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ISSUE NUMBER 70

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. Star Entertainment Group Ltd v Antoniak [2020] NSWWCCPD 46
2. State of New South Wales (Central Coast Local Health District) v Bunce [2020] NSWWCCPD 48
3. Mission Australia v Eves [2020] NSWWCCPD 49
4. Ausgrid v Parasiliti [2020] NSWWCCPD 51
5. Prince v Seven Network (Operations) Ltd [2020] NSWWCCMA 128
6. Dodd v Qantas Airways Ltd [2020] NSWWCC 249
7. Morcos v Deosa Enterprises Pty Ltd [2020] NSWWCC 267
8. Neal v Secretary, Department of Education [2020] NSWWCCR 4

Correction

In Bulletin 69, WIRO reported that in the matter of *King v Metalcorp Steel Pty Ltd* [2020] NSWWCC 234, the worker applied for reconsideration of the Senior Arbitrator's decision. However, the worker's solicitor has advised WIRO that the Senior Arbitrator reconsidered his decision on his own motion and over the objections of the parties.

WCC – Presidential Decisions

Monetary threshold required by s 352 (3) WIMA

Star Entertainment Group Ltd v Antoniak [2020] NSWWCCPD 46 – Deputy President Wood – 23/07/2020

The worker claimed compensation for a psychological injury at work, including a performance review on 9/02/2019 and he ceased work on 10/02/2019. However, the appellant disputed the claim under ss 4, 9A and 11A *WCA*.

On 3/10/2019, ***Arbitrator Wynyard*** delivered an ex-tempore decision and ordered the appellant to pay the worker's s 60 expenses. He directed the parties to file written submissions regarding the weekly payments claim by 9/10/2019. He issued a COD to that effect on 9/10/2019.

On 14/10/2019, the worker advised the Commission that the claim for weekly payments was discontinued, but the Arbitrator was not advised of this fact. On 5/12/2019, the Arbitrator issued a further COD and ordered the appellant to make weekly payments to the worker. The appellant appealed against the COD dated 9/10/2019, but no appeal was lodged in respect of the later COD.

Deputy President Wood noted that the award under s 60 *WCA* totalled $1,721.63 and that neither party addressed the status of the COD dated 5/12/2019 or whether the monetary threshold in s 352 (3) (a) *WIMA* was satisfied. She directed the parties to file submissions regarding these matters.

The appellant argued that the COD dated 5/12/2019 is, prima facie, final and binding in accordance with s 350 *WIMA* and while s 350 (3) *WIMA* provides for a reconsideration of that decision, the respondent had not sought reconsideration. In any event, reconsideration is outside of the scope of an appeal to a Presidential member under s 352 *WIMA*, as the appellate jurisdiction is limited to the identification and correction of error of fact, law or discretion. As the Arbitrator was not provided with notice of the discontinuance of the weekly payments claim, it could not be said that he erred in the manner required. Therefore, the COD maintains its valid status.

In relation to the threshold issue, the appellant argued that this is satisfied because the whole award is the subject of the appeal and the inclusion of the weekly payments dispute in this appeal squarely puts the quantum of the claim as greater than $5,000.00. It noted that the worker conceded that the threshold has been met.

However, the worker argued that as he discontinued the weekly payments claim before the second COD issued, that COD is incompetent and it should be revoked by either the Arbitrator or Registrar. He stated that he intended to make that request to the Registrar. He asserted that the monetary threshold is not satisfied.

Wood DP noted that on 14/07/2020, the worker requested that the second COD be reconsidered by either the Registrar or an Arbitrator. She held that as this was not the subject of the appeal, she lacked jurisdiction to determine its status. In relation to the monetary threshold, she stated that whether the worker conceded that the threshold has been met is immaterial as there is no discretion to permit an appeal to proceed whether the threshold is not satisfied.

Wood DP stated:

> 41. It is not disputed before me that the respondent provided notice to the Commission and the appellant on 14 October 2019 that he discontinued his claim for weekly payments. In accordance with Rule 15.7(3), the discontinuance took effect from that date, which was before the appellant lodged this appeal and before the Arbitrator delivered his decision in respect of the weekly payments. In those circumstances it cannot be said, therefore, that the amount of weekly payments claimed but not on foot when this appeal was lodged is part of the amount in issue on this appeal in accordance with s 352 (3) (a) of *the 1998 Act*. Such a conclusion is consistent with the observations and conclusions reached in *Sheridan, Regan, Popovic, Corporate Management Services* and *Dinning*, discussed above.

> 42. The appellant submits that *Corporate Management Services* can be distinguished from this case because in this case, the weekly compensation remains on foot. I do not accept that submission. The weekly payments claim was clearly discontinued before the appeal was lodged and what remained was an amount of compensation in respect of treatment expenses which were below the threshold. The decision in *Corporate Management Services* is therefore not distinguishable from this case.

