Bulletin

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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.

Supreme Court of New South Wales – Judicial Review

Section 323 WIMA – MAP did not err in applying a deductible of 75% for pre-existing osteoarthritis – No denial of procedural fairness – Summons dismissed

Gatt v State of New South Wales [2019] NSWSC 451 – Campbell J – 24 April 2019

Background

In or about 1980, the Plaintiff began work as an Ambulance Officer. He had previously injured his right shoulder (different employer) and underwent a shoulder reconstruction, which left him symptom free. In 1984, he qualified as a paramedic and in 1991 he joined the Special Casualty/Access Team and engaged in search and rescue work often involving helicopter extractions in difficult bush terrain or on the water.

In 1993, the plaintiff injured his right shoulder in a helicopter crash, but he later resumed full duties despite ongoing pain and reduced movement. On 3 December 2011, he further injured his right shoulder while engaged in a bushland rescue. In or about early 2014, he accepted a secondment as the Operations Officer at the Aeromedical Control Centre, but found that the static postures involved in that role aggravated his shoulder symptoms and he underwent a total right shoulder replacement on 28 April 2014. He resumed full duties as a rescue paramedic in early 2015.

On 21 December 2016, the plaintiff claimed compensation under s 66 WCA with respect to the 2011 frank incident, based on an opinion from Dr Millons. He stated that the plaintiff made an excellent recovery from the shoulder reconstruction in 1993, but that his shoulder problems “really continued” from the helicopter crash on 1 February 1993, and the 2011 frank incident caused a particularly severe aggravation and that there is a direct relationship between the current condition and the injuries sustained in the accidents and particularly the helicopter crash in 1993 and the canyon rescue in 2011. He assessed 22% WPI, which he attributed to the frank incidents and the nature and conditions of employment, but he did not apply a deductible under s 323 WIMA.

The employer relied upon an opinion from Dr Pillemer, who assessed 20% WPI, but stated that the majority of the ongoing shoulder problems are the result of the helicopter crash in 1993 and he applied an 80% deductible under s 323 WIMA for pre-existing impairment.

The plaintiff filed an ARD and the Registrar referred the dispute to Dr Weisz for assessment of WPI as a result of the 2011 frank injury.

On 27 April 2017, Dr Weisz issued a MAC that assessed 21%$ WPI, but he applied a deductible of 75% for pre-existing impairment. He attributed the condition to the 1977 injury, accidents between 1993 and 2001 and the nature and conditions of employment and described the injury date in 2011 as a "deemed date" of injury. He concluded that if the 2011 accident was taken separately, it would have caused "a quarter" of the assessed impairment.

Reconsideration and Medical Appeals

Neither party accepted the MAC. The plaintiff's solicitors argued that it contained an obvious error because the AMS applied a 75% deductible and his reasons stated that he found no pre-existing condition. They asked the Registrar to correct the error and issue a replacement MAC or to ask the AMS to do so. The employer's solicitors also argued that there were demonstrable errors in the MAC. The Registrar's delegate re-referred the matter to the AMS on 23 May 2017.

On 2 June 2017, the AMS issued a replacement MAC, which maintained his assessment of 21% WPI, but he removed the reference to the 75% deduction under s 323 WIMA from Table 2.

The employer appealed against the amended MAC under ss 327 (3) (c) and (d) WIMA and the appeal was referred to a MAP. The plaintiff opposed the appeal.

On 28 September 2017, the MAP determined the appeal and revoked the replacement MAC. It issued its own MAC, which assessed 21% WPI and applied a deductible of 75% under s 323 WIMA. As a result, the impairment resulting from the 2011 frank injury was reduced to 5% WPI (after rounding).

Judicial Review

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision on the following grounds: (1) The MAP fell into jurisdictional error by determining the appeal on grounds which were not those on which the appeal was made; (2) The MAP fell into jurisdictional error by misconceiving its function by reviewing Dr Weisz's first MAC rather than the second; (3) The MAP fell into jurisdictional error by misconceiving its function because in substance it found no impairment resulted from the injury. According no occasion arose for making a deduction; (4) The MAP's decision was legally unreasonable for the reasons explained in ground 3; (5) The plaintiff was denied procedural fairness. The substance of this ground relates to the same matter as grounds 3 and 4; and (6) In the alternative, the MAP made a non-jurisdictional error of law on the face of the record of the decision. The particulars repeat grounds 1 to 5.

Justice Campbell determined the summons as follows.

His Honour rejected ground (1). He noted that the MAP held, using the language of Malpass AsJ in *Aircons*, that the AMS had addressed matters other than those referred to him for assessment because he continued to approach the task of assessment by reference to a "condition" that is a result of the 1977 injury, severe accidents in 1993 and 2001 (sic) and the heavy duties that he performed along the years. However, there was no dispute about the plaintiff's condition and it was the result of a series of traumatic injuries commencing with the 1993 helicopter crash and the nature and conditions of his heavy work concluding ultimately with the 2011 injury, after which he underwent total shoulder replacement. Rather, the dispute related to the significance of the pre-2011 injuries. He stated:

> 61. In my judgment in the first stage the Appeal Panel identified two discrete errors. The first was the *Aircons* error. And, the second was dealing "with aggregation and causation issues which were not his concern"…
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> 66. I accept that the Appeal Panel erred when they ruled that issues of aggregation and causation were not matters properly within the purview of Dr Weisz. I understand questions of aggregation to be a reference to the requirement that impairments resulting from the same injury are to be assessed together as part of the one assessment of the degree of permanent impairment of the injured worker resulting from an injury…
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> 67. Questions of causation necessarily arise when assessing the degree of permanent impairment of a worker as a result of an injury… The question of whether a permanent impairment is caused by a work injury is a matter an approved medical specialist, or an appeal panel, is entitled to consider: *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264 at [112]. Indeed, one might say it was necessary for Dr Weisz to consider questions of causation to discharge his statutory remit, just as the appeal panel considered them in carrying out its review.

His Honour stated that this error was not material to the MAP's decision and the material errors in the replacement MAC were going beyond the terms of the referral and failing to make a deduction under s 323 *WIM Act.* He held that the MAP was correct to make that finding. He also stated:

> 74. The point remains whether one considers the osteoarthritic changes shown on the December 2011 MRI scan as injurious consequences of the previous injuries or as a pre-existing condition or abnormality, as a matter of law, on the evidence before Dr Weisz and the Appeal Panel, s 323 *WIM Act* required a deduction to be made, and in the same proportion.

His Honour rejected ground (2) and held that this was *"an error of composition"* in the MAP's reasons. He held that this error was not jurisdictional because it was obvious on the face of the MAP's reasons that it was aware that its task was to review the replacement MAC and not the original MAC.

