Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 31

Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Supreme Court Decisions – Judicial Review

Review of decision of a delegate of the Registrar refusing to allow an application to appeal against a MAC – Error of law not established

Ballas v Department of Education (State of NSW) [2019] NSWSC 234 – Wright J – 8 March 2019

Background

The plaintiff alleged that she suffered a significant psychological injury. On 24 October 2016, she made a claim for lump sum compensation and the Registrar referred the matter to an AMS (Dr Hong) for assessment of permanent psychological impairment with the date of injury being 24 October 2016 (deemed). He issued a MAC that assessed 8% WPI.

On 8 June 2018, the plaintiff lodged an application to appeal against the MAC under ss 327 (3) (c) and (d) WIMA. The first defendant opposed the appeal. However, on 17 July 2018, the Registrar's delegate decided that a ground of appeal under s 327 (3) WIMA had not been made out and that the appeal was not to proceed. On 22 August 2018, an arbitrator Registrar issued a COD based upon the MAC

Judicial review

On 14 September 2018, the plaintiff applied to the Supreme Court of NSW for judicial review of the decision by the Registrar's delegate, on grounds which ***Wright J*** described as follows:

(a) "***The Failure to consider the submission"*** – the plaintiff alleged that the delegate erred: (a) by failing to determine that at least one of the grounds of appeal in s 327 (3) WIMA had been made out; (b) by failing to consider whether the AMS had considered the correct criteria when assessing Social and Recreational Activities; (c) by failing to consider whether the activity of attending a club by herself to play poker machines was a matter that could properly be taken into account when assessing Social and Recreational Activities; and (d) by failing to properly consider the argument made in support of the appeal;

(b) ***"The Discretion as to category"*** – the plaintiff alleged that the delegate erred when considering what matters were relevant to each category was a matter for discretion rather than an application of the guides; and

(c) ***Consequential grounds*** - The plaintiff alleged that: (i) The statement of reasons and certificate issued by the Registrar contained both jurisdictional error and error of law on the face of the record; (ii) The COD dated 22 August 2018 "compounds the error" by recording a degree of impairment "based upon the erroneous assessment which was the subject of the appeal against the Medical Assessment Certificate dated 14 May 2018"; and (iii) The delegate erred: In failing to determine that a MAP should be constituted to provide an assessment of WPI in accordance with the guidelines as read with AMA5; and by failing to determine that she had made out a basis for appeal *"in that it is open to a Medical Appeal Panel to find that the Medical Assessment Certificate should be revoked and replaced with a certificate recording that, in accordance with the Guidelines as read with AMA5."*

(a) Failure to consider the submission

His Honour rejected this ground for reasons that included the following:

> 42. If a decision maker fails, in reaching the challenged decision, to address a substantial argument put to the decision maker, or misunderstands it, then there will have been effectively a failure to exercise the jurisdiction entrusted to the decision maker. This is both jurisdictional error and an error of law: *Mahenthirarasa v State Rail Authority of New South Wales* [2008] NSWCA 101 at [6], [58], [72] and [75].
>
> 43. The argument set out above was a substantial argument put to the Delegate. If she did not address or consider it, or misunderstood it, her decision would be liable to be set aside for jurisdictional error and error of law on the face of the record, as Ms Ballas contended…
>
> 51. The Delegate referred, at [14], to Ms Ballas's submission concerning the appropriate class under the heading "Social and Recreational Activities", after referring to the six scales or categories and mentioning specifically "social and recreational activities" at [13]. If the reasons are read fairly and as a whole, [14] does not indicate that from the start the Delegate treated the application in the present case as being only about classes and not about the distinctions between the different scales or categories, as Ms Ballas submitted.
>
> 52. Secondly, the Delegate's reliance on [62] of *Jenkins* (at [23] of her reasons) does not establish that she did not address or consider the argument put in Ms Ballas's submissions. It can be accepted that the citation of *Jenkins* in that paragraph of the Delegate's reasons was not strictly apposite. *Jenkins* at [62] concerned examples given in relation to classes within a particular category or functional area and not whether particular activities fell to be assessed within one or more categories or functional areas. Nonetheless, that decision does establish that the process of rating psychiatric impairment is not to be approached on an overly rigid reading of the relevant provisions of Ch. 11 of the Guidelines, including the relevant tables (see for example *Jenkins* at [57] - [65].) …
>
> 54. The Delegate was expressly addressing the very argument that Ms Ballas contends was not addressed. The Delegate may have misapprehended precisely what was held in *Jenkins* but she has not misapprehended the argument which had been put by Ms Ballas and which the Delegate was addressing.

(b) Discretion as to category

His Honour briefly dealt with this ground because the plaintiff did not formally abandon it, but he rejected it on the basis that it poses a false dichotomy and does not accurately reflect what the Delegate said. He stated:

> 68. Moreover, there is no doubt that the PIRS categories are generic and general in description. They are only identified at a very high level of generality: "Self-care and personal hygiene"; "Social and recreational activities"; "Travel"; "Social functioning (relationships)"; "Concentration, persistence and pace"; and "Employability". The wording used to describe the categories suggests that some may overlap. For example, impairment in the ability to relate socially may well be reflected in both "social and recreational activities" as well as "social functioning (relationships)". Similarly, impairment of "employability" may well involve, or result from, impairment in some or all of the other categories. The description of each scale, and the examples given in relation to each class from 1 to 5 within each scale in Tables 11.1 to 11.6, also suggests that overlap is quite possible between different PIRS categories. The PIRS categories, as specified in Ch. 11, do not appear to be rigidly separate and exclusive.
>
> 68. Fairly understood, what the Delegate was saying was that the PIRS categories are as described in the Guidelines and are to be applied as required by the Guidelines. Because of their generality and the generic nature of the words used and examples given, however, application of the categories in accordance with the Guidelines involves the AMS using his or her professional expertise and judgment in the light of the clinical examination and any relevant history. There is nothing erroneous in such an observation.

He concluded that as none of the substantive grounds had been made out, it was not necessary to consider the consequential grounds and he dismissed the summons.

WCC Presidential Decisions

Principles relevant to raising a new issue on appeal - whether actual earnings are an accurate reflection of the ability to earn - consideration of objective evidence when witness evidence unreliable - Brines v Westgate Logistics Pty Ltd [2008] NSWWCCPD 43 considered and applied

RCR Stelform (VRBT) Pty Ltd *v* Palmer [2019] NSWWCCPD 6 – Deputy President Elizabeth Wood – 28 February 2019

Background

On 26 September 2011, the worker injured his back at work with the appellant. He reported the injury and was taken to a Medical Centre and was seen by Dr Munoz, GP. Dr Munoz certified him fit for pre-injury duties. On 7 October 2011, the worker resigned because he had obtained alternative work as a boilermaker/leading hand. However, on 5 December 2011, he consulted Dr Geschwind (his GP). He was referred to Dr Saravanja (orthopaedic surgeon) who performed lumbar spine surgery in December 2011 and January 2012.

