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.

Court of Appeal Decisions

Court refuses to grant leave to appeal against an award for hearing aids under s 60 WCA

Bluescope Steel (AIS) Pty Ltd v Sekulovski [2019] NSWCA 136 – Gleeson JA, White JA & Emmett AJA – 13 June 2019

On 10 May 2019, the Court dismissed the appellant's application for leave to appeal against a decision of Wood DP, which confirmed an award for the cost of hearing aids under s 60 *WCA, and* reserved its reasons. These are summarised below.

Background

The worker received several consent payments for hearing loss during his employment with the appellant and on 21 August 2002, the Compensation Court's Medical Panel certified under s 122 (5) *WIMA* that he had suffered 1.9% binaural loss of hearing due to boilermaker's deafness or deafness of a similar origin. On 22 June 2016, an audiologist recommended that the provision of bilateral digital hearing aids and on 31 January 2017, the worker made a claim for hearing aids under s 60 *WCA.* The appellant disputed that claim and argued it was not supported by a medical report from an ENT specialist.

On 6 July 2017, Dr Tamhane (ENT specialist) opined that the worker had suffered 7.1% binaural hearing loss and that his employment with the appellant had *"the tendencies, incidents and/or characteristics"* that gave rise to a real risk of boilermaker's deafness or deafness of similar origin. He recommended bilateral digital hearing aids. However, the appellant asserted that this report was invalid because the assessment of binaural hearing loss *"considerably exceeded"* the percentage certified in the 2002 Certificate. It argued that the hearing aids were not reasonably necessary for the work-related noise induced hearing loss.

At first instance, the **Senior Arbitrator** awarded the worker the cost of digital hearing aids under s 60 *WCA.*

Presidential Appeal

The appellant alleged that the Senior Arbitrator erred: (1) in finding that the worker had discharged his onus of proving that his need for hearing aids was "as a result" of injury, within the meaning of s 60 *WCA;* (2) in so far as she based her determination upon a medico legal assessment of 7.1% binaural hearing loss in the face of the 2002 Certificate, which assessed 1.9% binaural hearing loss due to industrial deafness; (3) she wrongly found that the worker's medico legal expert attributed the entirety of his hearing loss to industrial deafness; (4) she failed to address the meaning of the phrase "as a result of injury" as contained in s 60 *WCA;* and (5) she failed to address its submissions and failed to exercise jurisdiction.

Deputy President Elizabeth Wood held that no medical evidence displaced Dr Tamhane's evidence regarding the matters in dispute and his opinion was supported by evidence of the audiologist and the worker's unchallenged statement. There was no dispute that his hearing difficulties were noise-induced and she found that the hearing aids were reasonably necessary for the purposes of s 60 *WCA.*

Court of Appeal

The appellant applied for leave to appeal on 7 grounds and alleged that DP Wood: (1) failed to apply s 60 (1) (a) *WCA* correctly; (2) failed to consider and apply s 122 (6) *WCA* as to the "conclusive evidence" of the 2002 Certificate; (3) made crucial findings that were not open on the evidence; (4) made findings to the effect that the Worker's hearing loss, as assessed by Dr Tamhane, was in fact caused by his employment with Bluescope where the worker had not worked for Bluescope since 31 October 2000 and the she was not an expert; (5) erred in finding that the whole of the Worker's hearing loss as at the time of the examination by Dr Tamhane was work related, in circumstances where the Worker had ceased his employment on 31 October 2000 and there was no medical or other evidence to support such a finding and she was not an expert; (6) erred in finding that there were no other factors available, other than work related injury, that could or might explain the deterioration in the Worker's hearing between 31 October 2000 and the time of his examination by Dr Tamhane; and (7) failed to set out adequate or lawful reasons for her decision.

Emmett AJA (with whom Gleeson JA and White JA agreed), noted that it was common ground that the 2002 Certificate certified the percentage to total hearing loss and s 122 *WIMA* (then in force) required the Registrar of the Compensation Court to refer a medical dispute to a Medical Panel upon the application of the worker or employer. Under s 122 (6), that Certificate was conclusive evidence of the matters certified. He stated, relevantly:

> 23. The thrust of the appellant's complaint is that neither the Arbitrator nor the Deputy President applied s 122 or s 326 of the 1998 Act. Both s 122 and s 326 are clear in their terms. There has been no suggestion that there is any doubt as to their effect, or that there is any misapprehension on the part of the Commission and its members as to their effect. The complaint is simply that both the Arbitrator and the Deputy President failed to apply s 122.

However, a fair reading of DP Wood's reasons makes it clear that she did not ignore s 122 and she referred to the number of claims that the worker made under s 66 *WCA* for his hearing loss and noted that he received compensation for losses attributable to noisy employment. She also noted that he received compensation for a total binaural hearing loss of 8.38% and under s 122 (6) *WIMA*, that the Medical Panel's Certificate was conclusive as to the matters certified. He stated:

> 26. Had the Deputy President then made a finding that the worker's binaural hearing loss was something different from 1.9%, either the worker or Bluescope may have had a basis for a complaint. However, notwithstanding the contentions advanced on behalf of Bluescope, the Deputy President did no such thing.

However, DP Wood found that Dr Tamhane's report did not opine that the need for hearing aids depended upon the extent of the hearing loss. He stated, relevantly:

> 30. That reasoning and those findings were not inconsistent with the 2002 Certificate. The Deputy President expressly accepted that the Certificate was conclusive evidence as to the matters certified. That point, however, was that the evidence of Dr Tamhane supported the conclusion that, assuming the 2002 Certificate was correct, the need for hearing aids was the result of work-related hearing loss.

Accordingly, his Honour held that DP Wood did not err and there is no reason to suggest that the Commission or its officers or members will, in the future, ignore the clear terms of s 122 and, if relevant, s 326 *WIMA*. As the appeal would not raise any question of law or principle, leave to appeal was refused with costs.

Journey claim under s 10 (1) WCA –Deputy President incorrectly determined an issue that was not the subject of the Appeal – Award for the respondent entered.

Ballina Shire Council v Knapp [2019] NSWCA 146 – Basten JA, Macfarlan JA & Payne JA – 20 June 2019

The appellant employed the worker as a plant operator. He usually worked on weekdays and travelled from his home in Evans Head to his workplace at Alstonville. However, on 5 July 2014, he was to work overtime as a traffic controller with a different crew in Ballina and he left home at about 6am to travel to either the Works Depot or directly to the worksite. While on-route, he had a head-on collision and Police determined that he was 'at-fault' and charged him with dangerous driving causing death. They opined that the accident occurred because while driving, and just before the accident occurred, he was using his mobile telephone and lost control of his car. The worker has no memory of the accident, but he pleaded guilty and was sentenced in the District Court of NSW. He then claimed weekly payments and medical expenses for his injuries and the Insurer disputed liability, essentially relying upon ss 4 (a), 10 (1), 10 (1A) and 10 (3A) *WCA.*

Arbitrator Ross Bell awarded the worker s 60 expenses and gave the parties leave to apply if any issue about weekly payments could not be resolved. His reasons are summarised below.

> *Real and substantial connection – s 10 (3A) WCA*

- The employer gave the worker a mobile telephone to contact his work supervisor. As he had his gear with him and there was no need for him to go to the Depot, he found that the only explanation for that calls was that the worker was telling his supervisor that he was running late and would go straight to the work site and the logical inference was that these *"were about work".*
- It was not necessary to establish a direct causal connection to the employment (see: *Namoi Cotton Co-Operative Ltd v Easterman* [2015] NSWWCCPD 29; *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden* 2014] NSWWCCPD 13; and *Field v Department of Education and Communities* [2014] NSWWCCPD 16. As a result, the 'relatively broad' test of 'real and substantial connection' in *Field* was satisfied.

