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. Wahhab v Insurance Australia Ltd [2021] NSWSC 521
2. Sarheed v C1 Formwork Group Pty Limited [2021] NSWPICPD 7
3. Negi v Nass Consulting Pty Ltd [2021] NSWPICPD 8
4. Negi v Nass Consulting Pty Ltd (No 2) [2021] NSWPICPD 9
5. JA & MA Costa Pty Ltd v Makouk [2021] NSWPICPD 11

Supreme Court of New South Wales – Judicial Review Decisions

Wahhab v Insurance Australia Ltd [2021] NSWSC 521 – Basten J – 12/05/2021

On 26/03/2016, the plaintiff was injured in a MVA. He claimed damages for personal injury, but due to his inaction, in December 2018 the claim was deemed to have been withdrawn under s 85B (3) of the *Motor Accidents Compensation Act 1999* ("*the* Act"). The claim was not reinstated and the principal claims assessor declined to refer it for assessment.

The plaintiff applied for judicial review of that decision on two grounds, namely: (1) *The Act* contained no prohibition on the lodgement of a second claim; and (2) The principal claims assessor was obliged to refer the claim for general assessment under Pt 4.4, Div 2 of *the Act*.

Basten J determined the summons and dismissed it for reasons that are summarised below.

His Honour noted that Pt 4.4 deals with claims assessment and resolution. Section 90 of *the Act* allows the claimant to refer a claim for assessment, while s 93 confers powers on the principal claims assessor to assign claims to a claims assessor. Section 94 provides for the assessment of claims that are "*referred*" to the assessor. His Honour stated:

> 18. The effect of this statutory scheme is that a highly prescriptive process must be followed by a person seeking to make a claim for damages resulting from a motor vehicle accident. Assuming the process and the relevant timelines are followed, the only step to be taken by the Authority prior to assessment is the identification by the principal claims assessor of the particular claims assessor who is to undertake the assessment. The claim is not made to the Authority, nor in any relevant sense "*lodged*" with the Authority. The claim is made to the insurer. Accordingly, the statements by the solicitor for the plaintiff that she had "*re-lodged the plaintiff's personal injury claim form*" found no reflection in the statutory scheme. The question to be asked is whether a claimant can make a claim more than once in respect of the same matter.
>
> 19. As senior counsel for the plaintiff submitted, there is nothing in the Act which expressly precludes a claim being made more than once. However, the statutory scheme suggests two responses to this assertion. First, if a claim has been properly made and has proceeded through various steps prescribed by the Act and is taken to have been withdrawn, that claim can no longer be referred for assessment. There is only one claim and once disposed of, there is no power to make the same claim again. The provisions of ss 72, 73 and 74 with respect to the making of a claim do not envisage repetition.
>
> 20. In this case, a new claim made in July 2019 would have been made more than three years after the accident. It is true that late claims are permitted: thus, s 73 (1) provides:

73 Late making of claims

(1) A claim may be made more than 6 months after the relevant date for the claim under section 72 (in this section called a late claim) if the claimant provides a full and satisfactory explanation for the delay in making the claim. The explanation is to be provided in the first instance to the insurer.

Apart from the fact that lodging a notice of claim with the Authority is not the making of a claim, the present matter does not fall within s 73 (1) because the claim was made within six months of the accident. It was not a late claim; it did not have to go through the process of justification which may allow a late claim to proceed if the insurer does not take objection, or if the claimant provides a "*full and satisfactory explanation for the delay in making the claim*": s 73 (3) (b). There was no delay in making the claim in the present case; the delay lay in the failure to comply with later procedures under the Act.

21. There is no provision permitting one claim to be made twice (or more times). Sending a copy of a claim form to the insurer for a second (or third) time is not the making of the claim. In a sense the plaintiff conceded that: his request for an assessment assumed that all relevant particulars had been supplied. Such a document had in fact been supplied to the insurer, but only after the deemed withdrawal. The plaintiff's case thus required that all prior non-compliance with the Act be disregarded. To imply the availability of such a course would be to subvert the scheme of the legislation and cannot be accepted.

22. The plaintiff's second proposition relied upon the terminology by which the process terminated in the present case. As a step in the process, the insurer was entitled to seek particulars of the claim, which it did. The responsibilities of the claimant were identified in the Act as follows: …

23. The solicitor for the plaintiff failed to comply with those obligations. (It is possible to state the matter in that way because when an explanation was given in support of the reinstatement application, there was no suggestion that the claimant himself was at fault.) A failure to provide particulars results in consequences prescribed as follows: …

24. It is not in dispute that the insurer took the appropriate steps under s 85B (1), without drawing a response from the plaintiff. Accordingly, pursuant to s 85B (3), the plaintiff was "*taken to have withdrawn the claim*." An application for reinstatement was made but rejected. The claim was not reinstated.

25. The plaintiff submitted that *"[d]eeming a claim withdrawn is a far cry from dismissing the claim, or even saying that the claim is withdrawn*." The plaintiff further submitted that the Act did not "*specify the consequence of a refusal to reinstate the claim*". He sought to draw a distinction between this language and that used with respect to the next step, namely an assessment of damages. Where an assessment is made, the claims assessor must issue "*a certificate as to the assessment*": s 94 (4). Section 95 then provides that an assessment of liability is not binding on any party to the assessment, but that an assessment of damages is binding on the insurer if the claimant accepts the amount of damages "*in settlement of the claim*": s 95. The concept of settlement, it was submitted, was clear: it involved finalisation of a claim.

