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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.

Decisions reported in this issue

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Supreme Court of NSW – Judicial Review Decisions

Jurisdictional error – procedural fairness - "appropriateness" of medical assessors - unfair for MRP to refer to medical literature not provided to the plaintiff

Raina v CIC Allianz Insurance Limited [2021] NSWSC 13 – Campbell J – 25/01/2021

The plaintiff claimed damages for a disc protrusion at the C5/6 level with right-sided radiculopathy that resulted from a MVA on 20/09/2017. Dr Kam (treating neurosurgeon) recommended either cervical discectomy with artificial disc replacement or a posterior foraminotomy at the C5/6 level. Dr P Bentivoglio (a qualified IME) recommended anterior discectomy and fusion at that level. However, he disputed that these procedures did not relate to any injury caused by the MVA and that they were not reasonable or necessary in the circumstances.

The plaintiff applied for an assessment of permanent impairment and SIRA appointed Prof Home (occupational physician). On 6/09/2018, the insurer referred the medical dispute regarding the proposed surgery to SIRA.

On 24/09/2018, the plaintiff disputed that Prof Home was qualified to assess neurosurgical issues and asked for a neurosurgeon to be appointed. However, SIRA appointed Dr Dixon (orthopaedic surgeon) and he examined the plaintiff on 16/01/2019.

On 24/01/2019, Dr Dixon issued a MAC, which certified that: (a) the plaintiff suffered a C5/C6 disc herniation involving C6 nerve root compression, a C3/4 disc protrusion, a C6/7 disc bulge, foraminal stenosis at the C5/6 level and a soft tissue injury as a result of the MVA; (b) the plaintiff suffered 15% WPI; and (c) the proposed surgeries related to the injuries caused by the MVA and were reasonable and necessary.

On 19/02/2019, the insurer applied for a review of Dr Dixon's assessment and on 18/06/2019, the Proper Officer referred the matter for review by a MRP comprising Dr Cameron (rehabilitation specialist), Dr Stubbs (orthopaedic surgeon) and Dr Kenna (GP with expertise in musculoskeletal medicine and pain management).

On 17/07/2019, the plaintiff challenged the constitution of the MRP and argued that he would be denied procedural fairness because neither Dr Cameron nor Dr Kenna have the appropriate qualifications to properly consider whether neurosurgical treatment would be reasonable and appropriate.

On 18/07/2019, the Proper Officer confirmed the constitution of the MRP, as follows:

> … All parties were advised of the construction of the panel on 18 June 2019. The Panel met on 27 June 2019 and determined an examination was required and scheduled for 24 July 2019.
>
> I note your concerns about the construction of the panel.
>
> I note the examination will be conducted by Assessor Stubbs and Kenna. Like Assessor Dixon, who conducted the initial assessment, Assessor Stubbs is an experienced Orthopaedic Surgeon. Contrary to your letter, Assessor Kenna is Musculoskeletal Physician. We do not have any neurosurgeon who are review panel assessors.
>
> I am satisfied the panel have the necessary experience and qualifications to conduct this assessment.

On 23/07/2019 the Proper Officer notified the plaintiff as follows:

> The Panel wish to advise you that, although they have not made any preliminary findings, it is possible that the review might result in findings which may adversely affect your claim. The Panel note that in deciding not to attend the examination, you forego the opportunity to present your case.

On 6/12/2019, the MRP issued a MAC, which certified that: (a) the plaintiff suffered only a soft tissue injury to the cervical spine causing left sided symptoms as a result of the accident; (b) the plaintiff suffered from 5% WPI; and (c) The treatments recommended by Dr Kam and Dr Bentivoglio were not reasonable and necessary as they were not causally related to the injuries sustained from the MVA.

The plaintiff applied for judicial review of both the Proper Officer's decision not to reconstitute the MRP and the MRP's MACs. He also sought an order remitting the matter to SIRA for reallocation to a different Proper Officer for referral to a differently constituted MRP and sought an extension of time to challenge the Proper Officer's decision. The insurer opposed this.

Justice Campbell granted an extension of time, noting that the summons was filed within a period of 3 months of the publication of the MRP's MAC and the points made with respect to Prof Cameron and Dr Kenna were "*fairly arguable*". He found that there was no prejudice to the insurer.

His Honour found that the decisions of the Proper Officer were not vitiated by jurisdictional error. He held that the members of the MRP were not being asked to perform the surgery, but merely to assess, inter alia, its appropriateness in terms of s 58 of the *Act* and Dr Stubbs is an experienced orthopaedic surgeon.

His Honour stated that the primary questions involved diagnosis of the relevant injury and its causal connection to the MVA, which are not within the exclusive domain of neurosurgeons and orthopaedic surgeons and while the points made regarding Prof Cameron and Dr Kenna are "*fairly arguable*", he was not satisfied that they were substantiated. He also found that the Proper Officer's decisions were not legally unreasonable and there was no constructive failure to perform her statutory role. There was also no failure to respond to a substantial and clearly articulated argument.