Serious and wilful misconduct – s 10 (1A) WCA

- The appellant argued that the use of a mobile telephone while driving, speeding and having alcohol in his bloodstream established serious and wilful misconduct under s 10 (1A) *WCA*. However, it had not raised the alcohol issue in its dispute notice and required leave to do so.
- The Arbitrator noted that s 289A (4) *WIMA* allows a new issue to be referred if it is in the interests of justice to do so, he did not need to consider this matter because the Police and the District Court formed the view that alcohol was not a causative factor. There was no evidence that the worker knew that he had alcohol in his system and the authorities require knowledge of the risk of injury. He cited the decision of Roche DP in *Karim v Poche Engineering Services Pty Ltd* [2013] NSWWCCPD 24 ("*Karim"*) as authority that: (1) the onus on proving serious and wilful misconduct rests on the respondent; (2) 'serious and wilful misconduct' is more than carelessness, negligence or disregard for others; (3) where the risk of loss or injury is remote, or if probable, trivial, it will not ordinarily be serious misconduct, and (4) the gravity of the conduct is not to be judged by its consequences.
- Further, in *Sawle v Macadamia Processing Co Pty Ltd* [1999] NSWCC 26; 18 NSWCCR 109 (*Sawle*) O'Meally CCJ stated:

  > [24] Serious and willful misconduct is conduct beyond negligence, even beyond culpable or gross negligence. In order to establish serious and willful misconduct, it must be demonstrated that the person performing an act or suffering an omission knows it will cause risk of injury or acts in disregard of consideration whether it will cause injury. The word 'willful' connotes that the applicant must have acted deliberately. As it seems to me, in order to establish serious and willful misconduct, a person accused of it must be shown to have knowledge of the risk of injury and, in the light of that knowledge, proceeded without regard to the risk.

- He held that exceeding the speed limit by 11 kph and using a mobile telephone while driving *"did not reach the standard of serious and wilful misconduct and that the conduct must be beyond culpable or gross negligence"*.
- Further, based upon the decisions in *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21 and *Vinidex Pty Ltd v Campbell* 2012] NSWWCCPD 6 (*Campbell*), the worker's conduct was not sufficient to take him outside his employment because: (1) it was necessary for him to travel to the depot or worksite; (2) the telephone that he used was issued by the employer; and (3) contact with the supervisor was for work purposes.

Presidential Appeal

The Insurer alleged that the Arbitrator erred: (1) By failing to take account, or adequate account, of the totality of the worker's conduct that resulted in the accident; (2) By failing to allow it to raise alcohol consumption as an issue; (3) By misunderstanding the relevance of consumption of alcohol; (4) In the application of the relevant authorities to the facts in this case; (5) In finding the injury was not attributable to gross misconduct and in relying on the same grounds advanced in respect of serious and wilful misconduct to find that the injury was a personal injury within the meaning of s 4 (a) WCA; and (6) in making an award under s 60 WCA.

Deputy President Elizabeth Wood determined the appeal 'on the papers' and observed that grounds (1), (3), (4), (5) and (6) depended on the outcome of ground (2) - whether the insurer could raise the alcohol issue.

She rejected ground (2) and noted that in *Mateus* at [46], Roche DP set out the factors relevant to the exercise of the discretion under s 289A (4) WIMA, as follows:

> (a) the degree of difficulty or complexity to which the unnotified issues give rise;
>
> (b) when the insurer notified that it wished to contest any unnotified issue/s;
>
> (c) the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;
>
> (d) any prejudice that may be occasioned to the worker, and
>
> (e) any other relevant matters arising from the particular circumstances.
>
> He also stated that the following matters should be considered:
>
> > (a) a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved;
> >
> > (b) any insurer seeking to dispute an unnotified matter is seeking to have a discretion exercised in its favour and, accordingly, must act promptly to bring the matter to the attention of the Commission and all other parties;
> >
> > (c) any unreasonable or unexplained delay in giving notice of an unnotified matter will be relevant to the exercise of the discretion;
> >
> > (d) in exercising its discretion, the Commission may have regard to the merit and substance of the issue that is sought to be raised;
> >
> > (e) in assessing prejudice to the worker, it will be significant to consider when and in what circumstances the worker was first made aware of the unnotified issue that is sought to be raised;
> >
> > (f) though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial merits of the case, those matters will not be determinative, and
> >
> > (g) the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion. (emphasis in original)

DP Wood held that that the appellant failed to explain the delay in notifying the worker of the alcohol issue. The worker would be prejudiced if leave to raise it was granted and there was little evidence that alcohol was a contributing factor to the accident. However, the Arbitrator erred at law because he did not explain why he only considered the conduct of driving "slightly" above the speed limit and using a mobile telephone in making his findings about the conduct. He failed to consider facts that were in the evidence and put to him in submissions, that: (i) the worker was travelling at a relatively high speed on a two-way carriageway without barriers; and (ii) while making a telephone call he took one hand off the steering wheel: see *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255; 12 DDCR 95, [171].

Based upon the decision in *Chubb Security Australia Pty Ltd v Trevarrow* [2004] NSWCA 344; 5 DDCR 1, DP Wood decided to re-determine the following issues:

(1) The identification of the actions constituting the conduct that resulted in the injury;

(2) Whether that conduct constituted serious and wilful misconduct pursuant to s 10 (1A) WCA, to disentitle the worker to benefits under s 10 (1) WCA;

(3) Alternatively, whether the worker suffered a personal injury arising out of or in the course of his employment; and

(4) If so, whether the conduct was gross misconduct, taking him out of the course of his employment. She held as follows:

In relation to issue (1), the evidence indicates that the accident most likely occurred because of driver distraction due to the use of a mobile telephone;

In relation to issue (2), the worker's actions constituted serious and wilful misconduct under s 10 (1A) *WCA* and he was not entitled to benefits under s 10 (1) *WCA*. She stated:

> 181. The serious nature of Mr Knapp's conduct is reflected in the description of the driving as "dangerous" driving in the criminal charges that were laid against him. While those charges encompass the consequences of the conduct (death or grievous bodily harm), which are not to be considered here, the legal descriptor is relevant to the way Mr Knapp was driving when the collision occurred. As Wells J said:
>
> > The driving in a manner dangerous element of the offence is due to the distraction and inattention that was caused by his use of the mobile phone in combination with the excessive speed …
>
> 183. The risk of injury flowing from Mr Knapp's conduct in those circumstances was at least probable and, on any view, likely to cause significant injury.

Also, the seriousness of the conduct should be considered according to contemporary social standards and using a hand-held mobile telephone while travelling at speed and over the speed limit is a serious matter. Because of Police advertising campaigns, the risk of injury from both speeding and from using a hand-held telephone is well publicised and must be regarded as "common knowledge" and must have been apparent to the worker, or he proceeded to act without regard as to whether it would cause injury. He did not challenge the deliberateness of his conduct in the District Court.

In relation to issue (3), there was a causal, rather than a temporal connection with employment, and the worker did not make the telephone calls in the course of his employment. However, his injuries arose out of his employment because he had no other reason to telephone his employer. She stated that the authorities indicate that if the injury arose out of employment, the misconduct is irrelevant, even when the misconduct is such that it takes the worker outside of the course of his employment.

Accordingly, she held that the injuries were compensable under s 4 (a) *WCA* and she remitted the matter to the Arbitrator to determine the weekly payments claim.

Court of Appeal

At the completion of oral arguments on 7 June 2019, ***Payne JA (with whom Basten JA and Macfarlan JA agreed) allowed the appeal***. The Court set aside DP Wood's orders, allowed the appeal against the Arbitrator's determination and entered an award for the respondent. It also dismissed the worker's cross-appeal and reserved its reasons, which are summarised below.

- The Court noted the appellant's argument that the only issue before DP Wood was whether, in determining that the worker was entitled to compensation by reason of his s 10 journey claim, the Arbitrator's decision was affected by any error of fact, law or discretion. It was common ground that it did not need to consider any other issues if it upheld this ground.

- The worker conceded that ground (3) was established and DP Wood erred by embarking upon a process of rehearing, which was prohibited to her by s 352 *WIMA.* His Honour stated that the language of s 352 (5) *WIMA* makes it clear that the dicta in *Chubb,* which DP Wood relied upon, had no role to play in the appeal before her. Having dismissed the claim under s 10 *WCA* she had no jurisdiction to determine whether the worker was entitled to compensation on some other basis.

- Regarding the cross-appeal, the Court's jurisdiction under s 353 *WIMA* is limited to correcting error "in point of law". However, the worker did not identify any such error and instead asserted that an error of fact finding can amount of an error of law, based on the decision of McColl JA in *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282. He rejected that assertion and stated that all McColl JA was doing in the cited passages was explaining that the well-known principle that a *"no evidence ground"* may be characterised as *"a decision of a question with respect to a matter of law"*: *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* (2010) 241 CLR 390; [2010] HCA 32 at [59] (French CJ) and a *"question of law": Kostas* at [90] - [91] (Hayne, Heydon, Crennan and Kiefel JJ). He held, relevantly:

  > 38. The relevant question is whether there was evidence available from which the Deputy President could draw inferences and make findings. Whether the evidence was sufficient was a matter for the Deputy President to determine, so long as the evidence taken into account could be described as rationally probative of the existence of a fact in issue.