Wood DP held that the threshold requirement in s 352 (3) (a) *WIMA* has not been met and there can be no appeal from the decision dated 9/10/2019.

An assistance dog is therapeutic treatment within the meaning of s 59 (b) WCA

State of New South Wales (Central Coast Local Health District) v Bunce [2020] NSWWCCPD 48 – Deputy President Snell – 30/07/2020

The Arbitral decision in this matter was reported in Bulletin no. 59, but its background is summarised as follows. The worker was as a registered nurse. On 21/03/2017, she suffered a catastrophic reaction to an incident when a patient became aggressive and threatened her. Injury was not disputed. She sought a declaration that the provision and maintenance of an assistance dog is reasonably necessary medical treatment.

Arbitrator Wynyard noted that the insurer argued that s 60 (2A) WCA applied and that the worker did not obtain its prior approval, but he held that the Commission had considered this issue many times and under Table 4.2 of the Guidelines, a worker is exempt from the operation of s 60 (2A) *WCA* if there is a determination that any disputed treatment was payable. He discussed the principles regarding s 60 (1) WCA, which Roche DP summarised in *Diab v NRMA Ltd* [2014] NSWWCCPD 72, as follows (citations omitted):

> 86. Reasonably necessary does not mean 'absolutely necessary' (Moorebank at [154]). If something is 'necessary', in the sense of indispensable, it will be 'reasonably necessary'. That is because reasonably necessary is a lesser requirement than 'necessary'. Depending on the circumstances, a range of different treatments may qualify as 'reasonably necessary' and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment is "reasonable and necessary", which is a significantly more demanding test that many insurers and doctors apply…
>
> 87. Giles JA added (at [49] in O'Shea) that the qualification whereby the necessity must be reasonable calls for an assessment of the necessity having regard to all relevant matters, according to the criteria of reasonableness. His Honour was talking in the context of whether an easement should be granted under s 88K of the Conveyancing Act 1919, which provides that 'the Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement'. However, his Honour's observations are applicable in the present matter and are clearly consistent with *Clampett.*
>
> 88. In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> (a) the appropriateness of the particular treatment;
> (b) the availability of alternative treatment, and its potential effectiveness;
> (c) the cost of the treatment;
> (d) the actual or potential effectiveness of the treatment, and
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

89. With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.

90. While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content."

The Arbitrator noted that despite the doctors' reservations regarding the small evidence base for the effectiveness of treatment by way of the provision of an assistance dog, there was unanimity there the worker received a therapeutic benefit in the treatment of her condition by the presence of her dog. Associate-Professor Robertson expressed a pragmatic view that the presence of the dog had enabled the worker to re-engage with employment and improve on her clinical progress. Accordingly, he held that the provision and maintenance of the assistance dog was reasonably necessary medical treatment.

The appellant appealed and asserted that the Arbitrator erred in law as follows: (1) in finding that an assistance dog constituted therapeutic treatment for the purpose of satisfying the definition of medical or related treatment under s 59 *WCA*; and (2) in failing to give adequate and/or sufficient reasons for the finding that the provision and maintenance of an assistance dog was therapeutic treatment for the purposes of s 69 (b) *WCA*.

Deputy President Snell determined the appeal on the papers. He noted that the appellant argued that the provision of an assistance dog does not fall within the definition of "*therapeutic treatment*" and it relied upon the decisions of Neilsen CCJ in *Woollahra Council v Beck* [1996] NSWCC 43 and Burke CCJ in *Rose v Health Commission (NSW)* [1986] NSWCC 2. However, the respondent argued that the appellant did not raise this at first instance and it should not be allowed to raise it on appeal.

Snell DP held that the appellant did not raise any argument based upon *Beck*, that "*treatment*" involved a worker being "*the (mainly) passive recipient of some other person's ministrations*" *or that* '*therapeutic treatment*' must involve "*the provision of a service pertaining to medication, surgery or other medical service*". He stated:

54. In *Mamo v Surace* it was said:

> A party is bound by the conduct of his or her case. It has long been the law that, except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him or her, to raise on appeal (even one by way of rehearing) a new argument which, whether deliberately or by inadvertence, he or she failed to put during the hearing when there was an opportunity to do so: *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 (at 7 - 8) per Gibbs CJ, Wilson, Brennan and Dawson JJ; approving *University of Wollongong v Metwally* (No 2) [1985] HCA 28; 59 ALJR 481 (at 483); *Whisprun Pty Ltd v Dixon* [2003] HCA 48; 77 ALJR 1598.

55. In *Super Retail Group Services Pty Ltd v Uelese* Roche DP said:

> As the Commission has attempted to explain in dozens of decisions, and as s 352 (5) makes express, appeals against a decision by an Arbitrator are not a 'review or new hearing'. Nor are they a rehearing. They are restricted to the identification and correction of error. Arbitrations are not a trial run where the parties can await the outcome and then decide to run new issues on appeal.