On 13 February 2012, the worker claimed weekly compensation under the previous s 36 WCA and s 60 expenses, but the appellant disputed liability. It denied that the worker injured his lumbar spine and asserted that the need for surgery did not result from a work injury. On 12 March 2018, the worker commenced WCC proceedings claiming weekly payments, s 60 expenses and compensation under s 66 WCA for 16% WPI.

Arbitrator Rachel Homan awarded the worker weekly payments until 29 May 2014 (the end of the second entitlement period), s 60 expenses (including the surgery costs) and remitted the matter to the Registrar for referral of the s 66 dispute to an AMS.

Appeal

The appellant alleged that the arbitrator erred because she: (1) failed to provide sufficient reasons for the decision; and (2) failed to apply the *"Aitkin"* test.

Deputy President Elizabeth Wood determined the appeal on the papers and she dismissed it for reasons that are summarised below.

Ground (1)

DP Wood rejected this ground. She stated that the appellant's submissions as "unsatisfactory" because they did not comply with Practice Direction No 6. She held that the arbitrator clearly spelled out the matters that were relevant to her evaluation of the evidence and that it was open to her to find that Dr Munoz's evidence was inconsistent. Regarding the alleged incorrect histories in the medical reports, she found that those recorded by Dr Geschwind, Dr Bodel and Dr Saravanja were *"entirely consistent"* with that which was accepted by the arbitrator, namely that the worker suffered prior back symptoms but the injury on 26 September 2011 caused significantly greater symptoms, and the appellant failed to address why these histories were not correct. Further, whether there was a later injury was only one of the issues that the arbitrator considered in determining causation and her observation that there was no evidence of a later injury did not shift the onus of proof from the worker.

Ground (2)

Wood DP observed that *Aitkin* was a stated case before the Court of Appeal, where the worker suffered an injury that rendered him partially incapacitated. He continued to work for the employer on suitable duties, but several years later he became totally incapacitated as a result of a non-work-related condition. The issue was whether he was entitled to compensation for his work-related partial incapacity. She stated:

> 219. In a joint judgment delivered by Jordan CJ, the Court determined that Mr Aitkin was not entitled to weekly payments. The Court considered s 11 of the *Workers' Compensation Act*, *1926* (the section equivalent to the former s 40(2)(b) of 1987 Act) and the phrase "is earning, or is able to earn". Referring to earlier relevant authorities, Jordan CJ made the following observations (omitting citations):
>
> > The burden of proving that the incapacity established by the worker is partial only, and, if so, of proving the other facts necessary to limit the weekly payments under s 11 is upon the employer. The English section corresponding with s 11 has been considered in several decided cases … As to the phrase 'is earning', it has been held that if the partially incapacitated worker is earning something his actual earnings must *prima facie* be taken as the basis, and the rate of compensation provided for by s 9 reduced by a calculation based on the excess of his pre-injury average weekly earnings above what he is actually earning. If, however, it is proved that his actual earnings are not a proper test, because there is some reason un-connected with his earning power which makes them lower than they should be, the other alternative, what he is 'able to earn,' must be adopted This is so where it is shown that he is deliberately taking lower-paid work than he could get, or is idling and on this account receiving less than he could be reasonably expected to obtain, or where his actual earnings have been compulsorily reduced by something unconnected with his injury or general earning power …

Wood D rejected this ground and stated that it was based on a false premise, namely that the contrary proposition was argued at the arbitration. However, the appellant's submission regarding the worker's ability to earn was not based on an argument that the presumption in *Aitkin* was displaced by the evidence, but that he actually earned $980 per week after the injury. That was not supported by the evidence. She stated:

> 224. The point raised in this appeal is that there was evidence of payments to "associated persons" which allowed Mr Palmer to minimise his actual earnings, presumably by "income splitting".
>
> 225. The Commission has repeatedly pointed out that arbitrations are not a dress rehearsal and appeals are not a rehearing. It is not open to RCR to argue that the Arbitrator erred in not dealing with an issue that was never argued before her.

If it was open to the appellant to raise this issue on appeal, it would fail as there is no evidence to support it, other explanations are available and no contrary proposition was put to the worker. In accordance with *Aitkin,* the arbitrator considered all of the evidence and followed a proper reasoning process to arrive at her conclusion that that actual earnings were a true reflection of the worker's ability to earn.

However, she held that the arbitrator erred in awarding weekly payments from 1 April 2012 to 30 June 2012 at the rate of $849.39 per week and from 1 July 2012 to 31 December 2012 at $839.75 per week as the entitlement was under the previous 40 WCA. She revoked those awards and awarded weekly payments under s40 (5) WCA as follows: (1) from 1 April 2012 to 30 September 2012 at the rate of $432.50 per week; and (2) from 1 October 2012 to 31 March 2013 at the rate of $439.50 per week, but she otherwise confirmed the COD.

Psychological injury – application of State Transit Authority of New South Wales v Chemler

Lindsay v IMB Ltd [2019] NSWWCCPD 7 – Deputy President Michael Snell – 1 March 2019

Background

On 3 August 2010, the appellant commenced employment with the respondent as a Loans Assessor, but interpersonal conflicts developed particularly from about December 2016, and various meetings were held to deal with these conflicts. She ceased work on 9 August 2017 and consulted her GP, complaining that she felt *"very anxious and … betrayed" and* gave a a history of *"bullying and harassment at workplace … going on for the past two months"*. She was certified as having no work capacity and did not return to work.

On 9 November 2017, the insurer disputed the claim on grounds including s9A WCA. On 9 May 2018, the appellant filed an ARD that claimed weekly payments and s 60 expenses because of a psychological injury that allegedly occurred on 1 July 2017.

On 12 September 2018, ***Arbitrator Catherine McDonald*** issued a COD, which entered an award for the respondent. While she noted that there was no dispute that the appellant suffered a psychological injury and that she was unfit for work, she found that there were significant differences between the appellant's evidence regarding her past history and the previous symptoms that her GP recorded, which *"cast doubt on her veracity"*.

The arbitrator quoted the decision of Keating P in *Brines v Westgate Logistics Pty Ltd* [2008] NSWWCCPD 43 (*Brines*), as follows:

> Where a worker has given untruthful evidence, the Arbitrator must carefully assess the rest of his evidence in order to determine its honesty and reliability. Some of the evidence may have been acceptable because other independent or objective evidence confirmed it. However, where a worker's evidence was not independently supported it clearly must be assessed with great care to determine whether it could properly be accepted as proof of any matter that was in issue in the proceedings (see *Malco Engineering Pty Ltd v Ferreira* and others (1994) 10 NSWCCR 117 and *Divall v Mifsud* (2005) NSWCA 447).

