Bulletin

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ISSUE NUMBER 40

Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue:

Supreme Court of New South Wales – Judicial Review

Judicial review – Court made consent orders that quashed a decision of a MAP and COD based upon the decision in Hunter Quarries Pty Limited v Mexon

Agricultural and Development Holdings v Parker (Unreported: 2017/368011) – Adamson J – 20 May 2019

In Hunter Quarries Pty Limited v Mexon (Mexon), the Court of Appeal held that "permanent impairment" involves some lasting diminution in a worker's function and did not include an impairment resulting from a serious injury from which the worker died "within a short time." In that matter, the worker had died approximately 3 minutes after he was injured.

In **Agricultural and Development Holdings v Parker**, the worker was pronounced dead approximately 16 hours after being injured at work. Medical opinion suggested that the worker's brain had died within half an hour of the frank injury occurring.

The deceased worker's executor claimed compensation under s 66 *WCA,* but the insurer disputed the claim. On 16 May 2017, Dr Lahz (AMS) issued a MAC, which assessed 100% WPI due to the deceased's injuries. The Plaintiff appealed against the MAC, but on 5 September 2017, a MAP confirmed the MAC.

The Plaintiff then applied for judicial review by the Supreme Court of the MAP's decision.

Adamson J noted the Court of Appeal's decision in *Mexon.* She also noted that in an email to the Plaintiff's solicitors 15 May 2019, the first defendant's solicitors accepted that *Mexon* required that the MAP's decision be quashed and that in lieu thereof: (1) the MAP should be directed to issue a MAP that certified that there was no permanent impairment resulting from the injury; and (2) the Commission should be directed to issue a COD entering an award for the respondent (the Plaintiff in the Supreme Court proceedings).

Her Honour confirmed that the proceedings were resolved on that basis. She quashed the MAP's decision dated 5 September 2017 and in lieu thereof, directed the MAP to issue a MAC certifying there is no permanent impairment resulting from injury. She also directed the Commission to issue a COD that entered an award for the respondent and ordered each party to pay its own costs of the proceedings.

Judicial review – need to make out jurisdictional error or error of law on face of record – significance of distinction – MAP empowered to rely on medical examination by one of its members – significance of "clinical judgment" – application dismissed

Gray v Geoff Groom Building Pty Ltd [2019] NSWSC 1081 – Leeming JA – 22 August 2019

On 21 October 2015, the plaintiff injured his left hand at work. He claimed compensation under s 66 *WCA* and on 31 July 2018, an AMS issued a MAC, which assessed 13% WPI. However, the plaintiff's solicitor had qualified Dr Meares, who assessed 22% WPI (13% + 9% for scarring).

The plaintiff appealed against the MAC. The MAP determined that the worker should be examined by one of its members and he was examined by Dr Giles on 6 February 2019. Dr Giles assessed 4% WPI for scarring and, based upon his report, the MAP issued a MAC, which assessed 14% WPI (10% + 4% for scarring).

The plaintiff applied for judicial review of the MAP's decision by the Supreme Court.

Acting Justice Leeming stated that the amended summons failed to distinguish between jurisdictional error and error of law on the face of the record. The distinction is important, and arises at the outset, because (aside from anything else), it affects the material to which the Court may have regard. The Court of Appeal has repeatedly emphasised this: see, without attempting to be exhaustive, *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302; [2012] NSWCA 13 at [19] ("These considerations require the applicant to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record"); *Henderson v QBE Insurance (Australia) Ltd* [2013] NSWCA 480; 66 MVR 69 at [85] and *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; 77 MVR 348 at [45] ("As has been repeatedly emphasised, the distinction is important"). It also failed to identify the errors of which the

plaintiff complains with any particularity. It did not comply with the obligation to state "with specificity, the grounds on which the relief is sought": UCPR r 59.4(c).

His Honour referred to the submissions "as developed" during the hearing. I have summarised his findings below.

- *The examination by Dr Giles*

The plaintiff argued that the other members of the MAP were unable to use clinical judgment in applying the TEMSKI categories, as the photographs reproduced in Dr Giles' report were insufficient. However, his Honour held that there are at least four obstacles to this submission:

> (1) it seeks to elevate cl 14.9 into a rule of law, whereas it is a clause in a Guideline given limited force by the WIM Act. Even if a provision that an assessor "should use clinical judgment" is regarded as mandatory and is not complied with, it does not without more follow there has been any error of law.
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> (2) the Medical Dispute Assessment Guidelines proceed on the basis that one member of the Panel will be an arbitrator who need not be medically qualified and therefore will be unable to exercise clinical judgment.
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> (3) cl 14.9 is directed to determining the exact impairment value within a range. But the Plaintiff was assessed pursuant to Table 14 at 4%, at the very top of the range. Clause 14.9 is not directed to identifying the correct category; that is addressed by cl 14.8.
>
> (4) it requires one to form the view that in the particular case of the Plaintiff, it was not possible lawfully to determine to have a further medical examination by one member of the Panel. Indeed, it is far from clear how it could be said that even if there was a further assessment hearing (pursuant to cl 5.17.3) an arbitrator who lacked medical qualifications could nonetheless apply clinical judgment.

His Honour noted that in *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Ltd* [2006] NSWSC 235, Studdert J said: *"the Appeal Panel was entitled to draw upon the expertise of one of its members, as plainly it did in this case".* Studdert J also agreed with and relied upon what had been said by Beaumont J in *Minister for Health v Thomson* (1985) 8 FCR 213, to the effect that it was reasonable to assume that the defendant was at all times on notice that the members of the committee would be likely to make use of their own expertise and experience in such matters.

His Honour held that this ground was not made. The MAP was empowered to proceed pursuant to cl 5.17.2, with one of its members undertaking a further medical examination of the plaintiff, and the Panel as a whole informing itself based on the doctor's report.

- *Procedural fairness/constructive failure to exercise jurisdiction*

The plaintiff argued that the MAP failed to deal with a significant element of his case, namely that Dr Meares had assessed 9% WPI for scarring.

