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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. Naidu v State of New South Wales [2020] NSWCA 147
2. Weate v Racing NSW [2020] NSWWCCPD 40
3. Qantas Airways Ltd v Coleman [2020] NSWWCCPD 42
4. King v Metalcorp Steel Pty Limited [2020] NSWWCC 234
5. Rohl v Flincept Pty Ltd [2020] NSWWCC 236
6. Sharman v Chemtools Pty Ltd [2020] NSWWCC 237

Court of Appeal Decisions

Meaning of exceptional circumstances in the context of an application for extension of time to appeal from an Arbitrator's decision

Naidu v State of New South Wales [2020] NSWCA 147 – Basten & Leeming JJA – 15 July 2020

The Presidential decision in this matter was reported in Bulletin no. 51, but its background is summarised below.

On 5/11/2007, the appellant injured her right ankle and foot at work. She resumed work on restricted hours, but alleged that she was then bullied by her supervisor and ceased work on 14/07/2008, following an alleged assault by her supervisor. She did not return to work and claimed compensation under ss 66 and 67 *WCA* for 22% WPI for an alleged primary psychological injury. The respondent disputed the claim.

On 13/10/2014, ***Arbitrator Foggo*** entered an award for the respondent. He held that if the appellant sustained a psychological injury in the course of or arising out of her employment, it was a secondary psychological injury.

The appellant appealed and the respondent opposed the appeal. The Commission directed the parties to file and serve any Further Amended Application, accompanied by submissions in support of a grant of leave. The question of leave was to be determined by the Presidential member and the respondent was given time to lodge submissions in response, including the question of leave.

Deputy President Snell granted the appellant leave to rely upon a Further Amended Application dated 16/09/2019.

In relation to an application to extend time, Snell DP referred to s 324 (4) *WIMA* and noted that the applicable principles, taken from *Gallo v Dawson*, were summarised by Roche DP in *Allen v Roads and Maritime Services* as involving the need to have regard to the following matters: (a) the history of the proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences for the parties of the grant or refusal of the application for the extension of time; (e) the prospects of the applicant succeeding in the appeal, and (f) upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for extension of time is granted

In *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd*, the Court of Appeal held that the primary considerations on an application for leave to extend time within which to appeal are: (a) the extent of the delay and the reasons therefor; (b) the prejudice to the applicant if the application were to be refused; (c) the prejudice to the defendant from the delay if the application were to be granted; and (d) the prospects of success of the proposed appeal.

As to "*delay*", Snell DP noted that the current appeal was lodged approximately four years out of time. The appellant asserted that she had instructed three lawyers to act for her since the Arbitrator's decision was issued and said she became self-represented in May 2018. Her original solicitor attempted to lodge an Appeal in November 2014, which was within time, but that it was rejected by the Commission. An Amended Appeal was filed on 27/11/2014, but it did not comply with Practice Direction no. 6 and it was also rejected. The Commission's file was then closed. He stated, relevantly:

> 51. The delay from 13 October 2014 (the date of the arbitral decision) to 19 December 2014 (the last conversation with the Presidential Unit Manager) is adequately explained. This leaves a period from about December 2014 to 30 May 2018, about three and a half years, when the appellant was represented by three different firms of solicitors. This period is largely unexplained. Two medical reports were obtained. There was a misconceived application to restore the original appeal proceedings which were no longer on foot. One of the firms requested material from the insurer, and formed the view the proceedings did not have reasonable prospects of success. This amounts to some explanation of the delay over this period but it is not, in my view, adequate. There is little explanation of what instructions the appellant gave, or of what (if anything) she did to have her solicitors progress the matter. There is no meaningful evidence about what contact the solicitors had with the appellant, and why.
>
> 52. This then leaves the period from 30 May 2018 to 10 May 2019, about one year, when the appellant was unrepresented. The only explanation of delay over that time is the appellant's statement that she saw the Registrar of the Supreme Court of NSW, to see if she could lodge her case in that jurisdiction.
>
> 53. Viewing the lengthy period of delay in its entirety, it is in no way adequately explained. There is little explanation at all of the last year.

Snell DP rejected that the appellant's arguments about '*injury*'. As to whether there is "*an arguable case*" on appeal, he noted that the appellant relied upon 14 grounds, of which 7 concerned how the Arbitrator dealt with the medical evidence. He accepted the appellant's argument that the Arbitrator did not deal with the opinions of Dr Sringeri or Dr Gertler and stated, relevantly:

63. …In *Beale v Government Insurance Office of NSW* Meagher JA said:

> No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to."[59] (references omitted)

64. There was passing reference in the reasons to the reports of Dr Sringeri and Dr Gertler, but not to the opinion of those doctors relevant to the central issue of whether the appellant had suffered a 'primary' or 'secondary' psychological injury. That opinion evidence was contrary to the Arbitrator's conclusion that the psychological injury was secondary. It was necessary that the Arbitrator deal with this opinion evidence, and he failed to do so. This involved error.

