Bulletin

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ISSUE NUMBER 19

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.

NSW Court of Appeal

Lawyer found personally liable for costs payable by client

King v Muriniti [2018] NSWCA 98 – Basten JA, Gleeson JA & Emmett AJA - 10 May 2018

Summary

This is a timely example of the risk faced by legal practitioners where they bring and prosecute legal proceedings without a proper basis and they may be held personally liable for the costs incurred by the other parties to those legal proceedings.

The Court ordered a solicitor to indemnify the applicants with respect to costs orders that were made by the Court in dismissing four appeals that had been brought by the solicitor's client.

Facts

On 19 October 2016, the Court dismissed four appeals that were brought by the solicitor's client against Mr & Mrs King and ordered the client to pay their costs in each of the appeals. It found that in the appeals the solicitor made extensive and complex allegations of fraud against Mr & Mrs King on behalf of his client, but in its principal judgment the Court determined that there was "not a skerrick of evidence" to support the fraud allegations. The solicitor's client subsequently became bankrupt and failed to satisfy the costs orders and Mr & Mrs King filed a notice of motion seeking an order that the solicitor should pay the costs that were ordered against his client.

The Court considered the following key issues:

1. Whether it could rely on findings made in the four proceedings when determining whether costs should be ordered against the respondent;
2. Whether a costs order should be made against the solicitor in respect of the four appeals; and
3. The appropriate form of any costs orders to be made.

Determination

In relation to 1.

Basten JA (Gleeson JA agreeing) held that s 91 *of the Evidence Act 1995* (NSW) does not prevent a court, exercising the jurisdiction conferred by s 99 of the Civil Procedure Act 2005 (NSW) ("CPA"), from having regard to findings in its principal judgment.

In relation to 2.

Basten JA (Gleeson JA agreeing) held that the power under s 99 (2) (c) CPA is not limited to court-ordered costs, and extends to the contractual liability of a party to pay his or her own lawyers. An order can therefore be made, requiring that the solicitor indemnify the applicants in respect of costs payable by them to their lawyers in relation to the proceedings. Their honours also held that the findings made in the principal judgment warrant the drawing of the necessary inferences to order costs against the solicitor.

Gleeson JA also stated that if it were necessary, the additional reasons given by Emmett AJA further engage the court's power to award personal costs against the respondent.

Emmett JA stated that the Court (both at first instance and on appeal) endeavoured to have the client's representatives clearly explain the allegations of fraud and that they failed to do so. He held that Mr & Mrs King's costs were incurred due to the serious incompetence and neglect of the solicitor and those employed by him and an order under s 99 CPA should be made: (at [101]).

In relation to 3.

Basten JA (Gleeson JA agreeing) held that as Mr & Mrs King only sought payment of the amount of costs ordered to be paid by the solicitor's client, the costs order made in respect of the principal proceedings should be so limited: (see: [10], [11], [51]- [52]).

However, Emmett AJA considered that the solicitor should pay the costs reasonably incurred by Mr & Mrs King in responding to the four appeals: (see: [101]).

Workers Compensation Commission - Presidential decisions

Did a death arise out of or in the course of employment?

Carroll v S L Hill and Associates Pty Limited [2018] NSWWCCPD 17 – Keating P – 7 May 2018

Introduction

On 16 June 2010, the deceased worker died because of injuries that she suffered in an assault by the third respondent (her de facto husband). It was accepted that the third respondent was responsible for the deceased's death, but he was found not guilty of her death due to mental illness and was detained in a psychiatric hospital. At the time of her death, the deceased was employed by the first respondent company and she she undertook work for it at her home, which she was also occupied by her sons (the appellant and second respondent) and the third respondent. The second respondent was a baby at the time of her death.

The third respondent claimed lump sum death benefits under s 25 WCA, but did not seek any apportionment in his favour. The insurer disputed this under sections 4 and 9A WCA but it did not dispute dependency. The ARD alleged the cause of death as "blunt force head trauma and complex pattern of stab wounds" and that this either arose out of or in the course of employment. Alternatively, it alleged that the injury occurred during an authorised recess when the deceased was "…assaulted by a fellow employee with a hammer resulting in her death".

