of the injury. It was therefore apt to be referred for medical assessment. The point of doing so was to resolve the dispute.

47 Sections 321 and 321A concern referrals of a dispute for assessment. The language of the heading of each section commences "*Referral of medical dispute*" and each provision confirms that it is the medical dispute which is referred for assessment. Section 293 authorises the referral of a medical dispute for medical assessment and the deferral of determination of the dispute. All these provisions proceed on the basis that the outcome of the assessment is the resolution of the medical dispute. So too does the conclusive presumption of correctness accorded by s 326 to assessments which are certified in a medical assessment certificate.

48 The paperwork associated with the administration of the legislation seems to have led to a tendency to give to the document comprising the "*referral*" to an Approved Medical Specialist a greater status than it warrants. The document is important. However, the fundamental legal concept is a dispute. In the absence of a dispute, the worker and the insurer would not need to go to the Commission. An important category of disputes is medical disputes, and the referral of the medical dispute to an Approved Medical Specialist is but an aspect of the statutory scheme to resolve the dispute.

49 The document signed by the Registrar's delegate and dated 1 September 2017 described itself as a "*Referral for Assessment of Permanent Impairment to Approved Medical Specialist*". Its first numbered subheading was "*Medical Dispute Referred for Assessment*" and there it stated, wrongly, "*Body part/s referred: Left Upper Extremity (joint ring finger), Scarring (TEMSKI)*". That was wrong insofar as it did not include Mr Skates' wrist. The later referral contained the same poor language and contained additional errors. But the infelicity of parts of the covering document cannot stand in the way of the fact that it was the dispute between the parties, crystallised in the documents attached to that covering document, which was referred for assessment in accordance with the statute. The Appeal Panel was correct to state that the Approved Medical Specialist had gone beyond assessment of the medical dispute which had been referred to him.

50 The foregoing substantially corresponds with the first explanation given by Basten JA for confirming the correctness of the result reached by the Appeal Panel and the primary judge, with a heavier emphasis upon the purpose of the statutory regime being to resolve a medical dispute and that a dispute is identified by the disputants' competing claims.

McCallum JA dissented. Her Honour found that the primary judge erred in holding that the AMS was not entitled to assess the degree of impairment of the whole of the left upper limb and went beyond the jurisdiction conferred on him by the Referral. She held that the MAP's MAC was vitiated by error and that the COD dated 1/11/2019 should have been set aside for that reason. Her Honour stated, relevantly:

73 The mechanism by which, in the case of a dispute, the task of assessing the degree of permanent impairment is assigned to an approved medical specialist is (or was at the material time in the present case) by referral by the Registrar: s 293 of *the 1998 Act*. At the time of the referral in the present case, that section provided: …

74 As submitted by Mr Skates, the power conferred by that section is confined to the referral of a "*medical dispute for medical assessment under Part 7*". The term "" is defined in s 319 of the 1998 Act to mean a dispute about one of the "*matters*" specified in the section:

> *medical dispute* means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim— …

75 The term "*matters*" in that definition assumes some importance. Section 325 of *the 1998 Act* requires the approved medical specialist to give a certificate as to the "*matters*" referred for assessment. The certificate is conclusively presumed to be correct as to the "*matters*" listed in s 326 which include "*the degree of permanent impairment of the worker as a result of an injury*".

76 Nowhere in those provision or indeed anywhere in either statute is there any reference to the assessment or referral of "*body parts*" or "*body systems*". The process contemplated by the legislation is that the Registrar will refer a "*medical dispute*", which means a dispute about a "*matter*" specified in the definition in s 319. The task of the approved medical specialist is to certify his or her assessment with respect to the "*matter*" referred; that is the statutory function to be performed. The certificate is then conclusive as to any of the "*matters*" listed in s 326 which are the subject of the certification. As already noted, they include "*the degree of permanent impairment of the worker as a result of an injury*".