With respect to the MACs issued by the MRP, his Honour noted that the plaintiff refused to attend a medical examination by the MRP and that the MRP concluded based upon the complaints recorded in the clinical records, that the injury caused by the MVA as a left-sided soft tissue injury to the cervical spine. There was no record of any right-sided complaints in 2017, although the plaintiff gave that history to Dr Kam and Dr Bentivoglio in 2018. If he had attended the MRP's examination he would have had the opportunity to explain this and it would then have been a matter for the MRP to decide, as a question of fact, whether it accepted the plaintiff's account in preference to the contemporaneous record.

However, his Honour found that the MRP's literature review was influential in its reasoning. The MRP stated that to resolve the issues that it identified it "*needed*" to review the literature. It then considered 22 papers, which were summarised in its reasons. He stated, relevantly:

> 88 Assuming for the moment that the use made by the Review Panel of the 22 papers involved a denial of procedural fairness to Mr Raina, for that "error" to be jurisdictional it must be shown to have been "material" in the sense discussed in the plurality judgment in Hossain referred to at [66] above. I am conscious of the approach of Wright J in *Robson* (see [60] above) where his Honour found materiality because he was unable to conclude the study in question there was "not a more than minimal factor in the Review Panel's conclusions, such as to attract the obligation to disclose the study to (the claimant) and allow him the opportunity to respond to it". That the same ultimate decisions could have been made on the Review Panel's primary findings of fact without reference to the medical literature does not require a finding that the literature was not material when it was obviously influential in the reasoning process. The correct approach described by Basten JA in *Boyce* (see [57] above) to the assessment of the effect of a breach of the hearing rule aspect of procedural fairness should be taken as a statement of general principle.

His Honour held that *Kioa v West* and *The Minister v SZGUR* established the relevant principle that a decision-maker must advise the person affected "*of any adverse conclusion which would not obviously be open on the known material*". It is clear that the conclusions adverse to the plaintiff were not drawn to his attention and he was not asked to comment or allowed the opportunity to make further submission. He stated, relevantly:

> 91. …I should say that even a court of ordinary jurisdiction may be under a similar obligation in regard to legal precedents not put before the court by the parties, but rather, representing the product of the judge's own research. In his judgment, in *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319; [2009] HCA 49 Heydon J (at [146]) said:
>
> > If, in determining whether the law should be developed in a particular direction, the court has recourse to learned works, it ought to give the parties an opportunity to deal with all matters which the court regards as material…
>
> 93. …What procedural fairness requires is the provision of a fair opportunity for a person "*to propound his or her case for a favourable exercise of the power*": see *SZSSJ* (at [55]). Here a reasonable opportunity was provided to Mr Raina to attend for "*a personal interview and clinical examination*" (see, Boyce at [57]), during which he would have had full opportunity to present his case and in particular explain inconsistencies drawn to his attention by the examining assessor. The procedures adopted by the Review Panel did not deprive him of this opportunity. His own decision to refuse to attend for examination achieved that outcome. The letter of 23 July 2019 ([12] above) "*warned*" him his decision may result in adverse findings being made in the absence of explanations from him. He was not dissuaded from his refusal to attend. In those circumstances, the Review Panel had no real option but to make its decision on a review of the clinical material provided by the parties. It was not incumbent upon the Review Panel, having provided the opportunity for a personal discussion and clinical examination, to provide a series of written questions for Mr Raina's consideration. Practical justice had been offered…

His Honour rejected the plaintiff's argument that the MRP failed to respond to a substantial and clearly articulated argument for 2 reasons, namely: (1) The MRP was well aware that Drs Kam, Bentivoglio & Dixon received a history that the plaintiff's symptoms were on the right-hand side and they evaluated that argument in the light of other materials provided to them for their review. It rejected that argument on factual grounds; and (2) In their formulation of this ground of denial of procedural fairness in *Dranichikov,* Gummow and Callinan JJ premised the ground in terms of a "*clearly articulated argument relying upon established facts*". In this matter, the facts were in dispute and an import part of the MRP's statutory function was to determine what the facts were regarding the receipt of injury and the resulting pattern of symptoms.

His Honour also found that the MRP applied the correct test of causation.

Accordingly, his Honour set aside the MACs issued by the MRP and remitted the matter for reconsideration by a differently constituted MRP. He ordered SIRA to pay the plaintiff's costs.

Local Court of NSW – Private Prosecution

Worker succeeds in a private prosecution against the insurer under s 283 (1) WIMA – Order made under s 10 (1) (a) of the Crimes (Sentencing Procedure) Act 1999 – Insurer ordered to pay costs of $1,250

Drew v QBE Insurance Australia – Local Court of NSW 2020/0012731 – Magistrate D Price – 14/05/2020

At the request of the informer (a worker) the Local Court of NSW issued a Court Attendance Notice (CAN) against the insurer with respect to its failure to determine the claim in accordance with s 287A (3) *WIMA.*

The insurer determined the claim shortly after receiving the CAN and it entered a plea of Guilty. The matter was listed for sentencing on 14/05/2020.

Magistrate D Price noted that the informer requested that the Court publish a written judgment despite the fact that the parties agreed that an order should be made under s 10 (1) (a) of the *Crimes (Sentencing Procedure) Act 1999*. His Honour opined that it was difficult to comprehend how this could be a fair use of the State's resources and the informed did not press that request.