Decision at First Instance

Senior Arbitrator McDonald issued a Certificate of Determination and entered an award for the first respondent. In a brief statement of reasons, she found that the evidence did not permit her to make any findings as to when the deceased died, other than this occurred after 7:30am on 16 June 2010. She said that she was not satisfied that the deceased died in the course of her employment for reasons that are summarised below:

Injury in the course of employment

The Senior Arbitrator held that where an injury occurs in the course of employment it is necessary to consider the temporal connection between the employment and the injury. The evidence indicated that the deceased was on her bed and was wearing pyjamas at the time of her death and that she usually worked in her office, but after the birth of the second respondent she also worked in various locations around the home. She also noted that Police found work papers and equipment including a laptop in her bedroom.

However, the Senior Arbitrator found that the deceased's usual working day started around 9.00 am and finished at about 6.00 pm and that when the appellant left for school at 7.30 am on the relevant day, the deceased was in bed and was feeding the second respondent. On that basis, she concluded that the deceased's work day "had not begun" and she stated that evidence concerning the time of death was crucial to whether the deceased was in the course of employment when she died. She held:

"[161] The evidence does not permit me to make any finding as to when the deceased died other than that it was after 7.30 am. I therefore cannot be satisfied that she was in the course of her employment when she died."

Injury arising out of employment

The Senior Arbitrator determined that the cause of the injury that resulted in the death was the third respondent's paranoid delusions regarding the deceased. She held that it was not the fact of the employment that caused that injury, but rather the fact that the deceased was in a relationship with the third respondent. On that basis, she was not satisfied that the injury arose out of the employment.

Substantial Contributing Factor

The Senior Arbitrator found that it was not necessary to determine this issue, although she commented that "many of the matters" listed in s 9A (2) WCA would prevent a finding that employment was a substantial contributing factor.

Appeal

The appellant argued that the Senior Arbitrator's findings were against the weight of the evidence; that they were not open to her based upon the evidence; and that she failed to consider evidence and provide any, or any adequate, reasons for her findings.

President Keating determined the appeal 'on the papers'. He found that the Senior Arbitrator's consideration regarding the 'course of employment' was focussed almost exclusively upon the time of death and that she failed to consider evidence and did not provide adequate reasons for her findings. He revoked her determination and provided reasons, which are summarised below:

- The issue for determination is whether there is a sufficient temporal connection between the deceased's employment and her death, to establish that she was in the course of her employment when she was attacked by the third respondent. The time of death is an important factor, but it is not determinative of the issue [at 108];
- The Senior Arbitrator failed to consider critical evidence as to the deceased's span of working hours, which went to the question of the temporal connection between the employment and the death, and she specifically failed to consider uncontradicted evidence that the deceased commenced work as early at 7.30 am [at 109];
- The Senior Arbitrator held that the deceased's working day started at 9 am, but this was contrary to the evidence [at 110] and the failure to consider all the material relevant to an issue is an error in the process of fact finding and amounts to an error of law [at 111] and an error in the process of fact finding [at 112]. This was a critical error as the unchallenged evidence was that the deceased was essentially "on call" and if it is accepted that the assault occurred after 7.30am and before 4 pm, the deceased may well have been in the course of her employment when she was fatally injured [at 114].

- He considered and applied the decision of the High Court in *Waterways Authority v Fitzgibbon* [2005] HCA 57; 221 ALR 402, as follows:

  > "In the present case, however, reference to the 'sufficiency' of the primary judge's reasons is not to be understood as seeking to invoke only those principles. Rather, because the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact finding. In particular, it is revealed as a failure to examine all of the material relevant to the particular issue. (Fitzgibbon, [130] (per Hayne J (McHugh and Gummow JJ agreeing)).