…

81 The problem in the present case is that the terms of the referral did not reflect Mr Skates' case. With respect, the primary judge's statement at [69] that the body parts referred were "the very same body parts as had been identified by the Claimant in the application to resolve a dispute" was not correct (the difference is explained above). But more importantly, the focus on body parts is apt to distract attention from the precise matter to be assessed and certified by the approved medical specialist. Parts 4 and 5.6 of the application to resolve a dispute had to be read together and in the context of the statutory regime explained above. The legislation contemplates the referral of a "*medical dispute*", being one of the matters specified in s 319 (here, the degree of permanent impairment of the worker as a result of his injuries). Part 4 of the application specified the relevant injuries; part 5.6 specified the body systems claimed to have impairment as a result of those injuries. As submitted by Mr Skates, properly read, the application sought an assessment of the permanent impairment of the entire left upper body limb as a result of Mr Skates' injuries. There can have been no doubt in the insurer's mind on that issue. The medical evidence was replete with medical assessments of impairment in parts of the limb other than the wrist and ring finger, particularly the shoulder.

82 Since preparing this judgment, I have had the benefit of reading the judgment of Basten JA in draft. His Honour's reasoning has prompted me to clarify my position as to the status of the Registrar's referral. I do not mean to suggest that an approved medical specialist is free to ignore the terms of the referral. However, the medical dispute referred must be the medical dispute the parties have sought to have resolved.

83 Here, the applicant sought resolution of a medical dispute as to the degree of impairment in the body parts and systems specified in part 5.6 of the application to resolve a dispute, which were "*left upper extremity, joint ring finger and scarring*." The change in punctuation in the referral ("*Left Upper Extremity (joint ring finger), scarring*") had the effect of excluding not only the wrist but the whole of the left upper extremity apart from "*joint ring finger*" and scarring. The Registrar's punctuation should not have determined the parameters of the medical dispute. In my view, the medical dispute referred, and indeed the only medical dispute the Registrar had power to refer to the approved medical specialist, included a dispute as to impairment in the left upper extremity.

84 Further, I respectfully disagree that the combination of the manner in which the claim has been conducted on behalf of the applicant and the quantum involved warrant the refusal of leave. While the sum involved is small by reference to the limit for an appeal as of right or the quantum of other claims the Court is accustomed to determining, its significance to the injured worker is unknown. It cannot be assumed that the amount involved is small to him. It follows that I would grant leave to appeal and uphold the appeal.

Accordingly, her Honour allowed the appeal, set aside the COD dated 1/11/2019 and she remitted the matter to the President of the PIC for determination according to law.

MAP refused application to re-examine the worker - Primary judge held that the request was not considered by the MAP – MAP considered the application - Adequacy of MAP's reasons - Whether there was a denial of procedural fairness by the primary judge - Whether any denial could be material in light of the right of appeal by way of rehearing - Consideration of differences in assessment regimes under workers compensation and motor accident legislation

Sydney Trains v Batshon [2021] NSWCA 143 – Leeming, White & McCallum JJA – 16 July 2021

The worker suffered a work-related psychological injury, which Dr Smith diagnosed as a major depressive disorder and he assessed 24% WPI. However, his assessment differed significantly from assessments made by 2 other psychiatrists, Dr Allnutt and Dr Samuell. On 10/11/2015, Dr Allnutt (qualified by the worker's previous solicitor) assessed 4% WPI and Dr Samuell (qualified by the appellant) expressed the view that there was no work-related psychiatric condition.

The worker commenced proceedings in the WCC claiming weekly benefits in the amount of $2,375.50, s 60, and compensation under s 66 *WCA* for 24% WPI. The Registrar referred the dispute to Dr Hong and on 12/06/2019, he issued a MAC which assessed 8% WPI with respect to an "Adjustment disorder with anxiety and depressive symptoms".

The worker appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and he also sought to be re-examined by an AMS member of the MAP. The appellant opposed the appeal, but it was referred to a MAP.

On 30/08/2019, the MAP confirmed the MAC and stated, relevantly:

> [31] The panel does not accept the appellant's contention that the AMS failed to provide any reasons for preferring Adjustment Disorder over Major Depressive Disorder as the diagnosis in this case. It must be borne in mind when considering this contention that the AMS did not reject the diagnosis of Depressive Disorder. Rather, as the quotation from the MAC contained in the appellant's submissions makes clear he thought that it was an 'equally valid diagnosis.'
>
> [32] In attempting to establish a diagnosis the AMS took a careful history, carried out a physical and mental state examination, recorded the appellant's complaints and considered the medical evidence tendered by the parties, including the reports of three psychiatrists. On this foundation, the AMS expressed the opinion that the applicant suffered a recognisable psychiatric condition, which was best characterised as an adjustment disorder but which may also fit within the diagnostic criteria for Major Depressive Disorder.
>
> [33] To adopt the language of the High Court in *Kocak*, the '*actual path*' by which the AMS reached this conclusion is perfectly clear. He applied his knowledge and expertise as a psychiatrist to the information which he had obtained from the applicant and other sources and reached an opinion as to diagnosis. He expressed the opinion that the correct diagnosis sat between Adjustment Disorder and Major Depressive Disorder, although he preferred Adjustment Disorder with Depressed Mood.
>
> [34] Plainly, psychiatric diagnoses are not always capable of rigid classification. The diagnostic criteria overlap. This is the case here. Both diagnoses require the presence of significant depressive symptoms. In those circumstances, it was undoubtedly open to the AMS to reach one diagnosis but concede that another may be '*equally valid*'.
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> …
>
> [39] Chapter 11.6 permits the AMS to consider a wide range of standardised tests at his discretion. It does not prohibit the psychiatrist from performing tests which are relevant to his specialty. A psychiatrist may be trained to carry out psychometric testing. A psychiatrist is certainly trained to carry out basic cognitive testing. …
>
> [40] In assessing the worker, the AMS is entitled to employ the entire range of tests for which he has been trained. These undoubtedly include cognitive testing. The AMS did not fall into error by employing a test that is clearly relevant to his assessment.

The worker applied to the Supreme Court of NSW for judicial review of the MAP's decision on 13 grounds.

Harrison J set aside the MAP's decision and found that the MAP committed jurisdictional error by failing to consider the worker's request to be re-examined by an AMS member of the MAP. His Honour stated, relevantly:

> [7] In my opinion, this is a case in which the total absence of any reference to Mr Batshon's request gives rise to the very strong inference that the Medical Appeal Panel did not consider it. There is no indication that it was given even cursory consideration. This amounts to a jurisdictional error, being a failure to exercise its decision-making power in accordance with the terms on which jurisdiction was conferred."

His Honour remitted the matter to the Registrar for referral to a new MAP for redetermination according to law.

The appellant appealed to the Court of Appeal on 9 grounds, namely:

Leeming JA (***White & McCallum JJA*** agreeing) described grounds 1 to 3 as "*entirely arid*" and refused to grant leave for them to proceed. With respect to grounds 4 to 9, his Honour noted that the appellant argued that the primary judge simply incorrect to state that the MAP did not consider the request for re-examination as the MAP noted the request and it was the subject of a determination as part of the Panel's preliminary review. This was a material error in his Honour's reasons.

The Court heard arguments about whether the MAP's reasons were inadequate. However, his Honour stated, relevantly:

> 51 The Panel gave full reasons for concluding that none of the grounds had been made out. Although in a sense it may seem artificial for the "*preliminary*" review as to whether there should be a re-examination to be affected by the outcome of the assessment of those grounds, in truth it resembles the ordinary approach of courts, including this Court in this very case – for the conclusion that there should be a grant of leave to Sydney Trains is one that is very materially informed by my ultimate conclusion that this ground is made out, there being no point of principle or general importance in the case.
>
> 52 In *Bojko v ICM Property Service Pty Ltd*, there was as there is here an appeal based on a complaint that there had been error in declining to conduct a further medical examination by a Panel constituted under the WIM Act. The entirety of the reasons of the Appeal Panel are reproduced at [7]. They were as follows:
>
> > **PRELIMINARY REVIEW**
> >
> > 7. The Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines.
> >
> > 8. As a result of that preliminary review, the Panel determined that it was not necessary for the worker to undergo a further medical examination because there is sufficient information on the papers.'
>
> 53 This Court noted that it would be helpful if in the future Panels would make it clearer that they had considered and dealt with the whole case before them. It was observed at [37] that this would "*reduce the challenges on judicial review and remove any perception by the unsuccessful party that the case has not been properly considered*". Nonetheless, no error was made out in that case. The reasons given by the Appeal Panel for refusing Mr Batshon's application for re-examination likewise sufficiently explain why, given the nature of his appeal, it was unnecessary to do so.
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> 54 Contrary to the reasons of the primary judge, Mr Batshon's application for re-examination was mentioned and was attended to by the Panel. Contrary to the submissions made on Mr Batshon's behalf in this Court, the reasons were adequate.