His Honour also rejected grounds (3) and (4). He stated relevantly:

> 83. …The concluding sentence of Reasons [95] is in the following terms:
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> > Were it not for the presence of the degenerative changes, the incident in 2011 would not have been sufficient to give rise to the need for surgery.
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> This is in fact a finding that the 2011 injury was a cause of the need for surgery, but not the sole cause. The 2011 injury may not have been "the pivotal incident giving rise to the need for surgery"… but reading the reasons fairly and as a whole, the Appeal Panel found it was a necessary condition of the need for surgery and accordingly, the whole person impairment resulted from the 2011 injury, but not solely.

His Honour rejected ground (5). He accepted the employer's submissions that the issue of pre-existing pathology/changes was fairly raised in the application for appeal and supporting submissions. He held that the existence of osteoarthritis in the right shoulder was not a new issue and this is not a case in which the MAP raised an important issue for themselves without notice to the parties. He found that the MAP did not misconceive its role, the nature of its jurisdiction and its duty: *Markovic.*

His Honour also rejected ground (6) as none of the grounds have been made out as material errors.

Accordingly, he dismissed the summons and ordered the plaintiff to pay the first defendant's costs.

His Honour also observed that it seemed *"a remarkable outcome"* that the plaintiff should be adjudged entitled to no permanent loss compensation at all. However, he was apparently not advised by counsel for either party that as an exempt worker, the plaintiff was not subject to the threshold in s 66 (1) WCA. That observation is not material to the determination of the summons.

Denial of procedural fairness - MAP considered certain material without giving the worker notice of it

Pascoe v Mechita Pty Ltd [2019] NSWSC 454 – Justice Button – 24 April 2019

Background

From 1959 until 2014, the plaintiff was employed in many positions in which he was exposed to varying levels of noise, although his employment between 1979 and 1985 was not noisy and he was unemployed from 1985 until 1990. From July 2014 to 10 October 2014, he was employed as a truck driver by the defendant.

On 27 March 2017, the plaintiff made a claim under s 66 WCA for 13% WPI for binaural hearing loss, based upon an assessment from Dr Scoppa (17% WPI less previous compensation received for industrial deafness). However, the defendant disputed the claim based upon an opinion from Dr Williams who assessed 5.88% hearing loss in both ears as a result of employment in NSW and stated that there was no further hearing loss.

The dispute was referred to an AMS and a MAC was issued on 28 November 2017. The AMS assessed 38.9% work-related hearing loss in both ears (19% WPI),of which he apportioned 16/40 on a time-weighted basis to employment in NSW. He therefore assessed 15.6% binaural hearing impairment and, after deducting the previous compensation, he assessed a further 7.6% BHI (or 4% WPI). As a result, the plaintiff was not entitled to compensation under s 66 WCA.

The plaintiff appealed against the MAC and argued that far too much reduction had occurred in the AMS' calculations on the assumption that much of his work-related hearing loss had been inflicted outside NSW. The Registrar referred the appeal to a MAP.

On 5 April 2018, the MAP found error in the AMS' approach and held that he had applied incorrect criteria to assess the permanent impairment due to previous injury. However, it then considered that issue for itself and ascribed much of the plaintiff's hearing loss to "constitutional/unknown aetiology". After deducting the previously awarded impairment, it assessed 4% WPI.

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision on the following grounds: (1) The MAP denied him procedural fairness by taking into account scientific material that was adverse to him without providing either party with notice that it proposed to do so; and (2) The MAP's decision is sufficiently unreasonable as to constitute legal error. In other words, the MAP impermissibly reasoned from the general to the particular, and assumed that general observations about large numbers of people could apply to the plaintiff.

Justice Button upheld ground (1) and determined that the plaintiff had been denied procedural fairness because the MAP took into account the ISO adversely to him without giving him notice that it proposed to do so. He stated:

> 71. It is important to my reasoning that the ISO was not mentioned in the decision of the specialist, and barely mentioned in the report of Dr Williams. In other words, the plaintiff had no notice that this extrinsic material could play such important role in the subsequent adverse determinations…
>
> 78. In other words, as part of accepting that the degree of procedural fairness that must be accorded is a flexible concept and to be determined according to the statute that creates the decision-making process under consideration, I consider it important that the significant consequence of this adverse determination is that no permanent impairment compensation is payable for a degree of WPI at 10% or less: see generally *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40.
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> 79. In summary then: by taking into account the ISO adversely to the plaintiff without providing him with notice that it would do so, the Panel denied him procedural fairness; the ISO cannot be characterised as common sense or common knowledge, but rather is something quite specific and detailed; the important adverse consequence to the plaintiff of the determination by the Panel about the level of hearing loss and therefore WPI itself argue for the provision of procedural fairness of a level that encompasses notice with regard to the ISO; and it cannot be said that the plaintiff waived his right to be provided with such notice.

However, His Honour rejected ground (2) and stated that he was not satisfied that the MAP's line of reasoning was inherently unavailable to it and therefore constitutes legal error. Accordingly, he set aside the MAP's decision and remitted the matter to a newly-constituted MAP for re-determination.

WCC Presidential Decisions

Current work capacity & s32A WCA - Material facts either overlooked or given too little weight – COD revoked & matter remitted to another arbitrator

Berri v Harbour City Ferries Pty Limited [2019] NSWWCCPD 9 – President Judge Phillips – 15 March 2019

Background

In October 2014, the appellant injured his right shoulder at work. He claimed compensation, but the insurer disputed the claim. On 7 January 2016, he was suspended on full pay pending investigation into allegations of serious misconduct and a number of allegations relating to misconduct, unsafe work practices and breach of a Code of Conduct were later found to be substantiated. On 18 January 2016, he alleged further bullying & harassment, which the respondent investigated. On 8 February 2016, he applied for a redundancy, but his application was rejected. On 27 June 2016, he gave notice of left shoulder pain at work on 21 June 2016. From 29 June 2016 to 27 July 2016, he undertook suitable duties, but then alleged further bullying and abuse and ceased work. On 14 July 2017, the insurer disputed the claims. On 25 July 2017, he underwent right shoulder surgery. On 13 October 2017, he claimed compensation for major depression due to bullying & harassment at work from 1 January 2014 to 27 July 2016, but the insurer disputed the claim. He then filed an ARD claiming weekly payments and s60 expenses for injuries that occurred: (1) on 1 October 2014 - right shoulder; (2) on 21 June 2016 - left upper extremity injury; and (3) on 27 July 2016 (deemed) - psychological injury. However, at arbitration, he amended the ARD to allege that all injuries occurred on "*27 July 2016*".