Snell DP did not allow the appellant to raise these fresh arguments on appeal, but he considered its arguments on their merits in the context of the broader issue regarding whether provision of an assistance dog falls within s 59 (b) *WCA.*

Snell DP rejected ground (1). He noted that the respondent did not dispute that the provision of the dog was therapeutic, but it disputed that it does not constitute "*treatment*". He cited the decision of Burke CCJ in *Rose,* dealing with the term '*treatment*', as follows:

> … treatment must be reasonable if it is to fall within the purview of the subsection. But that is not solely because of the words '*reasonably necessary*' but is rather inherent in the concept of '*treatment*' itself. Treatment is necessarily purposive. Treatment, in the medical or therapeutic context, relates to the management of disease, illness or injury by the provision of medication, surgery or other medical service designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition. It is the provision of such services for the purpose of limiting the deleterious effects of a condition and restoring health. If the particular 'treatment' cannot, in reason, be found to have that purpose or be competent to achieve that purpose, then it is certainly not reasonable treatment of the condition and is really not treatment at all.

Snell DP accepted the respondent's argument that *Rose* extended to an award for the provision of medicines or medical supplies is correct and that it is inappropriate to confine '*medical or related treatment*' to the provision of a service. He stated:

> 63. A number of the paragraphs in s 59 clearly relate to matters that are not services, yet by the terms of the definition they constitute '*medical or related treatment*'. In *Craig Williamson Pty Ltd v Barrowcliff* Hodges J stated:
>
> > I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section.
>
> 64. In *Beck* it was accepted that providing the worker with social activities was '*therapeutic*'. His Honour then identified a dictionary meaning of the word '*treatment'*: "*management in the application of remedies; medical or surgical application or service*". The respondent makes the point that this definition "*covers a range of modalities*". The respondent refers to two other dictionary definitions:
>
> > The use of drugs, exercises et cetera to improve the condition of an ill or injured person, or to cure a disease.(Cambridge Dictionary)
> >
> > Treatment is medical attention given to a sick or injured person or animal. (Collins Dictionary)
>
> 65. The respondent submits these definitions, as a common feature, can involve a wide range of modalities, directed to the management of the consequences of injury or disease. The definition from the Collins Dictionary restricts itself to "*medical attention*". This is plainly too restrictive in the context of the section and would not

catch a number of the matters specifically referred to in s 59. The definition from the Cambridge Dictionary describes the purpose of '*treatment*' ("to improve the condition of an ill or injured person, or to cure a disease"). Given its use of the term "*et cetera*" it does not much assist in identifying matters that constitute '*treatment*'.

66. There have been many recent instances of appellate courts doubting the utility of dictionary definitions in the task of statutory interpretation. In *State of New South Wales v Chapman-Davis* Gleeson JA (McColl JA agreeing) said:

> … there are limitations on the use of dictionary definitions in statutory construction. Dictionary definitions specify a range of meanings, rather than the particular meaning of the word in its context in a statute. The unhelpfulness of relying on dictionary definitions for statutory meaning has been reiterated recently in this Court: *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* [2014] NSWCA 409 at [81] (Leeming JA); *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68 at [80] (Leeming JA, Beazley P and Emmett AJA agreeing).

67. Little assistance is to be gained from the various dictionary definitions on which the parties have relied in the current case. This includes the dictionary definition referred to in *Beck*, on which the appellant relies.

68. The word '*treatment*' is not, in the opening words of s 59, restricted to the provision of services. I cannot see any valid reason why the word should be given a narrower meaning in para (b) than that which it has in the opening words of s 59. I accept that the phrase '*medical or related treatment*' in s 59 should not be restricted to the provision of a service. There is no reason why the word, where it forms part of the phrase '*therapeutic treatment*', should be constrained in the way for which the appellant argues. Treatment can extend to the provision of things in an appropriate case. This is consistent with the structure of s 59 and with the decision in *Rose*. This remains subject to the proviso in *Everill*, that the meaning of the matters described in the various paragraphs in s 59 is to be understood in the context of the phrase '*medical or related treatment*' which is being defined (see the passage quoted at [50] above).

69. The nature of the treatment the subject of this claim is unusual, in that it relates to the provision of an assistance dog. It must, however, be for the purpose of treatment, that is, it must be "*designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition limiting the deleterious effects of a condition and restoring health*" (see the passage of *Rose* quoted at [60] above). Additionally, it must be by direction of a medical practitioner.

