WIRO
Workers Compensation independent review office

HOME ... ABOUT US ... CONTACT

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

**ISSUE NUMBER 67**

**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:

1. Peachey v Bildom Pty Ltd (Quality Siesta Resort Pty Limited and Quality Hotel) [2020] NSWSC 781
2. Skates v Hills Industries Ltd [2020] NSWSC 837
3. Secretary, Department of Communities and Justice v Miller and Anor (No. 5) [2020] NSWWCCPD 38
4. BC v State of New South Wales [2020] NSWWCCPD 39

## Supreme Court of NSW Decisions

### *Jurisdictional error – MAP misapplied cl 1.32 of the Guidelines – MAP's decision set aside & matter remitted to a differently constituted MAP for determination*

**Peachey v Bildom Pty Ltd (Quality Siesta Resort Pty Limited and Quality Hotel) [2020] NSWSC 781 – Adamson J – 22/06/2020**

The plaintiff was employed by the first defendant as a chef and suffered a psychological injury during the period from 1/03/2016 to 16/09/2016. She claimed compensation and the first defendant accepted the claim and paid weekly compensation and s 60 expenses. However, on 8/02/2018, it issued a dispute notice.

On 7/11/2018, the plaintiff claimed lump sum compensation under s 66 WCA, based upon an assessment from Dr Bake, who diagnosed an exacerbation of Major Depressive Disorder and assessed 17% WPI (19% less a 1/10 deductible under s 323 WIMA).

The first defendant disputed that claim based upon medical reports from Dr Wotton, who opined that there was no work-related psychological condition. He did not assess permanent impairment.

The plaintiff filed an ARD claiming weekly compensation and compensation under s 66 *WCA.* The weekly payments claim was resolved and the s 66 dispute was remitted to the Registrar for referral to an AMS. On 7/08/2019, Dr Glozier issued a MAC, which assessed 13% WPI (15% less 1/10 deductible), but it was common ground that this should have been rounded up to 14% WPI.

Dr Glozier took a history that the plaintiff had recently been working 30 hours per week for a cleaning company, which she found unthreatening, but that she suffered a recent panic attack during a meeting when there was some hostility between 2 other attendees. With respect to the question of treatment, he stated:

> b. Have all body parts stabilized/reached maximum medical improvement?
>
> Yes. Although her treatment has probably not been optimal, she has been compliant with antidepressant medication, engaged with psychotherapy and rehabilitation for many months with only a recent improvement in her symptoms of functioning as she has obtained employment. However it is unlikely, given her ongoing symptomatology, that she will improve by more than 3% in the subsequent 12-18 months.

Both parties appealed against the MAC.

The plaintiff argued that the AMS failed to properly apply cll. 1.31 and/or 1.32 of *the Guidelines* and that because her condition had improved to enable her return to work, there should have been an adjustment of 2% or 3% to the WPI, which would have satisfied the s 65A *WCA* threshold. She also argued that if a comparison between assessments was required, the MAP was required to explain why it chose to compare Dr Baker's assessment with that of the AMS and to disregard Dr Wotton's findings and opinion.

The first defendant argued that the AMS properly applied cl 1.32, but that the MAP determined that cl 1.31 and 1.32 applied and no adjustment ought to be made. Further, Dr Wotton's opinion was irrelevant because he did not assess WPI ad he did not accept that there was any work-related injury.

***The MAP*** accepted that the AMS did not specifically refer to the question of whether there should be an adjustment for the effect of treatment. The MAP stated that the AMS obviously made no adjustment and it can be inferred that the AMS was of the opinion that no adjustment should be made. It also held that no adjustment should be made for the following reasons:

- According to *the Guidelines*, there needed to be an apparent substantial or total elimination of the permanent impairment for an assessor to increase the percentage of WPI. The AMS noted that the worker's condition had improved in 2019 and assessed 15% WPI, but deducted 1/10 for a pre-existing condition; and
- It was not satisfied that the difference between the assessments of the AMS and Dr Baker demonstrated that there had been an apparent substantial or total elimination of the permanent impairment as a result of long term treatment. In those circumstances, no adjustment should be made for the effects of treatment.

The plaintiff applied for judicial review of the MAP's decision and alleged that the MAP erred: (1) in law in finding that the AMS correctly applied cl 1.32 of the Guidelines for the Evaluation of Permanent Impairment and that no adjustment for treatment should be made; and (2) in law by impermissibly filling in the gaps in the path of reasoning by reference to an assumption that the decision of the AMS was made according to law in respect of the application of cl. 1.32 of the Guidelines. The plaintiff also alleged that the MAP: (3) failed to correctly apply cl 1.32 of the Guidelines by failing to consider all relevant considerations such as the plaintiff's ability to return to some employment; and (4) failed to give any, or any adequate, reasons for the inference that it drew, or the assumption that it made, that the AMS was of the opinion that no adjustment should be made for the effect of treatment in accordance with cl. 1.32 of the Guidelines and for the methodology it adopted in respect of the application of cl. 1.32.