His Honour held that it was far from clear that an error in diagnosis case influenced the assessment of WPI, having regard to the approach to be followed (which is summarised in *Ballas v Department of Education (State of NSW)* (2020) 102 NSWLR 783; [2020] NSWCA 86 at [20]-[24]). However, even if the MAP were wrong in determining that any error in diagnosis had not influenced the assessment of WPI, that is not an error of law, still less jurisdictional error. It is at best an error of fact.

Accordingly, the Court allowed the appeal and reinstated the MAP's decision.

PIC - Presidential Decisions

Appellant failed to prove employment was main contributing factor - No challenge to Arbitrator's factual findings - Requirement for the appellant to demonstrate error of fact and law or discretion per Raulston v Toll Pty Limited [2011] NSWWCCPD 25; 10 DDRCR 156; Northern NSW Local Health Network v Heggie [2013] NSWCA 255; 12 DDCR 95; application of State Transit Authority of New South Wales v Chemler [2007] NSWCA 249; 5 DDCR 286 and Attorney General's Department v K [2010] NSWWCCPD 76; Application of Federal Broom Co Pty Limited v Semlitch [1964] HCA 34; 110 CLR 626 on the question of causation

Palasty v Lendlease Building Pty Limited [2021] NSWPICPD 19 – Acting Deputy President Parker SC – 7/07/2021

The appellant alleged that he suffered a psychological injury as a result of bullying and harassment at work. He has a prior history of psychiatric illness including drug induced psychosis, and schizophrenia. His treating psychiatrist was Dr Williams and the appellant argued that when he commenced work with the respondent, his pre-existing psychiatric condition was well managed.

Arbitrator Homan conducted an arbitration and identified the issues in dispute as follows: (1)) whether the appellant sustained a psychological injury as claimed pursuant to s 4 *WCA*, including whether the employment was the main contributing factor to the injury; (2) the extent and quantification of any incapacity resulting from the injury, and (3) the entitlement to s 60 expenses.

On 24/12 2020, the Arbitrator determined issue (1) adversely to the appellant and entered an award for the respondent. The Arbitrator was not satisfied on the balance of probabilities that the events described by the appellant were real and while she accepted that he experienced considerable difficulty performing his work, she noted that he denied that his performance was an issue. There was no dispute that the appellant suffered an aggravation of his schizophrenia around about the time he was employed by the respondent and while the accepted noted that the medical referees, (Drs Khan, St George and George) all provided opinions consistent with employment being the main contributing factor to the aggravation of the appellant's condition, albeit in different ways, she was not satisfied that the history provided to them was correct.

The appellant appealed and alleged 13 mixed errors of fact and law.

Acting Deputy President Parker SC determined the appeal on the papers and dismissed it. His reasons are summarised below.

- There was no challenge to the Arbitrator's conclusion that she was not satisfied that the history recorded by the experts was credible or that the experts had "*a sufficiently complete and accurate factual background at the time their opinions on causation were expressed*."
- The onus was on the appellant to establish that the employment was the main contributing factor in relation to exacerbation. That meant that he was required to persuade the Arbitrator that the opinions of the three medicolegal doctors were soundly based on the facts as found. The absence of an alternative explanation for his condition does not prove that the employment was the main contributing factor to the aggravation of the schizophrenia. The appellant appeared to assume that the question is binary; either the employment was or was not the main contributing factor to the aggravation. However, Parker ADP rejected that and said that the point is not whether there was evidence of an alternative cause. The point is did the appellant prove that the employment was a material contributing factor to this aggravation? He did not.
- That there was no error in the Arbitrator's conclusion that the histories upon which the appellant's medical opinions were based were not sufficiently supported by the evidence.