On 5 October 2018, ***Arbitrator Nicholas Read*** issued a COD, which found that: (1) the effects of the right shoulder injury were continuing; (2) the left shoulder injury had resolved; (3) the appellant suffered a primary psychological injury as a result of real events that he perceived as creating an offensive or hostile working environment; (4) employment was a substantial contributing factor to the psychological injury; and (5) the respondent's s11A defence was not made out.

The arbitrator stated that the relevant issue is "*whether the appellant has no current work capacity".* He discussed the decisions in *Giankos v SPC Ardmona Operations Limited* and *Wollongong Nursing Home Pty Ltd v Dewar and* stated that *"suitable employment"* means that the appellant *"is not able to return to work in either pre-injury employment or suitable employment"*. He found that the appellant's restricted work capacity was due to his psychological injury and in making that finding, he rejected opinions from Dr Beer and Dr Oldtree Clark that he was "*totally incapacitated*". He also inferred that Dr Hanna certified that the appellant had no current work capacity *"largely because (he) is not desirous to return to employment".* He stated that whether the appellant perceived that a return to the workplace would be difficult is not relevant to whether he is able to resume suitable employment. He assessed the appellant as being able to work in suitable employment for 15 to 20 hours per week and held that he was able to earn $331.27 per week (comprising 17.5 hours per week x $18.93 per hour) in suitable employment. He therefore awarded weekly payments under s36 WCA from 27 July 2016 to 25 October 2016 (at $1,091.05 per week) and under s37 WCA from 26 October 2016 to date & continuing (at $866.47 per week).

Appeal

The appellant appealed against the finding of current work capacity and asserted the following errors by the arbitrator: (1) He failed to properly consider or misconceived that he had "some capacity for employment" and could earn $331.27 per week, as the medical evidence in that period proved that he had no work capacity; (2) He failed to consider or misconceived the medical evidence and statements or misdirected himself regarding that evidence in finding that he had *"some capacity for employment"* as the accepted evidence proved that he had no work capacity; (3) In finding that the left shoulder injury had resolved, he failed to properly consider the medical evidence and his statements and to give reasons about whether this injury contributed to his work capacity from 26 July 2016 to 2018; and (4) He failed to make a finding about the date(s) of injury to the shoulders and the date when the left shoulder injury resolved.

President Judge Phillips determined the appeal on the papers.

His Honour referred to the decision of Roche DP in *Raulston v Toll Pty Ltd (Raulston)* regarding the power to disturb a finding of fact and the application of s 352 (5) *WIMA,* and cited the principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (*Whiteley Muir*), which were approved Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd,* as follows:

> (a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.
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> (b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the 'fact of the [Arbitrator's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
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> (c) It may be shown that an Arbitrator was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong.

His Honour found that ground (1) was made out and held that the appellant had no current work capacity from 26 July 2017 to 26 September 2017. He also held that ground (2) was made out and held that it was not open to the arbitrator to infer that the appellant's willingness to try to return to work was consistent with him having capacity for some type of employment. He erred by ignoring Dr Smith's ultimate conclusion that the appellant was not fit to work at that time and he failed to consider that evidence or gave it too little weight. He also failed to analyse the evidence and his reasoning process was infected by these errors.

However, he found that the parties had not addressed these matters *"to the requisite detail needed"* and that as re-determination of the matter *"requires a consideration of all of the material facts and an assessment of the weight to be afforded to that evidence".* He stated:

> 131. To the extent that the appellant conceded that the appellant had current work capacity for suitable employment for at least 20 hours per week, I note that that concession is made in respect of the appellant's physical impairments and not the appellant's psychological impairment.

His Honour held that ground (3) was made out and he directed that the arbitrator should determine the question of whether and/or when the left shoulder injury resolved.

However, he found that ground (4) was not made out because the appellant's counsel applied to amend the pleaded date of all injuries to "27 July 2016" and it was not open to him *"to attempt to re-agitate matters in a manner that is inconsistent with the conduct of the case at first instance"*.

He remitted the matter to another arbitrator for re-determination.

Leave to appeal against an interlocutory decision refused

Jeld-wen Australia Pty Ltd v Quilao [2019] NSWWCCPD 110 – Deputy President Elizabeth Wood – 18 March 2019

Background

On 2 July 2018, the worker filed an ARD that claimed continuing weekly payments from 30 May 2017 for injuries to the cervical spine and left shoulder. The respondent disputed the injuries and the extent of the worker's capacity for employment.

On 17 October 2018, ***Arbitrator Richard Perignon*** part-heard the matter and stood it over to 5 November 2018, to enable the appellant to complete submissions about work capacity. On 5 November 2018, the appellant applied to admit a surveillance report and leave to cross-examine the worker, but the arbitrator refused both applications. While he accepted that the relevance of the surveillance report and that the appellant's solicitor received it after the arbitration, the actual observations pre-dated that hearing and there was no reason why the report could not have been obtained and served before that hearing.

The appellant then argued that the ARD should be dismissed because the worker failed to produce financial records under a Notice for Production issued on 23 July 2018. The arbitrator refused that application and he extended the time for production to 8 November 2018. On 9 November 2018, the worker produced documents up to 31 March 2018, but nothing thereafter.

The appellant filed an application for appeal against the arbitrator's decision to not admit the surveillance report and ***Deputy President Elizabeth Wood*** determined the application on the papers.

DP Wood confirmed that the appellant required leave to appeal under s352 (3A) *WIMA* and that it argued that leave should be granted because the determination of the appeal is *"necessary or desirable for the proper and effective determination of the dispute between the parties*". Its arguments included that the evidence is *'extremely relevant'* to the issues in dispute because it goes to the worker's credit and his capacity for work because indicates he was working while denying that he was doing so. She conducted a merits assessment of the application to determine whether it is necessary to grant leave for the proper and effective determination of the dispute.

The appellant alleged that the arbitrator: (1) erred in law by failing to give adequate reasons; (2) erred in the exercise of discretion in failing to admit the report into evidence; and (3) erred in fact in determining that it had not provided an explanation about why the report was not adduced earlier.

Wood DP stated that the appellant breached Practice Direction 6 because it did not separately address each ground of appeal.