***Adamson J*** upheld grounds (1) and (2). She stated that the MAP had an obligation to set out its path of reasoning in sufficient detail to expose whether it had complied with the law: *Wingfoot* (at [55]) and *Vegan* (at [121] – [122]). While the MAP inferred that the AMS had decided that no adjustment was warranted under cl 1.32 of *the Guidelines,* her Honour did not accept that this conclusion was available to it, having regard to the AMS' reasons (which were insufficient to record that he considered cl 1.32 at all). Although the AMS' reasons are entitled to a beneficial construction, this does not warrant an assumption being made that he addressed the vital issue of cl 1.32 of *the Guidelines* and decided no adjustment was warranted. The AMS' failure to mention cl 1.32 is consistent with his having overlooked it: *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26] (Stone J). However, her Honour was not satisfied that anything turns on the MAP's incorrect conclusion in this respect because its reasons are sufficient to record that it considered the question of whether an adjustment was warranted under cl 1.32 for itself.

Her Honour stated, relevantly:

> 52 Clause 1.32 requires a comparison to be made between the claimant's original degree of impairment as a result of the injury before the effective treatment and the claimant's degree of impairment as a consequence of treatment to determine whether the treatment has resulted in apparent substantial or total elimination of the original impairment. The comparison is to be made between the respective impairments at those two relevant times. I consider this construction to be clear from the wording of the clause and do not consider that resort to AMA5, cl 2.5g is either necessary or of assistance.
>
> 53 Clause 1.32 does not expressly require or authorise a comparison between the respective % WPI scores at two particular times. Nor does it expressly contemplate that there needs to be a post-injury pre-treatment WPI score for the purposes of undertaking the necessary comparison. The Appeal Panel saw fit to perform the evaluative exercise required by cl 1.32 of the Guidelines by comparing the WPI score of 17% given by Dr Baker on 2 September 2018 and the WPI score given by the AMS in the certificate dated 17 August 2019 as a consequence of his examination of the Claimant on 31 July 2019. It did not explain why it considered that this comparison would fulfil the requirements of cl 1.32. Nor did it explain why it considered that this comparison would indicate the improvement as a consequence of treatment or identify the treatment said to have been effective. The comparison between the two figures seems to have been the only basis on which the Appeal Panel considered that the change was not substantial. There does not appear to have been any evaluative assessment at all.

In relation to grounds (3) and (4), her Honour stated:

> 56 The comparison required by cl 1.32 would appear to be both qualitative and quantitative. There must be effective long term treatment which results in an "*apparently substantial or total*" elimination of the original permanent impairment. The fact that an adjustment of either 1%, 2% or 3% is available as a matter of discretion would tend to suggest that there is a range between substantial and total which would permit the selection of one of those three figures. If cl 1.32 had been intended to be satisfied by a mere mathematical comparison of assessments of % WPI at different times (one absent such treatment and the other when treatment had had its effect), one would have expected the draftsperson to state that this was all that was required. Moreover, if the comparison required was merely between WPI percentages, it could be expected that the adjectives "*substantial*" and "*total*" would be defined numerically rather than by references to adjectives which would appear to warrant an evaluative, qualitative assessment.

> 57 In order to address cl 1.32, the Appeal Panel was obliged to consider and record in its reasons whether there has been long-term treatment and if so, what the treatment comprised and whether it has been effective to result in either a substantial or total elimination of the original permanent impairment. If the answers to these questions are in the affirmative, the Appeal Panel is also obliged to consider and decide whether, if treatment is withdrawn, the worker is likely to revert to the original degree of impairment. This analysis does not amount to a gloss on cl 1.32; it is merely a summary of what is required by its wording. The approach taken by the Appeal Panel as disclosed by its reasons was insufficient to demonstrate that it had addressed that which was required to determine whether an adjustment under cl 1.32 was warranted. This constitutes an error of law on the face of the record: *Wingfoot* at [55]; *Vegan* at [130].
>
> 58 This is not to say that the Appeal Panel was not entitled to have regard to Dr Baker's assessment of WPI and the AMS's assessment of % WPI for the purposes of cl 1.32. However, it was required to explain why it considered that this differential was sufficient to fulfil its obligation to address the question of an adjustment under cl 1.32. It failed to do so. While the Appeal Panel disclosed what it had done (subtracted one figure from the other and decided that the difference was not substantial), it did not reveal why it had done so and on what basis this was sufficient for it to come to a conclusion that no adjustment was warranted under cl 1.32. Ground 4 has been made out in so far as it challenges the Appeal Panel's reasons. It is not necessary to determine ground 3 since I am persuaded that the Appeal Panel's decision should be set aside for the reasons given below.
>
> 59 In these circumstances, it is not necessary to address Ms Grotte's alternative submission that the Appeal Panel ought to have had regard to Dr Wotton's opinion or the parties' submissions about the meaning of "substantial" and "apparent" in cl 1.32.