26. If the claim could not proceed to assessment, the plaintiff was precluded from pursuing the claim in court, as s 108 would preclude such a step. Clear language is necessary to effectively deprive the plaintiff of his legal right to pursue litigation. The language of deemed withdrawal, it was submitted, involved no such element of finality, the Act not stating that the claim was dismissed, so as to determine any right to damages which the claimant might have had. All that was withdrawn, the submission proceeded, was a procedural step, whereby a complainant "*signifies an intention to claim damages*" by making a claim.

27. It may be accepted that the language of deemed withdrawal differs from that of determination or dismissal. However, the difference is readily explicable on two bases; first, no judicial process has been undertaken and, secondly, there has not been any determination of the merits of the claim. It does not follow that a withdrawn claim somehow remains on foot. The right to take and maintain judicial proceedings is usually constrained by time limits, non-compliance with which can result in the right being lost at an interlocutory stage without a hearing on the merits.

28. Counsel also submitted that there could be a voluntary withdrawal of a claim which would not constitute abandonment of any right to seek damages in the future. That may be so, though the consequence of a voluntary withdrawal will depend on the stage reached in the statutory scheme and whether any uncompleted steps could subsequently be taken in compliance with the Act. That is not what happened in this case, and the possibilities need not be pursued.

29. It is, of course, true that there are procedures whereby judicial proceedings may terminate without prejudice to an applicant's right to commence fresh proceedings where there has been no final determination. However, the proper construction of the Act turns not on analogies which might be drawn from proceedings in other statutory and institutional frameworks, but by an understanding of the operation of the Act itself. The meaning of s 85B is clear: if a claim is withdrawn, there is no extant claim. Therefore, there is no claim which can be referred by either party for assessment. Accordingly, there is no obligation, or power, on the part of a principal claims assessor to make arrangements for an assessment to be undertaken. The power of a party to refer a claim for assessment is conditional upon there being an extant claim which is subject to the requirements of Ch 4. A claim which has been withdrawn is not such a claim. Accordingly, there was no claim for referral under s 90. The decision of the principal claims assessor did no more than recognise this fact.

His Honour stated that the existence of a claim may be characterised as a jurisdictional fact in the sense that the fact does not ultimately depend upon an opinion formed by the Authority or the principal claims assessor, but on the court's determination. He held that it was not clear that the function being exercised by the principal claims assessor dismissing an application for a general assessment fell under any of the separate limbs of s 96 (1). This means that the refusal to arrange for an assessment under s 93 is not the subject of any dispute resolution mechanism under the Act. The validity of a refusal to make such arrangements can only be resolved by the Supreme Court. Where the reason for refusal was that there was no extant claim under the act capable of referral by the claimant, the existence of such a "*claim*" must be a jurisdictional fact to be determined by the Court.

His Honour found that since July 2019 there has been no extant claim under the Act which could be referred by the plaintiff for assessment and the failure by the principal claims assessor to make arrangements for such an assessment was correct. If that approach is wrong, and the matter was indeed one for resolution to the satisfaction of the principal claims assessor, no legal error has been identified.

PIC - Presidential Decisions

Section 352 (6) WIMA – Leave to adduce fresh evidence refused

Sarheed v C1 Formwork Group Pty Limited [2021] NSWPICPD 7 – President Judge Phillips – 27/04/2021

On 17/01/2020, the appellant was injured at work. The sole issue in dispute related to the calculation of PIAWE. He was, and continues to receive, compensation based on PISWE of $1,009.31, but asserted that the correct figure is $2,475. This was contested before Arbitrator McDonald and the determination involved an assessment of credit of the appellant and the respondent's principal. The Arbitrator held that the appellant failed to make out his case and made no order on the application.

On appeal, the appellant asserted that the Arbitrator erred as follows: (1) in law by failing to provide him with procedural fairness by not dealing with the submissions made on his behalf; (2) in fact and/or discretion by not accepting his evidence on the basis of credit; (3) in law by drawing an inference against him for failing to adduce evidence of Salam; and (4)in law in failing to provide adequate reasons for her findings.

The appellant sought leave under s 352 (6) *WIMA* to adduce fresh evidence on appeal. Section 352 (6) provides:

> Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the decision appealed against may not be given on an appeal to the Commission except with the leave of the Commission. The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case.

9. The application to adduce fresh evidence was made very late in these proceedings. The appellant's submissions in support of its appeal had been filed and responded to by the respondent. It was not until the appellant's reply submissions were submitted that the application to adduce fresh evidence was made. The respondent opposed the application.

His Honour President Phillips determined the appeal. He noted that the appellant sought to adduce 4 emails and argued that failure to grant leave to admit them into evidence would cause substantial injustice in the case. He also noted that the Court of Appeal examined this issue in *CHEP Australia Limited v Strickland* [2013] NSWCA 351 *(Strickland),* in which Barrett JA stated:

> Counsel for the appellant submitted that the Commission misdirected itself in law in construing the '*substantial injustice*' criterion in s 352 (6). It was submitted that that criterion may be satisfied in circumstances where it is not possible to say that availability of new evidence would have produced a different result; and that the criterion will be satisfied if the evidence is compelling and might have influenced the outcome even though it cannot be said that it would certainly have done so.
>
> That construction cannot be accepted. The part of s 352 (6) concerning '*substantial injustice*' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that 'would' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion. (emphasis added)

His Honour rejected the application to adduce fresh evidence for the following reasons:

> 34. For the reasons outlined below, I reject this submission and I reject the application for fresh evidence to be adduced in the appeal as sought. In making this decision, I make it clear that I accept the veracity of the email responses from Cbus. The Cbus officer concerned, ''Zak'', is clearly doing his best to answer the appellant's enquiries and there is no reason to doubt, nor is it suggested, the veracity of the information supplied. I have therefore proceeded to consider the emails on that basis.
>
> 35. A close consideration of the emails sought to be adduced into evidence by the appellant reveals that they do not have the necessary probative value that would cause a substantial injustice in the case if they were not admitted. In the last of the email chain, that is the email from Zak dated 3 December 2020, Cbus are still seeking further particulars. As set out above, Cbus said as follows:
>
> > To search for and access any member accounts we require the following information matching our records.