Snell DP noted that grounds 3 and 4 related to the adverse credit findings that were based on the Facebook and surveillance material. The appellant alleged that she was denied procedural fairness as she did not have an opportunity to respond to allegations that her statement was untruthful, the Facebook evidence and her supervisor's denial of the assault. She alleged that the Arbitrator's finding was based upon speculation and not evidence and that he assumed the role of a medical assessor. However, he held that the appellant was not denied procedural fairness and stated that she did not raise these matters at first instance and they could not be raised on appeal.

Snell DP described Arbitrator's manner of dealing with fact finding as "*a little unusual*", but felt that this was probably due to how the respondent disputed the claim. He held:

> 79. Whether the appellant suffered from a '*primary psychological injury*' was not purely a medical issue. The appellant's submissions before the Arbitrator dealt at some length with alleged events at work that were potentially causative of psychological injury, and medical histories that were associated with such events.[84] The balance of the grounds of appeal deal, in a general sense, with the issue of '*injury*', more particularly whether the lay and medical evidence supported the occurrence of a '*primary psychological injury*'.
>
> 80. The Arbitrator found that he could not accept the evidence of the appellant unless it was independently corroborated. Grounds Nos. 2, 7 and 10 seek to identify aspects of the evidence where the appellant was allegedly corroborated, such that her evidence should have been accepted in any event…
>
> 85. The various complaints by the appellant relied on in this ground, although they are relatively contemporaneous, remain complaints that are dependent on acceptance of the appellant's reliability to establish that the events occurred. They do not involve independent corroboration, the term used by the Arbitrator in his credit finding. Earlier versions of events given by the appellant, if the appellant's evidence is not acceptable having regard to the Arbitrator's credit finding, do not establish the occurrence of the events…

87. The appellant's submissions dealing with Ground No. 7 essentially raise the same point again. The appellant refers to Dr Hanif's report and the symptoms described. The appellant submits there is no suggestion these symptoms were feigned, so it is unchallenged evidence suggesting a psychological condition. To the contrary, the Arbitrator, in the reasons, did raise the possibility that symptoms were feigned. He referred to the disparity between the Facebook material and the surveillance, compared with the histories to doctors and the appellant's statement, and his view that the appellant's explanation of the difference between these was "*totally inadequate*". He said:

> It raises the question whether the [appellant's] complaints of psychological symptoms have been exaggerations or falsehoods from their very inception.

88. The Arbitrator did not answer this question in specific terms. The above passage makes it clear how deeply the appellant's credibility had been damaged, in the Arbitrator's view, by the Facebook material and the surveillance. The passage demonstrates that the Arbitrator, as a result of his credit finding, did not accept the genuineness of the appellant's complaints of psychological symptoms, at any stage of the alleged illness. In those circumstances, the arguments advanced in respect of Grounds Nos. 2, 7 and 10 would not succeed.

In relation to ground 8, Snell DP noted that the appellant complained that the Arbitrator wrongly found that the meeting on 11 March 2018 was not significant as she did not refer to it in her statement and that this influenced his not finding a primary psychological injury. He held that the appellant bore the onus of proof and the Arbitrator's comments regarding the deficiency in her case was available.

Snell DP noted that grounds 8 and 9 refer to the decisions in *State Transit Authority of New South Wales v Chemler* and *Attorney General's Department v K,* in which Roche DP discussed *Chemler* and other authorities relating to proof of psychological injuries. In Chemler, Basten JA stated:

> Nor is it necessary to determine whether the Respondent's response was a misperception as to the intention or attitudes of his fellow workers. In contrast to discrimination law, the proper focus in this context is the consequence of conduct on the claimant and not, even in a limited sense, the motivation, intention or other mental state of the co-worker or supervisor: cf *Purvis v New State Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92 at [166] (McHugh and Kirby JJ); and [234]-[236] (Gummow, Hayne and Heydon JJ). If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognizable injury followed, it was open to the Commission to conclude that causation was established.

The appellant also argued that the Arbitrator failed to indicate that he considered the principles in *Chemler*. In relation to this argument, Snell DP stated, relevantly:

> 94…An independent witness could not corroborate something that the appellant allegedly perceived to have happened. On reflection, the respondent's submission on this point is correct. It having been raised in the appellant's submissions before the Arbitrator, and potentially being relevant to the case the appellant presented, the Arbitrator should have referred to the argument based on Chemler. However, given the credit finding, that argument would not succeed. The appellant's perception of events was not something that could be independently corroborated.