She found that the test of substantial contributing factor was not satisfied and quoted passages from the decision of Roche DP in *Attorney General's Department v K.* She held:

> 129. For the reasons set out above, I am unable to accept that the events on which Ms Lindsay relies occurred as she said – the events relied on by Ms Lindsay were not real events. There is no evidence that Ms Jordan or any other person manipulated information or made false accusations. There is evidence that steps were taken to manage a team in which morale and productivity had become low. I accept the evidence of the other witnesses as to the reason for those events.
>
> 130. A/Prof Robertson's support of Ms Lindsay's claim was contingent on acceptance of her version of events and he correctly noted that a determination of whom to accept was not a matter for an independent medical examiner. The conclusion I have reached is consistent with that made by Dr Wotton but is reached on an analysis of the evidence rather than the acceptance of his conclusion.

Appeal

The appellant alleged that the arbitrator erred in law: (1) in failing to properly go about the fact-finding process resulting in an ultimate error of fact in finding that none of the employment events alleged by the appellant to have contributed to her psychological condition were real events.; and (2) in failing to apply established legal principles applicable to psychological injury cases such as the appellant's by failing to appreciate the difference between the actuality of events and the perception of events. The respondent opposed the appeal.

Deputy President Snell determined the appeal on the papers. He held that the events relied upon by the appellant were real events and he stated, relevantly:

> 73. The case brought by the appellant relied on a series of events. The claim did not rely on proof that any person "manipulated information or made false accusations". Such an allegation was not referred to in the s 74 notice, nor in how the matter was pleaded in the ARD. It is a line taken from the appellant's statement, describing a deteriorating situation at a time when she considered the whole team felt hostile. That phrase does not encompass the way in which the appellant framed her case on 'injury' and 'substantial contributing factor'. It is clear from other statements that interpersonal relations in the team were difficult around that time. The success of the appellant's case did not depend on where fault lay, for the apparently increasing difficulties in personal relations in her team. The appellant did not regard herself as blameworthy, and thought that Ms Jordan was manipulating information. Some of the respondent's lay witnesses considered the appellant bullied others in the team. These are matters of perception. The ultimate finding of fact at [129] of the reasons was effectively a rejection of the accuracy of the appellant's perception of where fault lay. The approach taken was inconsistent with the decision in *Chemler*, in particular with the reasons of Basten JA at [69].

> 74. The Arbitrator made a credit finding adverse to the appellant, based on identified deficiencies in her medical histories dealing with prior complaints and family history. The conclusion I have reached above is based on the evidence overall, and is available if the view the Arbitrator formed of the appellant's credit is accepted. To the extent to which the credit finding played a role in the Arbitrator's reasoning, I accept the appellant's submission that the finding that the events were not real was such that I can give effect to my own conclusion, consistent with the principles in *Fox v Percy.*

Snell DP referred to *Badawi,* in which Allsop P, Beazley and McColl JJA stated:

> Section 9A requires a consideration of '*the employment concerned*' to ascertain whether it was a substantial contributing factor to the injury given the relevant circumstances in which the injury occurred, including the matters in s 9A (2). (emphasis in original)

However, the employment duties associated with the injury had not been found by the arbitrator and he considered that it was inappropriate to embark on a determination of whether s 9A WCA is satisfied based on the current state of fact finding regarding "injury".

Accordingly, he revoked the COD and remitted the matter to a different arbitrator for determination.

WCC - Medical Appeal Panel Decisions

"Fully ascertainable" is not limited to the meaning of "maximum medical improvement" – the AMS erred in finding that permanent impairment was not fully ascertainable because of the possibility of future surgery

Narromine Shire Council v Sladek [2019] NSWWCCMA 30 – Arbitrator John Harris, Dr D Crocker & Dr D Dixon – 25 February 2019

Background

The respondent injured his lumbar spine at work on 6 July 2009. On 19 September 2019, he filed an Application for Assessment by an AMS seeking a determination as to whether the degree of permanent impairment is fully ascertainable under s 319 (g) WIMA. The matter was referred to an AMS (Dr T Anderson) and on 1 November 2018, he issued a MAC, which stated that the degree of permanent impairment was not fully ascertainable while a consideration of further surgery still existed.

Appeal

On 8 November 2018, the appellant appealed against the AMS' decision under ss 327 (3) (c) and (d) WIMA. It argued that the AMS erred in finding that the degree of permanent impairment was not fully ascertainable in circumstances where there was only a possibility of further surgery and that the AMS erred by not applying the definition of maximum medical improvement.

The MAP conducted a preliminary review and determined that the MAC contained a demonstrable error. It then issued a Direction dated 21 January 2019, providing the parties opportunities to file and serve further evidence from treating specialists (particularly as to whether surgery is being undertaken) and to make any further submissions.

The MAP noted the respondent's evidence that in early 2018, Dr Ruff advised him to have spinal fusion surgery, but the doctor required him to lose weight and be "115 kg or less" before the surgery could occur. As at September 2018, he weighed 130 kg.

The MAP stated that the AMS was requested to provide an opinion on whether the "*degree of permanent impairment is fully ascertainable"* and not whether the respondent had attained maximum medical improvement. The AMS made a finding consistent with s 319 (g) WIMA and directed himself to the correct question and provided reasons for his conclusion that the degree of permanent impairment was not fully ascertainable. However, he then stated that the respondent *"…is not in a state of maximum medical improvement to facilitate the assessment of whole person impairment."*

The MAP held that the meaning of whether permanent impairment is fully ascertainable is not limited to the meaning of maximum medical improvement in clauses 1.15 and 1.16 of the fourth edition Guidelines. It stated (citations excluded):

> 56. Whilst similar considerations may apply to both the concept of whether "maximum medical improvement has been attained" and whether the "degree of permanent impairment is fully ascertainable", the reference to both "maximum medical improvement" and "fully ascertainable" in Sch 8 cl 28C of the 2016 Regulations clearly suggest that they are distinct concepts.
>
> 57. The appellant submitted that the "and" in clause 28C was a "linking term" rather than a "separating term". No proper basis for that submission was provided. That submission simply supported its preferred interpretation. The normal meaning of the word "and" in this clause suggests that they are different concepts.
>
> 58. Further, normal principles of construction suggest that the meaning of the two terms were different because of the difference in the language. That interpretation is consistent with the change between the third edition guidelines, where the two concepts were defined to be the same, and the fourth edition guidelines which removed the reference to maximum medical improvement meaning fully ascertainable.
>
> 59. The clear meaning of clause 28C is that the worker has to satisfy both concepts, that is, maximum medical improvement has not been attained and that degree of impairment is not fully ascertainable. Clause 28C read in context, clearly suggests that the phrases have distinct meanings.
>
> 60. Both s 319 and s 326 describe the relevant test of whether permanent impairment is "fully ascertainable". Whilst the fourth edition guidelines are issued pursuant to s 378 of the 1998 Act, there is no reason to read the meaning of "maximum medical improvement" as defined in the fourth edition guidelines as restricting the meaning of "fully ascertainable" in ss 319 and 326 of the 1998 Act.
>
> 61. Contrary to the appellant's submissions, there is no basis to define "fully ascertainable" by reference to the meaning ascribed to a different concept, that is, maximum medical improvement as defined in subordinate legislation. To apply the defined meaning to "maximum medical improvement" is even more difficult when the definition of maximum medical improvement has been changed from the third edition guidelines to that contained in the fourth edition guidelines, and, in a manner, which supports the interpretation that "fully ascertainable" and "maximum medical improvement" have different meanings.