- The only grounds that the worker addressed orally related to the speed at which he was driving when the accident occurred (ground 1) and whether he was holding a mobile telephone near his ear at that time (grounds 1 and 6). He held:

  > 39. In relation to the speeding finding addressed by ground 1, the point of law was said to be that *"the document upon which the speed estimate was based, the expert report of Mr Parker, was based on an assumption that wasn't proved in the evidence".* Senior Counsel for the cross-appellant accepted that this issue was not raised before the Deputy President, which is itself a formidable hurdle to success on this point in this Court.

  However, ample evidence about speeding was available to the DP Wood and the fact that inconsistent observations were made by another eye witness is not to the point. Also, the challenge to her finding that he held his mobile telephone to his ear when the accident occurred does not raise any arguable error of law. The evidence indicated that he could only have made that call by taking the phone in his hand and putting it up to his ear. Whether or not that was *"in a sense, excusable or explicable in terms of him trying to contact his employer"*, it did not identify any error of law.

Basten JA stated that although it is clear that DP Wood exceeded her function in upholding the claim on a basis outside the scope of the appeal under s 352 (5) *WIMA,* her conclusions were wrong in law and the Arbitrator rightly dealt with the matter as a *"journey claim"* under s 10 *WCA.* He stated (citations excluded):

> 2. …If an injury in the course of travelling from home to work was an injury arising out of or in the course of employment for the purposes of s 4 of the *Workers Compensation Act*, s 10 would be otiose. That conclusion is not affected by the fact that he was making a telephone call to his supervisor, nor by the fact that he was using a mobile phone supplied by his employer. Even if the car had been supplied by his employer, the position would not be different.

3. The Deputy President noted that the phrase *"arising out of … employment"* invokes a causal connection. That is no doubt correct, but the connection must be more than travelling from home to work. The Deputy President recognised that difficulty and expressly relied upon reasoning of the High Court in *Hatzimanolis v ANI Corporation Ltd* and *Comcare v PVYW*. Each case involved an "interval" claim, that is, a claim for injuries sustained between two intervals of employment while the employee was at a place required in order to continue or complete the employment duties at a future time. This was not an interval case. The concept of the course of employment was not to be expanded in this case. Further, the activity had to be one induced or encouraged by the employer. As the joint reasons in *PVYW* stated:

> [35] Because the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in *Hatzimanolis* that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs.

His Honour concluded that if this was a legitimate subject of inquiry by DP Wood, her reasoning and conclusion were in error, but this conclusion was not necessary to support the Court's orders in view of the worker's concession that this finding was outside the scope of the appeal.

Nature of appellate review of an assessment of severity of non-economic loss under s 16 of the Civil Liability Act 2002 (NSW)

White v Redding [2019] NSWCA 152 – Macfarlan JA (Gleeson JA & White JA (agreeing) – 24 June 2019

Background

On 12 January 2014, the respondent was hit in her left eye by a tennis ball, which was struck by the appellant while he was paying an informal game of cricket in the Function Room at Manly Lifesaving Club. She suffered 97% loss of vision in that eye and claimed damages against the Club and the appellant. The proceedings against the Club resolved pre-trial, but the Primary Judge (Russell SC, DCJ) directed the entry of judgment for the respondent against the appellant in the sum of $692,806.30.

On appeal, the Court identified the following issues: (1) whether the trial judge erred in assessing the severity of the respondent's economic loss as 55% of a most extreme case; (2) whether the primary judge erred in assessing her loss of future earning capacity; and (3) whether the trial judge erred in making an allowance of $25,000 for the possible cost of contact lenses.

The Court dismissed the appeal and held, relevantly:

> ***Question (1) – Per Gleeson & White JJA (Macfarlan JA dissenting):***
>
> (i) The test for appellate review of an assessment of the severity of non-economic loss under s 16 of the *Civil Liability Act 2002* (NSW) is the *"deferential standard"* stated in *House v The King* (1936) 55 CLR 499.

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; *Costa v The Public Trustee of New South Wales* [2008] NSWCA 223; *Miller v Jennings* (1954) 92 CLR 190; *Hall v State of New South Wales* [2014] NSWCA 154; *Metaxoulis v McDonald's Australia Ltd* [2015] NSWCA 95; *Singer v Berghouse* (1994) 181 CLR 201; *Southgate v Waterford* (1990) 21 NSWLR 427; *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370, considered.

House v The King (1936) 55 CLR 499; and *Hornsby Shire Council v Viscardi* [2015] NSWCA 417, applied.

(Per Macfarlan JA)

(ii) The test for appellate review of an assessment of the severity of non-economic loss under s 16 of the *Civil Liability Act 2002* (NSW) is the "correctness standard" of appellate review identified in *Warren v Coombes* (1979) 142 CLR 531.

Miller v Jennings (1954) 92 CLR 190; *House v The King* (1936) 55 CLR 499; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, considered.

Warren v Coombes (1979) 142 CLR 531 and *Hall v State of New South Wales* [2014] NSWCA 154, applied.

(Per Macfarlan JA, Gleeson and White JJA agreeing)

(iii) Taking into account the advantage the primary judge had over the Court, the Primary Judge's conclusion that the severity of the respondent's non-economic loss was 55 per cent of the most extreme case was not erroneous: [30], [78], [80].

Question (2) - (Per Macfarlan JA, Gleeson and White JJA agreeing)

(i) There was no error in the primary judge assessing the respondent's future economic loss in the way that he did, notwithstanding the absence of evidence of the earnings of persons in certain potentially relevant occupations: *State of New South Wales v Moss* (2000) 54 NSWLR 536 applied.

Question (3) - (Per Macfarlan JA, Gleeson and White JJA agreeing)

(ii)There was no error in the primary judge making a 50 per cent allowance for the cost of contact lenses to the respondent.

Supreme Court of New South Wales Decisions

Jurisdictional error – Decision of the Proper Officer of SIRA set aside because it failed to address a substantial, clearly articulated argument

IAG Limited t/as NRMA Insurance v Jammal [2019] NSWSC 676 – Wright J – 7 June 2019

Background

On 25 February 2015, the worker was involved in an MVA. He claimed damages and the plaintiff (the CTP insurer on risk) disputed the degree of permanent impairment. On 21 February 2017, a Medical Assessor issued a certificate under s 61 of the *Motor Accidents Compensation Act 1999* (*the MAC Act*) and assessed greater than 10% WPI (5% of the cervical spine, 4% of the right shoulder and 2% of the left shoulder), which was based upon the worker's denial of pre-accident neck and shoulder problems.

On 8 June 2018, the plaintiff applied for a further assessment of permanent impairment under s 62 (1) (e) of *the MAC Act*, because it received additional relevant information about

the injuries that was capable of altering the outcome of the original assessment, but the worker objected. However, a Proper Officer of SIRA refused the application.

The plaintiff sought judicial review by the Supreme Court of NSW and alleged that the Proper Officer erred by: (1) Failing to provide adequate reasons; (2) Failing to address a substantial argument, namely whether the additional relevant information was capable of having a material effect on the outcome of the previous assessment because it indicated that the whole permanent impairment as previously assessed was not caused by the accident; and (3) Wrongly imposing a requirement that there must be first "clinical examination findings" available in the additional relevant information before that information could be capable of having a material effect on the outcome of the previous assessment.

Justice Wright first considered grounds (2) and (3).

He held that ground (2) was made out for the following reasons.

- If, on a proper reading of the plaintiff's application and submissions, there was a clearly articulated, substantial argument that the Proper Officer did not address in her reasons, this would be an error that rendered her decision liable to be set aside: *Dranichnikov Minister for Immigration and Multicultural Affairs* [2003] HCA 26 at [24] (Gummow and Callinan JJ), [88] (Kirby J); *Ali v AAI Limited* [2016] NSWCA 110 at [66] (Basten JA, Leeming and Simpson JJA agreeing).
- He identified the following issues:

  (1) Whether the plaintiff articulated clearly, in its application and submissions in relation to a further assessment, a substantial argument that the additional, relevant information, which was inconsistent with the history given by the first defendant, was capable of having a material effect on the outcome of the previous assessment because it could lead, on a further assessment, to a different conclusion concerning causation of the injuries and resulting WPI percentages?

  He held that a causation argument was clearly articulated in the application.

  (2) Whether the proper officer addressed this argument in her reasons?

