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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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Court of Appeal Decisions

Statutory interpretation- entitlement to weekly payments arose before, but was not determined until after 2012 amendments to WCA came into force — s 82A entitles the appellant to have PIAWE indexed historically from the time she first became eligible to receive weekly payments

Theoret v Aces Incorporated [2021] NSWCA 3 – Leeming JA, McCallum JA, Garling J – 2/02/2021

On 23/12/2002, the appellant was injured at work.

On 3/04/2019, the insurer served a dispute notice on the appellant stating that: she had been paid weekly payments for 116 weeks; she had no current work capacity; and that "*indexed PIAWE*" is $466.

On 24/07/2019, the appellant disputed the calculation of "*indexed PIAWE*" under s 82A *WCA* and asserted that this should have been indexed from December 2002 and be $690.19.

Arbitrator Harris conducted a teleconference as a Delegate of the Registrar and identified the only issue as being whether indexation applied from the date of injury or from 1/04/2013. He advised the parties that he considered this issue in *Thompson v ATN Channel 7 (No 2)* ("*Thompson*"), which the legal representatives had not considered, and he directed them to file written submissions. He ultimately determined the dispute as an Arbitrator, as opposed to a Delegate of the Registrar.

The Arbitrator noted that s 82A *WCA* was introduced by *the 2012 Amendments* and was further amended by the *2018 Amendment Act*, which included the repeal of s 82A (3) and a change to the wording of the various subsections under which "*the Authority*" was substituted for "*the Minister*" in s 82A (4) and that the Authority is to declare, by order published on the NSW Legislation website, the number that equates to the factor B/C. A similar change was made to the wording in s 82A (5).

The Arbitrator referred to his previous decision in *Thompson (No 2)*, in which he declined to index PIAWE from the date of injury and indexed it from 1/04/2013. He stated:

> 11. As the plurality stated in *Military Rehabilitation Commission v May*, the "*question of construction is determined by reference to the text, context and purpose of the Act*"; citing *Project Blue Sky Inc v Australian Broadcasting Authority and Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue.*
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> 12. In *Grain Growers Limited v Chief Commissioner of State Revenue (NSW)* Beazley P stated11 that "*the starting point and end point is with the text of the provision*". Her Honour cited the comments of the High Court in *Alcan* when the plurality stated:
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> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Footnotes omitted) See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].
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> 13. I do not accept the applicant's submissions and respectfully disagree with the decision of *Edwards* in relation to the finding that the PIAWE can be indexed prior to 2013 in accordance with the formula contained in s 82A (2).
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> 14. Section 82A is part of Division 6A of *the 1987 Act*. The section was inserted into *the 1987 Act* by the *Workers Compensation Legislation Amendment Act 2012* (*2012 amendment Act*).
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> 15. Section 82A (1) provides that the amount of weekly payments is varied "*on each review date after the day on which the worker became entitled to weekly payments*". "*Review date*" is defined in s 82A (2) to mean 1 April and 1 October in each year. Section 82A (4) provides that "*before each review date*" the Minister notifies by order on the NSW legislation website the number that equates to the factor B/C.
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> 16. The applicant in this case is seeking an indexation of the pre-injury average weekly earnings in accordance with its calculation of the factor B/C. Whilst the figure provided by the applicant may be the same calculation as set out in s 82A (1), it is not in accordance with the requirement set out in s 82A (4) that the Minister notify the number that equates to the factor B/C by order published in the NSW legislation website.
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> 17. As the respondent correctly submitted, the Minister has not notified a number that equates to the factor B/C for any period prior to 1 April 2013.
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> 18. Section 82A is operational from 1 October 2012. It was passed as part of a scheme of amendments for entitlements to weekly payments of compensation. These amendments included the entitlement to weekly payments in the first entitlement period of 13 weeks (s 36) and the second entitlement period (s 37), all of which are also operational from 1 October 2012.
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> 19. The submission that the average weekly earnings can only be indexed during a period after the commencement of the operation of the section is more consistent with the context of the amendments to weekly payments that are operative from 1 October 2012.
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> 20. The applicant's submission is that the critical words in s 82A (1), that the figure is indexed "*on each review date after the date on which the worker became entitled to weekly payments*" is without reference to a starting commencement year. That submission ignores the context of the section, reads the words "*review date*" in isolation and otherwise ignores the clear words of s 82A (4) of *the Act*.

21. In *NSW Trustee and Guardian v Olympic Aluminium Pty Ltd* Keating P analysed the various authorities, particularly with reference to the observations of the majority of the High Court in *Alphapharm Pty Ltd v H Lundbeck A/S*, which reiterate that the words under consideration must be viewed in context rather than in isolation.