The MAP rejected the notion that the introduction of *"maximum medical improvement"* into the 1987 Act by the 2015 amending Act indicates that both it and *"fully ascertainable"* have the same meaning and the simple difference in the language suggests the contrary. It held:

67. The AP agrees with the Reasons articulated in Goff. In that case the Panel noted that whether impairment is "fully ascertainable" suggests a narrower concept than impairment that is simply "ascertainable". The meaning of "fully", in its normal grammatical context and in the context of the section, can only limit something which was otherwise "ascertainable". Such an interpretation gives effect to the ordinary meaning of the word; *Cody v J H Nelson Pty Ltd*, whilst acknowledging canons of statutory construction that the *"question of construction is determined by reference to the text, context and purpose of the Act."*

68. Accordingly, the AP rejects that part of the appellant's submissions that the AMS erred in his conclusion by not applying the definition of maximum medical improvement to the concept of whether the permanent impairment is *"fully ascertainable".*

69. However, applying the correct test, that is whether permanent impairment is fully ascertainable to the findings made by the AMS, the AP is satisfied that the MAC contains a demonstrable error.

The MAP held that the AMS should have been satisfied that the degree of permanent impairment was fully ascertainable and it therefore re-assessed the evidence and concluded:

125. In these circumstances the AP is satisfied, on its re-assessment of the entire evidence, that the respondent's condition is fully ascertainable. There is no likelihood of surgery being undertaken in the foreseeable future. The AP agrees with the opinion expressed by the AMS that future surgery remains a possibility. However, given the uncertainty of whether and when future surgery will occur, the respondent's impairment is presently fully ascertainable.

126. The respondent could be presently assessed for whole person impairment under Table 15-3 of AMA5 noting the type of surgical procedures that have been undertaken. The respondent would also be entitled to the modifiers set out in Table 4.2 of the fourth edition guidelines.

Other observations

127. The AP notes, in response to the appellant's submissions on the one assessment process, that either party has the right to apply for further assessment or reconsideration pursuant to s 329 of the 1998 Act. The AP would expect that any reconsideration would not be filed until there was proper evidence establishing the nature of any proposed surgery and when it will be undertaken.

Accordingly, it revoked the MAC and substituted its finding that the degree of permanent impairment is fully ascertainable.

Demonstrable error – AMS not obliged to explain a difference of medical opinion

Martin v McLean Care Ltd t/as H N Memorial Retirement Village [2019] NSWWCCMA 31 – Arbitrator Marshal Douglas, Dr D Crocker & Dr B Stephenson – 28 February 2019

Background

The appellant injured her neck and right arm in a motor vehicle accident on 31 August 2000. On 13 March 2003, the Compensation Court made a consent awarded under s 66 WCA for 5% permanent impairment of the neck and 20% permanent loss of efficient use of the right arm at or above the elbow. On 30 October 2006, the Commission entered a consent award under s 66 WCA for an additional 5% permanent impairment of the neck and an additional 5% permanent loss of efficient use of the right arm at or above the elbow.

On 14 August 2017, the appellant gave notice of further claims under s 66 WCA for an additional 13% permanent impairment of the neck and an additional 14% permanent loss of efficient use of the right arm at or above the elbow, based upon assessments by Dr Patrick.

The respondent arranged for the appellant to be examined by Dr Diebold and on 5 January 2018, it placed an offer under s 66 for an additional 8% permanent impairment of the neck. However, the appellant then filed an ARD.

The Registrar's delegate referred the dispute to Dr Machart with instructions to provide an assessment of permanent impairment of the right arm at or above the elbow but neglected to instruct the AMS to assess the degree of permanent impairment of the neck.

On 4 May 2018, the Commission sent a copy of the MAC to the parties. On 7 May 2018, the appellant's solicitor advised the Registrar of the error in the referral. By consent, a referral issued to Dr Jander to assess the degree of permanent impairment of the neck. On 9 October 2018, she issued a MAC, which assessed 8% permanent impairment of the neck.

Appeal

On 6 November 2018, the appellant lodged an application to appeal against Dr Jander's MAC under s 327 (3) (d) WIMA. The Registrar referred the appeal to a MAP.

The appellant argued that the AMS was asked "essentially" to assess her deterioration since the date of the last settlement, but she did not do so and as a consequence of not doing so and not recording the prior settlements, there is a demonstrable error in the MAC. Further, the AMS failed to have any or any proper regard to the opinions of Dr Patrick and Dr Diebold, who each assessed her neck impairment to be greater than that indicated in the MAC. She was required to explain why her opinion differed from theirs and she did not do so.

However, the respondent argued that the matter referred to the AMS did not require the AMS to assess whether there had been any deterioration since the previous settlements and the AMS did not err by not doing this. There was no demonstrable error and, in any event, the AMS is required to provide an assessment of impairment based upon the appellant's presentation at the examination and she did so.

The MAP held that the AMS was not instructed to assess deterioration of neck impairment since the date of the last settlement and she was required to assess the permanent impairment of the neck resulting from the injury. She did so and issued a MAC. It stated:

> 33. In any event, an AMS is required in accordance with s 325 (2) to set out the AMS's reasons for the assessment made and to set out the facts upon which the assessment is based. An AMS is not required to explain why the AMS's opinion differs from conclusions others have reached. In the Appeal Panel's view the obligation under s 325 (2) is for the AMS to explain his or her opinion by revealing the actual path of reasoning by which he or she arrived at his or her opinion… As said, the obligation of an AMS is to reveal the pathway by which she or he formed his or her opinion with respect to the assessment that was done, and an AMS does not need to explain why that might differ from the reasoning of others. Further, there is no requirement, it seems to the Appeal Panel, and indeed no need for an AMS to detail and comment upon all the evidence in a MAC, irrespective of whether a particular piece of evidence has influenced the formation of his or her opinion regarding an assessment of a worker's impairment.

The MAP concluded that there was no demonstrable error and it confirmed the MAC.