  He held that the Proper Officer was clearly focussed on the absence of clinical examination findings in the clinical notes and she failed to consider whether the clinical notes contradicted or substantially undermined the first defendant's history of no prior problems. She also failed to address whether, if his history was not comprehensive and accurate, the assessor's finding regarding causation of the assessed 5% impairment was unsupported.
- A Medical Assessor applying cl 1.41 of *the Guidelines* would be required to attempt to resolve the inconsistencies between the worker's history and the material in Dr Nosir's notes by having him respond to the inconsistent material during an assessment. How he might respond would not be a matter upon which the Proper Officer could speculate in determining the application and she failed to consider the Causation Argument.
- He held that ground (3) was made out and stated that the Proper Officer is required to consider whether the additional relevant information is capable of changing the outcome of the previous assessment materially on other bases, such as a failure to establish causation, where those other bases are raised for consideration. Where the additional relevant information is capable of demonstrating that the complainant's

history was false or not comprehensive and accurate, a causation issue is likely to arise. He stated, relevantly:

> 112. Accordingly, if the proper officer did consider the Causation Argument, and NRMA's ground 2 fails, but rejected it because of her overly narrow understanding of her function under s 62 as explained above, her decision is affected by jurisdictional error. Misapprehending or disregarding the nature or limits of functions or powers where jurisdiction is exercised constitutes jurisdictional error: *Craig* at 177.
>
> 113. In a similar situation concerning a refusal to grant a review under s 63 of the MAC Act, Basten JA held in *Dominice v Allianz Australia Insurance Ltd* [2017] NSWCA 171 at [7]; 81 MVR 249 (*Dominice*):
>
> > Where the proper officer refuses to grant a review on the basis of a legal misunderstanding as to the scope of his or her powers, there may well be grounds for judicial review of that decision. …

- As grounds (2) and (3) were made out, it was not necessary to consider ground (1), but he stated that the reasons were detailed and disclosed the Proper Officer's reasoning process more than adequately and he would not find them to be inadequate.

Accordingly, his Honour set aside the Proper Officer's decision and remitted the matter to SIRA for re-determination of the application for further assessment. He also made a costs order against the worker.

WCC Presidential Decisions

A prior determination of an injury under s 4 (a) WCA does not give rise to an issue estoppel or Anshun estoppel – No entitlement to costs under s 341 WIMA because the dispute arose and proceedings commenced *after 31 March 2013*

Fourmeninapub Pty Ltd v Booth [2019] NSWWCCPD 25 – President Judge Phillips – 6 June 2019

The President held that a claim under s 66 *WCA* for a disease injury under s 4 (b) (ii) *WCA* was not barred by issue estoppel and/or *Anshun* estoppel as a result of a previous determination of a previous claim under s 4 (a) *WCA.* He also held that the worker had not suffered a disease that was capable of being aggravated under s 4 (b) (ii) *WCA.*

Background

On 7 November 2002, the worker got blood on her body when she attempted to intervene in a fight between patrons and was concerned that she may have contracted HIV or Hepatitis. She last worked on 19 November 2002, when she witnessed another fight between patrons. She was diagnosed with PTSD and claimed compensation and the insurer accepted that claim. However, in 2005, she was diagnosed with Bipolar Disorder and the insurer disputed that condition was work-related and that her employment aggravated, accelerated or exacerbated it.

In 2005, the worker claimed compensation under s 66 *WCA.* Dr Walden (AMS) diagnosed PTSD and depression and noted a history that in December 2004, the worker developed hypomania consistent with Bipolar Disorder. While she found that this caused additional impairment, it was not causally related to either the incident at work in 2002 or medication prescribed for it and she assessed 6% WPI.

On 17 June 2008, the insurer declined liability for weekly payments and s 60 expenses and asserted that the worker no longer suffered from work-related PTSD. The worker filed an ARD on 15 October 2008, but then made a further claim under s 66 *WCA* for 17% WPI, based upon an assessment from Dr Huntsman. He opined that work was a substantial contributing factor to both the PTSD and Bipolar Disorder. However, the insurer disputed this claim.

On 23 January 2009, the worker filed a third ARD and the dispute under s 66 *WCA* was referred to an AMS (Dr Parsonage). The referral was restricted to "PTSD" and the AMS assessed 8% WPI for it. However, he diagnosed PTSD, Major Depression, Bipolar II Disorder and possibly Bipolar III Disorder.

On 5 February 2009, Arbitrator O'Moore found that the worker suffered PTSD as a result of the incident at work in 2002, but that the Bipolar disorder was not work-related. He awarded continuing weekly payments from 1 August 2008 and s 60 expenses for the PTSD only. On 20 October 2009, an amended COD determined (based on the MAC) that the worker had suffered 8% WPI and was not entitled to compensation under s 66 *WCA.*

On 11 July 2013, the insurer made a work capacity decision and notified the worker that her weekly payments would cease on 18 October 2013 and that s 60 expenses would be paid until 18 October 2014. SIRA conformed that decision upon Merit Review.

On/about 3 April 2018, the worker made a further claim under s 66 *WCA* for 26% WPI, s60 expenses and weekly payments for the Bipolar disorder, based upon a report from Dr Scurrah. He opined that the Bipolar disorder resulted from the use of anti-depressant medication that was prescribed for the PTSD. The insurer disputed that claim and maintained its decision upon review.

First instance

On 3 September 2018, the worker filed this ARD, which alleged that she suffered an aggravation, acceleration and/or exacerbation of a pre-existing Bipolar disorder as a result of the effects of the PTSD and depression resulting from the 2002 incident at work. Alternatively, it alleged that it was a consequence of that injury.

Arbitrator Edwards issued a COD and determined that the worker was not estopped from pursuing a claim for a disease injury under s 4 (b) (ii) *WCA* as a result of the previous determination and he remitted the dispute to the Registrar for referral to an AMS to assess permanent impairment with respect to both PTSD and Bipolar Disorder.

Appeal

On appeal the appellant alleged that the Arbitrator erred: (1) in not treating the s 4 (b) (ii) claim as barred by issue estoppel; (2) in not treating the s 4 (b) (ii) claim as barred by *Anshun* estoppel; and (3) in construing s 4 *WCA* as including aggravation to a predisposition to injury.

President Judge Phillips rejected ground (1). He felt that the appellant had conflated the principles of issue estoppel and the doctrine of res judicata, as the Arbitrator did not determine that there was an issue estoppel. He stated (citations excluded):

> 90. Issue estoppel may arise as a consequence of a state or fact of law being determined, which would prevent a party from bringing, or defending, a claim in relation to a different benefit. In *Thompson v George Weston Foods,* Chief Judge McGrath observed:
>
> > It is clear that issue estoppel can arise as a consequence of an adjudication on a particular issue, which would prevent a party bringing, or defending, a claim in relation to a different benefit. I do not consider that there is any rule which

> would prevent a worker bringing an action claiming one type of benefit, and leaving another type of benefit for later, or other, adjudication. In doing this he may in some cases risk being penalised in costs, or risk failing on an issue which would debar the other claim. If he lost on the issue of injury he could not succeed in gaining compensation for a consequential benefit, whether it was included in the original application, or not.

91. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2],* Lord Guest stated that issue estoppel does not arise in respect of a judicial decision unless the following three components are satisfied:

> (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

92. The doctrine of *res judicata* provides that a cause of action which has been determined by a court of competent jurisdiction or by a tribunal may not be re-litigated. In *Blair v Curran,* the High Court highlighted the distinction between *res judicata* and issue estoppel as follows:

> The distinction between *res judicata* and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state or fact of law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.

93. In *Habib v Radio 2UE Sydney Pty Ltd*, McColl JA (Giles and Campbell JJA agreeing) said:

> The doctrine of *res judicata* properly so-called (the first principle referred to in *Dow Jones*) applies where a plaintiff establishes his cause of action so that, upon judgment, the cause of action and any matters which were necessarily established as its legal foundation or as the justification for its conclusion, or were legally indispensable to the conclusion merge in the judgment, and no longer have an independent existence and cannot be re-litigated in subsequent proceedings between the parties of their privies: *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 (at 531 – 532) per Dixon J; *Anshun* (at 597) per Gibbs CJ, Mason and Aickin JJ; *Chamberlain v Deputy Commissioner of Taxation (ACT)* [1988] HCA 21; (1988) 164 CLR 502 (at 508) per Deane, Toohey and Gaudron JJ; *James Hardie and Co v Seltsam Pty Ltd* [1998] HCA 78; 196 CLR 53 (at [40]) per Gaudron and Gummow JJ.

He held that as Arbitrator O'Moore did not determine whether the worker suffered a disease injury within the meaning of s 4 (b) (ii) *WCA,* there was no issue estoppel.