22. The plurality in *Alphapharm*, referring to previous High Court authority, stated:

> It is not always appropriate to dissect a composite legislative expression into separate parts, giving each part a meaning which the part has when used in isolation, then combine the meanings to give that composite expression a meaning at odds with the meaning it has when construed as a whole.

23. The reference to "*review date*" as being any "*1 April or 1 October*" ignores the requirement in s 82A (4) that the Minister must notify, by order published in the NSW legislation website, the number that equates to the factor B/C.

24. I do not accept the applicant's submissions. The submissions are contrary to contextual aspects of s 82A and specifically contrary to the requirements in s 82A (4) that the number for B/C be published by order in the NSW legislation website.

25. The reasoning in *Edwards* supporting the applicant's position was that workers compensation legislation is beneficial legislation which should "*be construed beneficially giving the fullest relief that the fair meaning of its language will allow*". Arbitrator Dalley stated:

> To apply indexation from the first review date after 18 November 2009 seems to me in accordance with the beneficial nature of the legislation as well as being in accordance with the plain words of the section. It has the effect of adding words to the section limiting indexation to the value of 'A' only on and after 1 April 2013. I accept the applicant's submission that the value of 'A' is to be indexed in accordance with the formula from the first review date after weekly payments became payable following injury on 18 November 2009.

26. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel* as having a "*non-beneficial operation*" and by the Court of Appeal as disclosing "*a cost-savings objective*": *Cram Fluid Power Pty Ltd v Green*.

27. Recently in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* Leeming and Payne JJA observed:

> 42. The applicant repeatedly invoked in support of its construction the legislative purpose, which was to benefit subcontractors in its position. But Gleeson CJ observed in Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47 at [6] that:
>
> > [T]he underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose.

28. In *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40] it was said, by reference to *Carr*, that:

> Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem.

29. Whilst the amendments to weekly compensation made by *the 2012 amendment Act* may not fall within the same class as the amendments to permanent impairment compensation, discussed by the High Court in *Goudappel* and the Court of Appeal in *Cram Fluid*, the 2012 amendments otherwise limited the entitlement to weekly compensation. These amendments included the restriction of the meaning of "*suitable employment*" by excluding the notion of whether alternative work was available in the employment market, by restricting the number of weeks to weekly compensation entitlements as set out in Division 2 of Part 3 of *the 1987 Ac*t and introducing the concept of a work capacity decision which is undertaken by the insurer managing the claim. These changes to weekly compensation introduced by *the 2012 amendment Act* were, in some respects, not beneficial to workers.

30. I do not agree that the s 82A should be given "*the fullest relief that the fair meaning of its language will allow*". In any event, read in context, I do not accept that the reference to "*on each review date*" in s 82A (1) means a date where the Minister has not published, in accordance with s 82A (4), the number for the factor B/C on the NSW legislation website.

31. The respondent submitted that s 82A "*is not retrospective*". I do not reject the applicant's entitlement based on suggestions of "*retrospective operation*". Section 82A clearly operates from 1 October 2012. The section does not have retrospective operation within the first sense discussed in *Goudappel* , that is, it does not purport to operate on entitlements existing prior to the date of commencement of the section. The section otherwise does not breach the concept of retrospective operation in the second sense discussed in *Goudappe*l, that is, it does not operate "*to alter rights or liabilities which have already come into existence by operation of prior law on past events*".

32. The section does not affect either of those rights as it does not affect an entitlement to weekly compensation up until 1 October 2012 when the section commenced. In that sense I do not consider that the question of "*retrospectively*" is relevant to the construction of the section. If I am wrong in this respect, then it is a further argument favouring the respondent's position.

33. For these reasons I reject the applicant's submission that the indexation applies from 2000. The indexation to s 82A applies from 1 April 2013.

The Arbitrator rejected the appellant's argument that his interpretation in applying the order declared under s 82A (4) WCA is using subsequent delegated legislation to interpret the legislation. The appellant cited the decision in *Mine Subsidence Board v Wambo Coal Pty Ltd* (*Wambo*) as authority for the proposition that:

> Delegated legislation in the form of regulations or publications by the minister or Authority come after the enactment of the legislation and do not accordingly disclose the intention of parliament when it passed the legislation.

The Arbitrator stated (citations excluded):

> 43. I assume that the applicant was referring to that part of the decision in *Wambo* when Tobias JA stated:
>
> 41. Although the appellant sought to call in aid the terms of a regulation made for the purpose of s 12A (2) (a), accepting that no such regulation had been made for the purpose of s 12A (2) (b), in my opinion it is well established that as a general rule it is impermissible to call in aid in the construction of an Act delegated legislation made under that Act: *Pearce & Geddes* '*Statutory Interpretation in Australia'*, 6th ed. (2006), Chatswood, [3.41] pp.104-105 and the cases there cited. It was not suggested by the appellant that the regulation in question and the Act formed part of a legislative scheme which, for the purpose of ascertaining but not construing that scheme, permits of a partial exception to the general rule.