WCC – Arbitrator Decisions

Section 10 (3A) WCA – injury caused by tripping while walking to a work site – no specific direction as to how to travel to building site – no real and substantive connection between employment and accident

Carrico v A & G Formworkers (Australia) Pty Ltd [2019] NSWWCC 78 – Arbitrator Elizabeth Beilby – 22 February 2019

Background

The worker was employed by the respondent as a carpenter and worked at many different sites. A foreman would advise him of the site that he was required to attend the following day and he was often required to work at more than one site per day. On 28 April 2016, he tripped and fell on an uneven surface while he was walking to work and landed heavily on his right shoulder. He said that he had worked at that same site for some months prior to the injury and that he was paid a travel allowance of $35 for each day that he worked.

Arbitrator Elizabeth Beilby identified the following issues:

(1) Was the worker in the course of his employment under s 4 WCA? and

(2) If the worker was on a journey, was there a real and substantial connection between the employment and the accident as required by s 10 (3A) WCA?

The worker argued that he was injured in the course of employment because he could be directed to work at anytime and anywhere by his employer and for the benefit of his employer and this distinguished him from a worker that went to the same workplace every day. He was paid a travel allowance for this flexibility and this meant that his position was like that of a travelling salesperson and he was in the course of his employment from the time that he left home to the time that he arrived home.

The worker relied upon the decision of Neilson CCJ in *Maurino v Amberlor Pty Ltd*, in which the worker used his own car to store and transport cleaning materials for use in his job as a cleaner. He was paid an allowance for his car and was injured in a motor vehicle accident while he was travelling home from work. The worker was not entitled to the benefit of the journey provisions of the act because he was the driver at fault. His Honour held that the worker was in the course of his employment because the arrangement was not only encouraged by his employer for its benefit, but it was also an obligation on the worker's part for which he was paid. He also argued that he was in effect under some type of control by the employer at the time he leaves his house as he is directed where to go.

However, the arbitrator held that there was no evidence that the worker was contractually obliged to travel to his workplace in a mode prescribed by his employer and there was no direction that he had to walk upon the street where he was injured. Rather, he was required to attend the building site to commence his working day at 7am. She stated:

> 24. I am sympathetic to the applicants circumstances I am unable to find that he was in the course of employment when he suffered his injury. The fact that the applicant worked at many different work sites around Sydney for varying lengths of time is very much indeed the nature of building work. That is, when the building is finished, employees are instructed to move to the next site to perform duties there. This is consistent with the applicant's statement where he provides a list of various sites that he has worked on for the respondent.

She held that the fact that the worker was paid a travelling allowance does not necessarily establish that he was in the course of his employment when the accident occurred and that he was not in the course of his employment when the injury occurred.

The arbitrator also held that there was no real and substantial connection between the employment and the injury. She stated that, as observed in *Bina*, whether and in what circumstances s 10 (3A) WCA will be satisfied is a question of fact, applying the words of the provision in a common-sense and practical manner in each case. She held:

> 35. To my mind, there was nothing in the factual matrix that is borne in the statements of the applicant or the evidence provided in the documents to take it outside of the normal journey provision matters nor is there anything that provides a real and substantial connection between the injury and employment. I can find no supportive evidence of an association or relationship between the injurious event and employment, beyond that fact that the applicant was travelling to work.

Accordingly, she entered an award for the respondent.

Death claim – death occurred during a house-sitting arrangement – no contract of service found between deceased and respondents

Spears and Spears v Chapple and Chapple [2019] NSWWCC 83 – Arbitrator Gerard Egan - 26 February 2019

Background

The applicants (the widow and an adopted adult son) claimed compensation under s 25 (1) (a) WCA in respect of the death of Norman Spears, who died on 23 April 2016, as a result of complications resulting from a wire-piercing injury that he suffered on 27 September 2015. The injury occurred while the deceased and Mrs Spears were undertaking tasks during the course of a house-sitting stay by arrangement with (and at the property of) the respondents. The respondents denied that the deceased was a worker.

Arbitrator Gerard Egan identified the issues as:

(1) Whether there was a contract between the deceased and the respondents; and

(2) If so, whether this was a "contract of service" with the respondents as employer under the definition of worker in s 4 WIMA.

The arbitrator noted that the Spears had been members of "Aussie House Sitters" for more than 10 years. This was a website on which property owners would advertise their house as available to house-sitters while they were away and the Spears had house-sat many properties. On 6 April 2015, they received an email from the respondents inviting them to house-sit their property from 17 September 2015 to 15 October 2015. No money changed hands, but the Spears stayed at the property and were able to use the Wi-Fi, landline telephone, electricity, water and wood was supplied for a heater.

Mrs Spears argued that there was a contract because there was clearly an offer and acceptance via the Aussie House-Sitters website, subsequent discussions and email exchanges and that this was consummated by actual performance of the arrangement. Their duties were set out in the Farm Handbook and they were provided with machinery (a Ute and tractor) and given explicit instructions regarding pumps, electric fences and other matters. She relied upon the following decisions:

- *Harris v Cudgegong Soaring Pty Ltd* [1995] NSWCC 18 (*Harris*), in which the applicant was a caretaker for the respondent. She argued that the circumstances of this matter were essentially the same as *Harris*, in which Neilsen J found that there was an intention to create legal relations that underpinned the ultimate finding that Mr Harris was a worker for the purposes of the legislation;
- *Spackman v Morrison* [2000] NSWCC 61 (*Spackman*), in which the provision of labour by a retired ex-abattoir worker to a friend in return for half the meat from a

slaughtered and butchered beast was considered sufficient consideration to support a finding that a contract existed between them. She argued that the fact that they were friends did not prevent the intention to create a legal relationship, which is relevant to the consideration of the social website status of Aussie House-Sitters affecting the parties' relationship; and

- Dietrich v Dare *(1980) 30 ALR 407 (*Dietrich*).*

Mr Spears argued that the significant list of duties set out in the Farm Handbook was akin to a job description and suggests that the Spears were "hired" by the respondents to protect their assets. This demonstrates a relationship akin to an employment contract.

However, the respondents argued that *Harris* is distinguishable from this matter because there was a permanent offer of a roof over his head and the putative employer operated a commercial enterprise. They did not operate a business and merely utilised a community-based website. The Spears were in the habit of house-sitting and their intention of visiting the Grafton area, which led to the eventual house-sit, was to visit friends in Grafton or to visit the area. They obtained alternative accommodation for no costs other than the provision of their service and there is no evidence that they treated any previous house-sit as a contractual matter, much less a contract of employment. The correct characterisation of the arrangement between them was the facilitating of another "trip" in accordance with the Spears' lifestyle and neither party intended to pay, or receive remuneration.