President Keating determined that a vast amount of evidence of relevance to the s 4 and s 9A issues had not been addressed at first instance or upon appeal and had not been properly considered. On that basis, he decided against making any findings based upon that evidence and he remitted the matter for determination by another arbitrator.

Workers Compensation Commission - Medical Appeal Panel Decisions

Searle v House with No Steps - Arbitrator Batchelor, Dr Dixon & Professor Fearnside –3 May 2018

Summary

The Medical Appeal Panel (MAP) determined that an AMS fell into a demonstrable error by focussing upon the contribution of a pre-existing spondylolisthesis to the need for spinal fusion surgery rather than its contribution to the degree of permanent impairment

Background

The worker injured her back while pushing a patient in a wheelchair up a ramp. She had an MRI scan, which indicated a bilateral L5 pars defect and Grade 1 anterolisthesis at the L5/S1 level with impingement of the L5 nerve roots, as well as facet arthropathy at the L4/5 level and a small disc bulge at the L3/4 level. On 20 July 2016, she underwent surgery (L5/S1 micro-discectomy and rhizolysis and fusion).

The worker claimed lump sum compensation under s 66 WCA. Both the qualified specialists and AMS assessed 23% WPI, but they each applied a different deductible under s 323 WIMA, as follows:

- Dr Bodel did not apply a deductible under s 323 WIMA, on the basis that "the injury" was the disc rupture that occurred at work and the mere presence of the spondylolisthesis did not necessarily indicate pre-existing impairment;
- Dr Casikar applied a 1/3 deductible under s 323 WIMA, on the basis that the pre-existing spondylolisthesis had significantly contributed to the symptoms that required surgery; and
- The AMS applied a ¼ deductible under s 323 WIMA, based upon matters that included the pre-existing spondylolisthesis and significant degenerative disc disease at the L5/S1

level. The AMS felt that ‘but for the spondylolisthesis’ the surgery would not have been required.

Consideration

In finding that the AMS fell into a demonstrable error, the MAP stated:

“42. The Panel is of the view that the fact that this surgery was, or may have been, more extensive because of the appellant’s pre-existing spondylolisthesis does not address the question as to whether such condition was a contributing factor to the level of permanent impairment assessed by the AMS. It is the contribution of the pre-existing condition to the current impairment which must be assessed, not the necessity for surgery as a result of the work accident…”

The MAP considered and applied the decision of Schmidt J in *Cole v Wenaline Pty Limited* [2010] NSWSC 78, that's 323 WIMA is directed to a situation where there is a pre-existing injury, pre-existing condition or abnormality. For a deduction to be made from what has been assessed to have been the level of impairment, which resulted from the later injury in question, a conclusion is required on the evidence that the pre-existing injury, pre-existing condition or abnormality ***caused or contributed to the impairment*** (emphasis added)***.***

Schmidt J also stated:

> “Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, ‘irrespective of outcome’, contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction ‘will be difficult or costly to determine (because, for example, of the absence of medical evidence)’. In that case, an assumption is provided for, namely that the deduction ‘is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence.”

Outcome

The MAP held that the AMS’ assessment of the s 323 deductible was made on the basis of an assumption or hypothesis, rather than evidence, and that it was conjecture and not based on logical deduction. It revoked the MAC, assessed a 1/10 deductible under s 323 WIMA and issued a new MAC containing an assessment of 21% WPI.

Workers Compensation Commission – Arbitrator Decisions

Insurer criticised for acting upon erroneous legal advice, resulting in 2 arbitral hearings and an oral hearing before a Deputy President.

Gilliana v Souvenir World (Airport) Pty Limited – Arbitrator Capel –1 May 2018

Background/Chronology

- 9 September 2003 - The worker injured her lower back and suffered a consequential injury to her upper digestive tract. She claimed compensation and the insurer accepted liability.

- 15 February 2007 – The worker claimed compensation under s 66 WCA for 13% WPI under s 66 WCA and a claim for pain and suffering under s 67 WCA. The dispute was resolved based upon a Complying Agreement dated 25 May 2007, for 12% WPI under s 66 WCA and $14,500 for pain and suffering under s 67 WCA.

