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ISSUE NUMBER 69

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. Dywidag Systems International Pty Ltd v Melksham [2020] NSWWCCPD 41
2. Candy v MC Connor Racing Pty Ltd [2020] NSWWCCPD 43
3. Li v Brighton Australia Pty Ltd [2020] NSWWCCPD 44
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WCC – Presidential Decisions

Section 4 WCA – whether the Arbitrator was required to determine the pathology arising from an injurious event – Jaffarie v Quality Castings Pty Ltd considered and applied

Dywidag Systems International Pty Ltd v Melksham [2020] NSWWCCPD 41 – Deputy President Wood – 30 June 2020

The worker claimed compensation under s 66 *WCA* for alleged injuries to the neck, right shoulder, left shoulder and consequential conditions of the upper and lower gastrointestinal tracts as a result of a fall at work on 26/06/2007. He also claimed compensation for alleged injuries to both knees as a result of the nature and conditions of employment until 30/06/2013 (deemed). The appellant accepted injuries to the neck and both shoulders in 2007, but disputed the degree of permanent impairment, and it disputed liability for the left knee injury in 2007, the gastrointestinal symptoms and an aggravation of disease in both knees as a result of the nature and conditions of employment.

Arbitrator Young issued an amended COD on 19/12/2019, which found for the worker with respect to the injuries alleged in 2007 and he remitted that dispute to the Registrar for referral to an AMS. He also remitted the dispute for the right lower extremity (2013) to the Registrar for referral to an AMS.

The appellant appealed and alleged that the Arbitrator erred as follows:

(1) With respect to the left knee: (a) in fact and law by failing to determine the question of injury with respect to the left knee in accordance with the requirements of s 4 *WCA;* (b) in law by declining to determine the nature of the injury sustained by the worker to his left knee and failing to make findings with respect to a nature and conditions claim in relation to the left knee; and (c) in error of fact by rejecting the opinion of Dr Myers on the basis that the opinion of Dr Myers was based on thinking that the worker had sustained a 'minor fall'.

(2) With respect to the right knee – in law by failing to apply the requirements of s 4 (b) (ii) and accepting the opinion of Dr Kleinman, as a basis for finding that the worker had suffered an injury to his right knee.

Deputy President Wood considered grounds (1) (a) and (1) (b) together and upheld them. She stated that in the context of a dispute relating to compensation under s 66 *WCA*, the Arbitrator clearly did not have jurisdiction to determine whether the 2007 injuries had resolved. To the extent that the appellant raised this at arbitration, the Arbitrator did not make such a finding.

The appellant argued that the Arbitrator was required to identify the pathological change that occurred in the event on 26/06/2007 in dealing with the question of "*injury*". However, the Arbitrator held that it was not necessary for him to determine the pathology arising from the injury. Wood DP held that in the circumstances of this matter, the nature of the injury was a matter for the Commission to determine. Applying the rationale set out by Roche DP in *Jaffarie*, the Arbitrator erred by failing to determine that issue.

Wood DP held that it was not necessary to determine ground (1) (c) because the acceptance or otherwise of the medical evidence will be a matter for the new decision maker.

Wood DP rejected ground (3). She held that the opinion of A/Prof Kleinman was not illogical and it was probative of the issue for determination. It provided a sufficient and proper basis upon which the Arbitrator could found his conclusion that the worker had made out his case for aggravation of degenerative changes in the right knee due to work. His finding that employment was the main contributing factor was a matter of common sense and no error is disclosed.

Accordingly, Wood DP confirmed the finding of disease injury to the right knee due to the nature and conditions of employment, but she revoked the finding of injury to the left knee in 2007 and remitted that matter to a different arbitrator for re-determination. She stayed the orders remitting the matter to the Registrar for referral to an AMS with respect to the cervical spine, both upper extremities, upper and lower gastrointestinal tracts and right lower extremity.

Principles applicable to disturbing a primary decision-maker's factual finding – Raulston v Toll Pty Ltd [2011] NSWWCCPD 25 applied

Candy v MC Connor Racing Pty Ltd [2020] NSWWCCPD 43 – Deputy President Wood – 7/07/2020

The appellant was a racehorse track rider employed by the respondent and suffered numerous work-related injuries, including a traumatic brain injury on 20/04/2013, which affected her ability to recall matters in any detail.