36. Six dot point requests then appear below. It is clear that Cbus, as at the date of this email, could not locate any "active accounts" for the appellant and was seeking further details or information in order to conclude its searches. The most that can be said about this email from Cbus is that no definitive answer had been provided by them because they still required further information to pursue their enquiries.

37. Further, the evidence is that at the time this application was made to Cbus, the appellant was incapacitated for work and in receipt of weekly compensation payments. The prospect must arise that if Cbus were searching for an active account, this may suggest that the enquiry might have been better directed to whether or not an inactive account existed in the appellant's name, but the Cbus material does not address this question.

38. The initial enquiry made by the appellant's solicitor was not restricted to active accounts, it was a broader enquiry than that, namely "*whether a CBUS account exists in my client's name*". The appellant's email of 2 December likewise was not constrained, but both responses from Cbus refer to their enquiries with regards to "*active accounts*". It may be that Cbus only maintains active accounts, but it is not possible to reach a concluded view about this issue given the state of the Cbus evidence.

39. In my view, the probative value of the evidence sought to be adduced is very low. The answers obtained from Cbus are qualified and suggest that further enquiries are necessary. The responses from Cbus appear to have been limited to active accounts only, when it is clear that the request from both the appellant and his solicitor were not restricted in terms to active accounts only.

His Honour found that fresh evidence was of low probative value, was not complete in many respects and was certainly not definitive or supportive of the argument made on its behalf. Even if this was admitted, the weight attributed to it would be either low or neutral and it could not be said that a different result would emerge.

His Honour rejected ground (1) and he stated:

167. In the circumstances, and particularly having regard to the manner in which this assertion was put to the Arbitrator, it cannot be said that the description of the appellant being a carpenter in the payslip undermined Mr Ibrahim's evidence as to the job title the appellant was engaged under. This assertion, as I have said above, is based upon the unsubstantiated assertion regarding the relationship of the roles of a carpenter and a formworker. In any event, the formation of the oral contract of employment took place at a point before the issuing of the payslip and it is clear that the Arbitrator has considered the evidence of both the appellant and Mr Ibrahim in reaching the decision that she did regarding the job title. Clearly from the transcript exchange that I have outlined above, the Arbitrator was not convinced of the bare assertion of the relationship between a carpenter's role and that of a formworker. In those circumstances, and as I have related above in the extract from DNA17, if one considers the Arbitrator's decision as a whole, it is clear that she has considered the relevant evidence regarding the appellant's job title and found accordingly.

His Honour rejected ground (2) and he stated, relevantly:

177. In my view, the manner in which the appellant has chosen to construe the Arbitrator's findings is not available. No positive finding that the appellant had committed Centrelink fraud was made. No finding that the appellant was intending to commit Centrelink fraud was made. Rather, the Arbitrator was construing the appellant's bank statement noting the Centrelink receipts and the fact that this was not explained by the appellant. At its highest, the Arbitrator stated that a request to be paid in cash could indicate that Mr Sarheed did not intend to disclose his earnings to Centrelink. In this section of the decision, the Arbitrator is opining about the content of the appellant's bank statement and his failure to offer any explanation of its contents. This was all done for the purpose of weighing the appellant's credit as opposed to that of Mr Ibrahim.

178. In terms of a finding of fact, I would not place this finding as described in [58] as high as being a positive finding of fact. Rather, it sits within the section of the Arbitrator's decision where the credit of the two respective witnesses is being weighed. I should say that in arriving at this decision, I have not read the Arbitrator as making any finding that the appellant had committed criminal conduct or had any intention to do so. I do not accept that the approach adopted by the Arbitrator is in contravention of the remarks that I have set out from *Devries* at [170] above.

179. In terms of an error of discretion, for this allegation to be made good, the Arbitrator must have involved herself in a *House v The King* type error. I do not see the basis for a *House v The King* type error in the Arbitrator's reasoning. This was a case about the appropriate level of the appellant's earnings which would then produce the PIAWE figure for his weekly compensation payments. This determination rested upon a review of the competing credit of the appellant vis-à-vis Mr Ibrahim. A review of the appellant's bank statements was a proper and appropriate activity to be undertaken by the Arbitrator and given the contest between the parties, which was well known to the appellant, it was open to him to attempt to explain these matters. He did not and in the circumstances this, along with other reasons, caused the Arbitrator to have concerns about the appellant's credit, hence her preference for Mr Ibrahim's evidence. This was an approach which was available to the Arbitrator on the evidence and no error in approach has been disclosed. This appeal ground therefore fails.

His Honour rejected ground (3). He stated that there are a number of aspects to the rule in *Jones v Dunkel*.

191. Firstly, the failure by a party to call a particular witness must be unexplained. In this case, it was the appellant who introduced Salam into evidence in his statement of 24 June 2020. No explanation for the failure to call Salam or to produce a statement from Salam was given by the appellant before the Arbitrator.