His Honour gave an ex-tempore decision in the following terms:

> I note that this is an ex tempore decision, delivered in a fairly busy list, in relation to the matter of Stephanie Drew against QBE Insurance Australia. The charge comes in the private capacity of Ms Stephanie Drew as a common informer and it is brought under s 287A (3) of the *Workplace Injury Management and Workers' Compensation Act 1998*.
>
> As I understand it, this is a fine only offence with a maximum penalty of $5,500.
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> In terms of the relevant factual scenario, I have had regard to the agreed facts that have been submitted by the parties and although this matter was important for the prosecutor herself and should not be minimised, in my view the objective seriousness of the offence is on the lower end of the scale. QBE had pleaded guilty at a fairly early opportunity and, in my view, they should be afforded the full 25 per cent discount in relation to the plea.
>
> In terms of the subjective features of the defendant, being QBE Insurance, that is outlined in the documents provided to me. They are obviously a longstanding and reputable insurer in Australia and I note that the company name check dated 12 May 2020 indicates there have been no disclosable court outcomes recorded against the insurer, so it is entitled to significant considerations of leniency.
>
> I agree with the submissions that QBE has significant prospects of rehabilitation in that this is likely to have been a rare event that occurred within its very large organisation and I am confident from the material provided to me that QBE is taking appropriate steps to ensure that this type of conduct does not occur again, or at least occurs rarely.

QBE has expressed remorse and contrition and that is an important part of any sentencing exercise. And it is actually quite admirable that the insurer has identified this issue and has taken steps to address the conduct involved and, in my view, it is likely that the remorse and contrition demonstrated by the defendant is sincere.

There is obviously a need for general deterrence, however. It is important that insurers do comply with their statutory obligations. Insurance companies, particularly of the magnitude of QBE, play a very important role, not only in the Australian economy but also in society at large. And they play a beneficial role predominantly, but when they do digress, as they have in this matter, it is important that the courts send a clear message that that type of conduct cannot be condoned and so general deterrence is important.

So, taking into account the purposes of sentencing under s 3A of the *Crimes (Sentencing Procedure) Act* and all other relevant factors, this is a difficult exercise balancing, in many ways. However, I do agree with the joint position brought by the parties today, that under the relevant circumstances it is appropriate for this matter to be dealt with under s 10 (1) (a) of the *Crimes (Sentencing Procedure) Act* and I reach that decision not only because the parties have, in effect, agreed to that as an appropriate and fair outcome but also taking into account the factors under s 10 (3) of the *Crimes (Sentencing Procedure) Act,* that although those factors ordinarily relate to an individual, as I understand it they can relate to a body corporate or a corporate entity, such as the defendant in this matter and it appears to me that the overall situation means that a s 10 (1) (a) dismissal is fair, reasonable and appropriate, as submitted by the parties.

So, that will be the order - s 10 (1) (a) *Crimes (Sentencing Procedure) Act* dismissal.

However, I also note that the prosecutor seeks an order for costs under s 215 of the *Criminal Procedure Act*. As briefly discussed with counsel for both parties, it appears to me that although the defendant has not been convicted an order is made against the defendant in this matter and so the power under s 215 (1) is enlivened.

As I understand it, the parties agree that a fair, reasonable and appropriate amount is $1,250 so an order for the costs in that amount, in favour of the prosecutor would be appropriate.

WCC – Presidential Decisions

Rejection of uncontradicted expert evidence - whether error to prefer the evidence of a treating surgeon over the evidence of a medico-legal expert - lack of complaints of symptoms prior to cessation of employment

Southern Meats Pty Ltd v Tucker [2021] NSWWCCPD 2 – Deputy President Wood – 14/01/2021

In 2012, on 5/02/2015 and in late-May 2015, the worker injured his left shoulder and he ceased work in September 2015. He later developed right shoulder symptoms, allegedly as a result of his work and he claimed s 60 expenses for that injury - including the costs of shoulder replacement surgery. The appellant disputed the claim for the right shoulder.

Senior Arbitrator Bamber issued a COD on 8/09/2020, which determined the dispute in favour of the worker. She rejected the evidence of the appellant's medical expert (Dr Miniter) and referred to an article that was annexed to his report which suggested that most injured people are already on major work restrictions, so they are performing an easier job, or are off work and therefore doing very little at home. However, she found that the worker continued to perform heavy work and he was unable to lift with his left arm. Dr Miniter did not examine what the worker was doing after he returned to work or consider the effect of 10 years of heavy work on the right shoulder. The article acknowledged that causation was a complex issue and the steps taken had to be applied to the individual's case. She held that Dr Miniter did not adequately apply those factors to the worker's circumstances and simply asserted a general proposition.

The Senior Arbitrator preferred the opinions of Dr Kinzel (treating specialist) and Dr Pillemer and, based upon the decisions in *Kooragang Cement Pty Ltd v Bates* and *Nguyen v Cosmopolitan Homes (NSW) Pty Limited,* she was satisfied that the right shoulder injury was a consequence of the accepted left shoulder injury. She also held that the worker suffered an aggravation of a disease in his right shoulder as a result of the nature and conditions of employment and found that the proposed surgery was reasonably necessary.