On 25/06/2018, the appellant fell from a horse at work. She alleged that she was thrown from the horse, but was uninjured so she re-mounted it, but the horse threw her off and then fell on her and trampled her, causing injury to her right hip. She claimed future treatment expenses for the cost of a right total hip replacement, but the respondent disputed that the right hip was injured in the 2018 incident and/or that the 2018 incident was the main contributing factor to that injury.

Senior Arbitrator Bamber issued a COD and held that she was not satisfied that the appellant injured her right hip. She entered an award for the respondent.

The appellant appealed on 6 grounds, namely: (1) error of fact in finding that the incident relied on was quite similar to that referred to by Dr Jordan in 2015; (2) error of fact in placing weight on the appellant not having mentioned in her statement that she had an earlier fall and that she consulted Dr Jordan in 2015 for right hip pain; (3) error of fact in placing weight upon Dr Bodel not having access to the earlier x-rays or scans or being aware of the injury suffered by the appellant in 2015; (4) error of fact in considering that the views of Dr Powell on causation should not be accepted because of a lack of knowledge concerning earlier complaints of right hip pain and lack of such a complaint to Dr Li immediately following her injury; (5) error of fact in stating that it was very difficult for the Senior Arbitrator, on the basis of the evidence from Dr Nabavi, to make a sound finding as to the nature of the injury on 25/06/2018, and (6) error of fact in the Senior Arbitrator's finding that she could not make a "common-sense" evaluation of the causal chain because key information was missing.

The respondent argued that there was no proper ground of appeal as the appellant simply disagreed with the Senior Arbitrator's findings of fact and it relied upon the decision in *Raulston v Toll Pty Ltd* as authority for that proposition.

Deputy President Wood discussed the relevant authorities (which are not set out in this summary) and determined the grounds of appeal as follows.

Wood DP rejected ground (1). She noted that although the appellant asserted that her truthfulness was not questioned, the respondent argued that her history should be treated with a degree of caution in view of the inconsistencies with the histories recorded by the treating doctors and in the contemporaneous records and that given to Dr Bodel. It was clearly available for the Senior Arbitrator to consider the appellant's statement evidence as unreliable and look to where her evidence sat in the context of overwhelming contradictory evidence. A court is not obliged to accept evidence which is not the subject of cross-examination if it is contradicted by a credible body of substantial evidence. She concluded that the Senior Arbitrator's observation that the description of the 2018 injury was similar to that recorded by Dr Jordan in 2015, was not a finding and it was not apparent how it is alleged to have infected the Senior Arbitrator's ultimate decision.

Wood DP rejected ground (2). She held that the absence of a correct history was fatal to the acceptance of the qualified specialists' evidence.

Wood DP rejected ground (3). She noted that while the post-injury investigation indicated a labral tear, as speculated by Dr Bodel, it was not clear whether this resulted from the injury in June 2018 or was pre-existing. That was a question to be answered by a properly informed medical expert and Dr Bodel was not properly informed.

Wood DP rejected ground (4). She stated:

> 123. The appellant once again expresses the view that it would be doubtful that, had Dr Powell been appraised of the evidence of prior symptoms, his opinion would probably have changed. With respect, whether Dr Powell would have remained of the same opinion as to whether the appellant's hip condition was aggravated or further aggravated in the injury on 25 June 2018 is very much a matter for that medical expert to say, after a consideration of the whole of the evidence. The appellant's submission on this point is speculative.
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> 124. The appellant's submission that the presence of significant lower back pain following the 2018 injury might well have masked the right hip pain is somewhat inconsistent with the appellant's submission that the appellant suffered right hip pain from the outset and is also speculative. There is no evidence from the appellant or elsewhere that this was the case.