Snell DP held that there were no "*exceptional circumstances*" and in making that finding he discussed the decisions of Allsop P (as his Honour then was) in *Bryce v Department of Corrective Services*, Campbell JA, in *Yacoub v Pilkington (Australia) Ltd* and Keating P in *Webb v Penrith Rugby Leagues Club Ltd*. He stated that the circumstances surrounding the conclusion of the first appeal were not exceptional and they were *"relatively commonplace, regular or routinely encountered*" and the evidence dealing with the very lengthy delay does not establish exceptional circumstances. He stated:

> 109. In *Gallo v Dawson* McHugh J, dealing with an application to extend time in which to bring an appeal, said:
>
> > The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties: see *Hughes v. National Trustees Executors and Agency Co. of Australasia Ltd.* [1978] VicRp 27; (1978) VR 257, at p 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant.
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> 110. In *Iovanescu v McDermott* Windeyer J (Sheller JA and Young CJ in Eq agreeing), dealing with an application that a matter be restored to the list, referred to the need for a proper explanation of delay, saying:
>
> > It is always a question bearing upon the exercise of discretion in a claim for extension of time: *Salido v Nominal Defendant* (1993) 32 NSWLR 524 at 533, 539 and 541; *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128 at 136. That is because it goes to the question of whether it is just and fair to grant the indulgence sought, namely an extension of time ...
>
> 111. In *Salido v Nominal Defendant* Gleeson CJ (as his Honour then was) said (in the context of an application under the *Motor Accidents Act 1988*):
>
> > The diligence, or lack of diligence, shown by a plaintiff or a plaintiff's representatives, in ascertaining and asserting his or her rights will ordinarily be a material factor, as will the extent of the relevant delay, and the reason for it.

Snell DP concluded that the appeal is "*not fairly arguable*", based upon the decision in *Leichhardt Municipal Council v Seatainer Terminals Pty Lt*d, in which Moffitt P said:

> ... it is not sufficient to show that some error of law appears in the judgment or during the course of the trial. The error has to be one upon which the decision depends, so the decision is vitiated by the error ... It will not suffice to establish that one or some only of a number of alternate findings upon which the decision was given involved errors of law, if one alternative involved no error of law.

Accordingly, Snell DP refused to extend the time to appeal under r 16.2 (5) of the Rules.

The appellant applied for leave to appeal to the Court of Appeal.

The Court of Appeal allowed an extension of time to file the summons, which raised 5 proposed grounds. Basten and Leeming JJA discussed these as follows:

(1) Error in failing to hold a conference or formal hearing. The appellant argued that the principles of procedural fairness require a formal hearing and that the material was incapable of satisfying Snell DP to exercise the power in s 354 (6) WIMA.

The Court held that this proposed ground does not warrant a grant of leave as the appellant was legally represented and requested that the appeal proceed on the papers and there was no denial of procedural fairness.

(2) Errors of legal principle in failing to find that the Arbitrator had misconceived his role or made errors based on speculation.

The Court noted that this ground went to the merits of the application and not the extension of time. It observed that in no view does this ground amount to an error that is plain on the face of Snell DP's reasons giving rise to a clear injustice.

(3) Snell DP should have taken into account, but erroneously failed to take into account, certain material.

The Court held that Snell DP was aware of this "*material*" and he dealt with it expressly. The Court stated that the inference sought to be drawn by the appellant was not established and, insofar as any of that material bore upon the issue of delay and establishing exceptional circumstance, it was taken into account.

(4) The appellant asked the question, whether the exercise of discretion under r 1.6(2) of the Rules was a mandatory relevant consideration that DP Snell failed to consider? She argued that as Snell DP was not satisfied that the discretion in r 16.2(5) ought to be exercised, he was bound by the WIMA to consider the exercise of discretion under r 1.6 (2) of the Rules.

The Court held that there is nothing in this ground that warrants a grant of leave as there is no suggestion that Snell DP was ever asked to dispense with this rule.

(5) Snell DP drew inferences that were not reasonably available.

The Court stated that even taken at its highest, this ground does not materially detract from the difficulties faced by the appellant concerning the lengthy and unexplained delay, and the failure to find exceptional circumstances. It held:

> 33 No proper basis has been made out to impugn the finding that exceptional circumstances warranting an extension of time had not been established. The proposed grounds that challenge other aspects of the Deputy President's decision do not warrant a grant of leave. It follows that there is no sound basis on which there should be a grant of leave to appeal.

Accordingly, the Court dismissed the summons seeking leave to appeal, with costs.

WCC – Presidential Decisions

Requirements of s 352 (3) WIMA & leave to appeal an interlocutory decision under s 352 (3A) WIMA

Weate v Racing NSW [2020] NSWWCCPD 40 – Deputy President Snell – 24/06/2020

The appellant was a jockey for about 37 years and suffered multiple injuries. He last worked as a jockey on 15/01/2008, when fell from a horse during a barrier trial and injured his right shoulder and ribs. He was not cleared to resume racing. He then worked as a cleaner.