- Expert evidence cannot rise above the substratum of proven factual material. The appellant did not establish that the Arbitrator was wrong in her conclusion that he appellant had not proven the facts assumed by the experts for the purpose of their reports. Absent a successful challenge in this regard, this ground of appeal fails.
- The Arbitrator did not require contemporaneous complaints, but simply observed that there was no such evidence and its absence added to her conviction that the history as recorded in the medical reports was not made out.
- The procedure in the WCC meant that the evidence to be relied on by the parties was disclosed in advance of the hearing before the Arbitrator. It must have been known to the appellant and his advisers that the respondent's case was to the effect that he did not have the symptomatic response of which he subsequently complained during the period of employment. It was for the appellant to marshal such evidence as he could to overcome the respondent's evidence to this effect. In the usual course, evidence of the GP, the treating psychiatrist or psychologist or evidence of relatives and acquaintances showing manifestations of symptoms would be expected to have been adduced. However, in this matter the Arbitrator was correct to say that there was no evidence of this type before her and its absence meant that it was easier for her to accept the evidence of the respondent's witnesses.
- The Arbitrator made a careful assessment by reference to the records which were before her of the extent to which the appellant's schizophrenia had been "well managed" without "psychotic relapses". On the basis of the records she concluded as a matter of fact to the contrary. The appellant does not challenge that finding of fact. Rather, his challenge starts with the premise that there was a change in his condition from one of well managed schizophrenia before employment to uncontrolled schizophrenia after the employment with the respondent. It was for the appellant to make good the proposition he was "*relatively well prior to commencing employment with the respondent*" and he failed to do so.
- The appellant was required to prove the case that he pleaded and it was not open to him on appeal to change the case advanced at first instance. It was not a case in the appellant suffered symptoms from his perception of real events that had occurred in the workplace. He did not establish that the events he alleged to have occurred in the workplace had in fact occurred. It was for that reason that his case failed.
- In accordance with the decision of King ADP in *Hahn*, there was no obligation on the Arbitrator to find a causal factor to explain the onset of the appellant's symptoms. All that she was required to do was explain why she was not satisfied that the case advanced by the appellant should be upheld and she explained and provided detailed reasons for the decision she made.

A Presidential Member of the PIC has power to reconsider a decision and correct asserted errors under s 350 (3) WIMA

Finney Pty Limited t/as Cut Price Car Rentals v Chequer (No 2) [2021] NSWPICPD 20 – Acting Deputy President Parker SC – 8/07/2021

The previous Presidential decision was reported in Bulletin 95. In that appeal the appellant argued that: (1) The Arbitrator failed to: (a) make a finding in respect of the credit issues raised in the evidence of the worker; and (b) 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 upheld grounds (1) and (4), but rejected grounds (2) and (4).

The appellant sought reconsideration of that decision under s 350 (3) *WIMA* on the basis that the previous decision contained errors. However, an issue arose as to whether a Presidential member other than the President himself has power to correct such errors.

On 29/06/2021 the President convened a teleconference with the parties' representatives to provide directions as to the matter's further progress. The President, with the concurrence of the parties, concluded that the matter was governed by cl 14B (4) (c) of Sub-div 2 of Div 4A of Part 2 of Sch 1 to the *Personal Injury Commission Act 2020 (the 2020 Act)* which provides as follows:

> (4) The following provisions apply to the completion of proceedings under this clause—
>
> …
>
> (c) the provisions of any Act, statutory rule or other law that would have applied to or in respect of the determination of the proceedings had this Act not been enacted continue to apply,

His Honour held that cl 14B (1) applies to permit the original decision maker to exercise the powers provided for under the *WIMA* and cl 14B (4) (c) operates so as to apply, as may be required, s 350 *WIMA* (which was repealed under *the 2020 Act*). He therefore remitted the matter to Parker ADP for reconsideration and determination regarding the asserted errors and he amended the decision to correct them.

Section 11A WCA – requirement for medical opinion where several potentially causative events may have contributed to the psychological injury – Hamad v Q Catering Limited [2017] NSWWCCPD 6 discussed and applied – application of s 34 WCA – the maximum statutory cap on weekly payments

Secretary, Department of Education v BB [2021] NSWPICPD 21 – Deputy President Wood – 13/07/2021

The worker claimed weekly compensation, s 60 expenses and compensation for 17% WPI under s 66 *WCA* for a psychological injury (deemed date: 23/05/2017). However, the appellant disputed the claim and argued that the injury was wholly or predominantly caused by reasonable action taken with respect to performance appraisal, discipline and transfer. The appellant later conceded that the actions which might fall within "*performance appraisal*" were more likely to be considered "*discipline*."

The matter has a lengthy history. It was first heard by an Arbitrator on 6/09/2019, but the Arbitrator found for the appellant. The worker then appealed and ***Deputy President Snell*** allowed the appeal and remitted the matter to another Arbitrator for re-determination.