Her Honour set aside the MAP's decision and remitted the matter to the WCC for determination by a differently constituted MAP and she ordered the first defendant to pay the plaintiff's costs.

### *Judicial error – Error of law on the face of the record*

**Skates v Hills Industries Ltd [2020] NSWSC 837 – Adamson J – 30/06/2020**

On 7/06/2013, the plaintiff fell from a ladder at work. He claimed compensation under s 66 *WCA* for 18% WPI, comprising 15% WPI (left-hand ring finger) and 3% WPI (scarring), based on assessments from Dr O'Keefe. However, the employer disputed the claimed based upon a report from Dr Panjratan, who assessed 12% WPI.

On 1/09/2017, a delegate of the Registrar issued a referral to an AMS with respect to injuries suffered on 7/06/2013, for assessment of the left upper extremity (joint ring finger) and scarring. However, on 11/09/2017, the parties agreed that the left wrist was to be included in the referral to the AMS.

On 29/09/2017, Dr Machart examined the plaintiff and found evidence of CRPS. However, he could not diagnose CRPS because the Guidelines for the Evaluation of Permanent Impairment require the symptoms to be present for more than 1 year and to be verified by more than 1 examining physician. In a MAC dated 13/10/2017, Dr Machart certified that MMI had not been reached.

On 16/11/2017, the Commission issued a COD stating that the degree of permanent impairment was not fully ascertainable and that the proceedings could be restored when MMI had been reached.

On 24/01/2019, the plaintiff asked for the proceedings to be restored and the parties agreed that the dispute should be referred back to Dr Machart. On 13/03/2019, the Registrar's delegate notified the parties that the proposed referral related to the left upper extremity (joint ring finger) and scarring. However, neither party informed the Registrar that the left wrist was omitted from the referral.

On 15/05/2019, Dr Machart issued a MAC, which assessed 61% WPI, comprising 60% for the left upper extremity (shoulder, elbow, wrist and all fingers of the left hand) and 2% for scarring.

On 15/06/2019, the insurer appealed against the MAC on the basis that the AMS had assessed body parts that were not referred to him and that the diagnosis of CRPS was made in error.

On 27/09/2019, ***the MAP*** revoked the MAC and issued a new MAC, which assessed 7% WPI, comprising 5% WPI (left ring finger) and 2% WPI (scarring). The MAP stated:

> 35. The appellant employer conceded that the referral by the delegate of the Registrar failed to identify the wrist as one of the matters for assessment and further, that the AMS himself had noted that the injury pleaded in the Application to Resolve a Dispute (ARD) was to the left wrist in addition to the matters that were actually referred….
>
> 39. It is clear from the description of the affected parts of the left upper extremity described in Part 10b (2) of the MAC that the AMS did assess the effect of the injury on the whole left upper extremity including the arm, shoulder, elbow, wrist and all fingers and thumb. We appreciate that such an assessment was difficult to compartmentalise in view of the diagnosis being CRPS affecting the whole upper limb. However, it is settled law that an AMS is confined by the terms of the referral.
>
> 40. In *Aircons Pty Ltd v Registrar of the Workers Compensation Commission of NSW*, Associate Justice Malpass observed at [34] that the referral should be regarded as being in the category of initiating process or pleadings.
>
> 41. In *Dening v Olfoy Pty Ltd trading as Noble Toyota* the referral was concerned with the assessment of hearing loss where the Appeal Panel was ambivalent about whether the employer was the last noisy employer. It was held that the Appeal Panel had erred. In *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd*, the question was whether the Appeal Panel had made findings beyond the scope of the referral, which, in the circumstances, it had not.
>
> 42. An AMS is bound by the terms of the referral by which he is appointed. Accepting the submission by the appellant employer that the referral did not reflect the intention of the parties in that the wrist was also to be assessed, it is clear that the AMS has nonetheless exceeded the terms of his remit. A demonstrable error has thereby occurred.
>
> 43. Accordingly we have determined that the MAC must be revoked. It is convenient to consider the other grounds raised by the appellant employer however, before doing so.

The MAP also held that the AMS had misapplied the diagnostic criteria for CRPS.

The Plaintiff alleged that the MAP erred at law: (1) by holding that the AMS had been wrong to assess impairment of the left wrist, elbow and shoulder; (2) by holding that the AMS was only entitled to assess the joint ring finger when the referral was to assess the left upper extremity; and (3) by holding that the AMS was only entitled to assess the body parts referred when it was not disputed that there was an established injury to the left wrist and there had been no determination of injury by an Arbitrator.