In 2009, the appellant claimed lump sum compensation for 16 injuries suffered between 30/07/1982 and 15/01/2008. The dispute was referred to Dr Bodel and on 17/11/2009, he issued a MAC, which assessed 7% WPI (11% WPI less a deductible under s 323 *WIMA*). The appellant's weekly payments later ceased by operation of s 39 *WCA.*

On 19/04/2018, Dr Sharp sought approval from the respondent for surgery to the right shoulder. The respondent disputed the claim and the dispute was referred to the Commission. On 19/04/2018, the parties filed consent orders, under which the respondent agreed to pay the costs of and incidental to the proposed surgery without admission of liability under ss 41A and 50 (2) *WCA*.

On 22/05/2019, Dr Sharp performed the surgery and on 1/07/2019, he reported that maximum medical improvement had not been reached.

On 17/01/2019, the appellant's solicitors served Dr Sharp's report on the respondent and requested the resumption of weekly payments. On 20/08/2019, the appellant filed an Application for Assessment by an AMS to determine whether the degree of permanent impairment was fully ascertainable.

On 11/12/2019, ***Arbitrator Bachelor*** issued a COD and SOR in which he determined that as the appellant had not made a claim for lump sum compensation, the Commission did not have jurisdiction to refer the matter to an AMS for assessment as to whether MMI had been reached. The Application was dismissed.

The appellant appealed and requested an oral hearing. However, ***Deputy President Snell*** determined the appeal on the papers. He noted that there were 2 threshold issues – (1) the quantum required under s 352 (3) *WIMA*; and (2) the decision appealed against is interlocutory and leave to appeal is required under s 352 (3A) *WCA.*

Snell DP stated that the ground of appeal set out in the appellant's submissions did not make sense, but it appears to be "*The Arbitrator made a mixed error of fact and law in finding that the appellant failed to make a claim for compensation and that there was no medical dispute.*"

With respect to s 352 (3) *WIMA*, Snell DP referred to the decisions of Fleming DP in *Grimson v Integral Energy* [2003] NSWWCCPD 29 (*Grimson*), Keating P in *NSW Department of Education and Communities v Colefax* [2012] NSWWCCPD 63 (Colefax) and Fleming DP in *Fletchers International Exports Pty Limited v Regan* (*Regan*). He noted that in *O'Callaghan v Energy World Corporation Ltd* [2016] NSWWCCPD 1 Roche DP applied the reasoning in *Regan* in a Presidential appeal from a refusal by an arbitrator to set aside consent orders for the payment of lump sum compensation. The purpose of the application was to permit a medical appeal under s 327 *WIMA.* Roche DP held that the worker "*has claimed no compensation in the present proceedings, and given no notice of any intention to claim compensation*. *It follows that no compensation is at issue in the appeal.*"

Snell DP stated that he applied the reasoning in these decisions in *Abu-Ali v Martin-Brower Australia Pty Ltd* [2017] NSWWCCPD 25, on an application where a worker sought referral to an AMS for assessment of permanent impairment with respect to a secondary psychological injury, with a view to being assessed a worker with high or highest needs. He concluded that the s 352 (3) threshold was not satisfied in those circumstances.

In *Anderson v Secretary, Department of Education* [2018] NSWWCCPD 32 (*Anderson*) Wood DP dealt with an appeal involving an application for referral to an AMS for the purpose of "*potential claims pursuant to ss 39 and 60AA*". No particulars of a weekly payment claim or a s 60AA claim were provided in the application. Applying the reasoning of the above decisions, Wood DP held concluded that the threshold in S 352 (3) *WIMA* was not satisfied.

Snell DP held that the s 352 (3) *WIMA* threshold was not satisfied and he stated:

> 41. The appellant's submissions argue that a claim for weekly payments was contained in his letter dated 17 July 2019. That letter enclosed a copy of Dr Sharp's report dated 1 July 2019. That report referred to the surgery on 22 May 2019 and said the appellant had not reached maximum medical improvement. It said the answer to when he would do so was "*probably two to three months, although that could be longer*". The letter dated 17 July 2019 is described at [4] above. It requested "*reconsideration and commencement of weeklies per force of section 32A of the Workers Compensation Act 1987 definition of injured worker with high and highest needs as in forms [sic] the operation of section 39 of the Workers Compensation Act 1987*."

42. The letter did not specify the rates or periods during which any weekly compensation was sought. The appellant was last paid weekly compensation as at 26 December 2017, about 18 months prior to the letter. It should be noted that the note to subs (2) of s 39 draws attention to the fact that payments outside the first 260 weeks are "*still subject to section 38*". Even if the matter is approached on the basis the letter constituted a claim, which the relief sought in the Application had the capacity to affect, there was no specific claim made on the respondent.