Senior Arbitrator Bamber heard the matter upon remitter. On 27/11/2020, she issued a COD and determined the dispute in favour of the worker. She found that while it was difficult to identify the causes of the injury, and that witnesses had different perspectives about the key incidents, those incidents occurred. She referred to the decision in *Hamad* as authority for the proposition that a series of events may have a cumulative effect and may cause a psychological condition that manifests at a later time. She held that the fact that the worker did not seek treatment after each incident did not mean that the incidents did not contribute to his psychological injury. She rejected the appellant's medical opinion (Dr Martin) as lacking in key areas, particularly the history of relationship difficulties between the worker and the careers adviser and found that in the absence of any proper consideration of that conflict, the appellant could not establish that the injury was either wholly or predominantly caused by discipline or transfer of the worker. She found that the worker had no current work capacity during the periods claimed and that he was entitled to weekly payments under s 37 representing 80% of PIAWE and s 60 expenses. She remitted the claim under s 66 *WCA* to the Registrar for referral to an AMS.

The appellant appealed on 2 grounds, namely: (1) The Senior Arbitrator erred in law by finding that it failed to make out a defence under s 11A *WCA* by rejecting the opinion of Dr Martin on the basis that the doctor had failed to properly consider the evidence about: (a) the effect of student aggression, (b) the respondent's workload, and (c) the relationship with the careers advisor, without first determining that those matters caused the psychological injury, and (2) The Senior Arbitrator erred in law in finding that the worker was entitled to weekly compensation at the rate of $2,206.25 from 6/07/2018 to 19/11/2019, when that exceeded the statutory maximum determined under s 34 *WCA*.

Deputy President Wood determined the appeal on the papers.

Wood DP rejected ground (1). She found that there was nothing remarkable about the Senior Arbitrator's exercise in evaluating the medical evidence and her reasons were logical. It was implicit in the Senior Arbitrator's reasoned logic and conclusions that she rejected the opinion of Dr Martin and accepted the worker's medical case that the events that fell outside of the ambit of s 11A caused the injury. It was then incumbent upon the Senior Arbitrator to evaluate whether the matters relied upon by the appellant were causative matters that fell within the ambit of s 11A (1) *WCA* and, in this case, whether the matters that fell within the context of performance appraisal, discipline or transfer were the predominant cause of the injury. She stated, relevantly:

> 179. The appellant asserts that the Senior Arbitrator was required to determine the causal relationship between the events and the injury and to provide reasons for so determining before assessing the weight to be afforded to the opinion of Dr Martin. The appellant relies upon *Gazi* to support that notion. *Gazi* does not support the appellant. The passage from the decision partly extracted by the appellant was reproduced in full by the respondent and is quoted at [137] above. In making his observations, Phillips P relied on the judgment of Fitzgerald JA (with Mason P agreeing) in *Manly Pacific International Hotel Pty Ltd v Doyle* in which his Honour said:
>
> > ... the whole or predominant cause of [the worker's] psychological injury within the meaning of subs 11A (1) is a question of fact and degree, which involves consideration of all the factors which produced [the worker's] condition.
>
> 180. The Senior Arbitrator approached her task in a manner consistent with *Doyle* and *Gazi*.
>
> 181. The appellant asserts that the Senior Arbitrator was required to make findings as to which matters caused the injury. The appellant contends, however, that it was not open to the Senior Arbitrator to reject the opinion of Dr Martin on the question of causation in relation to the student incidents, excessive workload and interactions with the careers adviser, without first making a positive finding that the incidents were causative. The Senior Arbitrator took the appropriate step of evaluating the medical evidence before rejecting the opinion of Dr Martin. Her rejection of Dr Martin's opinion was that Dr Martin failed to give proper consideration to matters that fell outside of the ambit of s 11A (1) which were potentially causative, so that his conclusion as to what predominantly caused the injury was flawed.
>
> 182. The appellant submits that the Senior Arbitrator was required to provide proper reasons for rejecting the opinion of Dr Martin. It contends that the Senior Arbitrator failed to give clear reasons as to why she was critical of Dr Martin's opinion when considering the potential causative factors of student aggression, the conflict with the careers advisor, and the respondent's workload. The Senior Arbitrator's reasons for rejecting Dr Martin's opinion were sufficient to discharge her statutory duty to give reasons.
>
> 183. An arbitrator is required to give reasons for his or her determination. Section 294 (2) of *the 1998 Act* (which is in the same terms as it was prior to the 2020 amendments) requires that when a Certificate of Determination is issued by the Commission, a "brief statement" setting out the Commission's reasons must be attached…