The respondent also argued that the indicia test in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 applies and that the facts in this matter are more like those in *Teen Ranch Pty Ltd v Brown* (1995) 11 NSWCCR 197 in which a volunteer relationship was found.

The arbitrator confirmed that the Spears bear the onus of proving an employment contract and must prove that there was an offer, acceptance, consideration, mutual obligations and an intention to create legal relations. He confirmed that in *Secretary, Department of Family and Community Services v Bee* [2014] NSWWCCPD 66 (*Bee*), Roche DP held that to be legally enforceable there must be, amongst other things, real consideration *"for the agreement"* and he stated (at [92]):

> To prove a contract, it must be established that the 'statement or announcement which is relied on as a promise was really offered as consideration for doing the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement' (Australian Woollen Mills at 456). In other words, there must be a quid pro quo ('one thing in exchange for another; something in exchange' Butterworths Concise Australian Legal Dictionary, 3th ed).

The arbitrator noted that in *Bee*, Roche DP said, at [42]:

> > The authorities are clear that the question of an intention to create legal (contractual) relations requires an objective assessment of the state of affairs between the parties (*Ermogenous* at [25]). 'Intention' describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened (*Ermogenous* at [25]).

While he accepted that there may well be a quid pro quo in the arrangements between the Spears and the respondents, he was unable to conclude that there was an intention to create legal relations.

The arbitrator noted that in *Teen Ranch*, the Court of Appeal determined that there was no contract because there was no intention to enter legal relations. It noted that the applicant had a moral obligation, but no legal obligation, to work with the organisation and held that

he was a volunteer. He also referred to the decision of the High Court of Australia in *Dietrich*, which concerned an unemployed man who undertook a work trial, in which the Court held that there was no contract of service. At [411], the majority stated:

> A contract of service is of its nature a bilateral contract. It may be conceded that merely to say that the parties had agreed upon a trial does not necessarily rule out its formation. The answer in that respect will depend upon the detail of the arrangement. In particular, the answer will be affected, among other things, by the discovery in the arrangement of the assumption by the 'worker' of an obligation to perform some work, it being the purpose of the trial to determine whether the work is performed in a satisfactory manner. But in the present case we cannot discover an obligation on the appellant to perform any work at all.

The arbitrator held that the parties' intention must be considered objectively and he held that the evidence failed to establish an intention to create legal relations. He held:

> 79. Here, it may be concluded that the expectations upon the Spears were to provide duties analogous to caretaking. However, I conclude that their intention was to legitimately (via Aussie House Sitters) use their presence at the farm and provision (of what I find to be) minimal services to obtain free accommodation in an area that was attractive for them and offered an alternative to an expensive cabin in a caravan park or Airbnb rental. The Spears no doubt also wanted to "secure a necessity: shelter" of life for the period of the intended stay, but it was as a recreation, a life-style, or a holiday, and as an alternative to their abode and life in Manilla, New South Wales.

Therefore, the deceased was not a worker. However, he briefly considered the indicia of employment test set out in *Stevens* and stated:

> Assuming there was an intention to create legal relations, I consider the exchange of the accommodation and utilities for the Spears' presence and some tasks to be more in the nature of a rental by barter. This is more so when one considers Dorothy's evidence that accommodation was alternatively to be sourced via cabins or Airbnb for the Spears' intended trip to the area, and that they "like the quiet country lifestyle".

Accordingly, he entered an award for the respondent.

Worker with highest needs – the entitlement to weekly payment under s 38A WCA commences on the date of the MAC and not on the date of the injury.

Melides v Meat Carter Pty Limited [2019] NSWWCC 81 – Arbitrator Anthony Scarcella – 26 February 2019

Background

On 14 August 2014, the worker contracted Q Fever in the course of his employment and he subsequently suffered a consequential psychological condition. On 14 December 2015, the Commission issued a COD – Consent Orders, which awarded the worker compensation as follows: (1) weekly payments under the previous s 36 WCA from 29 October 2014 to 12 November 2014 at the rate of $277.58 per week; (2) weekly payments under the previous s 37 WCA from 13 November 2014 to 14 December 2015 at the rate of $233.75; (3) an award for the respondent for any claims for weekly compensation after 14 December 2015; and (4) payment of reasonably necessary s 60 expenses incurred "to date". However, the insurer continued to pay weekly payments until 7 July 2017.

On 3 November 2016, the worker obtained an assessment of 31% WPI from Dr Burns. However, on 9 June 2017, Dr Haber issued a MAC that assessed 60% WPI.

On 4 July 2017, the respondent lodged an application to appeal against the MAC. The worker opposed the appeal. The Registrar referred it to a MAP, which ultimately upheld the decision of the AMS and on 21 September 2017, a COD awarded compensation under s 66 WCA based upon the MAC.

On 8 July 2018, the insurer began making weekly payments to the worker under s38A WCA. On 15 August 2018, the worker requested the payment of arrears under s 38A WCA from 14 August 2014 to 7 July 2017, with credit to the insurer for payments made, based upon the decision of Senior Arbitrator Capel in *White v Vostok Industries Pty Limited*. However, the insurer disputed that he was entitled to payments under s38A WCA before the date on which he was *"confirmed as a worker with highest needs"*.

Arbitrator Anthony Scarcella identified the following issues:

(1) Whether the worker is entitled to weekly payments under s 38A WCA from 14 August 2017 to 7 July 2017, or alternatively, from 3 November 2017 (the date of Dr Burns' assessment) to 7 July 2017?

(2) If so, does the Commission have jurisdiction to award such weekly payments after the conclusion of the second entitlement period on 9 February 2017?

The respondent argued that the worker had no entitlement under s 38A WCA before 9 June 2017 (the date of the MAC) and that the Commission lacks jurisdiction to make an order after 8 February 2017 (the end of the second entitlement period).

Regarding jurisdiction, the respondent relied upon decision in *Lee v Bunnings Group Limited* [2013] NSWWCCPD 54 (*Lee*). It argued that the insurer had determined that the worker had an entitlement under s 38A WCA beyond 7 July 2017, which it had dealt with and appropriately paid him, and that there is nothing that the Commission can act on beyond what the insurer has effectively determined by way of its conduct. There is an effective bar to making an order directing the insurer to commence payments under s 38A WCA after the end of the second entitlement period (or even for the period from 9 June 2017 to 7 July 2017).

The worker argued that *Lee* was a case dealing with s 38 WCA, in which the insurer had not made a determination of the worker's capacity, and that the ratio was that in the absence of a determination by an insurer, the Commission could not make that determination for the insurer. To that extent, the Commission lacked jurisdiction. However, he argued that *Lee* was incorrectly decided because s 105 WIMA gives the Commission exclusive jurisdiction to determine all matters arising under the Act and the correctness of the insurer's decision under s 38 WCA would be a matter arising under the Act unless it was excluded because it was a work capacity decision. In this matter there is no dispute that he was incapacitated and by necessary implication, the insurer had made an assessment of his work capacity and the *"Lee impediment"* does not exist.