43. If the appellant's application succeeded, and the Arbitrator referred the matter to an AMS to assess "*whether the degree of permanent impairment is fully ascertainable*", this would not have led to an award for compensation. Subsection (2) of s 39 applies in specific circumstances, where an injured worker's "*degree of permanent impairment resulting from the injury is more than 20%*". The application was not for assessment of the degree of permanent impairment, and the appellant had made no such claim, he not (on the evidence before the Commission) having an assessment of permanent impairment since the earlier MAC dated 17 November 2009.

Snell DP held that the decision under appeal is interlocutory in nature, based upon the decision of Gibbs J in *Licul v Corney* [1976] HCA 6, which has been frequently applied in the Commission:

> The distinction between final and interlocutory judgments is not always easy to draw and there has been disagreement as to the test by which the question whether a judgment is final or interlocutory is to be determined. One view - which was preferred by the Court of Appeal in *Salter Rex and Co. v. Ghosh* - is that the test depends on the nature of the application made to the Court. The other view which, since Hall v. Nominal Defendant, should, I think, be regarded as established in Australia, depends on the nature of the order made; the test is: Does the judgment or order, as made, finally dispose of the rights of the parties?

As the appellant requires leave to pursue the appeal, it is necessary to consider whether determining the appeal is "*necessary or desirable for the proper and effective determination of the dispute?*" In *Collingridge v IAMA Agribusiness Pty Ltd* [2011] NSWWCCPD 31, Roche DP held that this requires a consideration of the nature of the dispute and the orders sought on appeal. Snell DP noted that based upon Dr Sharp's opinion, it is likely that the appellant's medical condition has been ready for assessment for some time and, when assessed, he has an available claim for compensation under s 66 that he can pursue. If his permanent impairment exceeds 20% WPI, the appellant will be entitled to whatever rights flow from that under s 39 (2) *WCA* or any other provisions relevant to a worker with high or highest needs that may apply. A decision from an AMS as to whether permanent impairment is fully ascertainable will not assist one way or the other.

While the appellant sought to argue that the Arbitrator failed to consider cl 28C of the *Regulation,* Snell DP noted that this was not raised before the Arbitrator and he refused to allow the appellant to raise it on appeal.

Accordingly, Snell DP refused leave to appeal.

Alleged factual error – the drawing of inferences – Arbitrator's duty to provide adequate reasons

Qantas Airways Ltd v Coleman [2020] NSWWCCPD 42 – Deputy President Snell – 30 June 2020

The worker was employed by the appellant as a long-haul flight attendant from 6/06/1988 to 6/03/2019. On 20/05/2016, he suffered undisputed injuries to his dominant right arm and shoulder. However, the worker alleged that he reported injuries to his right shoulder and elbow and that he had an uncomfortable numbness sensation and tingling in both hands, including the fingertips, to the Customer Service Manager on the flight. He was in Santiago for a number of days before there was a return flight to Sydney and did not see a doctor in Santiago. The Customer Service Manager failed to record the symptoms in his left hand.

The worker lodged a claim form on 31/05/2016, which referred to the symptoms in his right arm, but not the left arm and the appellant accepted that claim. Dr Nicklin, treating plastic and reconstructive surgeon, diagnosed right-sided ulnar neuropathy secondary to cubital tunnel and performed surgery on 15/09/2016.

At/around Christmas 2016, he developed clawing of his left hand and Dr Nicklin diagnosed ulnar nerve impingement and recommended urgent left elbow surgery, which was performed by Dr Darveniza on 10/03/2017. However, the appellant disputed injury to the left arm.

The worker was also referred to Dr Sher, who performed a right arthroscopic acromioplasty, rotator cuff repair and biceps tendonesis on 5/04/2017. He resumed restricted duties in September 2017 and normal duties from February 2018, but took a voluntary redundancy on 6/03/2019.

The worker claimed compensation under s 66 *WCA for* 17% WPI based upon assessments of both upper extremities by Dr Bodel. The appellant disputed the claim for the left upper extremity and disputed that the threshold under s 66 (1) *WCA* was satisfied solely with respect to the right upper extremity.

On 30/01/2020, ***Arbitrator Isaksen*** determined that the worker injured his left ulnar nerve on 20/05/2016. He remitted the s 66 dispute to the Registrar for referral to an AMS to assess permanent impairment of both upper extremities. He found that the contemporaneous medical evidence included a certificate from Dr Hirschowitz dated 31/05/2016 and his clinical notes, which indicated complaints in both arms and that bilateral nerve conduction studies were performed on 6/06/2016. He stated:

> I consider it reasonable and understandable that although the [respondent] was pulling his bag out from the overhead locker, once it began to fall he also used his left arm to try to stop the bag from continuing to fall. Although the [respondent's] right arm took most of the weight because that was the arm that he was using to try to pull the bag from the locker, there would have been at least some strain upon his left arm."

The Arbitrator referred to *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd*, in which McDougall J referred to a fact finder making a rational choice between competing hypotheses, with an actual persuasion of the existence of the fact. He stated that the worker had not previously suffered left hand or arm symptoms; the weight of the falling bag took him by surprise and the incident caused immediate symptoms in both arms. The main concern was right sided symptoms and it was not necessary for the worker to provide a "*word perfect*" description of the incident.