His Honour found that the MAP not only said that had considered all the original documents and the written submissions, it also summarised the essence of the plaintiff's submission. He held, relevantly:

> 29. … The very points highlighted by Mr Romaniuk in oral submissions were referred to, expressly, under the heading "Scarring", especially at [54] and [55], when summarising the submissions. It is quite plain, even in the dispositive paragraphs [70]–[72], that the Panel had regard to Mr Gray's submission that (in accordance with Mr Meares's opinion) the scarring fell within the 5% – 9% range, rather than the range

found by the original assessor. I do not accept that the submission was not dealt with. The submission was a basic one, and the gravamen of the determination addressed it squarely, by applying Chapter 14 and reaching conclusions which were inevitably inconsistent with those expressed by Professor Meares.

Accordingly, this ground was not made out.

- *Failure to make findings and provide reasons*

His Honour stated:

> 37. As noted above, Mr Gray submitted that it was open to an assessor to "put up" the outcome of the application of table 14.1 in circumstances where a claimant satisfied some, but not all, of the criteria in a particular column. It is far from clear to me that that is the case. The application of the principle of "best fit" may indeed, in some cases, have that effect. But it does not by any means follow that in all cases, or indeed in Mr Gray's case, that there was some discretion which needed to be considered and addressed with "detailed reasons" in order to conclude that the appropriate category in which he fell was the only category in which he satisfied all the criteria. The Guidelines required detailed reasons when another category was regarded as appropriate. While that is what Mr Gray sought, it did not mean that there was an obligation to give detailed reasons when the Panel determined not to place his scarring within a category in which he did not satisfy all the criteria…
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> 40. However, the shorter and equally dispositive proposition is that there is no error of law, still less jurisdictional error, in the Panel giving the explanation that it did in making the finding that it did concerning the absence of a restriction to his grooming or dressing.

- *Error of law in applying the Guidelines*

The plaintiff argued, in essence, that the failure to apply Ch 14 and Table 14.1 of the Permanent Impairment Guidelines was an error of law on the face of the record.

His Honour held that this argument failed to attend to the proposition that even if there were a misapplication or misconstruction of this part of the Guidelines, it does not follow that the error is one of law. However, for the reasons already given, no misapplication or misconstruction of the Guidelines was established.

Accordingly, his Honour dismissed the summons with costs.

WCC - Presidential Decisions

Section 11A (1) WCA – factors to be considered in assessing whether action with respect to discipline was reasonable – s 11A defence failed

Westpac Banking Corporation v Mani [2019] NSWWCCPD 41 – Deputy President Wood – 9 August 2019

The worker was employed by the appellant as a Customer Experience Manager from about 2006. On 25 November 2006, he underwent heart surgery and commenced a graded return to work in February 201, after which he attended weekly meetings with his team leader. From and after 29 September 2017, he met with both his team leader and Ms Bray (their manager).

At a meeting on 7 February 2018, the worker was handed a formal performance warning letter, which asserted that at the meeting on 29 September 2017, he was advised that he had been placed on an informal performance improvement plan. Seven focus areas and

measures for improvement were identified, which were said to have been agreed for inclusion in the informal improvement plan. The targets and measures in respect of each focus area were listed, as well as "agreed actions". Details of the discussions undertaken at eleven meetings conducted between 1 October 2017 and 22 January 2018, were provided. In conclusion, Ms Bray acknowledged that there had been some slight improvement in his performance, but that it was not to the standard required by the appellant and that the letter was a first formal warning in respect of his performance. He was advised that a formal performance improvement plan was in place, and that if he had not achieved the required level of performance by 28 February 2018, the appellant would consider its options, which included consideration of whether to terminate his employment.

After this meeting, the worker ceased work and claimed compensation for a psychological injury allegedly caused by *"bullying, harassment, mistreatment, misleading, disingenuous and capricious conduct"* by his managers. The respondent accepted that he suffered a psychological injury, but relied upon s 11A (1) *WCA* (reasonable action taken or proposed in respect of performance appraisal, discipline or the termination of employment), and it disputed that he had no current work capacity.

Arbitrator Sweeney noted that the worker relied upon the decision on Sackville AJA in *Northern NSW Local Health Network v Heggie*, which set out the propositions that were consistent with the statutory language and the authorities regarding the constructions of s 11A (1) *WCA.* The appellant was required to prove that its actions were reasonable in both process and substance.

The Arbitrator stated that the assertions of bullying and harassment were not helpful in identifying the incidents that led to the injury. He accepted that the worker may have been upset that Ms Bray was monitoring his work, and may have felt intimidated by Ms Bray, but he was required to assess which of her actions caused the injury and the use of such a label to describe *"apparently courteous interaction between worker and manager only obfuscates the issue".* In any event, it is necessary to go behind the label of the action and look at the substance in order to determine whether conduct constituted "performance appraisal". While it was arguable that the informal or formal plans may fall within those parameters, it was not necessary to determine this issue given his subsequent findings. He stated:

> 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 [appellant] to be the first meeting with the applicant in a formal performance improvement plan. It is the [appellant'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.

The Arbitrator held that the warning letter and meeting on 7 February 2018, were matters relating to "discipline", based upon the decisions in *Kushwaha* and *Milovanovic*. As to whether the appellant's actions were reasonable, he considered the principles set out in *Pirie v Franklins Ltd* [2001] NSWCC 167. On balance, he considered that the appellant had established reasonableness with respect to the meeting on 8 February 2018, but he had concerns regarding the train of events that led to it. He noted that the worker had been employed for many years without complaint and that Ms Bray identified him as a worker who required coaching and upskilling during the period when he was unable to work because of his coronary artery issues. It was unclear how a decision could have been

made regarding his performance at that time. Also, the evidence in October 2017 was inconsistent with the worker being on an informal improvement plan. Further, the absence of a reference to it in the emails tended to show that the worker was not told about it or its stages and if the appellant chose to put an informal plan in place, with the knowledge that it could lead to a formal plan that may in turn end the worker's career, he should have been informed of the nature of the plan and its consequences. Failure to do so would amount to a failure to afford the worker procedural fairness.

The Arbitrator held that the appellant failed to prove that it informed the worker of these matters and as it "seemed unreasonable" that it relied upon breaches of a plan of which he was unaware, its actions with respect to discipline were not reasonable.

The Arbitrator awarded the worker weekly payments under ss 36 and 37 *WCA* on the basis that he had no current earning capacity from 8 February 2018 to 8 May 2018 and that he was thereafter able to perform suitable employment and to earn $360 per week (50% of the minimum wage). He also awarded s 60 expenses.