***Adamson J*** held that the MAP erred in finding that the AMS was not entitled to assess WPI by reference to the left wrist as the employer had conceded that this ought to have been included in the referral. This error led the MAP to omit the left wrist from its own assessment of WPI. However, the MAP was otherwise correct to find that the AMS had gone beyond the terms of the referral in assessing WPI for the whole of the left upper extremity.

Accordingly, her Honour set aside the decisions of the MAP and the Registrar and remitted the matter to the Registrar for determination in accordance with law.

## WCC – Presidential Decisions

### *Application of principles of estoppel – issue estoppel, the doctrine of res judicata and Anshun estoppel – joinder of parties in death claims*

**Secretary, Department of Communities and Justice v Miller and Anor (No. 5) [2020] NSWWCCPD 38 – President Phillips DCJ – 17/06/2020**

The previous decision of the Court of Appeal (Miller v State of New South Wales) [2018] NSWCA 152, was reported in Bulletin 21. However, the background is summarised below.

The first defendant claimed death benefits under s 25 *WCA* following the death of his wife, while she was at work, on 15/04/2011. The deceased was employed as a Community Transport Driver and was required to undertake driving duties when other drivers were not available. While performing those duties she suffered a severe asthma attack and a subsequent fatal cardiac arrest. On 5/05/2014, the Coroner entered a verdict of death due to anoxia, in turn due to a severe asthma attack.

On 21/03/2017, in *Miller v The State of New South Wales (Home Care Service Division)* [2017] NSWWCC 66 (*Miller No. 1*), Arbitrator Batchelor found that the deceased began having breathing problems from the time her bus commenced a return journey and increased to the point that a passenger asked her to pull over to the side of the road, which she did. There were 2 nurses were travelling in the bus and the worker carried Ventolin with her, he held that there was only a limited window of opportunity of a few minutes before the severe asthma attack proved to be fatal (by preventing the supply of oxygen to the body (anoxia) and leading to cardiac arrest). However, he found that the cause of the worker's injury was her pre-existing medical condition and that this was not aggravated by her employment and he entered an award for the respondent.

The claimant appealed against the Arbitrator's decision and alleged 17 errors of law. He also requested an oral hearing, leave to rely upon further medical evidence and leave to cross-examine a witness. However, ADP Parker SC decided that there was sufficient information upon which to determine the appeal '*on the papers*'. On 1/09/2017, he upheld the Arbitrator's decision: *Miller v State of New South Wales* [2017] NSWWCCPD 38 (*Miller No. 2*).

Parker ADP held that s 352 (6) *WIMA* requires the Commission to be satisfied that either: (a) the evidence concerned was not available to the party and could not reasonably have been obtained by that party before the proceedings concerned; or (b) the failure to grant leave would cause substantial injustice in the case (see: *CHEP Australia Pty Limited v Strickland* [2013] NSWCA 351, per Barrett JA at [27]). He found that there was no information as to why the further medical evidence could not reasonably have been obtained before the arbitral proceedings and it amounted to the proposition that if the worker received appropriate medical care sooner her prospects of survival were enhanced. However, it did not address whether there was an aggravation, acceleration, exacerbation or deterioration of asthma that was contributed to by employment (s 4 (b) (ii)) or whether the "*employment*" was "*a substantial contributing factor to the injury*" (s 9A (1).

Parker ADP was not satisfied that refusing leave to rely upon the further medical evidence would cause substantial injustice and/or that a different conclusion would have been reached if it had been received by the Arbitrator, and he refused to grant an extension of time to appeal. He also held that the appellant had not demonstrated any error in fact, law or discretion by the Arbitrator.

The claimant appealed to the Court of Appeal on 9 grounds. However, on 12/07/2018, the Court (McColl, Meagher & Leeming JJA) dismissed the appeal: *Miller v State of New South Wales* [2018] NSWCA 152. The Court held:

> 28. The short answer to all grounds of appeal is as was said by the respondent:
>
> > [Injury] wasn't ever put in a different fashion. It was never put, either to the Arbitrator or to the Deputy President, that there was an injury simpliciter in the form of a cardiac arrest or anoxia which was the injury which was to be determined by the Arbitrator.
>
> 29. That fairly describes the entirety of the proceeding before the ADP. There is ordinarily no error, still less any error of law, in failing to address a case which has not been put.