In relation to ground (2), she confirmed that an appellate Court must exercise caution in intervening in discretionary decisions made by the primary decision maker. As Heydon JA stated in *Micallef v ICI Australia Operations Pty Ltd* (Sheller JA & Studdert AJA agreeing), to succeed in an appeal against an interlocutory decision, the appellant must demonstrate that the arbitrator erred in that they: (a) made an error of legal principle; (b) made a material error of fact; (c) took into account some irrelevant matter; (d) failed to take into account, or gave insufficient weight to, some relevant matter; or (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning. She stated, relevantly:

> 63. … As the report was sent directly to Jeld-wen's legal representative, it could fairly be inferred that the surveillance was undertaken with the knowledge of the legal representative. A proficient legal practitioner would, as a matter of course, notify the investigators of the deadline by which this information was required. No explanation has been offered as to why Jeld-wen, or its legal representative, did not obtain the report or make enquiries as to the progress of the investigation prior to the first arbitration date. There is no evidence that either Jeld-wen or its legal representatives made any effort, at the time of the observations, to adduce evidence of the activities observed on the three days in August 2018, and on 2 October 2018, which were all well prior to the first arbitration date.
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> 64. An unexplained failure to serve a document prior to an arbitration hearing is a significant factor militating against the discretion being exercised. The extent and circumstances of the delay are powerful factors against the exercise of the discretion.

Further, the appellant did not seek to admit the DVD itself and Wood DP considered that the evidentiary value of part of a document (a surveillance report without the DVD) is questionable. The arbitrator considered the evidentiary value of the report and his observations were fair. He also considered the prejudice to the worker, which was fair considering that the worker had closed his case. These matters were consistent with the Practice Direction and the arbitrator was obliged to consider them. She stated:

> 72. … The concept of fairness involves a weighing of the consequences to each party if the report was or was not admitted, in the context of the objectives of the Commission. The sole consequence to Jeld-wen is that it could not rely on a document that carries little weight in its argument that Mr Quilao's credibility and capacity for work was impugned by that evidence. That consequence must be weighed against the matters that mitigated against the granting of leave, that is:
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> (a) the unsatisfactory explanation in relation to the failure to comply with r 10.3;
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> (b) the significant delay in obtaining the evidence;
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> (c) the lack of probative value of the report in the absence of the DVD, and
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> (d) the fact that Mr Quilao had closed his case.

Balancing these considerations, Wood DP held that the arbitrator's discretionary decision was not so unreasonable or unjust that it warrants interference on appeal and if leave was granted, this ground would fail.

In relation to ground (1), Wood DP held that the arbitrator is not required to give lengthy reasons and when their adequacy is considered, the decision must be read as a whole and not with an eye that is fine-tuned to find error. She held that the arbitrator's considerations were sufficient to form a proper foundation for his ultimate determination and, if leave was granted, this ground of appeal would fail.

In relation to ground (3), Wood DP held that the arbitrator did not determine that the appellant failed to explain why the report was not admitted earlier, but rather that there was no reason why it could not have been obtained and served before the first arbitration. That conclusion was supported by the report and, if leave was granted, this ground would fail.

Wood DP held that the appeal was without merit and she refused to grant leave. She remitted the matter to the arbitrator for determination of the remaining issues.

Arbitrator erred in finding that a deceased worker not a worker or a deemed worker

Marinic v RPC Interiors Management Pty Ltd [2019] NSWWCCPD 11 – Deputy President Michael Snell – 26 March 2019

Background

Please refer to Bulletin No 26 for the report on the decision at first instance. However, on 2 December 2016, the deceased suffered a heart attack caused by acute hypertension due to extreme heat while at work and died. The appellant (his widow) claimed death benefits. The respondent admitted injury and dependency, but disputed that the deceased was a worker or deemed worker at the time of his death.

Arbitrator Cameron Burge decided that the deceased and the respondent were engaged in a contract for services and not a contract of service at the time of the deceased's death. He entered an award for the respondent for reasons that included:

- The deceased was paid at a set hourly rate plus GST, which indicated a relationship of principal and contractor, as did the fact that he deducted his own income tax and claimed business-related deductions and depreciation on capital equipment in his tax return;
- The deceased brought his own tools of the trade to the worksite, which is '*a neutral indicator*' of whether an employment relationship existed;
- The evidence did not suggest that the respondent was responsible for and had control of the deceased's working hours at the site and his working hours reflected the hours that the site was open;
- The deceased did not have an obligation to work for the respondent and contracted through his own business to carry out work for the respondent;
- The evidence indicated that the deceased invoiced multiple other businesses over the years, at varying rates, which is consistent with him carrying on his own business rather than operating as an employee of the respondent;
- The respondent's site foreman exercised a substantial degree of control over the deceased at the site, but the mere presence of a foreman does not mean that independent contractors are not present on the site; and
- The fact that the deceased did not advertise his business to the general public is not of great significance, as the evidence indicated that he had substantial contacts within the building industry and arranged to carry out work for them from time to time and at different rates.

As to whether the deceased was a "*deemed worker*", the respondent relied upon the decision of the Court of Appeal in *L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15, in which the Court approved the decision of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 401-402 (which discussed analogous provisions in the Victorian legislation as follows):

> I think that the purpose of the exception or exclusion expressed by the words in question was to confine the benefit of the conclusive presumption which it establishes to persons who do not conduct an independent trade or business, who are not holding themselves out to the public under their own or a firm or business name as carrying on such a trade or business and who do not in the course of that trade or business, as an incident of its exercise, undertake the work by entering into the contract. The provision will thus cover men who work for the principal but have no independent business or trade and men who though carrying on an independent trade or business undertake a contract outside the scope or course of that business.

The arbitrator held that the deceased regularly carried on a business in his own name for at least the last 3 years before his death and he was not satisfied that the appellant had discharged the onus of proving that he was a deemed worker.

Appeal

Deputy President Michael Snell stated that the appeal primarily concerned the fact-finding process and that the preferable course was to deal with the issues on their merits. He therefore adopted the sub-headings from the appellant's submissions, as follows:

Ground 1 – Worker

DP Snell stated that the issue before the Arbitrator was whether the relationship between the respondent and the deceased at the time of his death was one of master and servant and the appellant was not required to prove that the deceased had such a relationship with the other entities that he previously contracted with.

However, the arbitrator asked himself the wrong question – namely whether the deceased was conducting a business over a number of years and whether the way that he contracted with the respondent was consistent with how he had done business over previous years? He failed to properly consider the conditions of the relevant contract with the respondent and his approach had the clear capacity to affect the result.

The arbitrator was obliged to consider the totality of the relationship between the deceased and the respondent, under the terms of the contract that governed their relationship at the time of the injury and death. While he considered whether the respondent had an exclusive right to the deceased's services, he relied on the deceased having provided his services to several businesses in the previous 2 years and his associated invoicing arrangements to find that he was an independent contractor and not a worker. He did not properly consider the indicia applicable to the deceased's relationship with the respondent and that error is appealable.