His Honour also rejected ground (2) and held that the Arbitrator did not err in finding that that there was no *Anshun* estoppel. He stated (citations excluded):

> 127. *Anshun* estoppel prevents a party from relying on a claim or defence if it unreasonably refrained from including it in the earlier proceedings. In *Anshun*, Gibbs CJ, Mason and Aickin JJ said:
>
> > In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been

unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding.

128. Their Honours also said:

> The likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments is obviously an important factor to be taken into account in deciding whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction.

129. In *Habib*, McColl JA said:

> A strict approach is necessary in an *Anshun* estoppel case to the inquiry whether there exists the requisite identity between the proceedings; the mere fact that the proceedings are closely related is insufficient; a technical approach is not helpful, the doctrine being concerned with substance and not form: see *Bazos and Anor v Doman and Ors* [2001] NSWCA 347 (at [44]) per Stein JA (Priestley and Beazley JJA agreeing) and the authorities to which his Honour refers.

130. It is clear that the objective of *Anshun* estoppel is the public policy that there are no conflicting judgments on the same set of facts. Applying the relevant principles, it must be determined whether the claim or defence was so closely related to the earlier subject matter that it would reasonably have been expected to have been raised. To answer this question the onus lies on the appellant to demonstrate that the failure to bring a claim in the earlier proceedings was unreasonable, and that there was no valid reason for refraining from doing so. In determining the *Anshun* estoppel question it is necessary to undertake an analysis of the medical evidence available in the proceedings below, to determine whether Ms Booth failed to bring the claim under s 4 (b) (ii) in the proceedings before Arbitrator O'Moore. In particular it is necessary to consider whether, in the proceedings before Arbitrator O'Moore, there was an absence of medical evidence required to support the s 4 (b) (ii) claim (which was determined in proceedings before Arbitrator Edwards)…

His Honour held that ground (3) was made out. He noted that the evidence indicated that the worker had a genetic predisposition to Bipolar Disorder and he stated, relevantly:

> 153. As Deputy President Roche said in *State of New South Wales v Rattenbury* being predisposed to a disease is "quite different to having a disease that is later aggravated." It means no more than "a tendency in a person to react in a certain way" and "a physical condition which makes a person susceptible to a disease." Indeed, Dr Scurrah stated "simply having a genetic predisposition to Bipolar illness does not necessarily mean it is going to emerge".

He held that having a genetic predisposition to Bipolar disorder does not prove that it was an underlying disease.

The worker sought costs of the appeal under s 341 *WIMA* (repealed). His Honour held that Div 3 of Pt 8 *WIMA* continues to apply to costs of a claim made before 1 October 2012, if proceedings were commenced in WCC before 31 March 2013. However, the current claim

was made on/about 3 April 2018, and the WCC proceedings commenced on 3 September 2018. Therefore, the current dispute (and proceedings) cannot be attached to the previous claims and associated WCC proceedings to enliven an entitlement to costs and the Commission has no power to award costs under s 341 *WIMA*.

Accordingly, His Honour revoked the COD and entered an award for the respondent.

Construction of s 39 WCA – RSM Building Services Pty Ltd v Hochbaum applied

Technical and Further Education Commission t/as TAFE NSW v Whitton [2019] NSWWCCPD 27 – President Judge Phillips - 17 June 2019

The President considered whether a worker is entitled to weekly payments after the expiry of an aggregate of 260 weeks and before an AMS has assessed a degree of permanent impairment as a result of injury that is greater than 20%.

Background

The worker injured her right wrist at work on 2 November 1999 and the appellant made weekly payments for all periods of incapacity. On 4 November 2013, it made a work capacity decision, that the worker had no current work capacity, which transitioned the claim onto the current scheme of weekly payments.

On 10 August 2017, Dr Harbison (qualified by the appellant) assessed 13% WPI and on 16 August 2017, the insurer issued a s 39 notice to the worker and advised her that her weekly payments would cease on 25 December 2017. The worker filed an ARD and a threshold dispute was referred to an AMS (Dr Mastroianni). On 18 June 2018, he issued a MAC that assessed 32% WPI. The worker then claimed weekly payments from 26 December 2017 to 11 October 2018, but while the appellant resumed payments from 18 June 2018, it declined to make any other payments.

Senior Arbitrator Josephine Bamber directed the parties to file written submissions and determined the dispute 'on the papers'. She distinguished this matter from *Taumololo* because there was evidence of a work capacity decision and the Commission may make an order consistent with a work capacity decision. She said that if the worker's interpretation of s 39 is accepted then the Commission has jurisdiction to order the payment of weekly compensation in the disputed period because that would be consistent with the work capacity decision. She agreed with the reasoning of Arbitrator Sweeney in *Kennewell,* that the language of s 39 does not have a temporal component and if the Parliament wished to limit payments to workers from week 260 until after they had an assessment of greater than 20% WPI, it could have so provided. Accordingly, she awarded the worker weekly payments from 26 December 2017 to 18 June 2018 *"at the applicable rate for a worker with no current work capacity."*

Presidential Appeal

The appellant argued that the Senior Arbitrator erred in law in construing s 39 (2) *WCA,* by interpreting it as giving a worker a retrospective entitlement to weekly payments after the expiry of the 260 weeks referred to in s 39 (1) and before the worker has been assessed as having over 20% permanent impairment. SIRA intervened in the appeal under s 106 *WIMA.*

President Judge Phillips conducted an oral hearing and directed the parties to address the relevance of the decisions in *RSM Building Services Pty Ltd v Hochbaum (Hochbaum),* in relation to the construction of s 39 *WCA, Shi v Migration Agents Registration Authority* [2008] HCA 31 (*Shi*), in relation to the question of whether s 39 *WCA* contains a temporal

element, and *Elliott v Minister administering Fisheries Management Act 1994* [2018] NSWCA 123 (*Elliott*), in relation to the principle of legality's application to statutory rights and Senior Arbitrator Bamber's decision at first instance.

The appellant argued that on a proper construction, s 39 (1) *WCA* removes a worker's entitlement to weekly compensation after 260 weeks and s 39 (2), read in the light of s 39 (3), only restores it from the point that the degree of permanent impairment is assessed as provided by s 65 as being more than 20%. Therefore, the worker is not entitled to weekly payments during the disputed period. It also argued that her adoption of the reasoning in *Kennewell* in respect of s 39 (2) *WCA*, namely that once s 39 does not apply there is no temporal restriction on the worker's entitlement to compensation, cannot be supported. It also adopted and expanded upon SIRA's oral and written submissions, addressing the relevant principles in *Hochbaum, Shi and Elliott.*

His Honour stated that the facts of this matter are very similar, if not identical to those in *Hochbaum* and he summarised his decision in that matter as follows (citations excluded):

> 106. In *Hochbaum*, much attention was paid to the phrase in s 39 (2) of the 1987 Act which says *"[t]his section does not apply".* This phrase was relied upon by the Senior Arbitrator in that matter virtually to the exclusion of the remainder of the sub-section and rest of s 39 in terms of the construction of the entire provision. I found that this approach was in error and not in accordance with the modern approach to statutory construction.
>
> 107. In *Hochbaum*, I found that the effect of s 39 (1) of the 1987 Act is to make clear that a worker has no statutory entitlement to weekly payments of compensation after an aggregate period of 260 weeks. Section 39 (2) restores that statutory entitlement in circumstances where the degree of permanent impairment resulting from the injury is more than 20%. Section 39 (3) defines *"permanent impairment",* for the purposes of s 39 (2), as an assessment provided by s 65 of the 1987 Act. Section 39 (2), read with s 39 (3), supplies the relevant temporal component to the operation of s 39.
>
> 108. In *Hochbaum* I also held that the proper construction of s 39 (2) of the 1987 Act, read in context, is to restore a worker's entitlement to weekly compensation, at the point in time an Approved Medical Specialist assesses the degree of permanent impairment resulting from injury to be more than 20%. 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. I further found that there was no warrant for the construction urged by Ms Whitton in *Hochbaum* that once the bar in s 39 (1) was lifted that it had been lifted for all purposes as if the provision were nugatory…
>
> 122. It is therefore clear, consistent with the cases which have been quoted regarding statutory construction, that s 39 (3) of the 1987 Act required close consideration and in particular how it interrelates with the operative provision which is s 39 (2). This task has not been undertaken by the Senior Arbitrator.
>
> 123. The Senior Arbitrator has, by omitting any reference or consideration of s 39 (3) (and by extension s 65), not strived to give meaning to every word of the provision to make sense upon the whole. In doing so, the Senior Arbitrator erred in failing to apply the principles of statutory construction in accordance with *Alcan*.
>
> 124. In reaching her decision in this matter, it is clear that the Senior Arbitrator was much guided or persuaded by the decision of *Kennewell* and the approach taken by Arbitrator Sweeney in that matter. Relying on the decision in *Kennewell* the Senior Arbitrator held that once the bar in s 39 (1) does not apply there is no temporal