The Arbitrator held that he was actually persuaded that the incident on 20/05/2016 caused injury to the left upper limb and he preferred the opinion of Dr Nicklin to the appellant's doctors. He stated that Dr Harrington's opinion was compromised by his understanding that the worker did not have left arm symptoms when the nerve conduction studies were performed on 6/06/2016, which is contrary to the records of Dr Hirschowitz and Dr Best. Dr Powell's opinion was based on an incorrect understanding that the worker did not have left arm symptoms until about 6 months after the workplace incident. He referred to the discussion of '*personal injury*' in *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45, as "*a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state*". He was satisfied there was a sudden pathological change to the left ulnar nerve, notwithstanding the symptoms were not initially as severe as those in the right arm.

On appeal the appellant alleged that the arbitrator erred as follows: (1) by inferring that the worker's left arm was involved in the incident on 20/05/2016; (2) by determining that the worker sustained an injury as defined in s 4 *WCA* to the left arm based on his erroneous inference; and (3) by failing to provide adequate reasons addressing the nexus between the ulnar neuropathy of the left arm and the incident on 20/05/2016.

Snell DP rejected ground (1). He stated that the relevant test is that set out by the High Court in *Bradshaw v McEwans Pty Ltd*:

> In questions of this sort where direct proof is not available it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture (see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf per Lord Loreburn, above, at 678.

Further, in *Fuller-Lyons* [2015] HCA 31*,* the High Court referred to the need for an inference of fact to involve "*a definite conclusion of which the trier of fact is affirmatively satisfied, as distinct from merely a possible explanation for the known facts*".

Snell DP stated that in considering whether an inference should be drawn, it is necessary to consider the evidence as a whole on the balance of probabilities. He stated that an Arbitrator is entitled to make findings "*within the realm of common knowledge and experience*" and this includes a conclusion that in giving a medical history, an injured person would give more attention to his most concerning problems. Even if this error was made out, the appellant does not deal with whether, and in what way, this would affect the result. He held that the inference was available on the evidence.

Snell DP also rejected ground (2), for the reasons set out in relation to ground (1).

Snell DP also rejected ground (3), which was dependent upon acceptance of grounds (1) and (2).

Accordingly, he confirmed the COD.

Arbitrator Decisions

Section 39 WCA - COD reconsidered under s 350 (3) WIMA following Court of Appeal's decisions in Hochbaum and Whitton – Award for the worker from the date of cessation of weekly payments to the date that an AMS certified that the degree of permanent impairment was not fully ascertainable

King v Metalcorp Steel Pty Limited [2020] NSWWCC 234 – Senior Arbitrator Capel – 13/07/2020

The Senior Arbitrator's original decision in this matter was reported in Bulletin no. 36. The Arbitrator applied Phillips P's decisions in *Hochbaum* and *Whitton* and held that the worker was not entitled to weekly payments for the period from the end of the 260 week period and the date on which an AMS certified that maximum medical improvement had not been reached.

Following the Court of Appeal's decisions in *Hochbaum* and *Whitton* the worker applied for reconsideration of the Senior Arbitrator's decision under s 350 (3) *WIMA.* The Senior Arbitrator allowed the application and he issued a further COD, which awarded the worker weekly payments under s 38 (6) *WCA* for the period from 26/12/2017 to 24/10/2018.

Consequential injuries - left shoulder injury and consequential psychological condition – prescribed medications caused Seratonin Syndrome, which caused the worker to fall and injure his left leg, requiring below-knee amputation

Rohl v Flincept Pty Ltd [2020] NSWWCC 236 – Arbitrator Burge – 14/07/2020

On 6/01/2009, the worker injured his left shoulder at work. He required surgery, after which he was treated with a combination of medications. On 28/02/2012, he felt dizzy and fell while at home and injured his left leg. This injury required multiple surgeries and, ultimately, a below-knee amputation. He alleged that the fall and left leg injury were a consequence of the medication prescribed for the left shoulder injury.

The worker claimed compensation under s 66 *WCA* for 36% WPI, with respect to the left shoulder and left leg injuries, but the respondent disputed the left leg injury and disputed that he is a worker with highest needs.