On appeal, the appellant argued that the Senior Arbitrator erred: (1) in fact by concluding that Dr Miniter's finding of a full range of movement in the right shoulder on 3/04/2018 was relevant to the weight that his opinion ought to be afforded; (2) in fact by concluding that Dr Miniter failed to consider what the worker did with his right arm at a time when he could not use his left arm; (3) in fact by assigning additional weight to Dr Kinzel's opinion because she had examined the worker on many occasions; (4) by relying upon her conclusion that Dr Kinzel's "*familiarity with the work*" assisted her to conclude that the worker suffered an injury to his right shoulder under s 4 (b) (ii) *WCA*; and (5) by rejecting Dr Miniter's opinion that any injury to the right shoulder due to the nature and conditions of employment would have been accompanied by complaints of pain.

Deputy President Wood confirmed the COD. Her reasons are summarised below.

Wood DP rejected ground (1). She noted that the appellant argued that the conflicts between the findings of Dr Miniter and Dr Pillemer should have been put to those experts for explanation, without which the Senior Arbitrator could not infer that one of the experts was wrong. She stated:

> 95. The Senior Arbitrator found that that evidence was inadequate to support A/Prof Miniter's conclusion. If an expert's observations require clarification, it is a matter for the party relying on that opinion to adduce sufficient evidence from that expert to explain his or her observations and conclusions. In circumstances where that does not occur, it is open to the decision maker to find that evidence unsatisfactory and prefer a different view.
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> 96. It is clear from the passage cited at [92] above that the absence of restriction in the range of movement in the respondent's right shoulder initially formed the basis for A/Prof Miniter's opinion that the respondent did not suffer from a consequential condition in his right shoulder. The fact that other experts did find such a restriction was a matter that weighed against the acceptance of this opinion expressed by A/Prof Miniter. Notably, A/Prof Miniter provided detail of his examination of the right shoulder in his final report and did find such a restriction. Thus, there was no error in the Senior Arbitrator rejecting A/Prof Miniter's opinion that the respondent did not suffer from a consequential condition because there was no restriction of movement in the right shoulder, a clinical finding that formed the basis of his opinion.

Wood DP rejected ground (2). She stated that the contemporaneity of complaints is not always determinative regarding an allegation of consequential injury. The Senior Arbitrator conducted a proper analysis of the expert medical evidence and applied the correct test. The opinions of Dr Kinzel and Dr Pillemer were logical and probative and it was open to the Senior Arbitrator to accept them and to prefer them to Dr Miniter's opinion.

Wood DP rejected grounds (3) and (4). She stated, relevantly:

> 122. … It is logical that a treating medical practitioner who examines and treats a patient on a number of occasions has more opportunity to obtain an accurate history and record complaints than does a qualified expert. That does not always mean that the treating doctor's opinion will be accepted over that of the qualified expert, but it is one factor that a decision maker can take into account. The role of the decision maker is to weigh the evidence of each expert and provide reasons for affording greater weight to the opinion of one expert over another. Questions of the acceptance of evidence and the weight it is given are peculiarly matters within the province of an arbitrator, unless it can be said that the finding was so against the weight of the evidence that some error must have been

involved. It cannot be said that the Senior Arbitrator's conclusion as to the weight to be afforded to the opinion of Dr Kinzel was so against the weight of the evidence that it was wrong. Dr Kinzel's evidence was consistent with all of the medical experts other than A/Prof Miniter.

Wood DP also rejected ground (5). She stated, relevantly:

> 127. The appellant's allegation of error on the part of the Senior Arbitrator appears to rest on the proposition that A/Prof Miniter's conclusion that there would have been a contemporaneous complaint remained unanswered by Dr Pillemer or Dr Kinzel. If the appellant's submission is that because that conclusion was not contradicted, the Senior Arbitrator was bound to accept it, the submission is wrong. A court, or in this case the Commission, is not obliged to take the opinion of an expert as conclusive even though there is no expert evidence to contradict it. The Senior Arbitrator took the evidence and the appellant's submission about that evidence and acted upon it. Her conclusion was not unreasonable or perverse.
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> 128. That is sufficient to dispense with this allegation of error and there is no other challenge to the Senior Arbitrator's reasons for determining that she did not accept the respondent's submission about that evidence or A/Prof Miniter's conclusion.

Pre-filing statement struck out under s 151DA WCA

Aluminium Specialities Group Pty Ltd v Opokuware [2020] NSWWCCPD 3 – President Judge Phillips – 19/01/2021

The worker was employed by Arrowpak Packaging Pty Ltd from July 1992 to approximately October 2002. He alleges that in or around 1993, he began to suffer low back pain at work and that he suffered a frank injury to his right knee on or about 14/10/2002.

The worker was employed by the applicant from 8/05/2003 until 2010. He alleges that on or about 7/08/2009, he suffered sharp pain in his posterior and intense pain in his hip and groin and that the nature and conditions of his employment aggravated his prior back injury.

In 2012, the worker claimed compensation against both employers. In 2013, he commenced WCC proceedings and on 20/06/2014, the Commission issued a COD – Consent Orders, which awarded the worker weekly payments from 28/10/2010 to 28/04/2013 and s 60 expenses. The parties agreed to enter into a Complying Agreement for 20% WPI (right lower extremity).