WCC – Medical Appeal Panel Decisions

Fresh evidence rejected on appeal because it was of no probative value

Pearson v Carey's Freight Lines (Tamworth) Pty Ltd [2019] NSWWCCMA 104 – Arbitrator Wynyard, Dr J Parmegiani & Dr N Glozier – 5 August 2019

The appellant was employed by the respondent as a truck driver. On 9 July 2015, he suffered a psychological injury as a result of being handed a warning letter dated 7 July 2015. He claimed compensation, but the insurer disputed the claim. On 3 December 2018, an Arbitrator found for the worker with respect to injury and a claim under s 66 *WCA* was remitted to the Registrar for referral to an AMS.

On 7 March 2019, Dr Bench (AMS) examined the appellant and on 27 March 2019, he issued a MAC that assessed 10% WPI. On 24 April 2019, the appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) *WIMA* and the Registrar referred the matter to a MAP.

Fresh evidence

The appellant sought to adduce fresh evidence on the appeal, namely a further statement from himself and a statement from his wife, each dated 12 April 2019. The appellant made various complaints about the assessment process, but there is no evidence that he raised any of those matters prior to the issue of the MAC. He said that he *"did not hit it off"* with the AMS and that he found the AMS to be *"very arrogant".* He complained that the AMS had a mobile phone on his desk and that he asked the doctor to put it away. However, the AMS told him that he was expecting an urgent call from the WCC and that if it occurred, the assessment would be terminated and the appellant and his wife would be asked to wait in an outer office. He became more and more distressed during the interview due to questions about his childhood. In relation to the PIRS assessments, he asserted that he could not read for up to 60 minutes at a stretch and that he required breaks and "sometimes lost the plot". He conceded that what the AMS recorded in general terms regarding "self-care and hygiene", but complained that he was been "misunderstood and taken out of context". He complained that the AMS' comment regarding his ability to work elsewhere on a full-time basis "just shows there is a complete breakdown in our communication" and that his emotional state "was not reliable enough to be an employee". He said that he "couldn't wait to be out of the room" and did not see how some questions that the AMS asked him were relevant.

The appellant's wife observed that there was no rapport between the AMS and the appellant and that the appellant became more stressed and agitated ad the interview progressed. She said that he might cook once a week, but would leave a mess in the kitchen and that she "did not know whether to laugh or cry" at the suggestion that he could live independently. She had to push him to shower and shave and if it were not for her, he would do so far less than 2 or 3 days per week. She did not recall him saying some of the specific things "that have been ascribed to him by the AMS".

The appellant's solicitors submitted that these statements were admissible because they went to the process of the examination, the appellant's level of agitation during the consultation and the "actual" circumstances within the appellant's home. They asserted that the appellant had not experienced any communication issues with prior qualified specialists and there was no reason to prepare additional materials in anticipation that there would be a communication breakdown between the appellant and the AMS. They asserted that rejecting this evidence would cause "an injustice" and would be "contrary to public interest".

The respondent objected to the admission of the fresh evidence and the MAP rejected it. It stated, relevantly:

> 43. The evidence must be rejected. Firstly, as will be seen, an AMS is required to evaluate impairment arising from a psychiatric injury. The deponents in both statements have not denied that what was ascribed to Mr Pearson by the AMS was in fact said. The thrust of the evidence was to explain why the various statements had been made to the AMS. Mrs Pearson was at pains to point out, as was Mr Pearson, that she was the motivating force that enabled her husband to do the various functions that he admitted to, and that accordingly Mr Pearson's admissions were taken out of context.
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> 44. The relevant question for an AMS in evaluating the degree of impairment caused by a psychiatric condition is not whether a claimant can do the tasks admitted happily, or with difficulty, or without motivation at times. The relevant question is whether a person is able to perform those activities.
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> 45. Secondly, in Lukacevic v Coates Hire Operations Pty Ltd [2011] NSW CA 112 (Lukacevic), the Court of Appeal was concerned with fresh evidence that took the form of a statement by the appellant calling into question the conduct and enquiry of the AMS. The majority (Handley AJA and Hodgson JA), upheld the Appeal Panel's decision to reject the statement upon a consideration of the policy of the legislation, and its relation to the particular matters raised in a fresh statement. Hodgson JA at [78] said:
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> > A dispute by the worker as to the history set out in the Certificate, or the observations made by the AMS, can readily be raised; and it could be raised honestly or dishonestly, on strong of flimsy grounds. Having regard to the matters I have set out, in my opinion, it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute going to a matter relevant to the correctness of the Certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act.

46. Handley AJA agreed with Hodgson JA. He analysed the decision of the Panel and found that its conclusion was a finding of fact and that there was no error of law on the face of the record (at paragraph 151).

The MAP was not satisfied that the fresh evidence has any substantial prima facie probative value. In order to evaluate WPI caused by the injury, an AMS relies upon the documentary evidence referred to him, but a face-to-face interview is an important part of the process whereby they can apply the clinical experience, knowledge, formal training and expertise necessary to make the evaluation. The MAP stated, relevantly:

48. …It is not, with respect, for a claimant to dictate what is relevant, and what is not, as each PIRS category is not just a tick the box evaluation of the descriptors but a broad clinical evaluation of each area of impairment as relevant to the case before the AMS.

49. Moreover, neither the appellant nor Mrs Pearson allege that the AMS had either not recorded Mr Pearson's statements or recorded them inaccurately. The thrust of their statements was an endeavour to put a gloss what they agree was stated.

50. In addition, it could not be said that Mrs Pearson's evidence was 'independent' support. She is Mr Pearson's wife, and has an interest in whether Mr Pearson is successful in his claim for lump sum compensation.

Other grounds of appeal

The MAP held that the grounds of appeal were "discursive, argumentative and lacking in clarity" and unhelpful. Many submissions were made on the assumption that they would accept the fresh evidence and as that evidence was rejected, a number of factual assumptions that were relied upon were not made out and could be "put to one side". They stated, relevantly:

59. Mr Pearson's advisors submitted that there was an inconsistency in the approach of the AMS as to the matters he "chose to delve deeper and whilst there was a deeper probing" in relation to alcohol consumption and employability, in relation to various other categories of the PIRS there was no such "deeper probing." "Deeper probing" was asserted as being the appropriate approach for all "criteria" and it was alleged that "it was not for the AMS to without reason be inconsistent."