192. Secondly, the rule in *Jones v Dunkel* does not entitle the decision maker to draw an inference that the untendered evidence would have in fact been damaging to the party not tendering it. In this case, at [61] of the Reasons, the Arbitrator drew the appropriate inference.

193. Thirdly, the *Jones v Dunkel* rule applies where a party is required to either explain a matter or contradict something. In this matter, various issues regarding the terms of the appellant's engagement by the respondent were hotly in contest. The evidence that the appellant attributed to Salam supports the very matters that the Arbitrator was called upon to adjudicate.

194. Fourthly, the position of a non-party witness who has not been called requires close consideration. Salam is of course a non-party witness. The appellant asserts, consistent with the decision of Glass JA in *Parker*, that had the Arbitrator considered the position of Salam as a non-party witness, the Arbitrator would not have reached the conclusion that the appellant would have been expected to call Salam in aid of his case.

195. The extract from *Parker* referred to in the appellant's submissions is the leading decision on this aspect of the rule in *Jones v Dunkel*. I set the quote out in full:

> The first condition is also described as existing where it would be natural for one party to produce the witness: Wigmore, par. 286, or the witness would be expected to be available to one party rather than the other: *O'Donnell v. Reichard*, or where the circumstances excuse one party from calling the witness, but require the other party to call him: ibid., or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him: ibid., *Regina v. Burdett*, or where the witness' knowledge may be regarded as the knowledge of one party rather than the other: *Earle v. Castlemaine District Community Hospital*, or where his absence should be regarded as adverse to the case of one party rather than the other: ibid. It has been

observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary: ibid. If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so: ibid. Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman: *Cafe v. Australian Portland Cement Pty. Ltd*.; his safety officer: *Earle v. Castlemaine District Community Hospital*; his accountant: *Steele v. Mirror Newspapers Ltd*.; his treating doctor: *O'Donnell v. Reichard*.

196. The question that Glass JA is considering here is whether it would be natural for one party rather than the other to produce this witness. The question in this case is, was it natural for the appellant to have led evidence from Salam rather than the respondent. I would pause in addressing this question to note that neither party addressed this aspect of the *Jones v Dunkel* rule before the Arbitrator. On one view, given that the power on appeal rests upon the identification of error, given that this aspect of the rule in *Jones v Dunkel* was not contested, it might be said that by definition the Arbitrator was not in error. However I think the better view is that the rule in *Jones v Dunkel* comprises a number of aspects and the appellant is asserting in this appeal that the contents of the rule, not just aspects of it, were not satisfied.

197. With regard to the evidence of Salam and the appellant's assertion that he was not a witness the appellant would have been expected to call, I do not agree with this submission. In light of the contents of the appellant's statement of 24 June 2020 which I have outlined above, clearly the appellant had a close personal relationship with Salam. Indeed Salam knew that the appellant was looking for work and it was Salam who initiated the contact with the appellant which ultimately led to him being retained by the respondent. As I have described above, Salam's evidence though goes in part to support the appellant's case on at least two of the principal matters that were in issue, namely the appellant's asserted retainer as a formworker, and the fact that they were being paid high hourly rates.

198. I accept that Salam was also an employee of the respondent. There is however no evidence as to his position in the respondent's organisation and in particular whether he had any managerial or supervisory role. However the manner in which Salam's evidence was introduced by the appellant does in my opinion inexorably lead to the conclusion that given the contents of the appellant's statement, it would only be natural for the appellant to have led evidence from Salam.

199. In the circumstances, the inference drawn by the Arbitrator was proper and appropriate. As is often the case when a *Jones v Dunkel* inference is sought or opposed, submissions are made in very much a short hand manner. Not every aspect of the rule was necessarily addressed by the parties. When I consider the Commission's obligation to provide adequate reasons, which is discussed at greater length at Ground D below, I find no error in approach with how the Arbitrator arrived at the *Jones v Dunkel* inference she ultimately drew. The consideration of the evidence that was before the Arbitrator shows that the salient aspects of the rule were satisfied and that the inference that was ultimately drawn was available to the Arbitrator on the evidence, in particular having regard to the manner in which this issue was argued before her.

His Honour rejected ground (4). He stated that the obligation to provide reasons has been described in a number of cases. In *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (*Soulemezis*), McHugh JA (as his Honour then was) stated:

> If an obligation to give reasons for a decision exists its discharge does not require lengthy or elaborate reasons: *Ex parte Powter; Re Powter* (1945) 46 SR (NSW) 1 at 5: 63 WN 34 at 36. But it is necessary that the essential ground or grounds upon which the decision rests should be articulated.

Further, in *Singh v FTW Products Pty Ltd* [2007] NSWWCCPD 230, Snell ADP (as the Deputy President then was) stated:

> 62. To succeed in having the decision set aside on this ground Mr Singh must demonstrate not only that the reasons are inadequate, but that their inadequacy discloses that the Arbitrator has failed to exercise his statutory duty to fairly and lawfully determine the application (*YG & GG v Minister for Community Services* [2002] NSWCA 247; *Absolon v NSW TAFE* [1999] NSWCA 311; *ADCO Constructions Pty Ltd v Ferguson* [2003] NSWWCCPD 21).
>
> 63. The standard by which the adequacy of reasons must be determined is relative to the nature of the decision itself and the decision-maker (*Mayne Health Group t/as Nepean Private Hospital v Sandford* [2002] NSWWCCPD 6). An Arbitrator's reasons should be read as a whole and it is not for a Presidential Member on review to comb through the Arbitrator's findings and reasons in search of error (*Beale v GIO (NSW)* (1997) 48 NSWLR 430 at 444; *Minister for Immigration and Multicultural Affairs v Wu Shu Liang* [1996] HCA 6; (1996) 185 CLR 259). It is not necessary for an Arbitrator to refer to every piece of evidence (*Yates Property Corporation Pty Limited (in Liq) v Darling Harbour Authority* (1991) 24 NSWLR 156; *Ainger v Coffs Harbour City Council* [2005] NSWCA 424).