- 25 October 2011- The worker claimed a further 1% WPI under s 66 WCA and a further $10,500 for pain and suffering under s 67 WCA. The insurer issued a s74 notice disputing that the worker was entitled to make the further claims.

- 12 December 2012 – The worker made a claim for 21% WPI with respect to injuries to the lumbar spine & upper and lower digestive tracts (with credit to the insurer for prior payments under s 66 WCA) and a further $15,500 for pain and suffering under s 67 WCA. The insurer again disputed that the worker was not entitled to make this claim as a result of the 2012 amendments to WCA.

Decision at First Instance

- 10 May 2013 - An amended ARD was registered by WCC, which claimed compensation under s 66 WCA for 21% WPI under s 66 (with credit to the insurer for previous payments) and a further $15,500 for pain and suffering under s 67 WCA.

- 5 March 2014 – Arbitrator Phillips SC conducted a conciliation conference and arbitration hearing. On 14 April 2014, he issued a Certificate of Determination and determined that there was a causal link between the lumbar spine injury and the gastrointestinal injury. He ordered that the matter be remitted the matter to the Registrar for referral to an AMS.

- 13 June 2014 – The AMS (Dr Kumar) issued a MAC, which assessed combined 14% WPI (12% for lumbar spine, 2% for Upper Digestive Tract and 0% for Lower Digestive Tract).

- 18 July 2014 - The Deputy Registrar issued a COD, which ordered respondent to pay the worker a further $3,000 under s 66 WCA, for 2% WPI (upper digestive tract).

- 29 October 2014 - Senior Arbitrator Snell conducted a teleconference in relation to the outstanding claim for pain and suffering under s 67 WCA. The respondent agreed to pay the worker a further $6,000 and a Certificate of Determination – Consent Orders was issued to that effect.

- 1 November 2016 - The Insurer referred the worker for examination by Dr Stening and he assessed 25% WPI (24% WPI for the lumbar spine + 1% WPI for scarring).

- 11 April 2017 - The worker's solicitor wrote to the insurer accepting Dr Stening's assessment and he requested that a further Complying Agreement be prepared under which the worker would receive a further $25,500 under s 66 WCA and a further $15,000 for pain and suffering under s 67 WCA.

- 17 April 2017 - The insurer disputed the worker's entitlement to make this claim and relied upon the decision of the Court of Appeal in Cram Fluid Power Pty Limited v Green. However, the worker replied that the claim was valid as cl 11(4) (a) of the Regulation applied and the claim made on 25 October 2011 was "not withdrawn or otherwise finally dealt with before the commencement of subclause 1."

- 15 June 2017 - The insurer advised the worker in writing that it accepted that the assessment of 25% WPI. It submitted a Complying Agreement that provided for payment of compensation for 25% WPI under s 66 WCA (credit for payments made). However, it made no allowance for further pain and suffering under s 67 WCA.The worker did not respond.

- 20 June 2017 – A further ARD was registered. In response, on 27 July 2017, the insurer's solicitor withdrew the insurer's offer on the basis that s 66 (1A) WCA applied; that the worker was not entitled to make a further claim for compensation under sections 66 and 67 WCA; and that the matter "should proceed to a determination in relation to liability".

- 12 September 2017 - Arbitrator Wynyard conducted a conciliation conference and arbitration hearing. The worker argued that the Commission should either give effect to the complying agreement or determine that the claim made on 12 December 2012 was not a new claim, but was rather an amendment to the claim that was made on 25 October 2011.

However, the Arbitrator determined that the worker was 'statute barred' by operation of Sch 8 Cl 11 (4) (b) (i) of the Regulation and she exhausted her entitlement under s 66 WCA by resolving her claim in 2014. He entered an award for the respondent. He did not determine whether this was a new claim or amended claim.