The worker also argued that s 32A WCA requires an assessment of WPI to be made, but it does not say anything about who has to make it and one cannot read into s 32A (a) a requirement that the assessment must be made by an AMS. He argued that in *O'Donnell,* Senior Arbitrator McDonald made a fundamental error in finding that s 65 WCA requires an assessment by an AMS under Pt 7 of Ch 7 WIMA and s 65 just requires that the assessment be in accordance with that section and division. Further, the proper reading of s 32A WCA is that once a person is identified as a worker with highest needs, they are entitled to the benefit of s 38A WCA from the happening of the injury because that is when their rights vest and this legal principle has not changed.

The arbitrator stated that the insurer failed to explain why it began making payments under s 38A WCA on 8 July 2017 rather than on 7 June 2017, but he rejected the worker's argument that the entitlement under s38A WCA vests when the injury occurs. He held:

> 96. Implementing the principles of statutory interpretation set out in *Wilson* as summarised by Deputy President Roche in *Hesami* and confirmed by *SZTAL*, I have interpreted and construed the words in sub-paragraph (a) of the section 32A definition of worker with highest needs having regard to their legal and historical context, giving close attention to the text and structure of the Acts. There was a medical dispute between Mr Melides and the respondent within the meaning of section 319 of the 1998 Act. The dispute followed the relevant processes referred to in Part 7 of the 1998 Act. A proper reading of sub-paragraph (a) of the section 32A definition of worker with highest needs results in the conclusion that the entitlement to weekly compensation at the section 38A rates, as adjusted, commences at the time the worker "has been assessed" with a permanent impairment in excess of 30% whole person impairment. In this case, that occurred once Mr Melides had been assessed by AMS Associate Professor Haber and the Medical Assessment Certificate issued. Pursuant to section 326(1) of the 1998 Act, the Medical Assessment Certificate of AMS Associate Professor Haber dated 9 June 2017 is conclusively presumed to be correct…
>
> 100. Whilst in both *O'Donnell* and *Hee No 1* the reasoning relating to the commencement date of payments pursuant to s 38A of the 1987 Act were obiter and not binding on me, for the reasons referred to above, I agree with Senior Arbitrator McDonald's reasoning in *O'Donnell*, which was subsequently supported by Senior Arbitrator Capel in *Hee No 1.*

Therefore, the worker's entitlement under s 38A WCA began on 9 June 2017.

Regarding jurisdiction, the arbitrator held that the principles discussed in *Lee* were confirmed by President Keating in *Paterson v Paterson Panel Workz Pty Limited* and by the Court of Appeal in and *Sabanayagam v St George Bank Limited* and *Jaffarie v Quality Castings Pty Ltd*. The *"clear and unambiguous language"* used in s 38 (2) WCA confirms that the insurer is responsible for assessing a worker's capacity after the second entitlement period. This is not controversial and is consistent with the authorities, but there was no evidence that the respondent had issued a work capacity decision.

Therefore, the Commission does not have jurisdiction to make an order for payment of weekly compensation under s 38A WCA from 9 June 2017 to 7 July 2017. However, he expressed the view that the insurer has an obligation to make these payments under the cl 3.2 of the Model Litigant Policy for Civil Litigation (NSW).

Section 39 WCA & s 322A WIMA – Previous MAC did not satisfy threshold under s 38 WCA – Worker not entitled to obtain a further MAC

Ali v Access Quality Services [2019] NSWWCC 79 – Arbitrator Josephine Bamber – 26 February 2019

Background

On 3 March 2014, the worker injured his left lower extremity and lumbar spine at work. In 2017, he commenced WCC proceedings and claimed compensation under s 66 WCA.

On 2 November 2017, a MAC assessed 14% WPI. However, the worker's solicitors discontinued the proceedings before a COD issued.

On 13 June 2018, the insurer disputed liability for the alleged right knee injury. On 12 September 2018, the worker's solicitors sought a review of that decision and also gave notice of a claim under s 66 WCA based upon an assessment from Dr Maniam.

On 20 September 2018, the insurer issued the worker with a notice under s 39 WCA and advised him that his entitlement to weekly payments would cease on 24 February 2019.

On 9 November 2018, the worker's solicitors re-served their letter dated 12 September 2018 on the insurer. On 10 January 2019, it issued a dispute notice under s 78 WIMA, maintaining the denial of liability for the right knee injury and also asserting that the worker was not entitled to make a further claim under s 66 WCA and that he was not entitled to obtain a further MAC by operation of s 322A WIMA.

On 24 January 2019, the worker's solicitors filed an Application for Assessment by an AMS, which sought an assessment for injuries to the lumbar spine and both lower extremities.

Arbitrator Josephine Bamber conducted an arbitration hearing on 13 February 2019.

The worker argued that s 39 WCA gives an entitlement to have WPI assessed that is independent to s 66 WCA and that s 39 (3) WCA is *"just a procedural provision giving a mechanism for determining the permanent impairment".* He also argued that: (1) s 322A WIMA is not a substantive provision; (2) s 322A (2) limits situations when a MAC is the only MAC that can be used in connection with any further medical dispute; and (3) s 322A was not intended to apply to *"other types of threshold disputes"*.

The worker also sought to rely upon evidence with respect to his right knee, which could have been but was not relied upon in the previous WCC proceedings. The respondent objected and the parties agreed that the arbitrator would only deal with the legal issue and that if the worker succeeded, the admissibility of that evidence could be dealt with at a telephone conference and further submissions could then be made.

The respondent argued that the facts in this matter are similar to those in *Singh* and it relied upon the decision of Arbitrator Moore, which was upheld on appeal by Snell DP (at [55]):

> The course adopted by the appellant, if it were properly available, potentially has the effect of avoiding the application of s 322A of the 1998 Act. A worker could make a claim, undergo medical assessment by an AMS, obtain a MAC, and if he or she was dissatisfied with the assessed level of permanent impairment, simply discontinue the proceedings before a Certificate of Determination was issued consistent with the binding MAC. If the worker subsequently obtained a higher medicolegal assessment, the worker could simply 'amend' the claim, and repeat the process, potentially on more than one occasion.