DP Snell also held that:

- The arbitrator failed to differentiate between the significance of payment on an hourly basis at a set rate and the significance of GST being added. In *Malivanek,* DP Roche held that the fact that pay was based on a set hourly rate, rather than on remuneration for a specific outcome, tended to suggest that labour was being sold as an employee rather than as an independent contractor.
- The arbitrator inferred that the deceased worked set hours because he was placed on the work site as part of his engagement with the respondent. This inference was reasonable on the balance of probabilities and it was not "*mere conjecture or surmise*" and it should have been made.
- As to the finding that the deceased did not have any obligation to work for the respondent, the arbitrator's reasoning was "*to an extent circular*" and he erred in the way that he considered this indicium.
- The arbitrator's finding that the deceased was not under an obligation to work for the respondent was error of the type identified in *Raulston*.
- The arbitrator's finding that the respondent did not have the exclusive right to the deceased's services involved an error of the type identified in *Raulston*.
- The arbitrator's reasons do not identify whether the lack of a right to delegate was treated as an important indicium or not. DP Snell stated:

  > 117. In *Stevens* Mason J described the right to delegate as "an important factor in deciding whether a worker is a servant or an independent contractor", referring to *Australian Mutual Provident Society v Chaplin*.
  >
  > 118. It is not suggested by either party that the Arbitrator erred, in finding that there was no right to delegate. Beyond the discussion at [96] of the reasons, the reasons are silent regarding the significance of this indicium to the reasoning. The Arbitrator concluded that there was not a right to delegate, and that this was suggestive of the existence of a contract of employment. The reasoning did not go beyond this. It was then necessary that this factor be considered, in balancing the indicia and considering whether, on the totality of the relationship, a contract of service existed. The failure to do so involved error, in that there was a failure to take account of a material consideration. It is error of the kind identified by Hayne J in *Waterways Authority v Fitzgibbon*:
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  > > … 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.

- The arbitrator did not indicate what weight was given to the indicium of the right of direction and control over the deceased or how it was balanced with the other indicia. This was an error of the kind referred to by Hayne J in *Waterways Authority* at [130].
- However, he held that the appellant did not raise *the ultimate question/entrepreneur test* before the arbitrator and the arbitrator did not err by failing to address it.

He revoked the COD and remitted the matter to another arbitrator for re-determination.

The principles that apply to disturbing factual findings - Raulston v Toll Pty Ltd & Najdovski v Crnojilovic applied – s50 WCA – NSW Police Service v Azimi applied

Patrick Stevedores Holdings Pty Ltd v Viera [2019] NSWWCCPD 12 – Deputy President Elizabeth Wood – 29 March 2019

Background

The worker claimed compensation for aggravation of pre-existing degenerative changes in his left foot (deemed date of injury alleged as 18 July 2016), but the appellant disputed liability. The worker filed an ARD claiming weekly payments under ss 36 & 37 WCA and medical and related treatment expenses (including surgery in 2017).

On 12 October 2018, ***Senior Arbitrator Glen Capel*** conducted an arbitration hearing, during which the appellant conceded issues of "injury" and "main contributing factor", but the following issues required determination: (1) Whether the worker recovered from his injury; (2) The extent and quantification of his entitlement to weekly compensation; and (3) Was the respondent liable for medical expenses under s60 WCA?

In relation to (1), the Senior Arbitrator was satisfied on the balance of probabilities that the worker continued to suffer from the effects of the injury to his left foot.

In relation to (2), the Senior Arbitrator held that the worker had no work capacity for the first 13 weeks after the surgery and thereafter he was fit for restricted/sedentary work for full hours and was able to earn $950 per week. He calculated the entitlement to weekly payments from 12 September 2017 to 11 February 2018 against the maximum rate under s 34 WCA.

In relation to (3), the Senior Arbitrator considered the decisions of Burke CCJ in *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32 and *Bartolo v Western Sydney Area Health Service* (1997) 14 NSWCCR 233 and DP Roche in *Diab v NRMA Ltd* [2014] NSWWCCPD 72 and *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49. He held that the worker bears the onus of proving that the aggravation made a material contribution to the injury, which required the application of the common-sense test of causation in *Kooragang*. He found that the evidence supported that the surgery was needed to address the ongoing effects of the work injury and, applying the relevant factors identified in *Rose* and *Diab,* held that it was reasonably necessary because of the injury.

Appeal

The appellant alleged that the Senior Arbitrator erred in fact, law and discretion in determining that the surgery was reasonably necessary as a result of the injury and that the worker required medical treatment as a consequence of the injury. In the alternative, it argued that the orders regarding weekly payments were affected by error of law *"in that there was no order in accordance with s 50 of the 1987 Act"* that gave it credit for sick leave payments made during the period.

Deputy President Elizabeth Wood determined the appeal on the papers.

DP Wood rejected ground 1. She cited the relevant principles that were stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr,* which were restated by DP Roche in *Raulston v Toll Pty* Ltd, namely that for the appellant to succeed, *"…it must establish that material facts were overlooked or given too little weight, or that the available opposite inference is so preponderant that the decision must be wrong."* She stated:

> 176. The Senior Arbitrator was correct to observe that there was no suggestion that the surgery was required until Mr Viera's underlying condition was made symptomatic by his work duties. There is no evidentiary basis to support a contrary proposition…

178. Having considered Patricks' submission as to why it says the Senior Arbitrator erred and the authorities referred to above, it cannot be said that the probabilities so outweigh that chosen by the Senior Arbitrator, that material facts were overlooked or given undue or too little weight, or that there was an opposing available inference that was so preponderant that the Senior Arbitrator's decision was wrong. The Senior Arbitrator has set out a proper reasoning process based on the facts before him that led him to his conclusions.

DP Wood also rejected ground 2. She said that the transcript indicated that both parties asked the Senior Arbitrator to make "some notation" in the form of re-credit to the appellant for payments of money paid in relation to wages for rostered weeks off totalling 3 weeks. However, neither party raised an issue or sought an order regarding the payments of sick leave and the Senior Arbitrator did not err by failing to deal with it. She held (citations excluded):

187. The Senior Arbitrator made no order in respect of credit being given to Patricks for sick leave (or any other leave) taken and it would not have been appropriate for him to do so.

188. Section 50(3) provides that if a worker is paid sick leave by the employer during any period of incapacity for work in respect of which the employer is liable to pay compensation to the worker, those payments are deemed to satisfy, to the extent of the payments made, the employer's liability to pay compensation for that period.