Appeal

The worker submitted that the arbitrator erred in his construction of sch 8, cl 11 (4) (b) (i) of the Regulation. On 19 February 2018, Deputy President Wood allowed the appeal and revoked the Certificate of Determination. She remitted the matter for determination by another arbitrator.

Re-determination

The matter was re-determined by Arbitrator Capel. He considered the relevant legislation and regulation and applied the decisions of the High Court of Australia in *Project Blue Sky* and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27* and the decision of Deputy President Roche in *Hesami v Hong Australia Corporation Pty Ltd [2011] NSWWCCPD 14* in relation to the issue of their interpretation.

In relation to whether the 2012 claim was a new claim or an amended claim, the Arbitrator stated that based upon the decisions in *Woolworths Ltd v Stafford* [2015] NSWWCCPD 36 (Stafford) and *Woolworths Ltd v Wagg* [2017] NSWWCCPD 13 (Wagg), a withdrawn or unresolved claim can be amended before a final determination. The claim made on 25 October 2011 was a valid claim as it was capable of being paid and it was not withdrawn or finally dealt with before 19 June 2012. He stated, relevantly:

136. Whilst it is true that the applicant's solicitor did not use the word "amends" or "amendment" in the particulars in the letter dated 12 December 2012 or in the letter dated 14 May 2013, he referred to the combined assessment of 21% whole person impairment and referred to the additional 1% whole person impairment of the lumbar spine that was claimed on 25 October 2011. Whilst that was a valid claim, it remained unresolved.

The letter of demand dated 12 December 2012 was not a pleading and while it was deficient, the insurer was certainly aware of the nature of the claim as it disputed the gastrointestinal claim in its letter dated 19 December 2012. The Arbitrator was satisfied that the letter merely confirmed the unresolved claim that was made in the letter dated 25 October 2011.

The Arbitrator also stated that there is certainly nothing in *Stafford* or *Avni v Visy Industrial Plastics Pty Ltd* [2016] NSWWCCPD 46 (Avni) to suggest that an amended claim should be restricted to the body parts identified in the initial claim. Indeed, in *Avni*, President Keating saw no problem with the inclusion of a different body part.

The Arbitrator also expressed criticism of the actions of the Insurer and its solicitors, as follows:

149. Mr Beran had no instructions as to why the insurer resolved the claim in that fashion and merely suggested that it was an error on the insurer's part. Given that the respondent had legal representation in 2014, one would have thought that the reasoning behind the resolution would have been clearly apparent from legal advices and file notes in the insurer's file.

150. Therefore, one can only conclude that, if there was an error as suggested by Mr Beran, it was not confined to the insurer and was presumably a decision based on legal advice.

151. The insurer initially accepted that a valid claim made by the applicant on 19 April 2017 and in fact it drafted a Complying Agreement for execution by the applicant. That should have been an end to the matter. It was only after the intervention of the respondent's solicitor that the insurer disputed liability. This appears to be the second time that the insurer has acted on erroneous legal advice. The solicitor's intervention resulted in two arbitral hearings and an oral hearing before a Deputy President.

152. In my view, the terminology used in the letters dated 25 October 2011 and 12 December 2012, when read together, can only lead to the conclusion that the applicant intended to make only one claim.

153. In the circumstances, I am satisfied that the claim made by the applicant on 12 December 2012 was an amendment of the claim made on 25 October 2011, which was finalised in the Commission on 18 July 2014 and 29 October 2014. It was not affected by the 2012 amendments. Consequently, the applicant was entitled to bring one further claim for lump sum compensation pursuant to s 66 of the 1987 Act and did so on 11 April 2017.

Hafizi v Rack Technologies Pty Ltd – Arbitrator Bamber – 4 May 2018 (unreported)

A worker cannot combine separate injuries (or pathologies) arising from separate injurious events for threshold purposes.

Background

The worker suffered frank injuries to his neck, left arm and shoulder on 1 November 2000 and a frank injury to his lower back on 19 January 2001. He received weekly payments of compensation for his injuries.