The arbitrator stated that while the facts in this matter are very similar to those in *Singh*, the worker is not making a further claim under s 66 WCA and while he gave notice of such a claim to the insurer, the current application sought only an assessment of permanent impairment for the purposes of s 39 WCA. She held:

> 27. Section 322A (1) WIMA provides that only one assessment may be made of the degree of permanent impairment of an injured worker. In Mr Ali's case, I find he has had his one assessment, that is the one made by AMS Dr Harrison of 14% WPI in 4227/17 on 2 November 2017. In (sic) matters not, following the reasoning in *Singh,* that he discontinued those proceedings…
>
> 35. …in *Merchant v Shoalhaven City Council* a similar argument to that made on behalf of Mr Ali was raised. The President, his Honour Judge Keating found in *Merchant* at [127}:

> Mr McManamey argued in reply that s 322A (2) *"limits the operation of the section to disputes about claims for permanent impairment compensation, commutations and work injury damages but not to disputes about whether the worker is seriously injured"*. He added *"the failure to mention seriously injured worker in section 322A is consistent with section 32A not being so restricted"*. I disagree. The limitation on the number of assessments in s 322A applies to "any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury..." (s 322A (2)) (emphasis added). Whilst the matters referred to by Mr McManamey are certainly included as matters to which the limitation applies, the sub-section expressly applies to any further assessment.

Following Keating P's approach in *Merchant*, the arbitrator held that the worker's one assessment was that obtained in matter 4227/17 and that is the only MAC that can be used *"in connection with any further or subsequent medical dispute about the degree of permanent impairment"* and a dispute under s 39 WCA is clearly about the degree of permanent impairment. Further, while parliament provided an exception for existing recipients of weekly payments, that exception was not available to the worker.

Accordingly, she determined that the degree of permanent impairment is as assessed by Dr Harrison in the MAC dated 2 November 2017 and the worker is not entitled to be referred for a further assessment of the degree of permanent impairment for purposes of s 39 WCA.

Injury - Absence of treatment over a long time is inconsistent with the persistence of symptoms – no corroboration of the occurrence of the injury with contemporaneous documents

Singh v Redi-Strip Australia Pty Limited [2019] NSWWCC 90 – Arbitrator Paul Sweeney – 28 February 2019

Background

On 10 April 2018, the worker injured his left shoulder and suffered consequential injuries to his right shoulder and cervical spine. However, in this claim he alleged that he injured his lumbar spine as a result of the nature and conditions of his employment on or before 23 August 2008. The respondent disputed liability for that injury. The worker filed an ARD, which was amended at the conciliation/arbitration to claim only s 60 expenses for the alleged lumbar spine injury, but the worker was unable to identify and/or quantify them.

Arbitrator Paul Sweeney stated:

> I expressed the view that determining disputes in the absence of a clear-cut claim for a monetary amount was undesirable. Arguably, it was impermissible, as there is no claim. It is also tantamount to the Commission giving an advisory opinion on an issue in dispute. More importantly, it imperilled the parties' rights to appeal from an adverse decision to the Presidential Unit of the Commission. As it was clear, however, that the applicant had incurred expenses in relation to the treatment of his lumbar spine, and given the background of the previous proceedings, I reluctantly agreed to determine the issue in dispute.

He noted that the worker relied upon a specific incident on 23 August 2008 and an allegation of either injury simpliciter or, alternatively, by way of an aggravation of a disease.

The worker argued that the Commission should accept his evidence regarding injury, but the respondent argued that there was no medical evidence before 2015 that suggested a back injury, which was many years after he ceased work, and aspects of his presentation to the medical practitioners necessitated a finding that his evidence was unreliable.

After summarising the worker's evidence and the contemporaneous medical evidence, the arbitrator stated:

> 40. In matter number 137/18, I determined that the applicant had not established that he had suffered injury to his low back in the incident of 10 April 2008. I did so because the contemporaneous medical evidence contained no history of a back injury or complaint of back pain. The applicant is confronted with similar difficulties, in this case.
>
> 41. The applicant's written evidence in respect of his injury is ambiguous. While he was not cross-examined on this evidence, Ms Goodman submitted that his evidence was not reliable. I think there is some force in this submission.
>
> 42. By his primary statement, the applicant appears to assert that the symptoms in his lumbar spine was a consequential or secondary condition, which developed after he ceased work for the respondent. By his statement of 18 August 2017, he states that he agrees with the opinion of Dr Charles New that "my lower back injury was caused by my injury on 10 April 2008". Then, by his statement of 4 April 2008, he asserts that it was his continued employment in arduous work after 10 April 2008, which caused his back injury.

The arbitrator noted that the worker had previously given 3 different versions of how the back pain occurred: (1) it was caused by the injury on 10 April 2008; (2) it resulted from accepted injuries to his neck and shoulders; and (3) it was caused by the nature of his work. In the previous proceedings, he argued that (1) should be accepted and did not allege (2). However, Dr New reported a fourth version, namely that injury as a result of a frank incident on 23 August 2008, which was not previously alleged. He stated:

> 45. The vacillation in the applicant's account of how his back injury occurred may be unimportant if there was evidence of a reasonably contemporaneous report to the respondent or medical history of a low or back injury caused by arduous work. But, as I will discuss below, that is not the case…
>
> 47. The absence of evidence of a report of injury stands in stark contrast to the formal reporting of the injuries which the applicant sustained to his neck and shoulders on 10 April 2008 and during the remainder of his employment.

He noted that the worker also gave *"a strikingly different account"* of the nature of his work after April 2008 to Dr Adler, which was consistent with the available evidence. He stated:

> 49. In *Armagas Ltd v Mundogas S.A. (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, Robert Goff LJ, in a passage that has often been quoted, stated:
>
> > The credibility of a witness and his, or her, veracity may also be tested by reference to the objective facts proved independently of the evidence given, in particular by reference to the documents in the case, by paying particular regard to his, or her, motives, and to the overall probabilities.
>
> 50. When the events in question, occurred many years ago, contemporaneous or near contemporaneous documentary evidence may provide more insight, then evidentiary statements prepared many years later. I appreciate the instruction from the New South Wales Court of Appeal in a series of cases, that caution must be exercised when considering histories contained in medical reports and medical records. However, experience suggests that these documents are of value in assessing the reliability of a witness as Robert Goff LJ observed in the *Ocean Forest* (sic).

The arbitrator held:

> 58. While opinions from medical practitioners are receivable on the issue of whether a worker suffered injury as a result of an incident or the general nature of his work, the question of whether such an injury has been proven is a question of fact for the Commission to determine on all the relevant evidence in the case. For reasons that I have given above, I am not persuaded that the evidence of the applicant in respect of injury to his lower back is reliable. There is no corroboration of the occurrence of the injury or of the onset in any of the contemporaneous documents. It is not evident that the back injury was reported to the respondent or to Dr Saxena…
>
> 63. Even if I believed that the evidence of the applicant was reliable, the interval of two years between alleged injury and the initial treatment by a medical practitioner would be troublesome. The absence of treatment over such a long period is inconsistent with the persistence of symptoms from an injury…

Accordingly, he entered an award for the respondent regarding the claim for injury to the lumbar spine as a result of the applicant's employment on or prior to 23 August 2008.

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Kim Garling