44. The decision is referred to in *Pearce & Geddies, Statutory Interpretation In Australia,* Eighth edition (*Pearce & Geddies*) which also refers to the observations of French CJ in *Plaintiff M47-2012 v Director-General of Security* when his Honour stated:

> Generally speaking, an Act which does not provide for its own modifications by operation for regulations made under it, is not be construed by reference to those regulations: *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J.

45. The applicant's submission fails to consider that s 82A (4) authorises the declaration of the factor B/C. Using the words of French CJ set out above, s 82A (4) provides for its own modification through the order made pursuant to it. Section 82A (4) is not delegated legislation and is the source of power for the declaration of the order that equates to the factor B/C is to be published on the NSW website. Accordingly, I am not using the orders made under s 82A (4) to interpret the legislation but applying it as a modification of the section…

47. In my view, s 82A (4) provides a clear intention that the number published on the NSW legislation website is the relevant number for the purposes of the section. The applicant stressed reliance on the wording of s 82A (1). In my view, that provision must be read subject to the express provision in s 82A (4)…

49. I note that I did not apply a purposeful approach in *Thompson (No 2)*. What I then said was that I would not follow the reasoning in *Edwards*, a decision which reached the contrary conclusion, because it solely relied on a beneficial construction in construing the section. I was not prepared to give the section "*the fullest relief that the fair meaning of its language will allow*". I otherwise referred to various authorities which cast doubt on the approach of stating the purpose of legislation to solve the problem of interpretation.

The Arbitrator confirmed the view that he expressed in *Thompson (No 2)*, which are to be read with the reasons in this matter. He concluded that the appellant's interpretation "*basically ignores the clear words contained in both s 82A (4) and (5) and the order declared by the Authority and published on the NSW legislation website*". However, he declined to enter an award for the respondent because it was validly paying weekly compensation in respect of the injury. Accordingly, he refused the application.

On appeal, ***Deputy President Wood*** upheld the Arbitrator's decision.

The appellant then appealed to the Court of Appeal and asserted that the Deputy President erred in law in holding that s 82A *WCA* only applied to index PIAWE from 1/04/2013 and not from the date the appellant first received weekly compensation.

The **Court of Appeal (McCallum JA, Leeming JA & Garling J)** allowed the appeal. The headnote provides:

> The appellant suffered injuries at different times during the same employment. She first became entitled to weekly payments of workers compensation in 2004. However, her entitlement to weekly payments in respect of a different injury was not determined until April 2019. In the meantime, on 1 October 2012, substantial amendments to the *Workers Compensation Act 1987 (NSW)* were introduced including amendments to the process for determining the quantum of weekly payments. The appeal raised the application of those amendments where the entitlement to weekly payments arose before the commencement of the amendments but the appellant was not an existing recipient of weekly payments at the time the amendments came into force.
>
> Both before and after the commencement of the 2012 amendments, the statute provided for indexation of weekly compensation payments. Under the amended legislation a worker's entitlement to weekly payments is calculated as a percentage of "*pre-injury average weekly earnings*". In Ms Theoret's case, that sum is derived from her earnings

back in 2002. The issue to be determined on appeal was whether, under the amended provisions, the dollar amount determined by reference to the pre-injury earnings in 2002 is subject to indexation from the time Ms Theoret first became entitled to receive weekly benefits for the relevant injury or only from April 2013, the first review date following the introduction of the 2012 amendments. The resolution of that issue turned on the proper construction of s 82A of the Act as currently in force.

Held (per McCallum JA; Leeming JA and Garling J agreeing), allowing the appeal:

(1) The appellant's argument was not that s 82A should operate retrospectively but that it should apply to weekly compensation payments to which she became entitled after the commencement of the section: at [23].

(2) The transitional provisions in Sch 6 Pt 19H cl 3(2) *of the 1987 Act* make plain that the 2012 amendments have no application to compensation paid before 1 October 2012: at [24].

(3) Although the State Insurance Regulatory Authority is required to publish the number that represents the factor to be applied in the indexation task for each review date, the Authority's failure to do so for review dates before the commencement of the 2012 amendments does not alter the construction of s 82A: at [30], [32]-[33]. The section gives effect to the relevant adjustment of its own force. It does not depend on the Authority fulfilling its duty, although the fulfilment of that duty has real utility: [39], [47].

(4) The words of sub-section 82A(5) operate as a deeming provision and indicate that historical indexation is not inconsistent with or prohibited by s 82A: at [34]-[35].