> restriction on a worker's entitlement to compensation. This construction focuses on the words in s 39 (2) *"[t]his section does not apply"* without reference to how the section as a whole is to be construed. The Senior Arbitrator was much taken by the reasoning in *Kennewell* and relies upon it specifically at Reasons [51] and [52]. Having observed that *Kennewell* was primarily concerned with construing cl 28C of Sch 8 to the 2016 Regulation the Senior Arbitrator held that the wording of s 39(2) "is quite plain, in my view. It allows for no ambiguity." Indeed, the Senior Arbitrator applied the approach and reasoning in *Kennewell* to make this finding…
>
> 129. In *Hochbaum* I examined the tense of s 39 of the 1987 Act in detail. In *Hochbaum* I found that the plain words of s 39 (2) were expressed in the present tense. There has been no submission advanced by Ms Whitton in this matter which would cause me to alter or modify that finding…
>
> 138. To construe s 39 (2) to mean that s 39 (1) does not apply *"at all"* once the necessary permanent impairment of greater than 20% has been assessed in accordance with the binding assessment procedure (set out in s 39 (3) and s 65) impermissibly reads words into the section that are not available on the plain words of the provision. There is no permit to read the words *"at all"* into this section…
>
> 141. The critical question to be decided is at which point does s 39 (1) not apply? To answer this question, it must be determined whether s 39 (2) supplies a temporal component to the operation of s 39 of the 1987 Act. In determining whether a provision contains a temporal component*, "the critical statutory question is whether a criterion was met or was not met at a particular date".* The use of the present tense in s 39 (1) and s 39 (2) supplies the necessary temporal component.

His Honour found that the Senior Arbitrator erred in her approach to the construction of s 39 *WCA* and that s 39 (3), which requires close consideration as part of the overall statutory scheme that is s 39. He adopted his construction in *Hochbaum* and found that the worker did not attain the status of a worker with highest needs until 19 June 2019. He stated:

> 159. In the absence of a MAC assessment of greater than 20%, in the circumstances of this case, there is no jurisdiction available to enter an award for weekly payments of compensation beyond the aggregate period of 260 weeks. As I said in *Hochbaum*, the Senior Arbitrator did not have jurisdiction to enter an award which had the effect of restoring an entitlement to weekly payments of compensation before the relevant criterion was met.

However, he also noted that the Senior Arbitrator relied upon the principle of legality as contextual support for her construction of s 39 *WCA.* This principle governs the relationship between the three arms of government, the legislature, the executive and the judiciary. It is the presumption that Parliament does not intend to affect fundamental common law rights, freedoms or principles except by clear and unambiguous language. In other words, common law rights will not be taken by a court (or tribunal) to have been displaced by statute unless Parliament's intention to do so is *'expressed with irresistible clearness.'* The principle is an aspect of the rule of law. He noted that the Senior Arbitrator equates statutory rights to weekly payments with fundamental common law rights and applied that reasoning to support her construction of s 39 of the 1987 Act. He stated:

> 175. The question arises as to whether or not the principle of legality can properly be relied upon by the Senior Arbitrator to support the construction given to s 39 of the 1987 Act.
>
> 176. This question has been examined by the New South Wales Court of Appeal in *Elliott v Minister administering Fisheries Management Act 1994*… Among a number

> of Mr Elliott's claims in this matter was an allegation that the trial judge erred in applying the principle of statutory interpretation known as the *"principle of legality".* In broad terms, Mr Elliott alleged the principle of legality involved a presumption that Parliament will not legislate to interfere with fundamental rights and freedoms without expressing a clear intention to do so. Mr Elliott further alleged that his statutory rights under the fishing legislation were such fundamental rights which could only be abrogated by the Parliament in the clearest terms.

However, the Court of Appeal did not accept this proposition and Basten JA commenced with the following settled statement of principle:

> The general requirement that effect must be given to the text of the statute, read in context and having regard to its apparent purpose remains the principal focus of statutory construction…

In the current matter, the rights to weekly payments of compensation are conferred by statute and these rights are subject to satisfaction of certain preconditions as set out in the legislation and are inherently liable to alteration by the legislature. They are not a vested common law right and the principle of legality does not override the usual exercise of statutory construction by reference to text, context and purpose.

His Honour held that the Senior Arbitrator erred to the extent that she held the rights to weekly payments were fundamental common law rights and freedoms protected by the principle of legality and by imposing that principle to find that clear language was required in s 39 to take away the right to weekly payments after an aggregate period of 260 weeks. In any event, s 39 (1) clearly removes the entitlement to compensation after 260 weeks, subject to the s 39 (2) exception.

Accordingly, he revoked the COD and entered an award for the respondent.

WCC – Medical Appeal Panel Decisions

MAP set aside an assessment of permanent impairment of the ribs by analogy to the thoracic spine because "the ribs" was not referred for assessment by the AMS

Wesfarmers Group t/as Coles v Briggs [2019] NSWWCCMA 64 – Arbitrator John Wynyard, Dr B Noll & Dr J B Stephenson – 10 May 2019

Background

On 21 January 2014, the worker fell from the back of a truck and suffered multiple rib fractures and injuries to his cervical and thoracic spines, left shoulder and possibly also his left elbow.

On 2 February 2019, Dr Pillemer issued a MAC that assessed 11% WPI, comprising 5% WPI (cervical spine), 5% WPI (thoracic spine) and 1% WPI (left upper extremity). He noted that the worker's main ongoing concern was the multiple left rib fractures and he stated, *"In my opinion, there is no residual damage to his thoracic spine noting the full range of movement."* He felt that there was possible non-union of rib fractures and stated that as the Guidelines do not suggest figures of impairment for those injuries, an "analogous or equivalent condition needs to be used" and he therefore assessed 5% WPI (DRE thoracic category II).

Medical Appeal

On 5 March 2019, the appellant appealed against the MAC with respect to the thoracic spine under ss 327 (3) (c) and (d) *WIMA.*

The MAP held that the AMS' assessment regarding the thoracic spine must be revoked, as while the ARD pleaded that injury, the claim under s 66 WCA was limited to the cervical spine, thoracic spine and left upper extremity and no dispute regarding the ribs was referred to the AMS. It held:

> 30. It is trite law that the terms of the referral govern the jurisdiction of the AMS5. Had the referral included a reference to the ribs or the chest wall, then the opinion of the AMS would have been unimpeachable. However, the error made by the AMS was to use the thoracic spine analogy to make an assessment of an injury that was not referred to him.

The MAP rejected the worker's submissions that it could not infer that the AMS was referring to the thoracic spine, as his comments clearly indicated that there was no permanent impairment resulting from injury to that area of his spine.

Accordingly, it revoked the MAC and issued a replacement MAC that assessed 6% WPI.

MAP uphold AMS' decision to apply a 50% deductible for pre-existing impairment as he complied with the 3-step test in Cole v Wenaline

Prakash v Novartis Australia [2019] NSWWCCMA 69 – Arbitrator Richard Perrignon, Dr P Harvey-Sutton & Dr J B Stephenson – 20 May 2019

Background

On 11 December 2015, the appellant injured her left knee and left shoulder as a result of a fall while at a Christmas party. A month later she suffered discomfort in the left knee and difficulty climbing stairs. On 11 May 2017, she underwent left total knee replacement surgery. On 13 February 2019, Dr Pillemer issued a MAC, which assessed 12% WPI, comprising 2% for the left upper extremity, 10% WPI for the left lower extremity (20% less a 50% deductible under s 323 *WIMA*) and 0% WPI for scarring.

Medical Appeal

The appellant appealed against the assessment for the left lower extremity on 5 grounds, namely: (1) the AMS failed to turn his mind to the relevant question, namely what is the actual contribution of the pre-existing condition to current impairment; (2) the AMS' references to pre-existing degenerative change constitute insufficient reasons to justify a deduction; (c) total knee replacement was necessitated by injury to the left knee, liability for which was accepted by the insurer. there is no evidence that any pre-existing degeneration contributed to the need for surgery; (4) degenerative change did not contribute to impairment, because the worker was working full time up to the date of injury in heavy physical work, the radiology does not pre-date injury, she was asymptomatic prior to injury, and her impairment resulted from surgery to which degenerative change did not contribute; and (5) the deduction made was excessive.