On 31/07/2014, the worker's solicitors gave the applicant notice of intention to claim WIDs in respect of the right hip injury and on 28/10/2014, the worker served a pre-filing statement on the applicant's solicitors. On 6/11/2014, the applicant issued a dispute notice and on 12/11/2014, a pre-filing defence was served on the worker's solicitors. On 18/11/2016, the Commission certified that the parties did not resolve the dispute at mediation.

The applicant argued that the parties attended an informal settlement conference on 18/11/2016, which was unsuccessful and in June 2018, the worker instructed new solicitors. Its solicitors filed an email from the worker's solicitors dated 29/09/2018, asking whether a further offer would be made and indicating that they may not be able to obtain realistic instructions from their client. A further informal settlement conference was convened on 22/02/2019, which was also unsuccessful, and on 14/05/2019, the new solicitors advised that they were terminating the worker's instructions because that could not obtain any meaningful instructions from him.

On 24/03/2020, the applicant's solicitors applied to strike out the pre-filing statement on the basis that there had been no further progress in the claim. On 27/03/2020, the second firm of solicitors confirmed that they did not act for the worker, but that he had instructed a further law firm. That law firm advised that they had recently received instructions regarding a claim under s 66 *WCA*, but not a WIDs claim, and they agreed to accept service of the strike-out application.

On 15/04/2020, the new solicitors advised the Commission that due to the COVID-19 pandemic and shutdown, they had been unable to obtain the file from the previous solicitors. On 18/06/2020, the new solicitors advised the Commission that they had obtained some documents but not the complete file, which appeared to have been lost. However, on 16/07/2020, the new law firm advised the Commission that they no longer acted for the worker because he had rejected their advice and that they had advised him to obtain legal representation as a matter of urgency because of the strike out application.

On 20/07/2020, the Commission contacted the worker, who advised that he would be seeking new legal representation. However, on 30/07/2020, the worker advised the Commission that he had not yet found a new lawyer. Further attempts by the Commission to contact the worker on 10/08/2020 and 12/08/2020 were unsuccessful.

On 25/08/2020, the Commission sent a letter to the worker by Express Post, enclosing a complete copy of the Application, a blank Notice of Opposition and contact details for ILARS and the Law Society's referral service. The letter requested the worker, or his solicitors, to return the completed Notice of Opposition by 22/09/2020 and that if the Application to Strike Out a Pre-Filing Statement is granted, he may lose his right to common law damages.

On 2/09/2020, 3/09/2020 and 4/09/2020, the Commission attempted to contact the worker by telephone and voicemail messages were left for him, but he did not return the calls. Further calls pm 8/09/2020 were unsuccessful.

On 15/09/2020, the Commission sent further copies of the documents to the worker by registered post, which were delivered on 18/09/2020 and advised him that if he failed to respond, the matter would be allocated to the President for determination. On/09/2020, the worker called the Commission and stated that he has not been well, wanted to get a lawyer and asked for an extension of time to seek legal representation.

The applicant consented to an extension until 26/10/2020 and the commission granted this extension. However, the worker did not contact the Commission and further attempts to contact him on 27/10/2020 and 28/10/2020 failed. On 29/10/2020, the Commission succeeded in contacting the worker, but he denied having been notified of the Application to strike out the pre-filing statement and receiving any documents from the Commission. He also denied having anything to do with the Commission and hung up the telephone.

President Judge Phillips DCJ determined the application on the papers and struck out the pre-filing statement and he stated, relevantly:

> 65. There are sound policy reasons for the inclusion of s 151DA(3) in the 1987 Act. The provision ensures that the parties have sufficient time to finalise the pre-litigation phase of the proceedings.[8] It also ensures that there is a degree of certainty to the process and enables the parties to explore resolution and/or mediation of the claim before embarking on litigation.
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> 66. It is now over six years since Mr Opokuware gave notice on 31 July 2014 to Aluminium Specialties of his intention to bring a claim for work injury damages. The mediation occurred on 19 February 2015 and informal settlement conferences occurred on 18 November 2016 and 25 February 2019. Mr Opokuware has not progressed the matter since the last informal settlement conference. I also note that there have been significant periods of time spanning between the mediation and the two informal settlement conferences.
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> 67. The emails annexed to Aluminium Specialties' submissions are indicative of an unwillingness on the part of Mr Opokuware to resolve the claim.
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> 68. As submitted by Aluminium Specialties, I also note that Mr Opokuware was entitled to commence proceedings in the District Court since 2015, which he has not done so.

69. The chronology above indicates that Mr Opokuware has been advised by multiple legal representatives. It is also indicative of the delay in resolving this matter. Apart from an assertion made in a telephone call on 28 September 2020 that he had been unwell, Mr Opokuware has not provided any explanation of the reasons for delay. As noted in England,[9] prejudice to the defendant and the reasons for delay are clearly relevant factors in the exercise of the discretion under s 151DA (3) of *the 1987 Act*.