In 2019, the claimant and his son commenced further WCC proceedings against the current appellant and claimed lump sum compensation, weekly payments and funeral expenses. The ARD alleged that the cause of injury and death as follows:

> 1. The deceased suffered anoxia.
>
> 2. The deceased suffered a cardiac arrest.
>
> 3. The anoxia and/or the cardiac arrest is a personal injury pursuant to section 4(a) of the Act and arose out of or in the course of her employment.
>
> Further, or in the alternative, we are instructed to make a claim for death benefits under the provisions of Section 25 of the *Workers Compensation Act 1987* as amended for the death of Ms Moori Miller arising from an injury pursuant to section 4 (b) of the Act as follows:
>
> 1. The deceased was suffering from asthma, which is a disease.
>
> 2. The 'aggravation, acceleration, exacerbation or deterioration' of the asthma (the disease injury) was the worsening of the asthma symptoms and the anoxia, which caused the cardiac arrest.
>
> 3. The aggravation of the disease was caused when the effects of the disease were increased by external stimulus, in this case, the unavailability of necessary medical treatment by reason of the location at which the deceased was required to work.
>
> 4. The location of the deceased's employment gave rise to an inability on her behalf to access medical aids and treatment when she suffered an asthma attack which was a substantial contributing factor to her suffering the injury (the anoxia and/or the cardiac arrest).

On 11/10/2019, Arbitrator Wynyard issued a COD, in which he determined that the deceased's injury arose out of or in the course of her employment with the respondent and that her employment was a substantial contributing factor to the injury. He also held that the claimants were not estopped from bringing that application by the findings and orders made in the 2016 proceedings. The Arbitrator cited passages from the decision of President Phillips in *Fourmeninapub Pty Ltd v Booth,* in which his Honour considered the concepts of res judicata, issue estoppel and Anshun estoppel. He found that the same issues arose in this matter and stated (at paras [102] – [103]:

> Before Arbitrator Batchelor the state of fact or law giving rise to compensation was whether the deceased suffered a disease injury, whereas the issue before me has been whether the deceased suffered a personal injury as defined by s 4(a). In either case, the causes of action are different and therefore no issue estoppel arises. Also, because the cause of action claimed before me was separate and had an independent existence to that brought before Arbitrator Batchelor, the fundamental elements of res judicata were also absent.
>
> Accordingly, the applicant is not estopped by the principles of either issue estoppel or res judicata

The Arbitrator also stated (at [116]):

> I am satisfied that, had the deceased suffered her asthma attack whilst she was in her office at Brewarrina 30 minutes before she suffered her cardio-pulmonary arrest, she would probably have survived. I accept the evidence of Dr Jennings and Professor Fulde, which indeed accords with common sense, in that regard. The place of the injury, being in a remote location following her driving in the course of her employment from Brewarrina to Dubbo and thence through Nevertire to a point about 10 km from Nyngan, was a substantial contributing factor to her cardio-pulmonary arrest. The location deprived the deceased of the opportunity to have either the means or the time to avail herself of appropriate treatment.

The appellants appealed and asserted that the Arbitrator erred in fact and law: (1) by determining that the claimants were not estopped either through the principles of res judicata or issue estoppel from pursuing a further claim for compensation for the death of the worker; (2) by determining compensation for death of the worker was payable by it contrary to the evidence and in the absence of any or any adequate reasons; and (3) by failing to properly apply the principles in *Anshun*.

***President Phillips DCJ*** upheld ground (1). He stated (citations excluded):

> 145. The appellant employer contends that the respondents' claim ought to have been estopped either by virtue of the application of the principle of res judicata or issue estoppel. At the outset, is important to remark that these two forms of estoppel are quite different. In *Blair v Curran*, Dixon J remarked 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 of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
>
> 146. In terms of res judicata it has been described as follows. 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 or 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.

147. The constituent elements of res judicata have been set out by the learned authors of *The Doctrine of Res Judicata* in the following terms:

(a) the decision was judicial in the relevant sense;

(b) it was in fact pronounced;

(c) the tribunal had jurisdiction over the parties and the subject matter;

(d) the decision was

(i) final, and

(ii) on the merits;

(e) it determined the same question as that raised in the later litigation, and

(f) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

148. In terms of issue estoppel, this 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. Chief Judge McGrath observed in *Thompson v George Weston Foods Ltd* as follows:

> 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.

149. Finally, in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*, Lord Guest stated that issue estoppel required the existence of the following three components:

(i) that the same question has been decided;

(ii) that the judicial decision which is said to create the estoppel was final, and

(iii) 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.

The President noted that in the proceedings before the Arbitrator it was alleged that the anoxia and/or cardiac arrest suffered by the deceased was a personal injury pursuant to s 4 (a) *WCA* and a further or alternative claim was made under s 4 (b) *WCA* (the aggravation, acceleration, exacerbation or deterioration of asthma). However, the latter pleading was not the subject of any argument before the Arbitrator and his Honour stated that a claimant in a death claim has, depending upon the facts of the case, a choice of whether to advance the claim on the basis of an injury (s 4 (a)) or as a disease claim (s 4 (b) (i)). Being separate and distinct causes of action, as he found in *Booth*, "*the fundamental elements of res judicata are absent as the very right or cause of action claimed in proceedings before [the second Arbitrator] was not passed into judgment in the proceedings before [the first Arbitrator]*..."