125. The appellant's reliance on the frequent inaccuracies in the notes taken by busy practitioners was addressed by the Senior Arbitrator and rejected. The Senior Arbitrator explained that she had carefully reviewed the clinical notes and noted that the appellant's claim form did not mention the right hip. The Senior Arbitrator concluded that, in this case, she could not be satisfied that complaints of right hip pain were probably omitted from the clinical notes. She did so in the context of all of the available medical evidence from the treatment providers…

128. In accordance with the principles established in *Whiteley Muir*, as summarised by Roche DP in *Raulston*, the Senior Arbitrator, though not basing her findings on credit, preferred one view over another of the primary facts. In order to disturb the Senior Arbitrator's finding, other probabilities must be so preponderant that the Senior Arbitrator's conclusion must have been wrong. The opinion of Dr Powell was based on an inaccurate premise and was arrived at without the benefit of a complete medical history on the background of a complex, longstanding, hip condition. On that basis, the Senior Arbitrator concluded that she could give no weight to Dr Powell's opinion. That conclusion was available to her on the evidence. There was no preponderance of evidence that would indicate that the opposite inference should have been drawn.

Wood DP rejected ground (5). She stated that the Senior Arbitrator appropriately rejected the opinions of Dr Powell and Dr Bodel and the evidence from Dr Nabavi does not assist in relation to the question of causation.

Wood DP also rejected ground (6). She stated that there were no contrary incontrovertible established facts and there was acceptable evidence that the appellant's right hip symptoms were longstanding. There was no established error in the weight the Senior arbitrator placed on the evidence of the right hip injury in 2015 and she provided proper reasons for reaching her conclusions.

Accordingly, Wood DP confirmed the COD.

Injury occurring during an interval or interlude within an overall period or episode of work – Alleged factual error – Application of Raulston v Toll Pty Ltd [2011] NSWWCCPD 25

Li v Brighton Australia Pty Ltd [2020] NSWWCCPD 44 – Acting President Snell – 16/07/2020

The arbitral decision in this matter was reported in Bulletin no 59, but the background is summarised below.

In February 2019, the appellant travelled from Sydney to Adelaide to work on a construction site. He worked on weekdays and spent weekends in Adelaide. The respondent paid his accommodation costs and an extra $300 per week for expenses (including meals). On the night of 17/03/2019, the worker attended a Chinese restaurant with 2 work colleagues. After dinner, one of his colleagues was attacked by a patron and the altercation developed into a larger affray, during which the worker injured his left eye. He lost vision in that eye also suffered sympathetic opthalmia in his right eye, which compromised the vision in that eye. He therefore had no current work capacity. The respondent disputed that the injury arose out of or in the course of employment and also relied upon s 9A *WCA as* it did not encourage the appellant to attend the restaurant.

Arbitrator Perrignon held that the left eye injury did not occur because of the appellant's mere presence at the restaurant and it did not occur while he was ordering or consuming a meal there, or because he did so, or while he ordered or waited for takeaway food there, or because he did so. Rather, it occurred because the appellant came to the aid of his co-workers

The Arbitrator found that there was no evidence that the respondent knew that the appellant and his colleagues ever attended or would attend the restaurant where the assault occurred, and he was not satisfied that it encouraged or approved of them and/or that it knew that the appellant would come to the aid of his colleagues in an affray at that restaurant.

In relation to causal nexus, the Arbitrator considered the common law decisions of *Hatzimanolis v ANI Corporation Limited* [2002] HCA 21 and *Comcare v PVYW* [2013] HCA 41. In *PVYW*, the High Court explained its reasoning in *Hatzimanolis* as follows (emphasis added):

> 38. The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the *Hatzimanolis* principle becomes relevant. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment.
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> 39. It follows that where an activity was engaged in at the time of the injury, the relevant question is not whether the employer induced or encouraged the employee to be at a place. An employer's inducement or encouragement to be present at a place is not relevant in such a case…
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> 52. The relevant connection or association created by the *Hatzimanolis* principle is between that activity and the employer's encouragement to engage in it. Likewise, when an injury is sustained by an employee at a place and by reference to that place, in the sense earlier discussed , the connection between that circumstance and the employment is provided by the fact that the employer induced or encouraged the employee to be present at that place.
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> 53. The connection or association spoken of is not the causal connection which is attributed to the expression "*arising out of … the employee's employment*" in the definition of "*injury*" in the *SR&C Act* . It is accepted that compensation may be payable in respect of an injury which is suffered "*in the course of*" the employee's employment notwithstanding that there is no such causal connection. The connection presently spoken of is by way of an association with the employment. In *Kavanagh v The Commonwealth*, Dixon CJ said that "*no direct … causal connexion … is proposed as an element necessary to satisfy the conception of an injury by accident arising in the course of the employment but only an association*" with the employment.
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> 54. Dixon CJ expressed that association in two ways. In a positive sense it might be said that, had it not been for the employment, the injury would not have been sustained. Put negatively, and perhaps more usefully for present purposes, it requires that "*the injury by accident must not be one which occurred independently of the employment and its incidents*."