His Honour concluded that there was no error in the Arbitrator's approach.

Accordingly, his Honour confirmed the COD.

Application for extension of time to appeal – admission of additional evidence on appeal – whether exceptional circumstances exist and whether failure to admit new evidence would cause substantial injustice – consideration of objective evidence when witness evidence is unreliable

Negi v Nass Consulting Pty Ltd [2021] NSWPICPD 8 – Deputy President Wood – 27/04/2021

The appellant was the sole director and Senior IT Consultant of the respondent, which would contract with other organisations for her to perform IT consultancy work. In 2014, the respondent entered into such an arrangement with the Commonwealth Bank of Australia, under which the appellant was required to perform her duties on a full-time basis.

On 30/01/2015, the appellant was conducting a conference at CBA's premises in Darling Harbour and, during a bathroom break, she slipped and fell on wet tiles and was injured. She reported the injury but did not claim compensation under 2016. The appellant asserted that over the weekend following the injury, she experienced significant pain, sought medical treatment, and then arranged to work full-time from home and did so for some months. She returned to work despite complaining of ongoing symptoms, until the contract between the respondent and CBA finished in October 2015, but she did not work thereafter.

The claim was initially accepted, but on 23/08/2016, the respondent issued a dispute notice, on grounds that: the appellant's injuries were resolved within three months of the incident; she was not entitlement to weekly payments, s 60 expenses and lump sum compensation under s 66 *WCA.*

The respondent issued further dispute notices dated 19/09/2016 and 8/06/2017, which disputed that the appellant:(a) injured her cervical spine, right shoulder, left shoulder, and lumbar spine in the incident; (b) suffered any ongoing effects from any injury suffered in the incident, and (c) was incapacitated as a result of any injury, including any psychological condition arising as a result of any physical injury. It also disputed that the appellant suffered any whole person impairment as a result of the injury and that her employment was a substantial contributing factor to any injuries.

On 6/09/2017, the appellant commenced WCC proceedings in which she alleged injuries to both shoulders, her right elbow, right arm, neck, back and right leg and a consequential psychological injury. She claimed weekly payments, treatment expenses and compensation under s 66 *WCA* for 16% WPI

On 2/02/2018 (amended on 15/02/2018), ***Arbitrator Sweeney*** issued a COD, which determined that the appellant injured her neck and right shoulder and suffered an aggravation of a pre-injury psychological condition, but he found that she did not injure her back. He awarded the appellant weekly payments from 2/10/2015 to 24/05/2018 and s 60 expenses until that date. He remitted the s 66 claim for referral to a Medical Assessor.

A Medical Assessor subsequently assessed 13% WPI, which was inconsistent with the Arbitrator's finding that the appellant had recovered from the effects of the injury. The appellant applied to the Arbitrator for reconsideration of his decision and the Arbitrator issued a decision regarding that application on 8/09/2020.

On 5/10/2020, the appellant appealed against the Arbitrator's decision and on 10/12/2020, she lodged an application to appeal against the Arbitrator's decision dated 2/02/2018.

Deputy President Wood determined the appeal against the 2018 decision on the papers. She found, based upon the decision of Acting Deputy President Snell (as he then was) in *Maricic v Medina Serviced Apartments* [2007] NSWWCCPD 196, that the decision was final and binding between the parties and accordingly, leave to appeal the decision was not required under s 352 (3A) *WIMA.*

The appellant sought to rely upon fresh evidence in the appeal, which Wood DP described as follows: (a) an undated report of Dr Ivy Wong, general practitioner and acupuncturist, confirming that she had treated the appellant from 6/06/2017 in relation to pain in the neck, right shoulder, back, left foot and ankle and the front of the ribs, all of which resulted from the injury on 30/01/2015; and (b) a report of Dr Andrew Singer, psychiatrist, dated 21/12/2017, in which Dr Singer reported that the appellant: (i) complained of "*right-sided body pain, neck pain, chest pain, abdominal pain, right leg pain, right arm pain with comorbid mood disturbance*," and (ii) described a number of unhelpful beliefs about the injury, including that she had crushed her right side, felt that she would not get better, and there was something wrong which has not been diagnosed; (c) Mr Broomfield dated 5/06/2018, in which Mr Broomfield reported that the appellant complained of more wide-spread symptoms and restrictions in the appellant's neck, right shoulder and arm, right ribs and thoracic area, lumbar spine and right hip and was displaying many pain avoiding behaviours; and (d) a bundle of further certificates of capacity that post-dated the Arbitrator's decision and certified that the appellant had no capacity for work.

Wood DP declined to admit the fresh evidence for reasons that are summarised below.

Wood DP referred to the requirements of s 352 (6) *WIMA* and noted that the reports of Dr Wong and Dr Singer pre-dated the Arbitrator's decision and were therefore either available to the appellant before the Arbitration or could, with reasonable diligence, have been obtained by her or by her legal representatives before the proceedings. However, the other documents post-dated the arbitration hearing. She held that the appellant needed to prove that a failure to grant leave to admit these documents would result in a substantial injustice to her.