60. We had a great deal of difficulty in comprehending this submission. The underlying implication was that there was somehow an obligation on an AMS to deal with the subjects, regardless of relevance, that Mr Pearson's advisors thought appropriate in the same manner as the AMS considered those matters that he/she, applying the expertise, experience and knowledge that is concomitant with his/her appointment, thought relevant. There is no such obligation.

The appellant's solicitors also argued that the AMS had erred by failing to exercise his powers under s 324 *WIMA* to consult with any medical practitioner or health professional who had treated the appellant. They argued that the matter "cried out" for contact to be made with the treating psychologist and treating general practitioner, because the appellant could not recall the surname of his new treating psychiatrist. The MAP rejected that proposition and held that s 324 provides an AMS with a discretion, but it does not impose any obligation.

The MAP also held:

63. Mr Pearson's advisors appear to be under the misapprehension that the task of an AMS includes the gathering of further evidence to enable the evaluation of impairment. The AMS only found one area of significant inconsistency. In this case

> he discounted the answer he recorded of the specific impairment in employability (which would lead to a rating of class 1 or 2, and a lower WPI) and used his overall clinical assessment to rate the worker as severely impaired, and thus providing a more generous WPI for Mr Pearson. Chapter 1.6a of the Guides provides that assessing permanent impairment involves clinical assessment of the claimant as he/she presents on the day of assessment, taking into account the claimant's relevant medical history and all available relevant medical information. This is exactly what the AMS has done and to the benefit of the worker. This submission too is rejected.

In relation to the PIRS categories, the MAP noted that in *Ferguson v State of New South Wales* Campbell J was concerned with a case where a MAP had revoked a MAC on the basis that the AMS' finding was "glaringly improbable" and he held that the MAP had fallen into jurisdictional error. He stated:

> 23. By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS:
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> > … the pre-eminence of the clinical observations cannot be underrated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face.
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> 24. 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.
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> 25. 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'*: Appeal Panel reasons at [37].

In *Glenn William Parker v Select Civil Pty Ltd* [2018] NSWSC 140, Harrison AsJ cited *Ferguson* with approval and held that in relation to the classes of PIRS, there *"has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense."* Further, in *Jenkins*, Garling J held that it is a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. However, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review.

Therefore, based upon the decision in *Ferguson,* the MAP must be satisfied that the AMS' assessment was erroneous in one of the following ways: (a) is the categorisation glaringly improbable? (b) could it be demonstrated that the AMS was unaware of significant factual

matters? (c) could a clear misunderstanding be demonstrated? or (d) could an unsupportable reasoning process be made out?

The MAP held that no error by the AMS was established and that the AMS took some care in providing a comprehensive and considered assessment. His reasoning was clear and internally consistent and he took time to carefully consider in some detail the documents that were before him, including the reports from the qualified psychiatrists. It stated:

> 81. A number of submissions were made cavilling with the reasons given by the AMS. Mr Pearson conceded that the AMS had explained the reasons why he differed from the medico-legal reports. He submitted that none of those reasons "was put to the Appellant in a vigorous and comprehensive fashion." No authority was advanced in support of that submission. The only possible basis could be that there was in place a procedure that required the rule in Browne v Dunn to be observed, but no such procedure exists. We have referred to the functions of an AMS earlier in these reasons…
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> 83. An AMS is not under any compunction to accept complaints made by a claimant as being reliable or the sole basis for an assessment. In Mr Pearson's case, the AMS clearly did not rely solely on what he was told by Mr Pearson when rating employability. Dr Prior's evidence "should have been more rigorously tested by the AMS", it was suggested. The AMS had not been "consistent in his approach to reviewing core issues." With regard to the category of employability, it was argued that the AMS "has simply got it wrong."
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> 84. It is not necessary to review the remaining submissions which are all similarly unhelpful. The submissions do not specify exactly how, beyond certain aspects of Mr Pearson's impairment potentially fit the descriptors of a different class in some PIRS categories but that, and the suggestions the AMS has not been consistent in his approach or more rigorously tested other IMEs opinions, the reasons provided by the AMS for his rating of impairments are actually erroneous.
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> 85. It is not necessary to review the remaining submissions which are all similarly unhelpful. The submissions do not specify exactly how certain aspects of Mr Pearson's impairment potentially fit the descriptors of a different class in some PIRS categories, nor do they particularise how the reasons provided by the AMS for his rating of impairments are actually erroneous.
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> 86. The AMS has engaged fully with the contents of the reports of both Dr Prior and Dr Bertucen. He has explained why he has differed from both assessments and his explanation is both consistent and logical – that is to say, Mr Pearson's condition has improved since those assessments were made. None of the many submissions have cast any doubt on the soundness of that explanation.

Accordingly, the MAP confirmed the MAC.

Appeal against MAC by worker dismissed – Appellant relied upon a decision that was based upon the Motor Accidents Authority Guidelines

Tziallis v Elephant Boy Trading Co Pty Ltd [2019] NSWWCCMA 108 – Arbitrator McDonald, Dr D Crocker & Dr M Fearnside – 7 August 2019

The appellant was employed by the respondent as a chef. On 17 January 2005, she injured her back at work. On 8 September 2006, the parties entered into a Complying Agreement for 7% WPI with respect to an injury to the lumbar spine.

In 2018, the appellant claimed further compensation under s 66 *WCA* for 31% WPI, with respect to the thoracic spine, peripheral and central nervous systems, based upon an assessment from Dr Teychenné. However, the insurer disputed the claim.

On 8 March 2019, an Arbitrator issued a COD and determined that the worker had suffered an injury to her thoracic spine and that dispute was then referred to an AMS. On 3 May 2019, Dr M Davies (AMS) issued a MAC, which assessed 0% WPI (DRE Thoracic Category I).

On 21 May 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The Registrar referred the matter to a MAP, which determined that a further medical examination was not required and that the appeal should be determined on the papers.

The appellant argued that the AMS had erred in failing to read and/or comment on the entirety of Dr Teychenné's opinion, that he had failed to provide "lawful reasons" in rejecting Dr Teychenné's opinion, that he failed to undertake an adequate assessment of the thoracic spine and that he was influenced by her lack of complaint about the thoracic spine when presenting to doctors. He did not undertake the same tests as Dr Teychenné and did not explain why that was not required. She said that the summary provided of Dr Teychenné's report was short and unfair and that the AMS ignored the second report containing the reasoning in support of the diagnosis of incomplete spinal cord lesion. She also submitted that the consideration of previous diagnoses was irrelevant and that the AMS was not required to look at the historical documents but merely conduct an examination on the day. The diagnosis of her condition was delayed until Dr Teychenné's examination and previous doctors ignored or misunderstood her symptoms.