In relation to issue estoppel, the appellant argued that there was a clear issue estoppel on the question regarding the remoteness of the deceased's location and that this was considered and dismissed in *Miller No. 1* and the finding was not disturbed in *Miller No. 2* and *Miller No. 3.* His Honour stated, relevantly:

> 157. With respect to issue estoppel, the Arbitrator found as follows:
>
> > It can be seen that the same issues have arisen in the present case, save that the situation is reversed. Before Arbitrator Batchelor the state of fact or law giving rise to compensation was whether the deceased suffered a disease injury, whereas the issue before me has been whether the deceased suffered a personal injury as defined by s 4(a). In either case, the causes of action are different and therefore no issue estoppel arises.
>
> 158. This finding, with respect however, does not deal with the issue that had been raised by the appellant employer in terms, being the issue of the location being remote. This was a matter which was clearly raised by the appellant employer as being a ground for the establishment of an issue estoppel. The learned Arbitrator, as is apparent, found that because different causes of action were involved, that the requirements for issue estoppel as set out in *Carl Zeiss* did not exist. Although the Arbitrator did not make this finding in these terms, I would infer that that is the result arising from Reasons. However, the basis upon which the issue estoppel was asserted, namely the remoteness of the location, was apparently not the subject of consideration.
>
> 159. Additionally, the third element of the *Carl Zeiss* components required the parties to the earlier decision, or their privies, to be the same. Issue has been taken as to whether or not Mr Tuhi was a party to the earlier proceedings and certainly there was no argument as to whether or not, if he was not party, whether he was Mr Miller's privy. However the submission has not been developed as to whether or not there is a relevant divergence between Mr Miller's position and that of Mr Tuhi regarding any potential issue estoppel. I would remark that it has long been the case that a dependant's rights are separate and distinct.
>
> 160. I do not consider that the learned Arbitrator has grappled with the issue estoppel question that was raised by the appellant employer. This matter needs to be remitted to another arbitrator to be redetermined with properly developed submissions. At that point, should the need arise, the separate issue of Mr Tuhi's position can also be ventilated. I would remark however, that the situation regarding Mr Tuhi's position is entirely unsatisfactory and I deal with that issue later in this decision.

Accordingly, the President rejected ground (2).

In relation to ground (3), the President stated, relevantly:

> 194. The mere fact that a party makes a choice to litigate a matter in other proceedings in and of itself is insufficient to ground an *Anshun* estoppel. This proposition has even greater resonance in the context of workers compensation cases given that the legislation does provide for various statutory benefits which can, quite properly, be asserted in different proceedings. But this does not mean that every decision in a workers compensation matter to litigate separate claims will always be permissible from an *Anshun* point of view. Rather, such a decision will only give rise to an *Anshun* estoppel if it was unreasonable not to have pleaded this cause in the earlier action. The principles distilled from the various authorities are neatly summarised by Judge Neilson in *Bruce v Grocon Ltd* in the following terms:

> The principles which I distil from these authorities are:
>
> (a) the principle in the *Port of Melbourne Authority v Anshun Pty Ltd* extends to claims as well as to defences: *O'Brien's* case in the Court of Appeal and *Boles'* case;
>
> (b) estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceeding or the granting of remedies inconsistent with the remedy originally granted or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
>
> (c) the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
>
> (d) it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case: *Boles'* case.

195. The learned Arbitrator, having posed the correct question at Reasons [104], then proceeds to review that which transpired In *Miller Nos 1, 2 and* 3, before turning to the final issue for determination, being the *Anshun* estoppel.[98]

196. At Reasons [118]-–[121] the learned Arbitrator then considers whether or not the *Anshun* estoppel is made out. He finds it is not, essentially on two bases. The first is "*the mere fact that the proceedings are closely related is insufficient*". However, it is clear that it is the additional medical evidence in *Miller & Anor No 4* which has figured highly in the learned Arbitrator's decision. At Reasons [120] the Arbitrator finds:

> As indicated, there was an absence of medical evidence in that matter required to support the s 4(a) claim that was before me. I have the additional evidence to which I have referred which was not part of the earlier matter.

197. This is a correct statement of fact; the learned Arbitrator was possessed of evidence which was not before the first instance decision maker in *Miller No 1*. However, that is not the end of the matter. The question which needed to be explored at this point was the exercise of the "*evaluative element based upon what a litigant could reasonably have been expected to do in earlier proceedings*" in accordance with McColl JA's remarks in *Habib* which I have set out above. The learned Arbitrator did not undertake this consideration.