Wood DP cited the decision of Barrett JA in *CHEP Australia Ltd v Strickland*, regarding the test to be applied in considering whether a failure to admit documents would cause a substantial injustice. She stated that, put simply, the second limb of s 352 (6) requires an assessment of whether the Arbitrator would have come to a different conclusion had that evidence been before him. Therefore, it was necessary to consider whether the fresh evidence would have produced a different result if it had been available to the Arbitrator.

Wood DP noted that the Arbitrator reviewed the contemporaneous entries in the clinical notes recorded by various doctors as well as the contents of a report of Dr Benedict dated 3/05/2016 and the numerous reports that post-dated May 2016, in which the appellant complained of more florid and widespread symptoms that were not referred to in the earlier evidence. He found that the history provided by the appellant to the medical providers and qualified doctors after 2015 was not consistent with the earlier entries and rejected the opinions accordingly.

Wood DP found that the histories that Dr Wong and Dr Singer based their opinions upon are inconsistent with the earlier entries and if that evidence was available to the Arbitrator, it would be most unlikely that a different conclusion would have been reached. She also found that the report of Mr Broomfield dated 5/06/2018 does not assist the appellant and when it is read with his earlier reports, his evidence tends to support the Arbitrator's conclusion that the appellant did not injure her back or left shoulder in the incident on 30/01/2015. The report would not change the outcome of the case.

Wood DP also found that the Arbitrator had before him a number of certificates of capacity certifying the appellant as having no capacity for work after 24/05/2017, but he did not accept that the appellant had an incapacity for work because of her presentation in the surveillance material, the opinion of Dr Wallace, and because the only body parts referrable to the assessment of the appellant's capacity were the right shoulder and neck. Both the bundle of certificates of capacity beyond 24 May 2017 that were before the Arbitrator and those now sought to be tendered included non-compensable components of the appellant's function. On the basis that the Arbitrator rejected the evidence of the certificates before him, the further certificates of capacity would not change the outcome of this case.

Wood DP noted that the appeal was lodged almost 3 years after the Arbitrator's decision and in considering whether exceptional circumstances existed, it was necessary to consider the merits of the proposed appeal. She stated that while the appellant does not clearly and separately identify her grounds of appeal, it is apparent that she appellant complains that the Arbitrator erred by: (1) rejecting her allegation that she injured her back and left shoulder in the fall; (2) finding that she was no longer incapacitated for work; (3) failing to correctly calculate her loss of income; (4) failing to take into account her psychological injury/condition when assessing her capacity to earn; (5) failing to provide the opportunity to her and to her legal team to make submissions about her capacity for work; (6) accepting the surveillance evidence; (7) accepting the opinion of Dr Wallace; (8) lacking fairness and independence in his decision-making process, and (9) incorrectly assessing her lump sum entitlements. However, she noted that ground (5) is not relevant to this appeal.

Wood DP rejected ground (1) and held that the Arbitrator gave logical and cogent reasons as to why he preferred the evidence before him to that of the appellant. Even if she would have reached a different conclusion to that of the Arbitrator after a consideration of the evidence, and she would not have, that is insufficient to overturn the decision.

Wood DP rejected ground (2). She held that it was incumbent upon the Arbitrator to assess the appellant's capacity resulting from the proven injuries to the neck, right shoulder and the psychological condition. He did so on the basis that, after viewing the surveillance evidence, he was not satisfied that the appellant's complaints to the medical practitioners and her own evidence was reliable. This was a finding of fact and the Arbitrator did not overlook material facts or give undue or too little weight to the evidence before him.

Wood DP rejected grounds (3) and (4) as being without merit.

Wood DP rejected ground (5). She held that the appellant and her legal representatives had ample opportunity to address the surveillance material. The Arbitrator not only relied upon his own observations of the DVD evidence, but also considered Dr Wallace's opinion that the appellant's observed activities were completely at odds with her presentation to him upon examination. She found that the appellant's complaints are largely based on assertions that are not founded in the evidence and she had not provided any cogent argument as to the Arbitrator erred in accepting the surveillance evidence.

Wood DP rejected ground (6) and found that the Arbitrator's finding was rational, based on a proper evaluation of the evidence and open to him for the reasons stated.

Wood DP also rejected grounds (7) and (8) as lacking merit.

Accordingly, Wood DP refused to grant the appellant leave to appeal and she refused the application for an extension of time to appeal.

Admission of additional evidence on appeal – whether exceptional circumstances exist and whether failure to admit new evidence would cause substantial injustice

<u>Negi v Nass Consulting Pty Ltd (No 2)</u> [2021] NSWPICPD 9 – Deputy President Wood – 27/04/2021

This is an appeal against a decision dated 8/09/2020 (amended on 20/09/2020 to correct a date) of ***Arbitrator Sweeney*** in respect of an application for reconsideration dated 16/06/2020.

In that application, the appellant essentially argued that the Arbitrator's finding that she had recovered from the effects of the injury was inconsistent with the conclusive finding by the medical assessor that she had a permanent impairment. The Arbitrator agreed that this was a proper ground for a reconsideration of his earlier decision and he reconsidered the matter. In a COD dated 8/09/2020 (which was amended to insert a corrected date on 29/09/2020), the Arbitrator declined to amend the closed period award for weekly payments, but awarded the appellant ongoing s 60 expenses *with respect to* the right shoulder and cervical spine.