The respondent argued that a difference of opinion is not a proper basis for an appeal.

The MAP noted that the AMS took a detailed history and conducted a physical examination and viewed the investigations. He diagnosed a back strain and felt that the appellant had later developed "central sensitisation" and that she was "symptom focussed". He assessed DRE Thoracic Category I and provided brief reasons as to why he did not agree with D Teychenne. It noted, relevantly:

> 33. The AMS was required to determine if the injury which Ms Tziallis suffered to her thoracic spine was an incomplete spinal cord lesion. If it was not an incomplete spinal cord lesion, he was not required to consider if Ms Tziallis suffered permanent impairment in respect of her central and peripheral nervous system.
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> 34. … However the AMS did provide a brief description of the reasons why he did not agree with Dr Teychenné when he set out Dr Teychenné's findings.
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> 35. A careful reading of Dr Teychenné examination findings reveals that the only symptoms he recorded with respect to the thoracic spine were a "sensory level to pain, temperature and touch sensation around T2 anteriorly and T7 posteriorly" and a "weakly positive left extensor plantar response" which he said was consistent with a thoracic cord lesion…There was no comment as to the level of muscle tone (presence of spasticity) in the lower limbs which would be anticipated to be abnormal in the presence of a spinal cord injury, even if incomplete or partial.

The MAP held that the AMS found no convincing clinical findings to support a diagnosis of a partial spinal cord lesion and Dr Teychenné's findings are not consistent with those of other doctors. It also stated that *Dogon v Redmond* does not apply because that decision concerned a breach of the relevant Motor Accident Authority Guidelines. The AMS reported his findings and set out his opinion, including commenting on the reports of other practitioners. The absence of any previous complaint regarding the thoracic spine is relevant, as is the absence of any radiological investigations. The MAP stated, relevantly:

46. In *State of NSW v Kaur* Campbell J said:

> In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480, the High Court of Australia dealt with the nature of the jurisdiction exercised by a medical panel under cognate Victorian legislation. The legislation is not entirely the same but it is broadly similar in purpose. Allowing for some differences, the High Court said at page 498 [47]:
>
> The material supplied to a medical panel may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on the medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the functions of the panel as being either to decide a dispute or to make up its mind by reference to completing contentions or competing medical opinions. The function of a medical panel is neither arbitral or adjudicative: It is neither to choose between competing arguments nor to opine on the correctness of other opinions on that medical question. The function is in every case to perform and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.
>
> Not all of this, as I have said, is apposite in the context of the New South Wales legislation. In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in Wingfoot Australia. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise. It is sufficient, as their Honours pointed out at [55], that:
>
> > The statement of reasons… explain the actual path of reasoning in sufficient detail to enable the Court to see whether the opinion does or does not involve any error of law.

The MAP held that the AMS disclosed his path of reasoning, as he was required to do, and it was not satisfied that there was an error with respect to his diagnosis. Accordingly, it confirmed the MAC.

WCC – Arbitrator Decisions

Arbitrator awards worker s 60 expenses for deep vein thrombosis following a period of 4 days of sedentary work

Traynor v AMP Services Pty Limited [2019] NSWWCC 251 – Arbitrator Bell – 23 July 2019

The worker alleged that he suffered a deep vein thrombosis (DVT) and an associated primary psychological injury on 30 June 2016. However, the insurer disputed the claim.

At the conciliation and arbitration on 2 July 2019, the worker discontinued his claim under s 66 *WCA* with respect to the DVT.

Arbitrator Bell identified issues as being: (1) Whether the worker suffered injury of DVT arising out of or in the course of his employment with the respondent or, alternatively, a disease or the aggravation, acceleration, exacerbation or deterioration of a disease?

He referred to the High Court's decisions in *Zickar v MGH Plastic Industries Pty Ltd* and *Military Rehabilitation and Compensation Commission v May*, which confirmed that there can be an overlap between a disease and a personal injury. He noted that in *Kennedy Cleaning Services v Petkoska*, Gleeson CJ and Kirby J held that *"if something can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an 'injury' in the primary sense of that word."* Their Honours also stated that,

> *Consideration [must] be given to the precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change accepted at trial. If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an 'injury' in the primary sense of that word.*

The Arbitrator held that the worker suffered the injury of DVT (arising) out of his employment with the respondent under s 4 (a) *WCA*, but it was not a disease or the aggravation, acceleration, exacerbation or deterioration of a disease. He stated:

> 24. Applying these principles to the facts of this matter, it seems to me that the physiological event for Mr Traynor was a personal injury. The thrombosis developed over a relatively short period overnight, and comprised a "sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state" resulting in the pain symptoms. There was no "disease" of DVT stretching from the event 20 years ago to the present or commencing at some point prior to the June 2016 DVT. The earlier event also required the additional factor of an immobilised leg for the DVT to occur…
>
> 27. For an injury to arise out of the employment requires "a certain degree of causal connection between the accident and the employment": (*Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Aust Pty Ltd* (2009) NSWCA 324). The employment must to some material extent contribute to the injury. I am satisfied that Mr Traynor's immobility sitting at the work computer for the hours shown in the employer's log satisfy this test.
>
> (2) Whether the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration?

Given the finding in relation to issue (1), it was not necessary to determine issue (2).

> *(4) Whether employment was a substantial contributing factor to the injury?*

The Arbitrator held that employment was a substantial contributing factor to the DVT, as there was no evidence that the worker undertook sedentary activities at home involving long periods of immobility and the relevance of periods of immobility in his work to the type of injury he suffered gave the overall impression that it is a real factor of substance among the other factors.

> (3) Whether the worker suffered a primary psychological injury arising out of or in the course of his employment with the respondent on 30 June 2016?
>
> (5) Whether that injury was a "secondary psychological injury"? and
>
> (6) Is the worker entitled to be assessed pursuant to for lump sum compensation under s 66 *WCA?*

The Arbitrator determined that the psychological injury was secondary to the DVT and he is therefore precluded from being referred for an assessment of permanent impairment under s 66 *WCA.*

(7) Whether the worker is entitled to medical expenses under s 60 WCA.