Arbitrator Burge identified the issue for determination as whether the left leg injury and subsequent amputation were consequential to the accepted left shoulder injury. If yes, the dispute would be referred to an AMS for assessment of permanent impairment, but if no, there would be an award for the respondent as the worker's IME assessed 10% WPI with respect to the left arm. He held, on balance, that he was satisfied that the fall that caused the left leg injury was a consequence of the accepted left shoulder injury. He preferred the opinions of Dr Rastogi and Dr Prasad to that of Dr Smith, as the latter was predicated on the assumption that the hospital records rule out the presence of serotonin syndrome. However, the hospital did not undertake testing for serotonin syndrome and he also accepted the worker's evidence that when he stopped taking the medication he was using before the fall (except for Lovan) his dizziness stopped. He stated:

> 32. The medical experts in the matter agree that the mixture of drugs the applicant was prescribed could cause serotonin syndrome and giddiness. Applying a common-sense test of causation as set out in *Kooragang*, taking into account that consensus view, I find Dr Rastogi's view is supported by and consistent with the applicant's lay evidence, which is uncontested.
>
> 33. I also take into account the evidence of the applicant in his statement to the effect he told his GP Dr Teoh about his dizziness. Although Dr Teoh's notes do not make specific reference to the dizziness, it is noteworthy he made it clear to the applicant he was only treating him for the workplace shoulder injury and was not responsible for prescribing other medication. Nevertheless, Dr Teoh's notes do contain a number

> of references to warnings being provided to the applicant as to the effects of the medication he was taking, albeit the majority of those warnings are recorded in general terms, whilst others relate to the addictive nature of Panadeine Forte.
>
> 34. The contention by Dr Rastogi that the mixture of drugs taken by the applicant can cause dizziness and serotonin syndrome is not disputed by the respondent's IME. The cause for the fall posited by Dr Rastogi is in my view consistent with the applicant's lay evidence as to the effects of the medication upon him, and I accept the applicant's statement he told GP Dr Teoh about the dizziness. Whilst Dr Teoh's records do not record specific warnings about dizziness, they do contain repeated warnings as to the interactions between prescribed drugs.

Accordingly, the Arbitrator remitted the matter to the Registrar for referral to an AMS to assess permanent impairment of the left upper extremity and left lower extremity.

Respondent declined to serve its WPI assessment - dispute under s 66 WCA referred to an AMS, who was advised of the principles of Jones v Dunkel

Sharman v Chemtools Pty Ltd [2020] NSWWCC 237 – Arbitrator Harris – 14/07/2020

The worker claimed compensation under s 66 *WCA* for 16% WPI (permanent psychological impairment) based upon an assessment from Dr Oldtree-Clark dated 15/02/2019. The respondent qualified Dr Rastogi, but there was no WPI assessment in the report dated 9/12/2019. On 14/02/2020, Dr Oldtree-Clark assessed 19% WPI.

On 12/05/2020, ***Senior Arbitrator Capel*** conducted a teleconference, during which the ARD was amended to claim continuing weekly payments from 5/10/2019 and s 60 expenses of $3,000. By consent, he entered an award for the respondent in relation to the weekly payments claim and noted that the respondent agreed to pay reasonable s 60 expenses of up to $3,000, with an award for the respondent thereafter. The s 66 dispute was remitted to the Registrar for referral to an AMS for an examination via video-link.

On 12/06/2020, ***Arbitrator Harris*** conducted a further teleconference, during which the respondent asserted that it had received a draft report from Dr Rastogi. He ordered that if the respondent served a further report from Dr Rastogi, it agreed that all correspondence to and from the doctor regarding the preparation of the report should be served in an application to admit late documents. He also ordered:

> The applicant has liberty to apply for a further telephone conference on or after 19 June 2020 following either service or non-service of the report by Dr Rastogi for the purposes of seeking to revoke the referral to the AMS and requesting the Commission determine the section 66 entitlement.

The respondent subsequently advised the Commission that it would not be serving the further report prepared by Dr Rastogi and the matter was listed for arbitration on 9/07/2020, principally on the issue of whether there was a "*medical dispute*" within the meaning of s 319 *WIMA*. During the arbitration, the respondent claimed legal professional privilege over Dr Rastogi's further report and the worker asked the Arbitrator to draw an inference under the rule in *Jones v Dunkel*.

The worker argued that there was no medical dispute that could be referred to an AMS because the respondent had not served an assessment that was inconsistent with that of Dr Oldtree-Clark. However, the respondent argued that there was a medical dispute because the degree of permanent impairment was disputed in the Reply.

The Arbitrator stated (citations excluded):