Supreme Court of NSW – Judicial Review Decisions

Review of decision of Delegate of the Registrar – Delegate did not exceed the "gatekeeper" role under s 327 WIMA by dismissing the appeal on the basis of jurisdiction – No appeal lies from the MAC of a MAP to another MAP under s 327 – No appeal lies under s 327 (3)(a) after the issue of a COD – The appeal was not a "threshold dispute"

Sleiman v Gadalla Pty Ltd [2021] NSWSC 86 – Harrison AsJ – 15/02/2021

On 14/05/2-14, the plaintiff was injured at work.

On 19/01/2017, Dr Truskett issued a MAC that assessed 2% WPI. The plaintiff lodged an application to appeal against the MAC and a Delegate of the Registrar concluded that a ground of appeal under s 327 (3) (d) WIMA was made out and referred the appeal to a MAP comprising Arbitrator Edwards, Dr D Dixon and Dr J Garvey.

On 6/04/2017, the MAP determined that the plaintiff should undergo a further medical assessment and on 16/06/2017, it issued revoked the MAC and issued a fresh MAC, which assessed 14% WPI. On 21/07/2017, the Registrar issued a COD, based upon the MAC.

The plaintiff alleged a further deterioration and sought to appeal against the MAP's MAC.

On 18/09/2019, a delegate of the Registrar declined to substantively consider the plaintiff's application on the basis that he had no entitlement to appeal. In short, the Delegate concluded that there was no statutory basis for engaging in the enquiry set out in s 327(4) *WIMA*, because the MAP's determination was not a "*medical assessment*", as it was not made by an AMS and the MAP had already issued a decision in relation to it.

The plaintiff applied to the Supreme Court of NSW for judicial review of the Delegate's decision and alleged that the Delegate: (1) exceeded the jurisdiction conferred by s 327(4) of the 1998 Act by not confining his consideration of his appeal to the face of the application and any submissions made to the Registrar; (2) erred in point of law when he decided the application to appeal on a basis that had not been raised by the parties and in respect of which he did not invite submissions, thereby denying him procedural fairness; (3) failed to exercise the jurisdiction conferred by s 327 (4) *WIMA* by failing to consider the question it posed; (4) erred in

law in misconstruing s 66 (1A) *WCA* and Chapter 7 Part 7 *WIMA* as precluding: (a) an appeal pursuant to s 327 (3) (a) or (b) *WIMA* from a medical certificate issued by a medical appeal panel following an appeal pursuant to s 327 (3) (c) or (d) of the Act; (b) an appeal pursuant to s 327 (3) (a) or (b) following a determination of the Commission or a complying agreement pursuant s 66A *WCA*; and (c) a claim for compensation payable pursuant to a medical assessment certificate issued by a medical appeal panel following an appeal pursuant to s 327 (3) (a) or (b) *WIMA*; and, in the alternative, (5) erred in law in determining that he was not entitled to appeal the existing medical assessment certificate pursuant to s 327 (3) (a) or (b) *WIMA* for the purposes of the determination of a "*threshold dispute*".

Associate Justice Harrison dismissed the summons and her reasons are summarised below.

- Her Honour rejected ground (1). She stated that under s 327 (4) *WIMA*, an appeal is not to proceed unless the Registrar (or the Delegate) is satisfied that, on the face of the application and any submissions before him, at least one of the grounds for appeal specified in subsection (3) has been made out. The plaintiff argued that this limited the Delegate to considering only those grounds for appeal, and that "*no question of jurisdiction formed any part of the inquiry*" committed to him.
- Her Honour held that s 327 (4) *WIMA* simply states that an appeal cannot proceed ***unless*** the Delegate is satisfied that one of the relevant grounds has been made out. In other words, it cannot proceed if none of those grounds has been established. It does not follow that the statute precluded the Delegate from considering whether the appeal could not proceed for another reason, such as that the Commission lacked jurisdiction.
- The question of whether the Delegate had jurisdiction to hear the plaintiff's application was a consideration inherent to the exercise of his statutory power. By considering the issue, the Delegate did not act in excess of the jurisdiction conferred by s 327(4) *WIMA*; on the contrary, had the Delegate considered the substance of an application in relation to which he lacked jurisdiction, it is that decision which would have been beyond power: see *Kirk* at [75].
- Her Honour rejected ground (3). She held that when read in context, the Delegate's comments merely acknowledge that despite the plaintiff's failure to tick the appropriate box on the application form, the Delegate was able to infer the intended ground of appeal. By so doing, the Delegate did not express any satisfaction that the plaintiff made out a relevant ground of appeal under s 327 (3) *WIMA.* Whether a ground of appeal has been made out is a more stringent test than whether a ground exists: see *Bunnings* at [67] per Simpson J.
- Regardless of the Delegate's attitude regarding the merits, the question remains whether his failure to consider its substance, after he had determined that the Commission had no jurisdiction to hear it, constituted a failure to exercise jurisdiction.
- The Delegate made his decision on the basis of a threshold issue of jurisdiction, in relation to which he gave substantial reasons. In circumstances where the Delegate had already concluded that there was no statutory basis for the appeal, he was under no obligation to then consider the substance of that appeal. He did not fail to exercise his statutory function.
- Her Honour rejected ground (2). She noted that this ground raised 2 issues. The first is whether there were submissions made to the Delegate that raised the issue of jurisdiction and she rejected that argument. The second issue is whether a failure to give the plaintiff notice or afford him an opportunity to respond to these issues constitutes a denial of procedural fairness. She accepted the defendant's argument that a decision maker does not fail to afford procedural fairness by refusing to consider an application from a party who has no entitlement to make it, when the question of that entitlement arose obviously from the terms of the statute under which the application was made.