Wood DP noted that in *Roncevich v Repatriation Commission*, Kirby J said that the Courts should "*avoid an overly pernickety examination of the reasons*" and that "*[t]he focus of attention is on the substance of the decision and whether it has addressed the 'real issue' presented by the contest between the parties."* The real issue was whether the appellant's defence was made out and in that context, and addressing the conflict between the medical evidence, the Senior Arbitrator gave adequate reasons for preferring the worker's medical evidence to that of the appellant regarding the cause of the injury. It was incumbent upon the Senior Arbitrator to determine the weight to be afforded to, and the acceptance or rejection of, medical opinions about causation, before she concluded what was, or was not causative of the injury. Whether events were causative of the injury is a matter for medical opinion. Whether they fall within the parameters of s 11A (1) is a legal question. She stated:

189. The Senior Arbitrator's conclusions about the medical evidence as to causation are findings of fact. It is well settled that the acceptance or rejection of evidence, the preference of some evidence over the other, and the weight to be afforded to particular evidence is generally a matter that falls within the province of the primary decision maker, and is a finding of fact. Findings of fact will not normally be disturbed on appeal if they have rational support in the evidence. The Senior Arbitrator's reasons provided a rational, evidence based platform on which to reject the opinion of Dr Martin. The Senior Arbitrator's ultimate conclusion was that, in circumstances whereby she did not accept the opinion of Dr Martin, there was no satisfactory evidence supporting the appellant's assertion that the respondent's psychological injury resulted from reasonable action taken by or on behalf of the appellant and thus, the appellant's defence to the claim failed.

However, Wood DP upheld ground (2) and accepted the appellant's schedule of correct entitlements. She held that the worker was entitled to weekly payments under s 37 *WCA* based upon that schedule.

PIC – Member Decisions

Issue estoppel; Consent Orders in prior proceedings in 2019 regarding award for the respondent for costs of lower back surgery; worker later claimed compensation under s66 WCA for the lower back injury after surgery; respondent argued that the Consent Orders estopped the worker from making that claim; Held- Worker not estopped from making the claim

Roddenby v Bunnings Group Limited [2021] NSWPIC 213 – Member Young – 25/06/2021

The worker alleged that she injured her lower back at work on 22/08/2017 and/or that this aggravated, exacerbated, accelerated or caused a deterioration in an underlying disease in her lumbar spine. However, the respondent disputed the injury and it also relied upon an alleged estoppel created by the entry of an award for the respondent made in respect of the worker's previous claim in 2018 for the costs of surgery.

Member Young noted that the principal issue for determination was the extent to which the Consent Orders made on 22/01/2019 created an issue estoppel that prevented the worker from pursuing the claim under s 66 *WCA*. He stated, relevantly:

Issue Estoppel

23. In *Tomlinson* the High Court outlined the three forms of estoppel, namely "*cause of action*" estoppel, issue estoppel and "*Anshun*" estoppel. The decision of four judges included the following observations (omitting footnotes): -

> Estoppel in that form (issue estoppel) operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a 'judicial determination directly involving an issue of fact or of law disposes once (sic-and) for all of the issue, so that it cannot afterwards be raised between the same parties…'

24. Nettle J in a separate judgment in *Tomlinson* came to the same result in that the appellant was not estopped. His Honour commented (omitting footnotes): -

> **The elements of issue estoppel**
>
> 1. In *Kuligowski v Metrobus*, this Court adopted Lord Guest's formulation of the elements of issue estoppel in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*. That was as follows:
>
> > (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

25. It would seem clear in the present matter that the second two elements are satisfied. The parties are the same. The order brings finality in terms of the costs associated with surgery conducted by Dr Edger on 6 June 2018. But it is necessary to examine whether "*the same question has been decided*". …

27. It is to be observed that the satisfaction of section 60 in terms of the issues includes not only a question as to whether the treatment is "*as a result of an injury*" but also whether the treatment is "*reasonably necessary*", constitutes medical/related/hospital treatment, had received the prior approval of the insurer, or was given with the treatment provided in accordance with Workers Compensation Guidelines. Failure to satisfy any one of the inclusionary factors or failing to comply with the exclusionary factors could mean that section 60 was not satisfied by the applicant so that the appropriate award is in favour of the respondent.