The Arbitrator held that the High Court found that PVYW was not injured in the course of employment and stated:

> 60. The principle in *Hatzimanolis* should nevertheless be understood to have sought, and achieved, a connection or association with employment. For present purposes that understanding is helpful to explain, if it be necessary, that for an injury occurring in an interval in a period of work to be in the course of employment, the circumstance in which an employee is injured must be connected to the inducement or encouragement of the employer. An inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured whilst engaged in an activity at that place.
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> Conclusion
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> 61. It may be accepted that the purpose and the effect of the principle stated in *Hatzimanolis* was to create an interval between periods of actual work, to better explain the connection that an injury suffered by an employee in certain circumstances has to the employment. It did so by reference to the fact that the employer induced or encouraged the employee to do something or be somewhere in particular and the fact that the employee did so and was injured. The two circumstances identified by *Hatzimanolis* were where an injury was suffered by an employee whilst engaged in an activity in which the employer had induced or encouraged the employee to engage; or where an injury was suffered at and by reference to a place where the employer had induced or encouraged the employee to be. An injury sustained in these circumstances may be regarded as sustained in the course of the employee's employment. Properly understood, whilst the inducement or encouragement by the employer may give rise to liability to compensation, it also operates as a limit on liability for injury sustained in an overall period of work.

The Arbitrator noted that the Court of Appeal discussed and applied the decisions in *Hatzimanolis* and *PVYW* in *Tran v Vo* [2017] NSWCA 134 and *The Star Pty Limited v Mitchison* [2017] NSWCA 149, which were not '*camp cases'*. Like Mr Hatzimanolis and Ms PVYW, the appellant was injured in an interval during an overall period of work while he was stationed far from his home for work purposes. His injury will have arisen in the course of his employment if it was suffered whilst he was engaged in an activity that the employer had induced or encouraged him to engage in; or where [it] was suffered at and by reference to a place where the employer had induced or encouraged him to be.

The Arbitrator held that the left eye injury was directly referrable to the appellant's actions in defending his colleagues and compensability depends on whether the employer encouraged or induced that activity. There is no evidence that it did and the injury is not covered by the principle in *Hatzimanolis*, and is not compensable. The employer also did not encourage or induce him to attend that particular restaurant at that time, even if by paying him a food allowance it encouraged, induced or approved of him purchasing food generally when off work or off site. Therefore, the injury did not arise out of the employment.

As to the issue under s 9A *WCA*, the relevant question is "*was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?*" That test cannot be satisfied merely by proving that but for the employment, the worker would not have been at the scene of the accident. In *Pioneer Studios v Hills* [2012] NSWCA 324, Allsop P (Basten & Hoeben JJA agreeing) stated:

> [29] In circumstances where it is not expressly concluded that the injury arose in the course of employment and thus where, on this hypothesis, the injured worker was not at work, it is not apparent how the Deputy President could draw any conclusion about the injury arising out of employment or employment being a substantial contributing factor without considering the kinds of matters to which Mason P referred in Mercer at 745 [13]. This is not to confine "*arising out of*" to what is required of an employee but rather what she in fact does in the employment. This would require focus upon what was the employment, not what Ms Hills thought was the employment.

Accordingly, the Arbitrator held that employment was not a substantial contributing factor to the injury and he entered an award for the respondent.