- Her Honour rejected ground (4) (a). She noted that the plaintiff argued that the statutory scheme provides that any medical assessment of a matter certified in a MAC under Part 7 of Chapter 7 *WIMA*, in respect of which the MAC is conclusively presumed to be correct, is appealable under s 327 (1), and this includes the decision of the MAP.
- In interpreting the operation of s 327 *WIMA* and the apparent conflict that appears to arise from those provisions, the Court is to give them the meaning which best achieves the result that will give effect to their purpose and language, while maintaining the unity of all provisions. Her Honour stated:

> 97. In my view, this construction of the statute is unworkable. The operation of ss 4 and 326 to 328 of *the 1998 Act* does not permit the certificate of an appeal panel to be considered a "*medical assessment*" as defined under *the Act*. As the defendant has submitted, s 328 (5) provides that an appeal panel may revoke the certificate appealed against and issue a new certificate. The provision in s 328 (5) for the application of s 326, which concerns the status of "*medical assessments*", to such a certificate indicates the difference between the appeal panel's certificate and the medical assessment of an AMS under Part 7 of Chapter 7.
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> 98. This reading is consistent with Part 7 of Chapter 7 more broadly. In s 324 (3), and "*approved medical specialist who is a member of the Appeal Panel*" is differentiated from "*an approved medical specialist under this section on an assessment of a medical dispute*".
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> 99. Section 328 (1) also states that an appeal against a medical assessment is to be heard by an appeal panel constituted by two approved medical specialists and one Arbitrator. As the Delegate noted in his decision, a person seeking to appeal from the decision of an appeal panel as a "*medical assessment*", which is defined as *"the assessment of a medical dispute by an approved medical specialist under Part 7 of Chapter 7*", would need to select an AMS from the appeal panel's members from which to appeal. This interpretation is incongruent with s 328 (6), under which the decision of the majority of the members of an appeal panel constitutes its singular decision.
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> 100. I acknowledge that the effect of the operation of Part 7 of Chapter 7 of *the 1998 Act* in this case is that an initial error on the part of the AMS has prevented the plaintiff from availing himself of the statutory appeals process he would not otherwise have exhausted. However, the legislation provides avenues for the reconsideration of the decisions of the Registrar and appeal panels outside of an appeal under s 327. Section 378 (1) of *the 1998 Act* states that the Registrar or an appeal panel may reconsider any matter that has been dealt with by the Registrar or an appeal panel, respectively, and rescind, alter or amend the previous decision. The section does not provide a time limit on an application for reconsideration. If, as in this case, a certificate of determination has already been issued, then the plaintiff has statutory recourse under s 350 of *the 1998 Act*, which provides that the Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision it has previously made or given: see *Martinovic* at [18], [91].
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> 101. For these reasons, it is my view that the natural meaning of Part 7 of Chapter 7 of *the 1998 Act*, understood as a whole and in context, indicates that no appeal lies under s 327 from the certificate of the Appeal Panel to another appeal panel. Ground 4 (b) fails.

- Her Honour rejected ground (4) (b). She noted that the plaintiff argued that the fact that the Commission has issued a certificate of determination in relation to a medical dispute should not shut out the possibility of an appeal brought on the bases in s 327 (3) (a) or (b) *WIMA*. This is because, as in relation to ground 4 (a), such a construction of the legislation would functionally bar a person from bringing an appeal under s 327 (3) (a) or (b), as the deterioration of a worker's condition, or the availability of additional relevant information, do not generally arise within 28 days of a determination. This is reflected in s 327 (5) in the differentiation of these grounds from those in s 327 (3) (c) and (d), in respect of which an appeal must be made within 28 days after the medical assessment appealed against, as the basis upon which an appeal is brought on those grounds is apparent on the face of the decision.
- Her Honour held that there is no basis for reading down the operation of s 327 (7) *WIMA* so as to exclude appeals brought under ss 327 (3) (a) and (b). She stated:

> 115 Section 294 of the 1998 Act unequivocally requires the Commission to issue a certificate of determination as soon as practicable after the determination has been made. Although the provision made for an appeals process s 327 is generally remedial in character, s 327 (7) clearly states that there is no appeal from a medical assessment after such a certificate has been issued. In my view, these provisions evince an intention to provide for finality in the resolution of medical disputes. This intention is reflected elsewhere in the legislation, such as in 322A of the 1998 Act, which limits an injured worker to one assessment of his or her degree of permanent impairment.
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> 116 In reaching this conclusion, I am conscious that the right to appeal a medical assessment under s 327(1) of the 1998 Act is a right created and dictated by statute. There is no fundamental right to such an appeal at common law which the Act may be seen to abridge, such that it must be read strictly: see *Momcilovic v The Queen* (2011) 245 CLR 1; (2011) 280 ALR 221 at [42]-[44].
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> 117 I am also not persuaded by the plaintiff's submissions that unless s 327 (7) is read down, claimants are functionally barred from seeking to appeal from a medical assessment on the basis of the circumstances set out in ss 327 (3) (a) and (b).
>
> 118 For one thing, s 327 (5) clearly imposes a 28 day restriction on appeals brought on the grounds under ss 327 (3) (c) and (d), not on appeals brought under subsection 3 (a) and (b). The plaintiff submitted that this differentiation is functionally irrelevant by reference to the Commission's Practice Direction number 11. However, it is not legitimate to construe legislation by reference to practice directions: see *Riverina Wines* per Campbell JA at [91].
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> 119 Moreover, s 327 (6) of *the 1998 Act* states that the Registrar "*may refer a medical assessment for further assessment under s 329 as an alternative to an appeal against the assessment (but only if the matter could otherwise have proceeded on appeal under this section)*". It also states that s 329 "*allows the Registrar to refer a medical assessment for reconsideration (whether or not the medical assessment could be appealed under [s 327])*". In *Riverina Wines*, the plaintiff successfully made an application for her matter to be referred for further assessment by a medical assessor, rather than to an Appeal Panel, on the basis of a deterioration of her condition over a year after the certificate of determination had been issued in relation to her medical dispute (at [29]). In that case, the Registrar was empowered under s 329 to refer the plaintiff's medical assessment for further assessment in circumstances where it appeared to him that at least one of the grounds specified in s 327 (1)(a) or (b) existed (at [89]).

120 For the reasons I have given in relation to the previous grounds of review, the plaintiff in these proceedings could not have availed himself of the application for further assessment process under s 329, because the decision of the Appeal Panel was not a "*medical assessment*". However, this avenue provides a pathway by which an applicant may seek a reassessment of his or her medical assessment on the basis of a deterioration of his or her condition even after the certificate of determination has been issued.

121 Finally, as set out earlier, there is provision in the legislation for the Commission to reconsider decisions which are otherwise final and not subject to appeal. In the event that a person might seek to have such a decision reviewed on the basis of that his or her condition has deteriorated, s 350 (3) provides a "*broad*" discretion by which the Commission may reconsider any matter it has dealt with and rescind, alter or amend it: see *Martinovic* at [91].

- Her Honour rejected ground 4 (c). She held that it is not the operation of s 66 (1A) that confined the use the plaintiff could make of the medical assessment following his appeal. Rather, he was confined from appealing the MAP's decision to another MAP because the MAP's decision was not a "*medical assessment*" for the purposes of s 327 (1).
- Her Honour rejected ground (5). She noted that the plaintiff argued that if the Court was against him in relation to the earlier grounds of review, it should apply the decision in *Lizdenis v Central Pty Ltd* [2016] NSWWCC 21 at [118]-[124] and hold that the COD remains no obstacle to his appeal. She also noted that the defendant argued that the Court is not bound by the Arbitrator's decision in *Lizdenis*. In any event, the Arbitrator's conclusion at [123] that "*an appeal based on deterioration…is expressly preserved by reason of the operation of s 322A(4) of the 1998 Act*" does not support the argument that a worker is entitled to appeal to a MAP from a MAC issued by the MAP.
- Her Honour stated:

  145 In my view, even if I were to adopt the Arbitrator's construction of ss 314, 322A and 327 of the 1998 Act, their operation would not assist the plaintiff's case. As in relation to s 66 (1A) *of the 1998 Act* (sic) under Ground 4 (c), it was not s 322A which restricted the use the plaintiff could make of the medical assessment following his initial appeal. The plaintiff was confined from appealing the decision of the Appeal Panel to another appeal panel because the Appeal Panel decision was not a "*medical assessment*" for the purposes of s 327 (1). Under Ground 4 (b), I also set out my reasons for determining that there is no basis on which to read down s 327(7) so as to exclude s 327 (3) (a) and (b), as the Arbitrator in *Lizdenis* determined. For these reasons, Ground 5 fails

Her Honour ordered the plaintiff to pay the first defendant's costs.