> 18. In *Hochbaum v RSM Building Services Pty Ltd* Brereton J referred to and rejected the respondent's argument that an assessment was required by an AMS to satisfy the criteria in s 39 of the 1987 Act. His Honour stated:
>
> > Moreover, it is at least opaque what mechanism is available for obtaining an assessment under Pt 7 of Ch 7 of the 1998 Act where there is no dispute about the degree of impairment, as in those circumstances there can be no '*medical dispute*' within the meaning of Pt 7 of the 1998 Act, and thus nothing to be referred to an approved medical specialist for assessment.
>
> 19. His Honour adopted the language of the statute in noting that where there was "*no dispute*" then there was no "*medical dispute*" as defined in that Part. The section refers to "*dispute*" between the parties and when that "*dispute*" relates to certain matters, it is defined to be a medical dispute. The section does not require that there be a "*medical dispute*" based on competing assessments of WPI.
>
> 20. The test for reading words into a statutory provision is articulated in *Taylor v The Owners of Strata Plan No 115646* where the plurality stated:
>
> > The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills '*gaps disclosed in legislation*' or makes an insertion which is '*too big, or too much at variance with the language in fact used by the legislature*'.
>
> 21. The principles set out in *Taylor* have been applied by the Court of Appeal in two appeals concerning the construction of the 1987 and 1998 Acts: *State of NSW v Chapman-Davis* and *Cram Fluid Power Pty Ltd v Green*.
>
> 22. There is no basis to reads words to limit the concept of a dispute to the circumstances articulated by the applicant. In my view the reading of those words does not satisfy the test for reading words into the section.
>
> 23. In *Uelese v Minister for Immigration and Border Protection* the plurality (French CJ, Kiefel, Bell and Keane JJ) cited Legal Services Board v Gillespie-Jones11 and stated that "*a construction that 'appears irrational and unjust' is to be avoided where the statutory text does not require that construction*". These observations are equally apposite to the construction proposed by the applicant.
>
> 24. A respondent may not have obtained a medical assessment because it had not given appropriate notice within the relevant time frame set out in the legislation that it required a medical examination. In those circumstances I do not accept that the respondent would be bound by the assessment provided by the applicant…

The Arbitrator noted that the respondent argued, based upon the opinion from Dr Rastogi, that the PIRS assessment for employability should be less than that of Dr Oldtree-Clark. He accepted that a dispute could be properly founded upon treating medical reports in this case that are inconsistent with that made by the only qualified doctor assessing permanent impairment. However, he declined to determine the dispute under s 66 *WCA.*

The Arbitrator held that it was appropriate to provide the AMS with direction regarding the decision in *Jones v Dunkel* and he described the relevant principle as follows (citations excluded):

42. The relevant principles in relation to the drawing of a *Jones v Dunkel* inference were discussed by Roche DP in *University of New South Wales v Brooks* which adopted the discussion by the Court of Appeal in *MSPR Pty Ltd v Advanced Braking Technology Ltd* [2013] NSWCA 416. Roche DP stated:

> 60. The principles that arise when a party takes a *Jones v Dunkel* point were succinctly summarised by Macfarlan JA (Ward and Gleeson JJA agreeing) at [53] in *MSPR Pty Ltd v Advanced Braking Technology Ltd* [2013] NSWCA 416. It is convenient to set out his Honour's summary in point form:
>
> > (a) '[a] *Jones v Dunkel* inference may be drawn against a party where the party would be expected to, but does not, call a witness who could give evidence on a relevant matter and that failure is unexplained (*Payne v Parker* [1976] 1 NSWLR 191 at 201)' (*Payne*) (two other preliminary points identified in *Payne*, as being necessary before a *Jones v Dunkel* point arises, were that the witness's evidence would elucidate a particular matter and that his or her absence is unexplained);
> >
> > (b) '[t]he inference to be drawn in these circumstances is not that the witnesses' evidence would have been adverse to the party, but simply that it would not have assisted the party's case (*Kuhl v Zurich Financial Services* [2011] HCA 11; 243 CLR 361 at [64]; *ASIC v Hellicar* [2012] HCA 17; 247 CLR 345 at [168] and [232])' (*Hellicar*);
> >
> > (c) '[t]he inference permits the Court to make a finding unfavourable to the party with greater confidence (*Hellicar* at [232])';
> >
> > (d) 'for a *Jones v Dunkel* inference to be drawn, there must be evidence that the party against whom it is to be drawn is required to explain or contradict (*Schellenberg v Tunnel Holdings Pty Limited* [2000] HCA 18; 200 CLR 121 at [51])', and
> >
> > (e) 'to base a judgment against a party simply upon his or her failure to call evidence would involve the erroneous drawing of an inference that the party's evidence would have been positively adverse to his or her interests'.
>
> 61. To the above points may be added that the failure to call a witness a party would normally be expected to call does not mean that the court applies 'some indeterminate discount to the cogency of whatever evidence was called' (*Hellicar* at [155]). In other words, other evidence may establish the party's case, even without the missing witness.
>
> 62. Significantly, where *Jones v Dunkel* applies, other evidence may, not must, be accepted and inferences drawn more readily (*Galea v Bagtrans Pty Ltd* [2010] NSWCA 350 at [2] and [52]–[62]). The drawing of an inference is not mandatory and, 'generally speaking, these inferences only become material where the balance of the evidentiary record is equivocal' (*Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [79]).

Accordingly, the Arbitrator advised the AMS that the respondent had withheld an assessment of permanent impairment from Dr Rastogi and that he is entitled to consider the principles of *Jones v Dunkel* as set out in paragraph 41 of his reasons.