198. However, it is hard to discern where the enquiry which is posed by the learned Arbitrator at Reasons [104] is actually answered in terms. The fact, as stated at Reasons [110] that "*there was an absence of medical evidence before Arbitrator Batchelor to support the present claim, which is based on the occurrence of a personal injury pursuant to s 4 (a), namely the cardio-pulmonary arrest*" was factually correct. This finding ought to have led the learned Arbitrator, consistent with the task set at Reasons [104], to considering whether or not it was unreasonable not to have advanced this case in *Miller No 1*. This would have entailed a consideration of what was known to the respondent and his advisers at the time of *Miller No 1* and then the undertaking of the evaluative judgment as to whether it was unreasonable not to have pursued this allegation. The medical evidence was available to the respondents and their advisers before the commencement of the 2016 proceedings, but the case now advanced was not advanced in the 2016 proceedings.

The President stated:

> 200. The similarity of the proceedings in and of themselves is not determinative but it is certainly a factor that needs to be evaluated. However, the question that the learned Arbitrator had to grapple with was whether or not it was unreasonable of the respondent not to have proceeded with the current allegations in the 2016 proceedings.
>
> 201. These are matters which will need to be properly prepared and explored. Accordingly, it is appropriate that the matter be remitted to another Arbitrator for redetermination to enable the *Anshun* issues to be properly considered and addressed. The learned Arbitrator was not much assisted by not being taken to these issues which go directly to whether an *Anshun* estoppel arises or not. I am satisfied that the learned Arbitrator was aware of the *Anshun* principle as described at Reasons [104]. However in rejecting the *Anshun* argument, the learned Arbitrator failed to apply the test which he had quite properly set for himself at Reasons [104].
>
> 202. I note that reference has been made to my decision in *Booth* in as much as it dealt with an *Anshun* estoppel question. In that case I held that there was no *Anshun* estoppel as there was no evidence at the time of the filing of Ms Booth's original proceedings which would have put her or her advisers upon notice of a psychiatric condition which had not yet materialised. That is to be contrasted with the situation here where the knowledge of what transpired on 15 April 2011 was in fact well known to the parties and their representatives. I think the facts in *Booth* can therefore be distinguished accordingly from those in this matter.
>
> 203. I therefore conclude that the learned Arbitrator, by not undertaking the enquiry that I have referred to above, namely whether it was unreasonable not to have advanced the current claim in the earlier proceedings, has in fact acted upon a wrong principle in a *House v The King* sense. The material which I have briefly outlined above was not taken into account in terms of considering the question of unreasonableness. The learned Arbitrator was thus in error.

Accordingly, the President revoked the COD and remitted the matter to a different Arbitrator for determination in accordance with his reasons.

### *Section 11A WCA - Reasonable action with respect to discipline*

**BC v State of New South Wales [2020] NSWWCCPD 39 – Deputy President Wood – 19/06/2020**

The appellant was employed as a Registered Nurse in a mental health unit from February 2013. He claimed compensation for an alleged psychological injury due to workplace bullying, harassment and vilification at work, which culminated in an incident on 21/11/2017. However, the respondent disputed the claim under s 11A *WCA.*

There was no dispute that on 21/11/2017, the appellant was the nurse in charge of the mental health unit when an aggressive patient stabbed a security guard with a pencil. The respondent's policy required him to complete the "*Seclusion and Restraint*" Register, but he did not do this before the shift ended. The respondent made several requests that he complete the register, but he did not do so. On 6/12/2017, the Clinical Operations Manager emailed him requesting an informal meeting with him, but this meeting did not take place.

On 13/12/2017, the Clinical Operations Manager lodged a complaint with the Australian Health Practitioner Regulation Agency (AHPRA) in relation to the appellant's failure to complete the register.

On 28/12/2017, the appellant was handed 2 letters: (1) from the Clinical Operations Manager, which set out 10 allegations of inappropriate behaviour on his part; and (2) from the Director of Operations, advising that a risk assessment had been conducted and that he would be placed on restricted alternate duties and that he was required to advise the Service Check Register of the restrictions.

On 8/11/2019, Senior Arbitrator Bamber issued a COD, which determined that the injury was wholly or predominantly caused by reasonable action on the part of the respondent in respect of discipline and entered an award for the respondent. The Senior Arbitrator determined that the appellant was an unreliable witness, she preferred the evidence of the respondent's witnesses and was not satisfied that the alleged incidents occurred.

On appeal, the appellant asserted that the Senior Arbitrator erred in finding that the respondent's actions were reasonable, she failed to provide sufficient reasons and overlooked material facts and/or failed to give them appropriate weight. The evidence that he identified was: (1) an email dated 13/12/2017 from the Clinical Nurse Consultant, which requested a number of staff to complete the Restraint Register; (2) the Complaint to AHPRA, which indicated that the Clinical Nurse Consultant had discussed the complaint with him; and (3) a series of emails commencing on 6/12/2017.