189. In *NSW Police Service v Azimi*, Deputy President Roche considered an application by the employer to have credit for sick leave payments made. Deputy President Roche said the following:

> The Appellant Employer argues that under section 50 of the *Workers Compensation Act* 1987 ('the 1987 Act') Mr Azimi is not entitled to both his sick leave and weekly compensation and, 'as such, the Respondent [employer] seeks an adjustment to the Arbitrator's current determination such that the Respondent [employer] receive credit for the sick leave payments already made to the Applicant for the period from 8 July 2002 until 23 August 2002'…
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> The provision does not mean that the worker is not entitled to an award in respect of the period when the employer paid sick leave. Section 50(1) makes it clear that compensation is payable 'even though the worker has received or is entitled to receive ... wages for sick leave'.
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> Therefore, the Appellant Employer's point is misguided. If Mr Azimi received sick leave in the relevant period, that does not mean that his award should be altered in the manner suggested by the Appellant Employer. That part of the award affected by the sick leave is deemed to have been satisfied and does not have to be paid again and Mr Azimi is entitled to have his sick leave re-credited. This is exactly the point made in the Respondent Worker's submissions on appeal filed on 28 November 2006 and in its email and letter to the Appellant Employer's solicitor dated 1 November and 14 November 2006 respectively.

190. The circumstance where weekly payments of compensation were awarded during periods where sick leave was paid was also considered by Deputy President O'Grady in *Milburn v Veolia Environmental Services (Australia) Pty Ltd*.

Accordingly, Wood DP confirmed the COD.

Interpretation of s 39 WCA – Worker not entitled to back-payment of weekly compensation between the date payments ceased and the date of the assessment of more than 20% WPI – Decision in Kennewell distinguished on its facts

RSM Building Services Pty Ltd v Hochbaum [2019] NSWWCCPD 15 – President Judge Phillips – 18 April 2019

Background

On 1 September 2000, the worker injured his right leg. The insurer accepted the claim and made voluntary payments of weekly compensation. In July 2004, the parties entered into a complying agreement under s 66A WCA for 12.5% permanent loss of efficient use of the right leg below the knee. In June 2012, he injured his right arm and back as a result of a fall caused by his right leg giving way. In January 2015, he claimed further compensation under s 66 WCA, but the appellant disputed this claim. On 2 April 2013, the appellant made a work capacity decision that the worker had no current work capacity.

On 2 August 2017, the appellant gave the worker notice that his weekly payments would cease on 25 December 2017 under s 39 WCA. On 6 April 2018, the worker claimed continuing weekly payments based upon an assessment from Dr Patrick (49% WPI), but the appellant disputed the claim.

On 1 May 2018, the worker applied for an assessment by an AMS and the application proceeded to conciliation/arbitration before ***Arbitrator Paul Sweeney***. On 19 June 2018, he issued a Certificate of Determination – Consent Orders, which entered awards for the respondent for injuries to both shoulders and the thoracic spine and noted that the parties agreed that the AMS should assess the degree of permanent impairment with respect to the right ankle, with consequential scarring and vascular conditions, and consequential conditions of the right wrist and lumbar spine.

On 16 July 2018, Dr Burns (AMS) issued a MAC, which assessed 21% WPI and the appellant recommenced weekly payments from that date.

On 16 August 2018, the worker requested payment of weekly compensation from 26 December 2017 to 23 July 2018 and he lodged an ARD on 17 September 2018. The appellant lodged a Reply disputing the entitlement to weekly payments during that period.

On 26 October 2018, ***Senior Arbitrator Josephine Bamber*** conducted a conciliation/arbitration hearing, during which the end date of the closed period was amended to 15 July 2018. On 7 January 2019, she issued a Certificate of Determination, which found (based upon the MAC) that the worker had suffered 21% WPI as a result of the injury in September 2000. She held that s 39 (1) WCA did not apply to the worker and in accordance with the "agreed work capacity decision", she entered an award for weekly payments for the period claimed.

Appeal

On appeal, the appellant argued that the Senior Arbitrator erred in her interpretation of s 39 WCA and should have found that where a worker has been assessed as suffering a degree of permanent impairment of greater than 20%, s 39 applies to permit weekly compensation payments after the end of the aggregate 260-week period only on and from the date of such assessment, and not in the period before such assessment.

On 22 February 2019, SIRA sought to intervene under s 106 WIMA. On 5 March 2019, ***President Judge Phillips*** conducted a teleconference. He allowed SIRA to make submissions, provided the appellant and worker an opportunity to reply and listed the appeal for hearing on 2 April 2019. He also directed the parties to file and serve submissions on a number of matters.

His Honour noted that the Senior Arbitrator agreed with the decision in *Kennewell,* which found s 39 *"does not provide an entitlement to compensation or enact the means by which compensation is to be ascertained. Rather, it limits the period during which compensation is to be paid pursuant to s 38…"* She held that s 39 is not a *"gateway"* provision, but a limiting provision. She observed that such terminology would apply to s 38, as a:

> worker needs to have proceeded through the 'gateway' in section 38 to get to a point where he has received 260 weeks of weekly compensation, because it is section 38 which governs the entitlement to weekly compensation after 130 weeks. So, every worker to which section 39 will apply, should have necessarily been assessed by the insurer as being entitled to weekly compensation under section 38.

The Senior Arbitrator distinguished the arbitral decision in *Taumalolo v Industrial Galvanizers Corporation Pty Ltd,* said that she was not bound to follow it and observed that in *Taumalolo* there was no evidence of a work capacity decision, but in the present case there was *"agreement by the respondent [employer] that the insurer had made a work capacity decision prior to 2017."* She added that the employer agreed that if she were to accept the worker's submissions about s 39 then the Commission had jurisdiction to make an order for the payment of weekly compensation for the period in dispute. She observed that this was a proper concession and consistent with the decision in *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd* and added that the Commission could make an order consistent with a work capacity decision.

His Honour stated:

> 39. The Senior Arbitrator referred to and adopted the reasoning in the decision in *Kennewell.* She acknowledged that that decision primarily concerned the construction of cl 28C of Sch 8 to the Workers Compensation Regulation 2016 (the 2016 Regulation). However, she observed that the finding in *Kennewell* that *"once section 39 does not apply there is no temporal restriction on the applicant's entitlement to compensation does seem consistent with an examination of the text of the provision."* She added:
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> > The wording of section 39 (2) is quite plain, in my view. It allows for no ambiguity. It provides that *'[t]his 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 than 20%'.* Here Mr Hochbaum submits he is such an injured person as his injury has resulted in permanent impairment of 21% WPI. (emphasis added) …

His Honour stated that the ratio decidendi of the Senior Arbitrator's decision is that once s 39 (2) WCA applies, s 39 WCA does not apply, and considering her reasons as a whole it is clear that this construction focuses almost exclusively on the words in s 39 (2) *"(t)his section does not apply…"* She relied significantly on the decision in *Kennewell*, which concerned the application of s 39 WCA and cl 28C of Sch 8 to the 2016 Regulation, but acknowledged that cl 28C did not apply to the worker in this matter. However, the decision in *Kennewell* does not grapple with the entirety of the text of s 39 and it does not attempt any assessment of the tense of the section, which he found to be "in the present". *Kennewell* and this matter deal with different aspects of s 39 and he did not accept that the Senior Arbitrator appropriately applied *Kennewell* to support her findings.