28. In its submissions the respondent contends:

> In the present case, the respondent accepts that the 2019 Consent Order does not prevent the applicant from bringing a claim for lump sum permanent impairment compensation. That is so because the Award in favour of the respondent with respect to the cost of surgery did not determine the issue of injury in the respondent's favour. Rather, what was necessarily determined conclusively in the respondent's favour was that the surgery was not reasonably necessary as a result of the alleged injury. It is implicit within that finding that there is no causal relationship between the alleged injury and the surgery and its effects. It therefore follows that the applicant is not entitled to be compensated for the effects of the surgery by way of the assessment of lump sum permanent compensation. The estoppel operates to limit the applicant's entitlement to WPI on that basis.

29. The first problem for the respondent with this submission is that the Consent Order in question makes no reference to the reason why the award for the respondent was made. As mentioned above, the issues for consideration of entitlement to payments under section 60 include inclusionary provisions as well as exclusionary provisions. Which particular provision or provisions were relevant in the resolution of that issue are unknown. For that reason, the particular Consent Order is support only for the proposition that the respondent does not pay the costs of the surgery. Contrary to the respondent's submission, there was no determination in the respondent's favour that the surgery was not reasonably necessary as a result of the alleged injury.

30. The second matter to discuss in terms of the respective issues is a consideration of the elements of section 66 of the 1987 Act. Section 66 includes the following terms:

> 66 (1) A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the workers employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act

31. It will be observed that the issues relating to section 66 include injury, permanent impairment, causal nexus between permanent impairment and injury and quantum in percentage terms. A common element in both sections 60 and 66 is that the treatment and permanent impairment must be "*as a result of an injury*" (treatment) and "*an injury that results in a degree of permanent impairment*" (impairment) respectively. But the Consent Order is entirely silent on this issue ("*as a result of an injury*") so that even if there is a common issue existing between sections 60 and 66, it has not been determined by the Consent Order.

32. In *Etherton* his Honour President Judge Phillips considered an appeal from a decision of an Arbitrator who had held that an earlier Consent Order estopped the applicant from pursuing his claim for permanent impairment compensation. The order in question included:

> Otherwise and thereafter there is an award for the respondent for section 60 expenses, including an award for the respondent for the claim for the cost of a right total knee replacement on the grounds that the right total knee replacement is not reasonably necessary as a result of the right knee injury on 15 April 2015.

Notwithstanding the specificity of this consent order in terms of its explanation of the grounds that the award for the respondent was made, his Honour approached the principles in accordance with an earlier decision of Roche DP in *Bouchmouni*. It was determined that it was necessary to examine exactly what was "*necessarily decided*" by the earlier Consent Orders. President Phillips noted that Mr Etherton's frank injury which allegedly occurred on 15 April 2015 was not referenced in the Consent Orders and therefore could not be the subject of an award in favour of the respondent which was referred to in Consent Order 3 relating to the nature and conditions of Mr Etherton's employment.

33. In *Etherton* his Honour noted that the Consent Orders did not determine one way or the other whether Mr Etherton on 15 April 2015 suffered a frank injury to his right knee and therefore the Arbitrator was in error to find an estoppel.

34. Consent Order 1 in the present matter deals only with the cost of medical and associated treatment in terms of the applicant surgery. There is no mention of the reason for this award and no concession by the applicant in terms of his rights to lump sum compensation pursuant to section 66 of *the 1987 Act*. I accept that the applicant could not have made any concession in respect of lump sum compensation in circumstances where the applicant's right and entitlement had not yet been medically considered. In the result, I am comfortably satisfied that the applicant is not estopped from pursuing a section 66 claim and in particular nothing in the earlier Consent Orders affects referral of the annexures to the Application and Reply to a Medical Assessor for determination.

Accordingly, Member Young found that the worker was not estopped by the Consent Orders from making a claim under s 66 *WCA and* asserting that the Medical Assessor should determine the percentage of whole person impairment, if any, resulting from injury to his lower back (deemed date: 22/08/2017) without excluding the effects of the 2018 surgery.