The Arbitrator awarded the worker compensation under s 60 WCA with respect to the DVT injury. However, he entered an award for the respondent with respect to the allegation of primary psychological injury.

Psychological injury - Arbitrator awards compensation under s 66 WCA without referral to an AMS

Monahan v R. H Anicich & A J Deegan & Others T/as Sparke Helmore Lawyers [2019] NSWWCC 265 – Arbitrator Homan – 5 August 2019

The worker commenced employment with the respondent as a solicitor on 4 February 2008. However, she ceased work on 22 March 2017. On 23 March 2017, she gave notice of a psychological injury (anxiety/depression) as a result of workplace bullying. The insurer accepted liability and approved payments of compensation.

On 21 January 2019, the worker's solicitors made a claim under s 66 *WCA* for alleged 22% WPI, based upon an assessment from Dr Bertucen. On 22 March 2019, the respondent's solicitors requested further and better particulars of the claim, which were provided to them on 28 March 2019.

On 30 April 2019, an ARD claimed compensation under s 66 WCA. On 23 May 2019, the worker attended the respondent's IME. During a teleconference on 28 May 2019, the respondent was granted leave to issue directions for production and to file late documents, including a supplementary report from its IME. The matter was then to be remitted to the Registrar for referral to an AMS to assess permanent impairment.

However, during a further teleconference on 10 July 2019, the worker objected to the referral to an AMS and asked the Arbitrator to determine that she had suffered 22% WPI. The respondent objected to the s 66 claim being determined without a referral to an AMS. The Arbitrator ordered the parties to file and serve written submissions as to how the claim should be resolved without a formal conciliation and arbitration hearing.

Arbitrator Homan noted that both qualified specialists had assessed 22% WPI, but the respondent disputed this and said that it did not rely upon its IME's report. Instead, it sought to rely on evidence from Dr Phillips, psychologist, who concluded that the worker's performance in psychometric testing indicated that she was either potentially malingering or suffering from an acquired brain injury. There was no allegation of brain damage and the report raised an issue regarding the consistency of her presentation to Dr Bertucen. It was therefore appropriate for the dispute be determined by an AMS.

The Arbitrator stated that in many cases, it will still be appropriate for an Arbitrator to remit the matter for referral for an assessment by an AMS. However, that course was not appropriate in this matter, for reasons that included:

- The only remaining issue concerned the amount of the worker's entitlement under s 66 *WCA*;
- The respondent arranged an IME in order to address the worker's claim and that IME provided a WPI assessment, which was filed and served. As the respondent chose not to rely upon it Dr Bertucen's report was the only qualified opinion on permanent impairment;

- The respondent argues that Dr Bertucen's report should not be accepted based upon Dr Phillips' evidence, but as he is a psychologist, he is not qualified under the Guidelines to assess permanent impairment resulting from a psychological injury.
- Dr Phillips' evidence did not persuade her that there is not a fair climate of fact to accept Dr Bertucen's assessment of permanent impairment. While it is not clear whether Dr Bertucen considered Dr Phillips' report, it was considered by Dr Whetton (the respondent's expert) and he explained that the worker's performance in that psychometric testing is not inconsistent with her diagnosed psychological injury.
- It has not been suggested that Dr Bertucen's report does not comply with the Guidelines for assessment of permanent impairment and he is qualified to make it.

The Arbitrator held:

> 58. In circumstances where there is no qualified evidence as to the degree of permanent impairment to contradict the assessment of Dr Bertucen, I am satisfied that his assessment provides an appropriate and reliable basis on which to determine the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.
>
> 59. I consider that this is an appropriate case for an award of compensation to be made without a referral to an AMS. The matters raised by the respondent, including the absence of regulations made pursuant to s 321A of the 1998 Act, do not persuade me that the further delay and costs associated with a referral to an AMS are warranted. This is so particularly in a case such as the present where to require the applicant to be examined by a third independent examiner has the potential to cause the applicant further, unwarranted, distress.

Accordingly, the Arbitrator awarded compensation under s 66 *WCA* for 22% WPI.

Psychological injury - Arbitrator not satisfied that there was a fair climate to accept the worker's medical evidence – award for the respondent entered

Wood v Woolworths Limited [2019] NSWWCC 266 – Arbitrator Homan – 5 August 2019

The worker was employed by the respondent as a store person. On/about 13 January 2018, he alleged that he suffered a psychological injury as a result of bullying and harassment. The insurer disputed the claim. He had previously claimed compensation for psychological injuries and the insurer disputed those claims on 3 November 2015 and 19 September 2016.

On 27 August 2018, the worker claimed weekly compensation, s 60 expenses and lump sum compensation under s 66 *WCA.* The insurer issued a further dispute notice in response.

During a teleconference on 1 May 2019, ***Arbitrator Homan*** ordered the worker to file an amended ARD that omitted irrelevant material and an amended ARD was lodged on 12 June 2019.

The Arbitrator conducted a conciliation and arbitration hearing on 1 July 2019, during which the parties agreed the amount of PIAWE. She identified the issues in dispute as: (1) whether the worker suffered a psychological injury, as alleged; (2) the extent and quantification of any resulting incapacity; (3) the entitlement to s 60 expenses; and (4) the entitlement under s 66 *WCA.*

In statements dated 31 January 2018, 20 October 2018 and 17 April 2019, the worker denied any prior diagnosis of depression, anxiety, stress or any psychological condition. However, these allegations were largely disputed by the respondent.

The Arbitrator referred to the principles for determining causation in psychological injury cases, which Roche DP summarised in *Attorney General's Department v K,* namely:

> 52. The following conclusions can be drawn from the above authorities:
>
> *(a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in Chemler at [40]);*
>
> *(b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in Chemler at [54]);*
>
> *(c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in Chemler at [69]);*
>
> *(d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in Sheridan);*
>
> *(e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in Wiegand at [31]), and*
>
> *(f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered…*
>
> 54. The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances.