His Honour stated:

> 122. Section 39 of the 1987 Act provides as follows. Section 39 (1) imposes an absolute bar with respect to the entitlement to receive weekly payments of compensation once an aggregate period of 260 weeks has been paid to the injured worker. Section 39 (2) and s 39 (3) then provide the means by which the s 39 (1) bar might be lifted. Section 39 (2) is the operative provision in that it expresses itself thus: *"[t]his section does not apply …"* when the particular criterion referred to in subs (2) is achieved. The criterion which is set out in s 39 (2) is that *of "permanent impairment resulting from the injury is more than 20%"*. The question in this case is when is the criterion in s 39 (2) met? As the High Court in *Shi* found if the *"critical statutory question is whether a criterion was or was not met at a particular date"* then the section should be regarded as having a temporal component. The particular date is important because this supplies the relevant temporal component to the operation of s 39 (2). That is, whether the lifting of the bar under s 39 (1) depends on the existence of the permanent impairment assessment as provided for in s 39 (3). Section 39 (3) is the definitional provision which supplies the only process by which permanent impairment can be assessed in s 39 (2)…

He held that the Senior Arbitrator's decision created a temporal component, namely that despite the fact that the relevant criterion (satisfying the requisite degree of permanent impairment by way of the defined process in s 39 (3)), the entitlement to weekly compensation is then awarded for a period *prior* to it being achieved. He accepted SIRA's submissions that s 39 should not be construed as having that effect absent clear language. He held that the Senior Arbitrator did not have jurisdiction to enter an award for weekly payments for a period before the relevant criterion was met.

His Honour found that the Senior Arbitrator failed to give detailed consideration to the effect of s 39 (3) WCA (the definition of how permanent impairment is to be assessed for the purposes of s 39), although *Project Blue Sky* directs the decision maker to give meaning to every word of a provision. This was an error of law that required the decision to be revoked and he decided to re-determine the appeal.

Re-determination

His Honour stated that the critical question is at which point does s 39 (1) not apply? Answering this question requires consideration of whether s 39 (2) supplies a temporal component to the operation of s 39? In determining whether a provision contains a temporal component, the *"critical statutory question is whether a criterion was met or not met at a particular date."* He stated:

> 147. …The worker having undertaken the process of an assessment of permanent impairment as defined in s 39 (3) and having achieved the criterion set out in s 39 (2) is then relieved of the bar provided for in s 39 (1). The bar is lifted at the point in time of the assessment of permanent impairment of greater than 20%. The phrase *"[t]his section shall not apply"* set out in s 39 (2) is dependent upon the completion of this process and the achievement of the criterion. The operation of s 39 (2) is subject to the existence of an assessment of the degree of permanent impairment, as set out in s 39 (2) when read with s 39 (3). A worker's entitlement to weekly compensation, beyond the aggregate period of 260 weeks remains dependent on satisfying the preconditions for payment of weekly compensation pursuant to s 38 of the 1987 Act. This is confirmed by the note to s 39 (2).

The worker argued that s 39 WCA should be interpreted beneficially, but his Honour held that the overall Parliamentary intention was to bring an end to compensation payments after an aggregate of 260 weeks. Therefore s 39 (2) is an excepting provision and does not warrant a beneficial interpretation and this view sits comfortably with the comments of the Court of Appeal in *Cram Fluid*, which were to the effect that the 2012 amendments disclose a cost-saving objective. He also noted that the worker asserted that s 38 WCA (and the work capacity decision) has primacy, but his Honour held that this does not alter or affect the consideration of the text of s 39.

Accordingly, his Honour entered an award for the appellant.

WCC – Arbitrator Decisions

Section 11A WCA – injury not wholly or predominantly caused by reasonable action in respect of discipline, performance appraisal or termination

Mani v Westpac Banking Corporation [2019] NSWWCC 77 – Arbitrator Paul Sweeney – 22 February 2019

The worker was employed by the respondent as a customer experience manager for many years. On 7 February 2018, the respondent issued him a formal written warning regarding his work performance, which set in train a performance improvement plan that was to continue until 28 February 2018. However, he ceased work shortly afterwards and did not return to work. The respondent disputed liability essentially under s11A (1) WCA.

Arbitrator Paul Sweeney held that the worker suffered a psychological injury that was predominantly caused by his meeting with the respondent on 7 February 2018 and that this was meeting in respect of discipline. He referred to the decision of Candy ADP in *ISS Property Services Pty Ltd v Milovanovic* [2009] NSWWCCPD 27, which accepted the comments of Neilson CCJ in *Kushawa v Queanbeyan City Council* [2006] 23 NSWCCR:

> The word 'discipline' in s11A (1) of the Workers Compensation Act 1987 has a primary meaning of learning or instruction imparted to a learner and maintained by training, by exercise or repetition. The narrow meaning of that word as punishment or chastisement is secondary to its primary meaning but is included in it.

Arbitrator Sweeney stated, relevantly:

> 94. It is tolerably clear that the warning notice involved chastisement and that the balance of the meeting was incidental to the issue of the letter. In other words, it was part of the process leading up to the issuing of the warning letter. It was in respect of discipline. The meeting was also intended by the respondent to be the first meeting with the applicant in a formal performance improvement plan. It is the respondent's contention that there was an earlier informal performance improvement plan in place which commenced on 29 September 2018. The applicant disputes that he was told of this plan. While this argument is important, it must be kept in mind that section 11A (1) does not refer to performance improvement as one of the actions of the employer which can defeat a claim for compensation for a psychological injury…

He held that neither the informal performance improvement plan nor the performance improvement plan that was put in place as a result of the meeting of 7 February 2018, fit within his Honour's description of 'performance appraisal' in *Dunn.* He considered it unlikely that a performance management plan, which continues over many months, can be "performance appraisal", but contrastingly, the annual appraisal from the time of the 7 February argument was action "in respect of performance appraisal".