On 27 June 2005, the Commission issued a COD, which awarded the worker compensation under s 66 WCA for 25% permanent impairment of the back and $11,250 for pain and suffering under s 67 WCA, with respect to the injury suffered on 19 January 2001.

On 12 July 2013, the Commission determined that the following claims should be remitted to the Registrar for referral to an AMS:

(a) Permanent impairment of the neck; permanent loss of efficient use of the left arm at or above the elbow; and permanent loss of bowel function determination, as a result of injury on 1 November 2000;

(b) Permanent impairment of the back; further permanent loss of efficient use of the left leg at or above the knee; and permanent loss of bowel function, as a result of injury on 19 January 2001;

(c) Permanent whole person impairment as a result of injury to the neck, left arm and loss of bowel function on 1 November 2000; and

(d) Permanent whole person impairment as a result of injury to the back, left leg and loss of bowel function on 19 January 2001.

The referrals under paragraphs (c) and (d) related to a threshold dispute for work injury damages.

On 3 December 2013, the AMS (Dr Dixon-Hughes) issued a MAC. However, while he provided separate assessments under the Table of Disabilities, he provided a combined assessment of 22% WPI.

On 14 January 2014, Acting Registrar Farrell issued a COD, which awarded the worker payments under s 66 WCA with respect to the Table of Maims assessments for the 2000 and 2001 injuries. The matter was listed for teleconference in relation to the outstanding claim for pain and suffering under s 67 WCA. Ultimately, the worker was awarded $11,000 with respect to the 2001 injuries.

On 31 October 2016, the insurer issued a notice to the worker under s 39 WCA and advised him that he would not be entitled to weekly payments of compensation beyond 260 weeks as his whole person impairment had been assessed as being less than 21%. The insurer relied upon a MAC that was issued by an AMS - Dr Dixon-Hughes - dated 3 December 2013, which indicated an assessment of 16% WPI.

The worker argued that the AMS had assessed him as suffering from 22% WPI and that the MAC was conclusively presumed to be correct and was binding upon the parties. However, the insurer argued that the impairment should be apportioned between the 2 dates of injury and that the AMS assessed 9% WPI with respect to the 2000 injuries and 15% WPI with respect to the 2001 injury. The insurer offered to arrange a further assessment with respect to the 2001 injury, but the worker's solicitors declined that offer. As a result, the worker's weekly payments ceased on 25 December 2017.

On 23 February 2018, the worker's solicitors filed an ARD, which sought weekly payments of compensation from 25 December 2017, and a declaration that he was entitled to receive weekly payments beyond 260 weeks on the basis that the MAC assessed 22% WPI referable to his injuries.

Upon hearing, the worker's counsel subsequently conceded that the Commission cannot make declarations, but he maintained that the MAC is binding on the parties and the Commission and the worker is entitled to continue to receive weekly payments as the threshold under s 39 (2) WCA has been met. Alternatively, he argued that the Commission has power to direct the insurer to make a determination to that effect.

The insurer filed a reply, which disputed that the worker was entitled to aggregate the impairments from the 2 injuries as the injuries are not the same injury resulting from multiple causes and that as the worker had already received weekly payments for 260 weeks, the Commission lacked jurisdiction to make an award for weekly payments under s 39 WCA.

Upon hearing, the insurer's counsel argued that the insurer's decision under s 39 WCA is a work capacity decision under s 43 (1) (a) WCA and that even if s 43 did not apply, the weekly payments in question are outside the 130 weeks and decisions such as *Lee v Bunnings Group Limited* [2013] NSWWCCPD 54 are authority for the proposition that the Commission cannot make an order under s 38 WCA.

The Insurer submitted that the issues to be determined were:

(1) Whether the Commission has jurisdiction to determine the dispute because of the contention that a work capacity decision has been made?

(2) Whether s 39 WCA is subject to s 38 WCA and whether the Commission has jurisdiction to order weekly payment?

(3) Whether the combination of 2 dates of injury for the purposes of s 39 WCA can be allowed.