In relation to grounds (1) and (2), the MAP held that an AMS may not simply assume that a pre-existing condition necessarily contributes to current impairment and must find on the evidence that it actually contributes to impairment: *Cole v Wenaline* [2010] NSWSC 78. However, a pre-existing condition may contribute to impairment even if it was asymptomatic before the injury and a deduction must be made if it contributes to impairment: *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25. It held:

> In *Cole at [38]*, the three steps for assessing whether a deduction ought to be made were expressed as follows:

> What s 323 required, however, was that the evidence be considered, so that it could be determined, firstly, what the level of impairment after the second injury was. Secondly, whether a proportion of that impairment was due to the first injury. Thirdly, what that proportion was.

The AMS carefully complied with these steps and gave detailed reasons for finding that the degenerative condition contributed to impairment. He did not simply make an assumption and did not fall prey to the *Vitaz* error. His reasons were relevant to the decision and his conclusion was the only one reasonably open to him. He exercised his clinical judgment in assessing the deduction as 50%., which he was entitled to do, and his approach does not indicate any error or the application of incorrect criteria.

The MAP rejected ground (3) and stated that the AMS did not find that the surgery contributed to the impairment and it was unnecessary for him the find that degeneration caused the need for surgery, although such a finding was implied in his reasons. His reasons are therefore properly interpreted as being based on a finding of direct contribution to the impairment by the pre-existing degeneration. It was open to the AMS to find that the assessed impairment was due to both the pre-existing degeneration and its aggravation as a result of the injury.

The MAP rejected ground (4), effectively based upon its reasons in relation to ground (3).

In relation to ground (5), the MAP held that the extent of the deduction was an evaluative exercise for the application of the AMS' clinical judgment, having regard to the history and medical evidence before him and the results of his own clinical examination. There was no error in his approach and there was ample justification for the deduction of 50%.

Accordingly, the MAP confirmed the MAC.

MAC revoked because AMS failed to consider relevant material

Wentworth Community Housing Limited v Brennan [2019] NSWWCCMA 77 – Arbitrator Catherine McDonald, Dr L Kossoff & Dr J Parmegiani – 11 June 2019

Background

On 26 January 2013, the worker suffered a psychological injury due to the nature and conditions of employment. The Registrar referred the matter to Dr Brennan (AMS) and on 9 January 2018, he issued a MAC that assessed 24% WPI.

On 7 February 2018, the appellant lodged an application for appeal against the decision of the AMS under ss 327 (3) (b), (c) and (d) WIMA. It alleged that the AMS: (1) failed to consider the evidence enclosed in the ARD and Reply; (2) based his opinion solely on the worker's subjective report of symptoms during the examination; and (3) failed to compare the history obtained from the worker to the evidence annexed to the ARD and Reply. It sought leave to rely upon 'fresh evidence' (reports that that it obtained as a result of an investigation regarding the accuracy of the AMS' history).

The worker opposed the appeal and objected to the appellant adducing fresh evidence and she argued that the 'fresh evidence' was not *"information of a medical kind or which was directly related to a question required to be made (sic) by the AMS".*

On 21 March 2018, a delegate of the Registrar refused the applications to appeal against the MAC and to adduce fresh evidence in an appeal. Under the heading "Availability of Additional Relevant Information", the delegate stated, relevantly:

> 8. Among the documents contained in the referral to the AMS were the Reply and the attachments to the Reply, including two surveillance reports from M&A

> Investigations dated 27 August 2015 and 11 October 2016, together with two social media reports of the same organisation dated 13 July 2015 and 12 September 2016. It is therefore apparent on the face of the MAC that the AMS had regard to the material placed before him, including the reports of M&A Investigations. Those reports contain evidence which is broadly consistent with that sought to be relied upon in the appeal.
>
> 19. The role of the AMS is to consider the material referred to them and to reach their own findings and conclusions based upon that material and their own assessment. The admissibility of new material in an appeal such as this is conditional on that material being not reasonably available at the time of the assessment…
>
> 21 The appellant's submission at paragraph six … is predicated on the assumption that the AMS relied solely on the respondent's version of events. On the face of the MAC this is not the case. Rather, the AMS had regard to the documentation before him and made his assessment based not only on his examination of the respondent, but also on the documentation referred to him.

The appellant successfully sought judicial review of that decision by Harrison AsJ and the matter was remitted to the Commission for determination according to law.

Medical Appeal

The MAP determined that the worker should be re-examined by Dr Parmegiani and that the fresh evidence should be admitted in the appeal because it was directly relevant to the assessment under PIRS. It stated (citations excluded):

> 27. In the section of the MAC dealing with his comments on other medical opinions submitted by the parties, the AMS referred to the reports of Dr T O Clark, qualified by Ms Brennan's solicitors, her treating psychiatrist, Dr P Thiering and Dr D Samuell who had been qualitied by Wentworth. He referred to three paragraphs of Ms Brennan's statement dated 22 April 2013. He did not refer to her lengthy statement dated 11 August 2017. The AMS also did not refer to surveillance reports dated 27 August 2015 and 11 October 2016 and to social media reports dated 13 July 2015 and 12 September 2016.
>
> 28. Those omissions are significant because the statement and the reports contain material at odds with the history obtained by the AMS. It was not necessary for the AMS to set out every document that he considered5 . However, it was necessary for him to consider the material in the file, to refer to those that were at odds with the conclusion he reached and to explain why. The lack of reference to the material in the MAC suggests the AMS did not consider it.
>
> 29. The AMS did not consider Ms Brennan's statements about ultra-marathon running and the fact that she undertakes intense exercise for one to two hours on a daily basis , the fact that she works 16 hours per week and works on her computer wherever she is, her relationship with her partner nor the evidence that familial strain occurred years before the work injury. If the AMS had considered Ms Brennan's statement he would have been directed to consider the other factual material because evidence with respect to running and exercise was made in response to the surveillance and social media reports which appear in the Reply. Ms Brennan said that she spent every second weekend with her partner in Manly and the social media reports show that Ms Brennan travelled to Tibet.
>
> 30. Campbell J described the role of the Appeal Panel in consideration of the PIRS categories in Ferguson v State of NSW:

> The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
>
> The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see Jenkins v Ambulance Service of New South Wales [2015] NSWSC 633. The Appeal Panel said, *'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected"…*

The MAP held that failure to consider relevant material is a demonstrable error and the AMS' findings are incongruous with it. His observations of the worker on the day of the examination are in stark contrast to the description of her participation in intense exercise and contrasted with her ability to travel to Tibet and to spend alternate weekends in Manly the description of her daily activities in her statement is markedly different from that recorded by the AMS. The error resulted in the application of incorrect criteria, which necessitated Dr Parmegiani's assessment, and it adopted his findings and assessment of 6% WPI. Accordingly, it revoked the MAC and issued a MAC that certified 6% WPI.

Arbitrator Decisions

Application for reconsideration of COD refused – further evidence that the worker sought to rely upon could have been presented earlier

Fischer v DTD Engineering Pty Limited (No. 2 decision – Recon) [2019] NSWWCC 168 – Arbitrator Anthony Scarcella – 14 May 2019

Background

On 7 February 2019, ***Arbitrator Anthony Scarcella*** conducted an arbitration hearing. On 29 March 2019, he issued a COD, which determined that: (1) the worker did not suffer a consequential injury to the lower back as a result of the accepted right knee injury on 11 February 2015; (2) the worker suffered injuries to his right knee and lumbosacral spine on 11 February 2015, to which his employment was a substantial contributing factor; (3) PIAWE was $1,026; (4) the worker had a current work capacity between 17 June 2017 and 25 June 2018 in suitable employment at the rate of $680.17 per week; (5) the worker had no current work capacity from 26 June 2018 to 12 August 2018; and the worker has a current work capacity from 13 August 2918 to date and continuing in suitable employment at the rate of $770.66 per week. He awarded the worker weekly payments under ss 36 and 37 *WCA*, with credit to the respondent for any payments made, and granted the parties liberty to apply within 14 days regarding the calculation of weekly payments. He also made a general order for payment of s 60 expenses.