While he accepted that it was reasonable for the respondent to conduct the meeting on 7 February 2018, it should have clearly informed the worker of the nature of the plan and its consequences. However, the respondent did not prove that it had done this, which was an obvious failure to afford procedural fairness. He held, relevantly:

> 116. …If the applicant knew that this was the final meeting of the informal improvement plan, he may have had the opportunity to prepare for the meeting and to address the issues raised by Ms Bray. Similarly, if he had clearly been told at the outset that, he was embarking on a PIP, the meeting of 22 January may have been unnecessary or taken a different form.
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> 117. The respondent's actions in respect of the informal PIP lead directly to the warning letter and the formal PIP. The tainted informal plan infects the meeting and letter of 7 February 2018 and necessitates a finding that the respondent has not proven that its actions in respect of discipline were reasonable…

The arbitrator found that the worker was incapacitated for all work until 8 May 2018 and thereafter, he had capacity to perform the most basic of clerical or administrative work on a part-time basis. He assessed his ability to earn by reference to the minimum wage and entered a continuing award of weekly payments from 8 February 2018 under s 37 WCA and made a general order for payment of s 60 expenses.

Section 322A WIMA – applicant not entitled to be reassessed for the purposes of s39 WCA

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

On 3 March 2014, the worker injured his left upper extremity and lumbar spine at work. In 2017, he filed an ARD claiming compensation under s 66 WCA. On 2 November 2017, a MAC assessed 14% WPI, but he discontinued the ARD before a COD was issued. On 13 June 2018, the insurer disputed that the worker suffered a consequential injury to his right knee.

On 12 September 2018, the worker's solicitors requested a review of that decision and also gave the insurer notice of a further claim under s 66 WCA. On 20 September 2018, the insurer issued a notice under s 78 WIMA, maintaining the dispute regarding the alleged right knee injury and asserting that the worker was not permitted to make a further claim under s66 (1A) WCA. It also stated that his weekly payments would cease on 24 February 2019.

On 9 November 2018, the worker's solicitors sent a further copy of their letter of demand to the insurer. On 10 January 2019, the insurer issued a further dispute notice under s78 WIMA, which also raised asserted that the 2017 MAC is the only assessment of permanent impairment that can be used for the purposes of s 322A (2) WIMA. The respondent relied upon the decision of Arbitrator Debra Moore in *Singh v B & E Poultry Holdings Pty Ltd* [2018] NSWWCC 178.

On 24 January 2019, the worker lodged an Application for Assessment by an AMS and the respondent filed a Reply. ***Arbitrator Josephine Snell*** conducted an arbitration hearing.

The worker argued that s39 WCA entitles him to have WPI assessed independent of s 66 WCA. He referred to the decision of DP Snell in *Abu-Ali v Martin Brower Australia Pty Ltd* [2018] NSWWCCPD 25, but argued that s 32A WCA is a procedural provision and not a substantive one and that s 322A WIMA is also procedural and not substantive in nature. He argued that s 322A (2) limits the situations when a MAC *is the only MAC that can be used in connection with any further medical dispute, namely "(whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages)"* and that the fact that those words are in brackets means that s 322A is not intended to apply to other types of threshold disputes.

The worker also sought to introduce further evidence regarding the alleged right knee injury, but the respondent objected to this. The Arbitrator decided to determine the legal issue and to consider the admissibility of the further evidence at a telephone conference, if required.

The respondent argued that the facts in *Singh* are very similar to this matter and that Arbitrator Moore's decision was upheld on appeal by Snell DP, who found:

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

The Arbitrator noted that Keating P considered a similar argument in *Merchant v Shoalhaven City Council* [2015] NSWWCCPD 13, and stated:

> 35. … The limitation on the number of assessments in s 322A applies to "**any** further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury..." (s 322A(2)) (emphasis added). Whilst the matters referred to by Mr McManamey are certainly included as matters to which the limitation applies, the sub-section expressly applies to any further assessment.
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> 36. Keating P's interpretation focused on the words in section 322A (2) preceding the parentheses. So, in Mr Ali's case following such an interpretation his one assessment was that obtained in matter 4227/17 and that is the only MAC that can be used "in connection with any further or subsequent medical dispute about the degree of permanent impairment". Clearly, a section 39 dispute is about the degree of permanent impairment. Mr Ali relies on Dr Maniam assessing his degree of permanent impairment at 39% WPI and the respondent is relying on the MAC which assessed permanent impairment at 14% WPI.

While in *Singh* Snell DP was not concerned with interpreting the meaning of s 322A (2) WIMA per se, his comments apply to this matter and the words in parentheses are not intended to be an exhaustive list, but rather extend the meaning of the preceding words in s 322A (2) an as illustration. In other words, "whether" does not mean "limited to".

Accordingly, Arbitrator Snell held that the worker had his one assessment of the degree of permanent impairment in 2017 and is not entitled to a further assessment of WPI.

Arbitrator determines dispute as to work capacity under s32A WCA and awards weekly payments under ss 36 & 37 WCA

Ramsey v Trustees of the Roman Catholic Church for the Diocese of Parramatta [2019] NSWWCC 102 – Arbitrator John Harris – 12 March 2019

On 6 July 2018, ***Arbitrator Nicholas Read*** issued a COD***,*** which determined that the worker had injured his cervical spine and lumbar spine on 16 November 2013 and as a result of the nature and conditions of employment (deemed date of injury being 18 April 2016). He remitted a claim under s66 WCA to the Registrar for referral to an AMS.

On 14 August 2018, Dr Wilding issued a MAC that assessed 27% WPI for the cervical spine and 0% WPI for the lumbar spine. The worker unsuccessfully appealed against the MAC and the claim under s66 WCA was resolved on 27 February 2019.

The worker claimed weekly compensation from 19 May 2016 to 17 November 2018. The parties agreed that the worker had not received weekly payments, that PIAWE is $1,557.69 and that is subject to indexation under s82A WCA, but the issue in dispute was the extent of his current work capacity as defined by s32A WCA.

Arbitrator John Harris held that at all relevant times the worker was "*unfit for his pre-injury employment*", but he was fit for suitable duties for 12 hours per week from the commencement of the claim until 15 June 2016. He was then *totally incapacitated* until 12 January 2017 and he was fit for suitable duties thereafter. On the balance of probabilities, he found that the worker had capacity to perform suitable duties for no more than 25 hours per week. In calculating the entitlement to weekly payments, he adopted an average rate of $42 per hour and awarded compensation under ss 36 and 37 WCA from 19 May 2016 to 17 November 2018.

FROM THE WIRO

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

Kim Garling