Deputy President Wood determined the appeal on the papers and noted that of the 9 stated grounds of appeal, only 4 required determination with respect to this appeal. The appellant asserted that the Arbitrator erred by: (1) finding that she was no longer incapacitated for work; (2) failing to take into account her psychological injury/condition when assessing her capacity to earn; (3) failing to provide the opportunity to her and her legal team to make submissions about her capacity for work; and (4) lacking fairness and independence in his decision-making process.

The appellant sought to adduce fresh evidence in the appeal, namely a report from Dr Dowda dated 21/08/2017; a bundle of payslips; references in relation to her work performance; the contract between the respondent and CBA; emails to and from a third party in relation to the standard of the third party's toilet facilities; a letter from the appellant's legal representatives dated 15/09/2020 regarding her prospects of appeal; and unidentified comments about Dr Wallace's conduct in medical examinations of injured workers. She argued that this evidence is necessary to prove her honesty and integrity and to show that the surveillance videos were "*manipulated by the respondent*". The respondent opposed the admission of the fresh evidence.

Wood DP held that put simply, the second limb of s 352 (6) *WIMA* requires an assessment of whether the Arbitrator would have come to a different conclusion had that evidence been before him. In order to make that assessment, it is necessary to consider the additional evidence and determine whether, had it been available to the Arbitrator, it would have produced a different result.

Wood DP declined to admit Dr Dowda's report and she stated, relevantly:

> 20. The Arbitrator's decision appealed against is the reconsideration decision dated 8 September 2020, which I have summarised below. The Arbitrator was asked to reconsider his findings that the effects of the injury to the appellant's neck and right shoulder had ceased, thereby disentitling the appellant to ongoing weekly payments or treatment expenses. The Arbitrator was not asked to reconsider his earlier findings that the appellant's back was not injured as alleged, or his findings in relation to the unreliability of the appellant's evidence. The Arbitrator was also not asked to reconsider the calculation of the appellant's pre-injury average weekly earnings, which had been the subject of submissions by the parties in the earlier proceedings…
>
> 22. It is notable that Dr Dowda considered the appellant presented with what would be described as a significant psychiatric illness about which he was not qualified to comment. It is also notable that, on examination, the appellant "*manifested very limited movement of the right arm*" and "*when testing for muscle power however, there was give way weakness and virtually no detectable effort for giving maximum grip strength or pincer grip strength between thumb and index finger, thumb and little finger*." Dr Dowda commented that the appellant had an unusual gait in respect of the right leg when asked to walk on her heels or toes.

23. Dr Dowda further commented that the appellant was displaying significant maladaptive behaviours which may be linked to a psychiatric condition, about which he would defer to the opinion of an independent psychiatrist. He opined that the limitations on the appellant's effective use of her right arm exhibited pain avoidance behaviour and considered that the entrenched chronic pain, together with her perception of pain and disability, was significantly impacting her ability to work.

24. The appellant is required to show that the evidence of Dr Dowda would have been sufficient to persuade the Arbitrator, had it been before him, to arrive at a different conclusion. The difficulty with this evidence is that, as with the evidence rejected by the Arbitrator, it is:

(a) reliant upon the history provided to the doctor more than two years after the event;

(b) dependent upon the reliability of the appellant's complaints, and

(c) inconsistent with the appellant's activities recorded in the surveillance material, some of which was in relation to activities performed by the appellant within months of the examination, and none of which was provided to Dr Dowda for comment.

Wood DP also declined to admit the other fresh evidence and she stated (at [26]):

(a) the bundle of payslips, together with the contract entered into with CBA, which the appellant seeks to rely upon to show her pre-injury earnings, were in evidence before the Arbitrator. They formed the basis of, and were consistent with, the Arbitrator's findings as to the appellant's pre-injury average weekly earnings. The documents are not supportive of error on the part of the Arbitrator;

(b) the references in relation to the appellant's work performance are not relevant to the appellant's conduct after the injury or to the issues of incapacity arising from the injury or the appellant's need for treatment;

(c) the emails to and from a third party in relation to the standard of the third parties' toilet facilities are proof only that the appellant was aware of the danger of slippery floors. They do not constitute proof of the appellant's purported phobia of wet tiles and toilets, which requires support from a psychiatric opinion;

(d) the letter from the appellant's legal representative dated 15 September 2020 about her prospects of appeal support the appellant's difficulties in obtaining legal representation on the appeal, but are not relevant to an examination of whether the Arbitrator erred, and

(e) the unidentified comments about the conduct of Dr Raymond Wallace in medical examinations of injured workers are not verified by the identification of the authors or the source of the information and cannot be tested as to their veracity.

Wood DP rejected ground (1) and found that the Arbitrator did not overlook material facts or give undue or too little weight to the evidence before him. His reasons set out the relevant evidence fully, and adequately explained why he arrived at his conclusions. It is not sufficient that another decision-maker might come to a different view.

Wood DP rejected ground (2) and found that the Arbitrator clearly considered the appellant's psychological condition when assessing her capacity for work. Noting that the effect of the injuries on the appellant's psychological condition depended upon her lack of credibility, about which Arbitrator had already made adverse findings, he was not satisfied that the appellant was entitled to weekly payments.