70. Further, following the lodgement of the Application, the Commission has provided Mr Opokuware with multiple opportunities to lodge a Notice of Opposition to the Application. Contact has been made in numerous attempts by post and telephone. To date, no Notice of Opposition has been lodged.

71. The Commission has made contact with Mr Opokuware on a number of occasions. Within the past 18 months, the only difficulty he has had is in relation to obtaining legal representation, but over time it is apparent that he has had access to legal advice. Nowhere has Mr Opokuware given an indication of any difficulty he has had in preparing his case, or an inability to obtain evidence, or that his medical condition has not stabilised. In short, he has not pointed to any reason which would cause me to exercise my discretion in his favour. The only problem is his inability to retain and maintain a legal adviser.

72. I am further conscious of the effluxion of time since the injury and the notice being given of the intention to make the claim. As submitted by Aluminium Specialties, it faces prejudice by the proceedings being protracted.

73. In view of the delay in this matter caused by the conduct of Mr Opokuware and the absence of sufficient explanation of the reasons for the delay, together with the prejudice that Aluminium Specialties faces, and in all of the circumstances, I consider it appropriate to exercise my discretion to strike out the pre-filing statement.

Application to strike out a pre-filing statement under s 151DA WCA refused

J & D Stephens Pty Ltd v Stephens [2021] NSWWCCPD 4 – President Judge Phillips – 19/01/2021

The worker was a sheep shearer. In about 1999, be began to suffer pain in his left elbow, but he kept working until February 2002. He has not worked since then.

On 3/04/2002, the worker lodged a claim for injury suffered on 11/02/2002. On 18/06/2002, he underwent left ulnar nerve neurolysis and anterior transposition surgery, which was unsuccessful.

On 13/10/2005, the worker filed an ARD claiming compensation under s 66 *WCA*. On 10/03/2006, Dr Nicholls issued a MAC, which assessed 12% WPI and a s 66A Agreement was registered by the Commission on 7/06/2006.

In May 2020, the worker's solicitors served an amended Pre-filing statement on the applicant. The worker argued that in May 2010, the insurer agreed to resolve his claim under s 66 *WCA* for 21% WPI. The applicant filed a pre-filing defence. The matter proceeded to mediation on 7/02/2011 and 21/03/2011, but the parties were unable to reach an agreement.

During 2010, the worker began to suffer symptoms in his right arm, which he attributed to overuse following his left arm injury. In 2015 and 2018, Dr Tsai recommended surgery, which he was reluctant to proceed with.

On 12/12/2019, the applicant filed an application to strike out the pre-filing statement and served it upon the worker's previous solicitors. The Commission directed the applicant to serve the application upon the worker personally and it did so on 2/03/2020. It directed the worker to file a Notice of Opposition by 24/04/2020, but the worker did not comply. He then re-instructed his previous solicitors and they filed a Notice of Opposition on 9/07/2020.

President Judge Phillips DCJ dismissed the application. His reasons are summarised below:

The applicant argued that the pre-litigation phase concluded on 23/03/2011 when the certificate of mediation was issued and the worker has not commenced Court proceedings or taken any other steps to resolve the matter.

The worker argued that he has not been compensated under s 66 *WCA* for the consequential injury to his right arm and he is entitled to make a further claim for this injury, which has not yet stabilised because he is to undergo surgery in the future. He relied upon the decision of *Sydney South West Area Health Service v Palau* [2012] NSWWCCPD 20 (Palau) and argued that he should be afforded the opportunity to recover any lump sum compensation for that injury before pursuing a WIDs claim. Further, under s 280B *WIMA*, a WIDs claim cannot proceed unless all entitlements to lump sum compensation have been paid and he should not be prejudiced by having his pre-filing statement struck out and the application should be dismissed.

His Honour stated, relevantly:

> 77. Whilst Mr Stephens may commence proceedings in a work injury damages claim, those proceedings cannot be resolved unless and until any permanent compensation has been paid to him. Implicit in this, is that any claim must be made, determined and any such compensation be paid before the work injury damages claim can proceed to be determined. This is consistent with *Gower*, at [44] where it was held that Court proceedings cannot commence unless a claim has been made.
>
> 78. I note that *Palau* was determined prior to the commencement of the *Workers Compensation Legislation Amendment Act 2012*, which introduced s 66 (1A). Section 66 (1A) of *the 1987 Act* provides "*Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury*."
>
> 79. Clause 11 (1) of Sch 8 to the *Workers Compensation Regulation 2016* (*the 2016 Regulation*) provides that a further lump sum compensation claim may be made in respect of an existing impairment and subcl (2) provides that only one further lump sum compensation claim can be made in respect of the existing impairment. Clause 11 of Sch 8 to *the 2016 Regulation* (cl 11) is applicable in Mr Stephens' matter.
>
> 80. In combination, s 66 (1A) and cl 11 means that Mr Stephens is now limited to being able to make one further claim for lump sum compensation. A consequence of this amendment is that workers will be inclined to delay making further lump sum compensation until their permanent impairment has settled. The present case is such an example.
>
> 81. As indicated by Dr Tsai, surgery to Mr Stephens' right elbow may or may not be effective, and his right elbow continues to deteriorate. Like in *Palau*, if Dr Tsai's and Mr Stephens' evidence is accepted, Mr Stephens may have suffered a consequential condition and he should be afforded the opportunity to seek to make a claim for and to recover any lump sum compensation he may be entitled to before pursuing his work injury damages claim.
>
> 82. It is apparent from White JA's comments in *Gower* quoted above, that Mr Stephens is unable to commence Court proceedings until such time as he makes a claim for compensation. Whilst there has been a claim in respect of the left elbow, there has not been a claim made in relation to the alleged consequential condition in his right elbow.
>
> 83. As the applicant defendant has gone to some length to point out, Mr Stephens has not yet made what may be his further claim. In my view, in light of White JA's helpful analysis in *Gower*, Mr Stephens is somewhat hamstrung in being able to commence proceedings in a work injury damages claim in view of the fact that Mr Stephens has indicated that in the future he will be making a further claim for lump sum compensation.