On appeal, the appellant alleged the following errors: (1) error of fact by finding that after dinner he and Mr Lui ordered takeaway food and erred of law in making a finding of fact not available on the evidence; (2) error of law in finding that the injury did not occur because of his mere presence at the restaurant, this finding not being available on the evidence; (3) error of law in making a finding of fact not available on the evidence that his injury did not occur while he was waiting for takeaway food, and in expressing a conclusion as to causation as a finding of fact; (4) error of law in making a finding that was not available on the evidence, being that the sole cause of the injury was him coming to the aid of his co-workers; (5) error of law in finding as a fact that the respondent had no knowledge that he would attend a China Town restaurant and that it had not encouraged or approved attendance and the finding was against the weight of the evidence and (6) error of law in making the following findings that were against the weight of the evidence: (i) that he might buy food away from his accommodation site; and (ii) the respondent had no knowledge that he would assist a fellow employee during an unprovoked assault during a work interval; (7) error of law in finding that the injury did not occur in the course of or arise out of his employment; (8) error of law in finding that the injury (sic, employment) did not substantially contribute to his injury; (9) error of law in failing to consider the full circumstances of the injury, in failing to consider the reasonable incidents of his employment; and (10) error of law in wrongly applying the law as to what constituted a connection to "*inducement or encouragement*" by the respondent as his employer.

Acting President Snell rejected ground (1). He held that the statement dated 10/01/2020 is sufficient to support the factual finding.

Snell AP rejected ground (5) (which gave context to the parties' arguments regarding grounds (2), (3) and (4)). He noted that the appellant had not argued that his case depended on the respondent having induced or encouraged his attendance at the specific restaurant where the injury occurred and that the respondent argued that this was nothing more than a random occurrence of going to a restaurant and simply because the appellant was in the habit of going to this restaurant more than once is not sufficient to join the nexus that it was arising out of the course of employment. He held that the Arbitrator's approach was consistent with the respondent's submission and stated:

> 52. The way in which Ground No. 5 is expressed is inconsistent with the finding the Arbitrator made at [65(cc)]. The Arbitrator's finding related to attendance at "*the restaurant in China Town where the assault occurred*". Ground No. 5, in contrast, refers to the finding as if it referred to attendance at "a China Town restaurant". The effect of this is that the appellant's submissions on this ground direct themselves to whether the respondent had knowledge of the appellant attending restaurants in the Chinatown district, rather than to whether it had knowledge of attendance at the restaurant where the appellant suffered injury (which was the finding made).

53. The appellant's submissions dealing with Ground No. 5 argue factual error in the Arbitrator's finding that the respondent did not know that the appellant had ever attended or would attend "*China Town district restaurants if not the restaurant he was at when injured*". Ground No. 5 states this finding was against the weight of the evidence. The finding challenged is not the finding the Arbitrator made.

Snell AP noted that on appeal, the appellant sought to argue that the respondent had a more general knowledge of his attendance at restaurants in the Chinatown district, which put it on notice of the practice, and it could be inferred that the respondent approved or encouraged his attendance on 17/03/2019. He considered that this argument was misconceived as it was not raised in ground (5) and held that the Arbitrator's finding was properly available to him and was not against the weight of the evidence.

Snell AP rejected grounds (2), (3) and (4). He held that the way in which the Arbitrator dealt with the issues was consistent with the principles in *Hatzimanolis* and *PVYW* and did not involve error. He stated:.

76. The appellant's submissions on these grounds refer to the fact that if he was not present at the relevant restaurant he would not have been injured. In T*ran v Vo* the Court of Appeal, referring to a passage from the judgment of Starke J in *Smith v Australian Woollen Mills Ltd*, said:

> Starke J's reference to *Stewart v Metropolitan Water, Sewerage and Drainage Board* (1932) 48 CLR 216; [1932] HCA 45 was a reference to his own judgment in that case. In Stewart, his Honour explained, by reference to six English decisions, that to show that an injury was one 'arising out of' employment it was not sufficient merely to show that but for the employment, the worker would not have been at the scene of the accident.

77. *Stewart* is applied in *Tran*, where Payne JA said:

> *Stewart* makes clear that it is not sufficient, as the appellant submitted orally, that the injury was one '*arising out of*' employment because '*but for*' the employment, the worker would not have been at the scene of the accident.

78. In *Tran* Payne JA quoted extensively from passages in the decisions of *Badawi* and *Hills*, where the test of 'arising out of employment' was considered. His Honour said:

> The critical enquiry was what the respondent actually did in her employment. Nothing about what the respondent actually did as part of her employment caused the injury she suffered on this occasion.