Consideration

In relation to (1)

The Arbitrator determined that the decision to cease weekly payments under s 39 WCA is 'a decision that can be the subject of a medical dispute under Pt 7 of Ch 7 of the 1998' and s 43 (2) WCA provides that this is not a work capacity decision.

In relation to (2)

The Arbitrator determined that the Commission has exclusive jurisdiction under s 105 (1) of the 1998 Act 'to examine, hear and determine all matters arising under this Act and the 1987 Act'. This issue arises under WCA and the Commission has jurisdiction to determine whether the worker falls within the exception in s 39 (2) WCA.

In relation to (3)

The Arbitrator referred to the decision in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWWCCPD 35, in which Deputy President Roche held at [45]:

> "As was explained by Giles JA (Hodgson JA and Brownie AJA agreeing) in *Wyong Shire Council v Patterson* [2005] NSWCA 74 at [38], the description of how the injury was received, for example, due to a frank injury or repetitive activities (often, though unhelpfully, referred to as a 'nature and conditions claim') are descriptions of mechanisms for suffering an injury. In other words, an incident (an injurious event) is only a mechanism for suffering an injury and is not itself a s 4 injury. The relevant 'injury' in s 4 is therefore the pathology that has arisen out of or been received in the course of the employment."

The Arbitrator held that the worker's argument is unsustainable as he has suffered different injuries or pathologies that cannot be aggregated.

In making that determination, the Arbitrator considered and applied the reasoning of President Keating in *Merchant v Shoalhaven City Council* [2015] NSWWCCPD 13, in which the President determined that it is not permissible to aggregate impairments that have resulted from injuries to different body parts, in a series of unrelated incidents, to meet the required threshold of more than 30% to be characterised as 'a seriously injured worker' (now 'a worker with highest needs').

The Arbitrator stated relevantly:

[56] In Merchant, the President specifically considered the phrase 'a worker whose injury' which appeared in the then definition of 'seriously injured worker' in s 32A f the 1987 Act. In section 39 of the 1987 Act, subsection 2 contains the same phrase:

*"This section does not apply to an injured worker **whose injury** results in permanent impairment if the degree of permanent impairment resulting from the injury is more that 20%." (bold added)*

[57] The President states at [130]:

Merely because machinery exists to dealt with the apportionment of liability arising from more than one injury does not support the conclusion that the reference to the words "whose injury" in s 32A should be construed as a reference (to) multiple injuries. This conclusion is strengthened by the relevant provisions of Div 4 and Ch 7 Pt 7 which indicate to the contrary for the reasons I have already indicated.

Is the MAC binding?

The Arbitrator referred to s 326 of the 1998 Act, which sets out the matters with respect to which a MAC is conclusively presumed to be correct. These matters include 'the degree of permanent impairment of the worker **as a result of an injury'** (s 326 (1) (a)). However, subsection (2) provides that the assessment certified is evidence, but not conclusive evidence, as to any other matter. She determined that: the line of the MAC where the AMS combined the assessments for the 2 injuries as being 22% WPI is not binding; the AMS was not requested to combine the assessments into 1 assessment; and the 1998 Act and WCA do not permit this to be done. Accordingly, the combination of the WPI assessments by the AMS was beyond his power.

Determination

The Arbitrator determined that the worker has not been assessed as having permanent impairment of more than 20% for the injury on 1 November 2000 or in respect to the injury on 19 January 2001, and he therefore does not come within the exception in s 39 (2) WCA. The ARD was dismissed.

FROM THE WIRO

The Legislative Council's Standing Committee on Law and Justice has commenced its next review of the state's workers compensation scheme.

The Committee has resolved to focus on the feasibility of a personal injury tribunal for CTP and workers compensation dispute resolution and recommendations for a preferred model.

Submissions are due by 17 June 2018. Further information is available here. My office is currently preparing a submission.

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office through editor@wiro.nsw.gov.au in the first instance.

Kim Garling