***Deputy President Wood*** referred to the email dated 13/12/2017, which the Senior Arbitrator considered relevant because it indicated that the Restraint Register had not been completed. She stated that a perusal of the transcript indicates that the appellant made no submission about this document at the arbitration and held that it was not an error for the Senior Arbitrator to fail to deal with a submission that was not put. She also stated:

> 148. The appellant submits that this evidence was material evidence that showed that the disciplinary process was unreasonable because there was no evidence that the other staff member was disciplined. The appellant's submission cannot be accepted. The document is not evidence that the other staff member's failure to complete the register related to the same incident and there is no evidence that the other staff member had failed to respond appropriately to numerous requests from the employer to complete the register. The appellant's entire behaviour in refusing and failing to adequately complete the Restraint Register was the subject of the disciplinary process and there is no evidence that the other staff member exhibited such behaviour. Whether or not the other staff member was disciplined in respect of her behaviour, about which there is no evidence, is irrelevant to the question of whether the disciplinary action taken by the respondent in respect of the appellant's conduct was reasonable, which must be determined on its own facts.

The appellant also argued that the Senior Arbitrator failed to take into account, or give sufficient weight to, the evidence that the Clinical Operations Manager lodged the complaint with AHPRA, indicating that she had discussed the complaint with him, when she had not and that this was procedurally unfair. Wood DP noted that the Senior Arbitrator found it reasonable that the respondent commenced the disciplinary process in the context of numerous unheeded requests directed at the appellant to comply with his obligation to ensure the Restraint Register was completed and found that his failure to do so, together with his false entries in the observation charts, were serious matters. She stated that given the undisputed factual evidence of the numerous communications with the appellant about completing the Restraint Register, it cannot be said that that concern had not been discussed with him.

However, Wood DP noted that there was no evidence that the complaint about the appellant falsely completing the observation chart was discussed with him and it was necessary to determine whether, on the basis of an assumption that there had been no such discussion, the failure to discuss the matter was sufficient evidence to displace the Senior Arbitrator's decision that the respondent's disciplinary action was reasonable.

Wood DP noted that the appellant did not dispute that he had falsified the records. The complaint form was not predicated by a requirement that the complaint be discussed with the appellant before the complaint could be lodged and it could have been lodged anonymously. The appellant does not explain why it was unfair for the respondent to lodge a complaint with AHPRA without having first discussed the complaint with him. In the context of patient safety and hospital obligations, the breach was serious and it cannot be said that the appellant had been treated unfairly. Further, as observed by Roche DP in *Raulston* (citations omitted):

> In summary, the role of a Presidential member is to determine if the decision appealed against is affected by error and, if so, to correct that error. The error must be one that has affected the outcome.

Wood DP held that in accordance with the principles in *Raulston* the Senior Arbitrator had not failed to take into account a material fact which, if considered, would be of sufficient weight to disturb her decision and any failure to give consideration to the absence of evidence that the Clinical Operations Manager had discussed the complaint with the appellant is immaterial. The probative value of that evidence has not been explained, other than it was unfair to the appellant and that submission has been rejected. Further, even if the Clinical Operations Manager's action in lodging the complaint was not reasonable, not every action in the disciplinary process must be reasonable. In *Department of Education and Training v Sinclair*, Spigelman CJ (with Hodgson and Bryson JJA agreeing) observed:

> Furthermore, the case before Sheahan J primarily focused on the whole course of Departmental conduct as constituting the relevant '*substantial contributing factor*' for purposes of s 9A. His Honour appeared to approach the s 11A issue on the same basis. This is an appropriate course to adopt in a context concerned, and concerned only, with psychological injury arising from matters such as '*demotion, promotion, performance, appraisal, discipline, retrenchment or dismissal*'. Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.
>
> His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation '*reasonable action with respect to discipline*'. In my opinion, a course of conduct may still be '*reasonable action*', even if particular steps are not. If the '*whole or predominant cause*' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, '*reasonable action*'.

Accordingly, Wood DP held that any failure by the Senior Arbitrator to consider that evidence had not affected the outcome and she rejected the appellant's argument that it was unreasonable that the respondent elected to propose a formal meeting to investigate those matters, rather than conduct the informal meeting proposed to address his conduct on the shift on 21/22 November 2017.

While the appellant also argued that the Senior Arbitrator gave inconsistent and insufficient reasons to explain her conclusion that the actions were reasonable, Wood DP held that there was no inconsistency in the Senior Arbitrator's reasons or her ultimate conclusion and that the conclusion was open to her.

Accordingly, Wood DP confirmed the COD.