79. Payne JA concluded in that case that the respondent's injury did not arise from her employment. The circumstances were that the respondent was not rostered to work on the day of injury, she went to the employer's premises not to work but to buy a drink and meet a friend, and at the time of injury the respondent was not performing a task her employer had induced or encouraged her to perform. His Honour said these findings "*strongly indicate that the requisite causal connection was not here present*".

80. The appellant, dealing with Ground No. 7, submits that the injury was one arising out of the employment as he was required to eat so as to be ready for work on the following day (see [87] below). In *Tran* it was said that the "*critical enquiry was what the [worker] actually did in her employment*". As the respondent submits, the cause of injury was the physical altercation; the evidence does not suggest this arose from the employment. There was not a sufficient causal connection between the appellant's work duties with the respondent and the injury. The Arbitrator did not err in concluding that the injury was not one arising out of the appellant's employment.

Snell AP rejected ground (6). He held that the challenge to the first of the Arbitrator's findings made no meaningful attempt to identify appealable error and there were so submissions directed to the second limb.

Snell AP rejected ground (7). He stated:

> 92. Whether the appellant was in the course of his employment in the circumstances was to be determined with reference to the relevant authorities, particularly *Hatzimanolis* and *PVYW*. The appellant (and his fellow workers) were put up by the respondent in accommodation where meals were unavailable, and the respondent paid them an allowance to cover the cost of meals. It was the appellant's practice to eat meals in Chinatown and to buy takeaway there for his lunch. The respondent provided a microwave at the work site in which such meals could be reheated. All of the above is consistent with findings made by the Arbitrator. The Arbitrator found that the respondent encouraged and approved these practices. The appellant argues he was in the course of his employment on the date of injury, from when he left his accommodation to travel to the restaurant to the time he sustained injury.
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> 93. The Arbitrator found the respondent's inducement and encouragement did not extend to attendance by the appellant at the specific restaurant at which the injury occurred, as the evidence did not suggest the respondent knew of the practice of attending and dining at the specific restaurant, and accordingly, it could not have approved or encouraged the practice. Whether the Arbitrator erred in this regard is not directly raised in the grounds of appeal or the submissions.
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> 94. If such an argument had been raised successfully by the appellant, it would not in any event have represented appealable error.
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> 95. In *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* Moffitt P said:
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> > ... 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.
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> 96. There was an additional basis on which the appellant was not in the course of his employment when injured. The Arbitrator's findings extended to the activity in which the appellant was engaged when he suffered injury. He found "*the injury occurred when [the appellant] came to the aid of his co-workers, and because he came to their aid*". The Arbitrator's reasons said:
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> > As I have found, Mr Li was not injured because he was in the restaurant, but because of his activity there in defending his colleagues from attack. His left eye injury is directly referrable to his actions in defending his colleagues. To submit that the employer might or would reasonably have been expected to approve of that course is to answer the wrong question. Compensability depends on whether the employer encouraged or induced that activity. There is no evidence that it did, or even that it knew Mr Li would come to the aid of his colleagues in the circumstances and at the time he did. In those circumstances, the injury is not covered by the principle in *Hatzimanolis*, and is not compensable.
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> 97. This conclusion was properly available on the evidence. It follows that, having regard to the passages in *PVYW* at [38] to [39], whether the appellant was in the course of his employment when he attended at the restaurant was not determinative of whether the injury occurred in the course of employment. The issue was whether the respondent induced or encouraged the appellant to engage in the activity in which

he was engaged at the time of injury. This involved the appellant's actions in seeking to protect his colleagues from physical assault.

98. There was no evidence that the respondent induced or encouraged the appellant to engage in this activity. The appellant submits his actions in this regard were "i*nstinctive*" and "*understandable*". He submits "*it was an act performed to the advantage of the [r]espondent*", which expected the appellant and his two colleagues to work the next day. The appellant submits "*[i]t is difficult to imagine any employer instructing employees to take no steps to assist a fellow employee dealing with an unprovoked violent attack such as occurred in the present case*". There was no basis to infer that the respondent induced or encouraged the appellant to engage in this activity. Contrary to the appellant's submissions, it is difficult to envisage an employer would induce or encourage an employee to engage in such an activity. This is an observation and not determinative. There was no evidence of the respondent inducing or encouraging such an activity, and no basis on which such matters could be properly inferred. At best it would involve "*mere conjecture*".