WCC – Presidential Decisions

Whether the incapacity for work resulted from the pleaded injury – Kooragang Cement Pty Limited v Bates (1994) 35 NSWLR 452 considered; alleged error of fact – Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611; Shellharbour City Council v Rigby [2006] NSWCA 308, Fox v Percy [2003] HCA 22; 214 CLR 118 applied

Toll Transport Limited v Smith [2021] NSWWCCPD 7 – Deputy President Wood – 5/02/2021

The worker was employed by the appellant as a driver and he suffered a number of injuries both before and in the course of his employment. Relevantly, on 5/04/2019, the worker had a MVA and alleged injuries to his neck, left shoulder, left thumb and low back. The appellant accepted liability.

The worker had no capacity for work for a period of time and was then certified fit for suitable duties, but suitable duties were not made available. He was then certified fit for pre-injury duties on a work trial from 17/07/2019, which he commenced on 19/07/2019, but he suffered significant neck and left shoulder pain while attempting to tighten a ratchet on the chain around a load and was again certified as having no capacity for work.

The worker returned to work on 15/08/2019 after requesting a return to truck driving duties and providing a certificate indicating that he was fit for pre-injury duties. The appellant provided the worker with administrative/office duties as a precautionary measure. On 2/09/2019 (which was a Monday), the worker reported that he was unable to work because of significant neck and shoulder pain which was associated with migraine headaches. He did not cite a particular precipitating event, but it appears that the onset occurred when he was reaching out to his grandchild.

The worker was again put off work and his employment was terminated in October 2019. The appellant disputed liability from 9/11/2019, asserting that, by the time of the incident on 19/07/2019, he had recovered from the effects of the injury on 5/04/2019 and any symptoms were not referrable to the accepted injury. He then claimed continuing weekly payments from 9/11/2019 and treatment expenses. He issued a COD on 23/09/2020.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) in finding that as a result of the injuries to the worker's cervical spine, lower back, left thumb and the symptoms in the left shoulder, he was totally or partially incapacitated for work until 8/11/2019; (2) in finding that from 9/11/2020, the worker was incapacitated for his pre-injury duties by reason of injury to the cervical spine and lower back; (3) in entering an award in favour of the worker under s 37 *WCA* from 9/11/2019; (4) in his fact-finding process, including the facts found which underpinned his orders; (5) by failing to provide sufficient reasons; and (6) by finding that the opinion of Dr Porteous was of sufficient weight to support the worker's case of incapacity.

Deputy President Wood dismissed the appeal and her reasons are summarised below.

Wood DP first determined ground (4) because the other grounds were dependent upon the outcome. She stated that the fact that the worker had minimal difficulties during a mini functional assessment does not demonstrate that he was fit to perform the sustained full-time heavy work he had undertaken pre-injury. He did not ever return to pre-injury duties after the pleaded injury, except for the few days in July 2019 which resulted in an aggravation of his injuries. The evidence undoubtedly supports the Arbitrator's finding that the symptoms consequent upon the pleaded injury had not resolved before the aggravation in July 2019 or the aggravation in late August 2019. The medical evidence thereafter also supports the notion that the incapacity resulted from the pleaded injury, with the exception of the opinion of Dr Smith.

Wood DP stated (citations excluded):

> 136. Whether the respondent's incapacity resulted from the pleaded injury must be determined on the facts of this case. In *Kooragang Cement Pty Limited v Bates*, Kirby P (as his Honour then was) made the following relevant observations:
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> > The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use the phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work

injury (or in the event of a disease, the relevant aggravation of a disease), is a question of fact to be determined on the basis of evidence, including where applicable expert opinions. Applying the second principle which *Hart* and *Honore* identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned.

137. As Parker ADP observed in *Le Twins Pty Ltd v Luo*, "*[m]ost conditions are the result of multiple factors. The question is always whether the facts as found satisfy the statutory criterion for causation*."

138. The Arbitrator's finding that the effects of the pleaded injury continued was a finding of fact which had a sound basis in the evidence. It is well settled that the acceptance or rejection of evidence and the weight to be afforded to particular evidence is a factual exercise and generally a matter that falls within the province of the primary decision maker. Findings of fact will not normally be disturbed on appeal if they have rational support in the evidence.

139. The Arbitrator's finding that the effects of the pleaded injury continued was open to him on the evidence. The appellant has provided no convincing submission upon which to found its allegation of error on the part of the Arbitrator in his fact finding process and this ground of appeal fails.

Wood DP rejected grounds (1), (2) and (3). She stated that for the reasons set out in respect of ground (4), it was open to the Arbitrator to find that the effects of the pleaded injuries to the neck and back continued and the overwhelming evidence supports the claim of a continuing incapacity. The appellant does not challenge the Arbitrator's finding as to the extent of the worker's capacity for work, the quantum of the entitlement to weekly payments, or the application of s 37 *WCA* and has failed to identify error on the part of the Arbitrator.