His Honour rejected the applicant's arguments regarding prejudice and he concluded that there was evidence that the worker had taken recent action in relation to the prosecution of his claim. Accordingly, he dismissed the application.

WCC – Arbitrator Decisions

Work capacity decision – application for review dismissed and WCD confirmed

Vecchie v Ricegrowers Ltd [2021] NSWWCC 18 – Arbitrator Wynyard – 18/01/2021

On 1/11/2017, the worker suffered injuries to cervical, thoracic, and lumbar spines and affected both upper and lower extremities.

On 2/07/2020, the insurer made a WCD that the worker was able to earn $900 per week in suitable employment as a delivery driver. PIAWE was $704 and the relevant rate under s 37 *WCA* was $563.23 per week.

The worker sought a review of the WCD and argued that he did not believe that he could perform the tasks required of a delivery driver.

Arbitrator Wynyard stated that the worker's condition is one that engenders considerable sympathy, but that the objective evidence does not support that his injuries are "*serious*". He stated:

> 39. Whilst Dr Douglas is of the view that Mr Vecchie is now virtually unemployable, some care has to be given to such an opinion when it is based on a finding of chronic pain.
>
> 40. One of the difficulties regarding the assessment of an injured worker's capacity to earn when considering a person suffering from chronic pain is that it can only be evaluated from a subjective viewpoint. Dr Douglas has accepted without question the complaints made by Mr Vecchie and has not exercised any objectivity in doing so.
>
> 41. He has not considered that Mr Vecchie was able to work eight hours a day for five days a week over the year before his light duties were withdrawn, and has not turned his mind to the question as to whether Mr Vecchie's condition has deteriorated since he ceased work in November 2019.
>
> 42. That may be because such an opinion would be difficult to sustain in the face of the evidence that Mr Vecchie has done no work over that period of time, save for limited work on his farm. Again, the fact that Mr Vecchie is able to do some limited work on his farm would have merited some consideration by Dr Douglas in deciding that Mr Vecchie's chronic pain condition rendered him with no current work capacity.
>
> 43. Accordingly, I am not persuaded by the report of Dr Douglas. I was also not assisted by the documentary evidence contained in the Application to Admit Late Documents of 3 November 2020. The fact that Mr Vecchie has been referred for further investigation and for further physiotherapy does not advance his case in so far as it is relevant to his earning capacity at present. I disagree with Mr Jeremy, with respect, that the WorkCover certificate of 2 November 2020 from Dr Campbell may be read as "removing" all of the suggested occupations. Indeed, to the contrary, it supported that Mr Vecchie did have a capacity to earn, subject to the limitations therein set out that I have referred to above.
>
> 44. I do not regard the content of that certificate as being inconsistent with Dr Campbell's response to the facsimile from the rehabilitation providers of 16 January 2020. Dr Campbell found that each suggested an occupation was suitable and that Mr Vecchie was able to do that work on a full-time basis. The rider given to Dr Campbell's opinion that a trial period should be considered in relation to the sales position and the farm hand position do not detract from the validity of his considered opinion. The facsimile was thorough and described the probable physical requirements of each position. Dr Campbell did not disagree that, given those descriptions, the positions suggested were suitable, and suitable for fulltime employment.

45. I also reject Mr Jeremy's suggestion that the authors of the vocational assessment report showed bad faith by suggesting the position of farm hand. At page 42 of the Reply, it was acknowledged that an improvement in medical status was required for this position to be marketable, although it was suggested that tractor driving and spraying were likely suitable aspects of the job that Mr Vecchie could perform at present. These reservations expressed often during the report.

46. The rehabilitation providers have given a most detailed and thorough report dealing with all facets of Mr Vecchie's employability. Potential employers have been contacted and interviewed, extensive tests were carried out with Mr Vecchie, and the conclusions that were reached I found to be reasoned, logical and sensible.

47. As I indicated, Mr Vecchie's condition is unfortunate and I am satisfied that there is an element, as suggested by the rehabilitation report, that his condition has been contributed to by his self-perceived disability, which the test administered showed to be "severe."