Wood DP rejected ground (3) and found that the transcript of the hearing on 17/08/2020 discloses that the appellant was given the opportunity to make full submissions in relation to the issues for determination in the reconsideration application, despite the technical difficulties that presented. The Arbitrator also gave the appellant's counsel the opportunity to confer with the appellant and the appellant's counsel made short further submissions expressed by him to be in accordance with the appellant's instructions. It is apparent that the appellant had every opportunity to present

her case and in fact did so and her remaining arguments as to the Arbitrator's degree of understanding in relation to "*complex spinal injuries*", her lack of ability to afford legal representation and her inexperience with workers compensation claims are either not founded in evidence or irrelevant to the question of whether the Arbitrator erred by failing to give her the opportunity to make submissions.

Wood DP also rejected ground (4) and found that the appellant's criticisms, made only in the appeal application and not raised at any earlier stage, are not supported by evidence from any of the appellant's experienced legal representatives or by the measured tenor of the Arbitrator's decisions. On the contrary, the Arbitrator approached the appellant's case in a balanced and reasoned manner and gave the appellant every opportunity to present her case. As the respondent submits, the Arbitrator gave consideration to the appellant's application for reconsideration and the appellant was partly successful.

Accordingly, the COD dated 8/09/2020 (and amended on 29/09/2020) was confirmed.

Whether a "dispute" existed within the meaning of ss 289 & 289A WIMA - Procedural fairness; Chanaa v Zarour [2011] NSWCA 199, Re Minister for Immigration & Multicultural Affairs; Ex parte Lam [2003] HCA 6; 214 CLR 1, Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; 204 CLR 82 considered and applied

JA & MA Costa Pty Ltd v Makouk [2021] NSWPICPD 11 – Deputy President Wood – 6/05/2021

The worker alleged that on 27/02/2017, she was required to clean toilets and bathrooms that were very unclean and she began to feel unwell after working that day. Her condition deteriorated over the weekend and she was admitted to hospital in a critical condition. She was diagnosed with pseudomembranous colitis after testing positive to clostridium difficile. She had a long prior history of anxiety and depression on a background of a number of significant personal traumas and a work-related back injury some years earlier. Following this diagnosis, she began to excessively clean her hands and developed a fear of a recurrence of the condition. She claimed compensation alleging that the colitis condition was work-related and an aggravation of her pre-existing psychological condition, but the appellant disputed the claim.

Arbitrator Isaksen conducted an arbitration and identified the issues in dispute as: (1) whether the worker contracted the physical condition in the course of her employment; (2) whether the worker suffered a primary psychological injury; and (3) if the worker suffered a psychological injury, whether it was in the nature of a secondary psychological condition. On 26/10/2020, he issued a COD, which determined that the physical injury occurred in the course of employment and that the worker suffered a primary psychological injury in the nature of an obsessive/compulsive disorder. He found that the worker had no current work capacity from 28/02/2017 to 15/06/2017 and ordered that the determination of the weekly payments claim be deferred pending provision of a MAC or any appeal therefrom.

The appellant appealed against the determination regarding the alleged psychological injury and asserted that the Arbitrator erred in law by: (1) finding that the worker sustained an obsessive/compulsive disorder as a result of the work injury in circumstances where she had never made a claim for obsessive/compulsive disorder as a result of the work injury; and (2) not considering whether the worker's employment was the main contributing factor to the injury of obsessive/compulsive disorder.

Deputy President Wood determined the appeal.

Wood DP upheld ground (1). She accepted the appellant's argument that the Arbitrator erred because neither party submitted that the worker suffered an obsessive/compulsive disorder that was caused by her employment. The appellant submitted to the Arbitrator that this condition was constitutional and the worker argued that her OCD traits were aggravated by the work injury, but she did not indicate whether this was an injury simpliciter within the meaning of s 4 (a) *WCA* or a disease within the meaning of s 4 (b).

Wood DP stated, relevantly:

> 134. As observed by Campbell JA in *Chanaa*, the proceedings are required to be conducted in accordance with the principles of procedural fairness, that is, the Arbitrator's decision must be based upon the issues that were litigated in the course of the trial.
>
> 135. The High Court discussed the manner in which procedural fairness cases are approached by the courts in *Re Minister for Immigration & Multicultural Affairs; Ex parte Lam*, where Gleeson CJ said:
>
> > A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations. … Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.
>
> 136. As McHugh J said in *Re Refugee Review Tribunal; Ex parte Aala*:
>
> > One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.
>
> 137. In *Ucar v Nylex Industrial Products Pty Ltd*, Redlich JA observed:
>
> > Where the risk of an adverse finding being made does not necessarily inhere in the issues to be decided or where the facts or the inference which the judge contemplates drawing from the facts and which gives rise to such a risk is unknown to the party, the fundamental rule of fairness requires the decision-maker in some way to draw attention to the existence of that risk.

Wood DP held that the Arbitrator went beyond the submissions put to him by the worker that she suffered from an aggravation injury and determined that she sustained a psychological injury within the meaning of s 11A (3) *WCA* in the form of an obsessive/compulsive disorder. He expressly rejected the submission that the injury was an aggravation of a disease within the meaning of s 4 (b) (ii) *WCA.* It is not apparent from the transcript or the Arbitrator's reasons that he drew to the attention of the parties his intention to consider a matter that was not put to him by either party. The appellant, having not been warned of the risk of the adverse finding, ought to have been given the opportunity to make submissions on point and is not surprisingly aggrieved by the Arbitrator's decision. Therefore, the Arbitrator erred in reaching his conclusion, which is sufficient to set aside his determination.

Wood DP also upheld ground (2).

Accordingly, Wood DP revoked the finding that the worker suffered a primary obsessive/compulsive disorder and remitted the matter to a different Member for re-determination.