Snell AP rejected ground (8). He held that the critical matter in this case is the finding that when the injury occurred the appellant was engaged in an activity that was not the subject of inducement or encouragement by the respondent. Consistent with *PVYW*, the issue was whether the respondent induced or encouraged the appellant to engage in that activity. Inducement or encouragement to be at a place then becomes irrelevant.

Snell AP also rejected grounds (9) and (10). He held that the appellant has not identified any error and the Arbitrator did not err in applying the statements of principle in *PVYW,* but there were two important respects in which the findings did not reflect the appellant's case. He stated, relevantly:

109. …I concluded above that even if there was error in the finding regarding inducing or encouraging attendance at the specific restaurant, this would not be appealable error. The finding that there was no evidence the respondent induced or encouraged the appellant to engage in the activity in which the Arbitrator found he was engaged, at the time of the injury, was inconsistent with the appellant being in the course of his employment when injured. The argument that the injury alternatively was one arising out of the employment was rejected by the Arbitrator, I have concluded correctly.

Accordingly, Snell AP confirmed the COD.

No error in determining that the effects of exacerbation of pre-existing arthritis had ceased – Adequacy of reasons

Srirudrakantha v Homebush Out of School Hours [2020] NSWWCCPD 45 – Deputy President Wood – 21/07/2020

The appellant was employed as a child-care worker. She alleged that on 23/08/2017, she was tripped by a student and fell onto her back and injured her right shoulder and right knee. She also alleged injury to her cervical and lumbar spines, or alternatively, the aggravation, exacerbation etc. of a pre-existing symptomatic disease process and a consequential injuries to her left shoulder and left knee.

The respondent initially accepted liability for injuries to the right shoulder and right knee, but on 29/04/2019, it disputed the alleged injuries to the cervical and lumbar spines, the left shoulder and the left knee and asserted that the injuries to the right shoulder and right knee had resolved. It disputed incapacity and the need for further treatment.

The appellant filed an ARD claiming continuing weekly payments from 29/04/2019 and s 60 expenses.

Arbitrator Sweeney conducted an arbitration on 27/02/2020. On 2/03/2020, he delivered oral reasons and issued a COD, in which he determined that the appellant suffered an aggravation of pre-existing arthritis in her right shoulder and an exacerbation of pre-existing osteoarthritis at work on 23/08/2017. However, he found that the appellant had not proved that the effects of the right knee injury persisted beyond 2017, she had not established injuries to the neck and back and she had not established consequential injuries to the back or left knee. He made no finding regarding the alleged consequential injury to the left shoulder. He held that the appellant was not entitled to weekly compensation after 28/04/2019, but he ordered the respondent to pay the appellant's s 60 expenses with respect to the right shoulder.

The appellant appealed on 7 grounds and alleged that the Arbitrator erred in fact and law: (1) by finding that the injury to the right knee involved a transient exacerbation of a longstanding condition and did not persist beyond 2017, which were not open to the Arbitrator on the available evidence; (2) by failing to provide adequate reasons for his finding that the exacerbation of the right knee arthritis was transient and the effects of which would not have persisted beyond 2017; (3) by failing to find that she suffered consequential conditions affecting her left knee and back as a result of the undisputed right knee injury; (4) by failing to consider the evidence of her incapacity and failing to consider that her undisputed right shoulder injury would have reduced her earning capacity, thus giving rise to an entitlement to weekly payments; (5) by failing to consider whether her right knee injury and the consequential conditions in the left knee and back reduced her capacity, giving rise to an entitlement to weekly payments; (6) in failing to provide reasons for the determination that she was not entitled to receive weekly payments; and (7) by failing to order the respondent to pay her weekly benefits pursuant to s 37 *WCA* and s 60 expenses in respect of the right knee, left knee and back, in addition to the right shoulder.