48. I am however not persuaded that his condition has rendered him with no current work capacity. The positions described, particularly the sales agent and delivery driver, I find to be suitable employment within the definition of s 32A of the 1987 Act. The details provided in the medical information, including the latest certificate of capacity, Mr Vecchie's age (33 years) and work experience with the respondent since 2007, his education and skills as described in the rehabilitation report, the contents of the rehabilitation report itself, and the services provided by the vocational assessment are all matters I regard as being indicative of Mr Vecchie's ability to engage in suitable employment.

49. Under s 32A of course it is not necessary to demonstrate that the suggested employment is available, but as I have indicated the vocational assessment aspect of the rehabilitation report has indeed interviewed prospective employers and I am satisfied that the work recommended is in fact available.

Accordingly, the Arbitrator confirmed the WCD.

Claim for cost of medical cannabis treatment rejected – no compelling evidence that the proposed treatment was effective or safe in the circumstances of the case

Donnelly v Camsons Pty Ltd [2021] NSWWCC 21 – Arbitrator Sweeney – 19/01/2021

The worker sought approval for a trial of medical cannabis as part of a pain management program for a left shoulder injury suffered on 25/02/2013. However, the respondent disputed that the proposed treatment is reasonably necessary for the purposes of s 60 *WCA.*

Arbitrator Sweeney determined the dispute on the papers. He noted that the parties agreed that the matter should be determined by reference to the principles set out by Roche DP in *Diab*, which significantly modified the "*standard test adopted in determining if medical treatment is reasonably necessary as a result of a work injury*" formulated by Burke CCJ in *Rose v Health Commission (NSW)* 1986 2 NSWCCR 32 (*Rose*). He stated that the cases referred to in *Diab* establish that novelty is not a basis for rejection of proposed treatment and that entitlement is not limited to the ordinary forms of treatment generally prescribed by the medical profession.

The Arbitrator held that the worker was probably addicted to opioids, which had been prescribed for him for several years. The evidence indicated that significant progress had been made to reduce the prescribed dosage, but the worker had not successfully come off them. He stated:

52. Dr Ho prefaces his recommendation that the applicant undertake a trial of CBD oil by noting that it is not common practice for the treatment of chronic pain at present. As Mr Stockley submitted, he based his recommendation on a "personalised medical principle". Dr Ho stated:

> *I further note that there is poor scientific evidence for the efficacy or safety of CBD oil at this stage.* (my italics)

53. It is true that Dr Ho is concerned that there be regular clinical assessment by a pain specialist to ensure safety and efficacy. Initially, he contemplates a trial for three months. This cautious approach is in keeping with TGA guidance which states:

> In the absence of strong evidence for dosing and specific preparations of cannabis or cannabinoids in the treatment of CNCP, it is recommended that any treating physician who elects to initiate cannabinoid therapy should assess response to treatment, effectiveness and adverse effects after one month. This is best achieved as part of a research project or clinical audit.

54. There remains, however, the necessity to balance efficacy and safety. It is undisputed that there are risks associated with the use of medical cannabis. They include addiction, psychotic symptoms, structural brain changes, and cognitive impairment. I assume that such risks would be minimised by a short trial of medical cannabis. Nonetheless, I am unable to understand why the applicant should be subjected to these risks, however minimal, when there is no compelling evidence that the treatment proposed will be efficacious.

55. Dr Ho does not put forward a convincing case that medical cannabis will assist the applicant in opioid withdrawal or that it will lessen his experience of pain. Dr Gorman, on the other hand, expresses the opinion that either outcome is improbable. It is accepted that medical cannabis might assist with the anxiety and sleep. But there are other modes of treatment which can address these problems.

56. The applicant has been treated with a variety of medication, including several opioids, over many years. It is of fundamental importance, as I understand the medical evidence, that he be weaned off harmful medication. The optimal outcome is that the applicant can ultimately self-manage his pain, with assistance of less harmful analgesia. In those circumstances, I believe there is considerable force in Dr Gorman's opinion that prescribing a potentially addictive new medicine at this stage will diminish the focus on the difficult process of withdrawal from the opioid treatment regime.

57. Finally, there is the fact that the applicant will be excluded from driving and from attending job sites during his treatment. While this is the least important of the reasons for rejecting the proposed trial of medical cannabis, it augments the other arguments deployed by Dr Gorman. It is important, as he opines, that the applicant be offered the opportunity for some selected employment at the earliest possible time. He has remained out of the workforce for five years. Experience suggests that if that situation is not remedied shortly, the applicant will join the ranks of the long term unemployed.

58. In my opinion, the evidence does not demonstrate that the treatment proposed by Dr Ho, namely CBD oil is reasonably necessary. The evidence does not establish benefit, other than the likelihood that it may improve the applicant's sleep. On the other hand, there are significant risks which are poorly understood. In those circumstances, it is inappropriate to subject the applicant to those risks.

59. My impression is that the applicant has been exposed to undue risk by his past treatment regime. It is difficult to understand why he was treated with opioids over such a long period, when the addictive and debilitating qualities of these drugs has been known to medical practitioners for many years. I do not believe that it is appropriate to magnify these risks. It is, of course, possible that further trials will reveal greater benefits from the use of medical marijuana than are presently proven. At that time, an analysis of the benefits of efficacy and safety may produce a different outcome.

Accordingly, the Arbitrator found that the proposed medical cannabis treatment was not reasonably necessary.