The Arbitrator was satisfied that the worker had repeatedly and significantly failed to disclose his relevant medical history in the context of this claim and stated, relevantly:

> 163. In making factual findings as to the events relied on by the applicant as causative of a psychological injury, all of the evidence must be weighed. In *Brines v Westgate Logistics Pty Ltd* Keating P said:
>
> > Where a worker has given untruthful evidence, the Arbitrator must carefully assess the rest of his evidence in order to determine its honesty and reliability. Some of the evidence may have been acceptable because other independent or objective evidence confirmed it. However, where a worker's evidence was not independently supported it clearly must be assessed with great care to determine whether it could properly be accepted as proof of any matter that was in issue in the proceedings (see *Malco Engineering Pty Ltd v Ferreira and others* (1994) 10 NSWCCR 117 and *Divall v Mifsud* (2005) NSWCA 447).

The respondent's statements tended to confirm that some of the alleged workplace events were real, but the worker's second statement made a number of serious allegations, including criminal conduct. She stated that in the absence of any corroboration, and having regard to her concerns about the worker's credibility, she was not satisfied that each of those particular events was real. She was satisfied that the worker perceived these events as *"…creating an offensive or hostile workplace, whether or not that perception was rational, reasonable or proportionate…"* However, the question is whether the real events caused, and were the main contributing factor to, the worker contracting a psychological injury. She noted that the ARD alleged the contraction of a disease, and not the aggravation, acceleration, exacerbation or deterioration of a disease.

The Arbitrator stated that she was not satisfied that there was a fair climate of fact to accept the opinions of Dr Ayliff and Dr Oldtree Clark and she cited the decision of Samuels JA in *Paric v John Holland (Constructions) Pty Ltd.* She also noted that those doctors had considered the effect of the termination of the worker's employment upon his current condition, but she was not satisfied that the worker had claimed, or that the respondent had disputed, a psychological injury caused wholly or partly by the termination of employment or the circumstances surrounding it. Therefore, she did not place weight upon their opinions regarding causation.

The Arbitrator held that the worker had not discharged his onus of proving a psychological injury "as pleaded" and she entered an award for the respondent.

Industrial deafness – hearing aids - worker failed to discharge his onus of proving noisy employment on relevant principles from Dawson v Dawson, Lobley and Makita

Lindsay v ISS Property Services Pty Limited [2019] NSWWCC 269 – Arbitrator Bell – 6 August 2019

The worker was employed by the respondent as a cleaner from 19 September 2011 until October 2012. He was required to use a backpack vacuum cleaner, which he alleged was significantly louder than a domestic vacuum cleaner and that it was *"so loud that he would have to turn it off in order to hear anyone trying to speak with him*". He alleged that he used this for at least 2 hours per shift (and up to nearly 4 hours per shift), but the respondent denied that the vacuum cleaner was noisy based upon the product specification of 67+3Db(a) and it asserted that the worker only used it for 2 hours per shift.

Arbitrator Bell discussed the evidence and case law and made the following findings:

> 12. … The test of the nature of the employment for hearing loss claims does not require strict causation but only that it was "of a type which could give rise to the injury in fact suffered".
>
> 13. To satisfy this test the worker does not require evidence from an independent expert such as an acoustic engineer to establish the noise levels to which the worker was exposed. The worker's evidence together with appropriate medical evidence may be sufficent.
>
> 14. It is not enough for a worker to state that the employment was "noisy", but it may be sufficient for an expert medical practitioner who obtains a history consistent with the worker's evidence with enough detail to form the opinion that the employment concerned had the capacity to cause hearing loss.

15. The weight given to the expert medical opinion is dependent on the degree of correlation between the history upon which the expert opinion is based and the evidence overall…

22. The submission of the respondent with which I agree concerns the history taken by Dr Malouf. There is nothing in his history that refers to the level of noise. Mr Lindsay describes the difficulty with conversation and compares the noise to other machinery but there is nothing to suggest that Dr Malouf took this into account. The statements were both made after the examination by Dr Malouf, so were not before him as part of the documentation he acknowledges.

23. In *Dawson v Dawson* Roche DP said,

> Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence (if no acoustics expert is to be ruled on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the "tendency, incidents or characteristics" of that employment are such as to give rise to a real risk of boilermaker's deafness.

24. The requirements noted above for both the nature and the extent of the noise exposure were met in the case of Mr Dawson.

25. By contrast, Roche DP in *Combined Civil Pty Ltd v Rikaloski* [2007] NSWWCCPD 181 (*Rikaloski*) found against the worker because there was *"…no evidence of the noise level to which Mr Rikaloski was exposed, the period of exposure, and whether those two factors were sufficient to result in his employment being employment to the nature of which boilermaker's deafness is due."…*

27. What is missing in Dr Malouf's history is evidence as to noise levels, either consistent with Mr Lindsay's statements or otherwise, that shows he considered any such history in arriving at his conclusion about the nature of the work in relation to potential hearing loss.

28. Mr Lindsay has detailed evidence in his supplementary statement, but unfortunately this does not appear to have been before Dr Malouf to consider in forming his opinion as to the nature of the noise exposure.

29. For these reasons the onus has not been discharged on the relevant and Mr Lindsay's claim must fail.

The Arbitrator held that the worker had not discharged his onus of proof based upon the relevant principles from *Dawson v Dawson, Lobley and Makita* and he entered an award for the respondent.

Application for reconsideration of a MAC declined

Blackie v Australian Jockey Club [2019] NSWWCC 273 – Arbitrator McDonald – 13 August 2019

The worker suffered hernia injuries as a result of the nature and conditions of her employment between 1 July 2003 and 30 December 2005. She claimed compensation under s 66 *WCA* and an AMS assessed 0% WPI. However, she appealed against that MAC and on 19 November 2010, a MAP revoked the MAC and issued a fresh MAC that assessed 10% WPI (9% for recurrent hernias and 1% for ilioinguinal neuralgia).

In 2012, the worker commenced WCC proceedings claiming further compensation under s 66 *WCA* and the dispute was referred to Dr Dixon-Hughes (AMS) for assessment. On 1 May 2012, he issued a MAC that assessed 11% WPI (9% for recurrent hernias, l% for left ilioinguinal nerve damage and 1% for right ilioinguinal nerve damage.

On 14 June 2012, a COD issued, which reflected an agreement reached at a teleconference that the worker would receive compensation under s 66 *WCA* for a further 1% WPI and compensation for pain and suffering.

On 3 September 2013, Dr Garvey issued a further MAC, which was for the purpose of determining whether further surgery was reasonably necessary. He was not asked to assess WPI, but he assessed 23% WPI. He later issued an amended MAC that deleted that assessment.