Deputy President Wood noted that the appellant did not take issue with the Arbitrator's conclusion that her evidence was unreliable and his findings that the neck and back were not injured on 23/08/2017. The challenge is limited to the findings that the right knee injury was merely transient, that she did not suffer consequential conditions in the lumbar spine and left knee and the finding regarding the appellant's work capacity. These are findings of fact and in order to demonstrate error by the Arbitrator, the appellant must establish that material facts have been overlooked or given too little weight, or that other probabilities so outweigh the conclusion that it can be said that the conclusion was wrong.

Wood DP rejected ground (1). She noted that the appellant argued that the question of whether an exacerbation has ceased requires a medical explanation and questioned where the medical evidence is that indicates when the resolution occurred. However, she held that the appellant had an undisclosed, significant, pre-existing condition and there was simply no evidence that there was a complaint of a continuum of more serious symptoms (than those complained about before the injury). Therefore, it cannot be presumed that the symptoms were referable to the injury and it was appropriate for the Arbitrator to determine, on the evidence before him, that he could not be satisfied that there was evidence that the aggravation continued during the relevant period.

Wood DP rejected ground (2). She stated:

> 129. An arbitrator has a statutory obligation to give a brief statement of reasons for his or her decision. The reasons are not required to be lengthy or elaborate. A consideration of whether an Arbitrator has complied with the obligation to give reasons must give regard to the overall reasoning process, read as a whole and without an eye attuned to error. As Kirby J explained in *Roncevich v Repatriation Commission* (citations omitted):

> Upon this basis, it may be accepted (as the primary judge concluded in the Federal Court) that the reasons of the Tribunal were brief. However, that is not necessarily a flaw in the context of such a busy administrative tribunal. Courts conducting this form of review have been repeatedly enjoined by this Court to avoid overly pernickety examination of the reasons. The focus of attention is on the substance of the decision and whether it has addressed the 'real issue' presented by the contest between the parties.
>
> 130. The appellant contends that the Arbitrator erred in failing to take into account the Workcover certificates of capacity issued by Dr Bala in April and June 2018. An Arbitrator has a duty to refer to the evidence relevant to the submissions advanced and to the conclusions reached. It is not, however, a duty to refer to every submission and every piece of evidence.
>
> 131. I have discussed above the lack of probative value of the certificates in question. That evidence is not material to the outcome in this case. Any failure on the Arbitrator's part to specifically consider those certificates in respect of his determination of whether the exacerbation of the appellant's right knee symptoms had ceased is not indicative of error in the Arbitrator's reasoning or in his ultimate conclusion.
>
> 132. In the context of the Commission, and the Arbitrator's obligations to provide brief reasons for his conclusions, reading the statement of reasons as a whole, I am satisfied that the Arbitrator has complied with his obligations in this regard. It follows that Ground Two of the appeal fails.

Wood DP rejected ground (3). She held that the Arbitrator did not err in finding that the exacerbation of the right knee condition ceased in 2017 and noted that the Arbitrator placed no weight on the opinion of Dr Gehr because the conclusions were not based upon a reliable history. It was open to the Arbitrator to reject that opinion.

Wood DP rejected ground (5). She held that the Arbitrator's findings regarding injury were open to him and there is no reason to disturb them on appeal. Therefore, the Arbitrator's failure to consider those matters in the assessment of the appellant's capacity for work was not an error of fact or law.

Wood DP rejected ground (7). She accepted the respondent's argument that this ground is substantially the same as ground (5).

Wood DP also rejected grounds (4) and (6). She stated that the Arbitrator had limited evidence before him regarding the effect of the right shoulder injury on the appellant's work capacity and it is not surprising that his reasons were brief. She stated, relevantly:

> 156. …The Arbitrator concluded that the appellant had not established that she was incapable of performing her pre-injury duties as a result of the right shoulder injury. Had the Arbitrator determined that the appellant was fit for her pre-injury duties, the reasons may not have been sufficient to show how he reached such a conclusion. The state of the evidence, as discussed by the Arbitrator, was such that there was a lack of evidence to assist in the determination of the relevant alleged limits on the appellant's capacity to perform her former duties in the period commencing April 2019. The deficiencies in the evidence are apparent from the Arbitrator's discussion of the evidence and it is apparent that such deficiency was the reason for the Arbitrator's conclusion.

Accordingly, Wood DP confirmed the COD.