Application for reconsideration

On 10 April 2019, the worker requested a reconsideration of the continuing award from 13 August 2018 that was made under s 37 (2) *WCA.* In support, he provided a copy of an email that he sent to his solicitors on 1 April 2019, which attached a schedule of earnings between 28 August 2018 and 31 March 2019, relevant pay slips and his submissions dated 10 April 2019. He argued, relevantly, that the arbitrator had limited data available to him at the arbitration hearing and this resulted in an inaccurate calculation of his entitlement to weekly payments. He also argued that:

> (a) The respondent does not require the applicant's services for a period of 8 to 10 weeks annually, being the aggregate of annual school holiday periods, and the arbitrator did not take this period into account in the calculating his earning capacity, which "prompted an inaccurate calculation";
>
> (b) He uses the school holiday periods to rest and recover from the cumulative adverse effects of his work-related injuries that are exacerbated by the work done during the rest of the year; and
>
> (c) $607.05 is a more accurate reflection of his continuing weekly earnings.

The respondent objected to the worker's evidence that he used the school holidays to rest and recover from the cumulative adverse effects of his work-related injuries and said that this evidence should have been raised at the hearing. The Arbitrator was aware that the respondent did not require the worker's services during school holidays and in relation to the definitions of "current work capacity" and "suitable employment" in s 32A *WCA,* this is irrelevant. Whether the work or employment is available (including the hours available) is not to be taken into account in assessing "current work capacity". Therefore, the arbitrator's determination is appropriate.

The Arbitrator held in *Samuel*, the Acting Deputy President listed nine principles that are relevant to the reconsideration power in s 350 (3) *WIMA*, namely:

> 1. the section gives the Commission a wide discretion to reconsider its previous decisions (*'Hardaker'*);
>
> 2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include "an award, order, determination, ruling and direction". In my view 'decision' in section 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp'*');
>
> 4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ("*Hilliger*");
>
> 5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ("*Maksoudian*");
>
> 6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350 (3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* ("*Anshun*") may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ("*Hurst*"); and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ("*Hilliger*" and section 354 (3) of the 1998 Act)…

He noted that the worker's statement dated 12 October 2018 and his email to his solicitor dated 1 April 2019 did not support submission (b) above and he could not accept this as evidence.

In any event, he held that the worker's argument is fundamentally flawed because it is not relevant that the respondent does not require his services during school holidays. This does not alter his "current work capacity" in "suitable employment" within the meaning of s 32A *WCA.*

He held that reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the arbitration hearing is later obtained and it would, if it had been put before the arbitrator at first instance, have been likely to lead to a different result. However, there is no explanation as to why this evidence could not, with reasonable diligence, have been provided by the worker at the arbitration hearing. He was also not satisfied that admitting the wage spreadsheet and payslips would have likely led to a different result and he declined to admit it.

Accordingly, he confirmed the COD.

Application for reconsideration of COD refused

Parsons v Dell Australia Pty Ltd [2019] NSWWCC 210 – Senior Arbitrator Glenn Capel – 14 June 2019

Background

The worker was employed by the respondent as a hardware product specialist from 11 April 2011 to 27 September 2013. He suffered a compensable psychological injury on 1 August 2013 (deemed) and the insurer accepted the claim.

On 17 March 2014, the worker claimed weekly payments, s60 expenses and compensation under s 66 *WCA* for 17% WPI. On 13 January 2015, following an arbitration hearing, he was awarded weekly compensation from 1 August 2013 and s 60 expenses and the dispute under s 66 *WCA* was referred to an AMS. On 25 March 2015, Professor Glozier (AMS) issued a MAC that assessed 15% WPI.

The respondent appealed against the MAC and on 26 June 2015, a MAP determined that the AMS erred in his assessment under PIRS. It revoked the MAC and issued a MAC that certified 7% WPI.

On 24 March 2016, the worker's solicitor served a notice of claim for compensation under s 66 on the respondent. On 11 April 2016, the insurer stated that the worker was precluded from making a further claim by reason of s 66 (1A) *WCA* and the decision in *Cram Fluid Power Pty Ltd v Green*.

On 18 January 2018, the insurer notified the worker under s 39 *WCA*, that his weekly payments would cease on 21 July 2018, because Dr Teoh (its independent medical examiner) had assessed 17% WPI.

On 22 March 2018, the worker's solicitor requested a review and reconsideration of his entitlements and made a claim under s 66 for 17% WPI based upon Dr Teoh's assessment. He did not seek any concession regarding a threshold dispute. The insurer responded by issuing a dispute notice based upon s 66 (1A) *WCA.*

On 3 May 2018, the worker's solicitor again asked the insurer to review its decision, but the insurer confirmed it.

On 3 December 2018, he served a notice of claim on the insurer, seeking weekly payments from 7 May 2018, s 60 expenses and compensation under s 66 *WCA* for 19% WPI, based upon a report from Dr Morris dated 21 November 2018. He also stated that the worker would be seeking reconsideration of the assessment by the MAP under s 350 (3) *WIMA* because the worker's condition had deteriorated. The Insurer disputed that claim.

Yet again, the worker's solicitor asked the insurer to review its decision and the insurer confirmed its decision. On 2 April 2019, a Miscellaneous Application was filed, which requested that the COD be set aside and that the matter be referred to an AMS to determine the degree of permanent impairment. The claims for weekly payments and s 60 expenses were withdrawn during a teleconference.

The Senior Arbitrator decided to determine the matter on the papers and he directed the parties to file written submissions.

The worker's solicitor argued that the MAP's assessment was incorrect because all doctors who have examined the worker since then have assessed more than 15% WPI. If the MAP's assessment was correct, the worker's condition has deteriorated and it would be manifestly unjust to not review it. If that assessment was incorrect, a manifest injustice has occurred which can be remedied by setting aside the COD.

However, the respondent's submissions included that the current application is "incompetent and misconceived" because "the Commission" as referred to in s 250 (3) *WIMA* is constituted by either an Arbitrator or Presidential Member and not a Medical Appeal Panel (which is constituted under s 328 *WIMA*). Therefore, the MAP's decision is not subject to reconsideration under s 350 (3) *WIMA.* It also argued that the worker had not addressed s 66 (1A) *WCA,* which applied to the current claim.

The Arbitrator noted that the MAP's decision was not the subject of judicial review in the Supreme Court. He held:

> 116. I am satisfied on the basis of the reasoning in *Cram Fluid, Robin-True* and *Lizdenis*, the claim made b the applicant on 17 March 2014 constituted the "one claim" and any further claims are precluded by s 66 (1A) of the 1987 Act. Further, s 322A of the 1998 Act restricts the applicant to only one assessment absent an appeal lodged by the applicant in accordance with s 327 of the 1998 Act.
>
> 117. In the circumstances, the applicant's application for reconsideration of the COD dated 3 August 2015 is declined.

Reconsideration

The Senior Arbitrator stated that if he is wrong in his interpretation of the limitations imposed by s 66 (1A) *WCA*, the merits of the application for reconsideration must be considered. A MAP is not subject to a reconsideration under s 350 (3) *WIMA* and the appropriate forum for an appeal against that determination is the Supreme Court. However, a COD issued following the determination can be reconsidered by the Commission and a

MAP has the power to reconsider its determination by reason of s 378 *WIMA*. He referred to Arbitrator Johnstone's *"useful summary of the principles regarding reconsideration of determinations pursuant to s 350 (3) WIMA* in *Howell v Stringvale Pty Ltd"*. He also referred to the decision of Acting P Roche in *Samuel,* which cited with approval the Court of Appeal's decision in *Schipp v Herfords Pty Limited*, where the court considered the equivalent reconsideration provisions of the 1926 Act. He held that while he has a wide discretion to reconsider the COD under s 350 (3) *WIMA,* that discretion must be exercised fairly and the matters identified in *Samuel* require some consideration, as follows:

> (1) Does the fresh evidence support a deterioration in the condition since the MAP's determination on 26 March 2015? The worker bears this onus.
>
> (2) Deterioration – whether the evidence supports a deterioration… such that it is likely that the MAP would find that the applicant had an impairment of 15% or more? He held that the evidence of deterioration in this matter is "far from satisfactory". All of the doctors' assessments are "extremely subjective and depend largely on the reliability of the histories provided to them" by the worker. He stated:
>
> > 170. Nevertheless, when one has regard to this further evidence and my analysis above, there is some doubt in my mind as to whether there is sufficient evidence to support a deterioration in the applicant's psychological condition that would result in a different assessment of whole person impairment by another MAP, if a further referral was an option.

He also found that there was an unacceptable delay in making the application for reconsideration.

Accordingly, the Senior Arbitrator declined the application for reconsideration.

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