On 25 June 2019, the worker's current solicitor sought reconsideration of the MAC dated 1 May 2012.

Arbitrator McDonald conducted a teleconference on 23 July 2019, during which the worker's counsel stated that she actually sought reconsideration of the COD dated 14 June 2012. The respondent opposed reconsideration. The Arbitrator directed the parties to file and serve written submissions and decided to determine the application on the papers.

The worker argued that Dr Dixon-Hughes was in error to *assess "bilateral inguinal and femoral hernias with more than one recurrence, now satisfactorily repaired with permanent restriction of activity (lifting): - 9%"*, and he should have assessed 9% WPI for each hernia based upon para 1.6. of the *Guidelines.*

Counsel for the worker stated that the worker was represented by different solicitors in the 2012 proceedings and it was not known why those consent orders were entered into and why an appeal against the MAC was not considered. He also asserted that the assessment of 23% WPI made by Dr Garvey should have alerted the previous solicitors to the possible error in the 2012 MAC, after which they referred the worker to Dr Kumar. On 2 February 2018, Dr Kumar assessed 21% WPI and stated that Dr Dixon-Hughes erred in assessing impairment for a single hernia.

The Arbitrator stated, relevantly:

> 13. The submissions state that Ms Blackie instructed her current solicitors on 13 February 2018 who took over conduct of the file on 15 March 2019. The latter date appears to be an error because Ms Blackie said that she commenced further proceedings (the 2018 proceedings) seeking further permanent impairment compensation which were part heard by a Commission arbitrator on 17 December 2018 and stood over to 6 February 2019. On that date, counsel briefed for Ms Blackie "became aware of the possible error" in the MAC issued by Dr Dixon-Hughes. The matter was again stood over to attempt settlement of the claim and to ask the Registrar to correct an "obvious error" in the MAC issued by Dr Dixon-Hughes under s 325 (3) of the *Workplace Injury Management and Workers Compensation Act 1998* (*the 1998 Act*).
>
> 14. That request was made on 3 April 2019 and on 30 May 2019, the Registrar informed Ms Blackie that the MAC did not contain an obvious error and that she should seek a reconsideration of the MAC.
>
> 15. The 2018 proceedings were again listed before the arbitrator on 3 June 2019 and discontinued. Because Ms Blackie is "out of time" to bring an appeal in respect of the MAC issued by Dr Dixon-Hughes, she sought that the matter be referred to "an AMS" under s 329 of the 1998 Act for reconsideration.

> 16. The submissions attached four MACs and the Medical Appeal Panel decision and Dr Kumar's report. None of the other correspondence or documents referred to were attached.

The worker relied upon a Statutory Declaration in which she said that that she recalled being sent a copy of the MAC prepared by Dr Dixon-Hughes in 2012, but she denied being given any advice about the possibility or prospects of an appeal. She "vaguely" recalled attending the telephone conference on 14 June 2012 and that negotiations were conducted about how much compensation she should receive for pain and suffering. She denied having any discussion about appealing the MAC, but recalled being advised that she had not exceeded the threshold to bring common law proceedings. Following the examination by Dr Garvey in 2013, she received a copy of his original MAC, but not the amended MAC. She recalled being advised that his WPI assessment was rejected because he was not instructed to assess it and that she was not able to make a further claim because of a change in the law. In about March 2015, she was advised that the law had changed again and that she could make a further lump sum claim and her previous solicitors then arranged for her to see Dr Kumar in February 2018.

The worker asserted that it was not until the second hearing date of the 2018 proceedings that she was told that there was an error Dr Dixon-Hughes' MAC and that an appeal should have been lodged. Efforts to settle the claim were unsuccessful and she understood that one reason why the 2018 proceedings did not proceed was to enable her to seek a reconsideration of that MAC.

Counsel for the worker referred to the decision of Roche DP in *Samuel v Sebel Furniture Limited* and asserted that while the delay was long, it was due to her legal advisers. While she noted that *Hurst v Goodyear Tyre and Rubber Co (Australia) Pty Ltd* is authority for the principle that a mistake or oversight by a legal adviser will not provide a ground for reconsideration, she argued that that case was distinguished in *Atomic Steel Constructions P/L v Tedeschi,* and he submitted:

> … Whilst it is conceded that the circumstances regarding the legal advisors error in this case differ from Tedeschi, it is submitted that the case of *Tedeschi* does demonstrate that a legal advisor's error does not prevent an injustice being corrected where it is in the interests of justice.
>
> In *Tedeschi*, it involved the overpayment of a worker in a Consent Award for weekly payments. It is submitted that in this matter, the injustice involved if the application for Reconsideration is refused, is a worker being denied her correct entitlements for lump sum compensation (including pain and suffering) and the ability to bring a Work Injury Damages claim.

The worker argued that the Commission is required to perform "a balancing act" between her rights and those of the respondent and as workers compensation is beneficial legislation, and as she has been deprived of her rights to lump sum compensation and common law damages, it should exercise its discretion in her favour.

However, the respondent argued that Dr Dixon-Hughes' MAC was correct and in any event, reconsideration is not appropriate given the length of the delay and the public interest that litigation ought not to continue indefinitely. The worker's submissions failed to take into account the fact that she had been in receipt of a consent award for seven years and that there was no offer to repay that award if reconsideration was granted. It also cited prejudice as a result of legal costs that it had incurred for the teleconferences and the arbitration of the 2018 proceedings (which were discontinued) including the cost of an IME.

The Arbitrator cited the principles that apply to the exercise of its discretion, which were summarised in *Samuel,* and confirmed that all of the relevant factors should be considered.

"Mistake"

In relation to this issue, the Arbitrator held that the decision in *Tedeschi* does not assist the worker. The failures to consider a medical appeal in 2012, to allow consent orders to be entered into in 2012 and to apply for reconsideration of those consent orders are all failures that are covered by the decision in *Hurst.*

Merits of the proposed medical appeal

The Arbitrator observed that the evidence in support of a proposed appeal "is scant", but based on the differences between Dr Garvey's first MAC and the report of Dr Kumar, there may be merit in the argument that the worker seeks to raise. She concluded:

> 49. The Commission is required to do justice between the parties. Apart from the possibility of the merits of the appeal, all of the other relevant factors weigh strongly against Ms Blackie's application.

Accordingly, the 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