Wood DP rejected ground (5) and held that the Arbitrator's reasons for rejecting Dr Smith's evidence were logical, sound and sufficiently clear. The extent and scope of a trial judge's duty to give reasons depends upon the circumstances of the individual case. The Arbitrator is not required to give lengthy reasons. When giving consideration to the adequacy of the Arbitrator's reasons, the decision must be read as a whole, and not with an eye attuned to find error and the reasons provided were adequate.

Wood DP also rejected ground (6) and she stated:

156. It is abundantly clear that Dr Porteous was well aware of the respondent's "actual history." Having reviewed the notice issued pursuant to s 78, which made clear reference to the certificate issued, as well as the general practitioners' clinical records, it was most likely that Dr Porteous was well aware of the contents of the certificate of capacity issued on 15 August 2019 and at least the opinions of Dr Au and Dr Benjamin that the respondent was fit for a trial of pre-injury duties.

157. As the respondent submits, the certification referred to must be considered in the context of all of the evidence. Dr Porteous formed the view that there was no evidence that the aggravation of the respondent's condition in the neck and lower back had ceased. The evidence about the respondent returning to "*pre-injury*" duties was that the respondent advised Dr Benjamin that he would be prepared to trial full duties. Mr Stephen Smith referred to the duties as a "*trial.*" In that context, it was open to Dr Porteous to consider that there was a continuing relationship between the appellant's fluctuating but ongoing symptoms and the pleaded injury.

158. The appellant's assertion that Dr Porteous' observation that there was an unbroken temporal association with the pleaded injury leads to the inference that Dr Porteous was unaware of the respondent's situation in August 2019 is not made out. As a consequence, Ground Six of the appeal fails.

WCC – Medical Appeal Panel Decisions

Appellant complained that the MAC did not accurately reflect his health, ADLs and well-being because the AMS made him feel relaxed and upbeat and he said things that were incorrect – No demonstrable error found – MAC confirmed

Clark v Department of Communities and Justice [2021] NSWWCCMA 17 – Arbitrator McDonald, Dr D Andrews & Dr P Morris – 1/02/2021

The appellant was employed by the respondent as a Senior Client Services Officer. However, from 2015 until 2018 he was seconded to a role as Community Development Worker and another role with NSW Land and Housing for 3 weeks until August 2018. He then asked to return to his substantive role and alleged that he suffered a psychological injury as a result of his interaction with management from mid-2018. The claim was accepted and the respondent assisted the appellant to find a part-time role at the Anzac Memorial in Hyde Park.

On 1/10/2020, Prof. N Glozier issued a MAC, which assessed 7% WPI (5% + 2% for the effect of treatment).

The appellant appealed against the MAC under s 327 (3) (d) *WIMA.* He argued that the MAC "*in its entirety paints a picture which is not consistent with the worker's general day-to-day health, activities, social life, and mental wellbeing*." He said that on the day of the interview he experienced his usual fairly depressed mood but the AMS made him feel relaxed and upbeat so that he said things which were incorrect. He said that the AMS concentrated on positive things and did not address his mental health concerns. He alleged that he suffered work-related PTSD and that the AMS should not have disputed that diagnosis by his treating psychiatrist. The respondent opposed the appeal.

The MAP determined that it was not necessary for the appellant to undergo a further medical examination. It dismissed the appeal and its reasons are summarised below:

- The Guidelines require the AMS to assess the appellant as he presented on the day of assessment, taking into account his relevant medical history and all available medical information.
- The AMS was required to come to his own diagnosis before applying the PIRS. He made a diagnosis that was open to him in the exercise of his clinical judgment and the fact that it is different to those made by others is not an error.
- The AMS gave reasons for his assessment in each of the PIRS categories and the reasons properly support his assessment. The fact that the assessment is different to that made by another assessor on a different date does not constitute error.
- In *Ferguson v State of New South Wales* [2017] NSWSC 887 Campbell J said:

> The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.

- Harrison AsJ cited *Ferguson* in *Parker v Select Civil Pty Ltd* [2018] NSWSC 140 and said that the passage cited above supported the conclusion that "*there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense*." Her Honour said:

  > To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.
  >
  > The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene...

- The AMS made an allowance for the effect of treatment.
- The appellant argued that the history that he provided to the AMS was incorrect because he was placed in a false sense of security and that the AMS made a demonstrable error. However, in *Pitsonis v Registrar Workers Compensation Commission* [2008] NSWCA 88, the Court of Appeal stated:

  > Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for.

- The errors relied upon by the appellant are not demonstrable errors.

Accordingly, the MAP confirmed the MAC.