70. The current matter proceeded on the basis the relevant dog was a trained assistance dog, trained with the help of a representative from Minddogs Australia. Provision of the dog was supported by the respondent's treating general practitioner and by her treating psychologist. It was supported by Associate Professor Robertson, the psychiatrist qualified in the respondent's case. Dr Ng, the psychiatrist qualified in the appellant's case, was more ambivalent. He said it was not unusual for war veterans with Post Traumatic Stress Disorder and other mental illness "*to be accompanied by such a dog*". He said there was "*face validity to such an idea and indeed it is a very attractive idea*". He referred to clinical trials and said "*the literature would not indicate that service or companion dogs are a mainstream treatment*". The Arbitrator concluded, on the medical evidence overall, that provision of the assistance dog was "*appropriate, and likely to be effective*" (see [17] above). His finding that provision of the assistance dog was reasonably necessary was available on the evidence and is not challenged on this appeal.

71. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* the plurality, in a frequently quoted passage, stated:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (footnotes omitted)

72. The term '*therapeutic treatment*' is broad and general. The Arbitrator found that "*all the medical professionals agreed that having an assistance dog was therapeutic to [the respondent's] psychological condition*". This finding is not challenged on this appeal. Provision of the assistance dog, on the evidence overall, comfortably falls within the description of treatment in *Rose*, as being "*designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition limiting the deleterious effects of a condition and restoring health*".

Snell DP held that "*therapeutic treatment*" in s 59 (b) *WCA* is sufficiently broad to encompass the provision of an assistance dog in an appropriate case.

Snell DP rejected ground (2). He noted that the appellant argued that the Arbitrator concluded that the provision of the assistance dog was therapeutic treatment without engaging in any analysis as to whether it satisfied the definition and that this was neither understandable nor logical. He stated:

> 84. There is a helpful and extensive summary of the authorities relating to the duty to give reasons in Pollard v RRR Corporation Pty Ltd. This review includes the following:
>
> > 58. The extent and content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties.
> >
> > 59. The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted. It is necessary that the primary judge 'enter into' the issues canvassed and explain why one case is preferred over another. (excluding references)
>
> 85. Reasons do not have to be "*lengthy or elaborate*"; it is necessary that an arbitrator's reasons be read as a whole.
>
> 86. The appellant's argument that '*treatment*' was restricted to the provision of services was not made to the Arbitrator, nor did the appellant place reliance on the decisions of *Rose* and *Beck* at first instance. It is not error to fail to consider an issue not argued. It is not an error of law to fail to refer to a matter not raised. ..
>
> 91. It is necessary that the reasons be read as a whole. The Arbitrator, dealing with whether the treatment was reasonably necessary, summarised the medical evidence overall. This included multiple references in the Arbitrator's reasons to the efficacy of an assistance dog in the treatment of the respondent's psychological condition. There was reference to a report from Ms Bell (an occupational therapist) which stated "*assistant dogs are medical aids*". The reasons referred to Dr Cordowiner (the

respondent's general practitioner) saying the respondent's functioning "*would significantly benefit from an assistance dog and is a form of therapy*". The reasons refer to Ms Patton, the treating psychologist, saying *"I do recommend that a service dog be included as treatment, to address [the respondent's] workplace injury*". Associate Professor Robertson said that an "*assistance dog appears to have enabled this patient to re-engage with employment and improve on her clinical progress*". Dr Ng (who did not examine the respondent) said that "*the literature did not indicate that service or companion dogs were a mainstream treatment*". In discussing the evidence relevant to whether provision of the assistance dog was '*reasonably necessary'*, the Arbitrator observed the respondent "*said she obtains great benefit from her assistance dog*".

92. The Arbitrator made the following findings:

> Notwithstanding such reservations as to the small evidence base for the effectiveness of treatment by the supply of an assistance dog, there was unanimity amongst all the medical professionals that in this case, there was a therapeutic benefit in the treatment of [the respondent's] condition by the presence of her dog…
>
> … the evidence of the medical experts is unanimous that the proposed treatment was appropriate, and likely to be effective – indeed was actually effective.

93. Dealing with whether the assistance dog fell within the definition in para (b) of s 59, the Arbitrator noted a submission by the appellant's counsel that the dog was not '*medical treatment'*. The Arbitrator said he was satisfied the treatment was '*therapeutic*'. He noted paragraph (b) refers to '*therapeutic treatment'*. On the clear words of the section '*medical or related treatment*' includes "*therapeutic treatment given by direction of a medical practitioner*". This is the point the Arbitrator made in the reasons at [107]. I note this is consistent with the decision in *Bartolo* where Burke CCJ said "*[i]t therefore follows that Mrs Bartolo must establish that the particular treatment falls within one or more of the particular items in the definition*".

94. The Arbitrator's thorough examination of the medical evidence in his reasons, referred to above, clearly described the evidence which justified his conclusion that provision of the assistance dog constituted '*therapeutic treatment*'. The Arbitrator found that the treatment was "*given by direction of a medical practitioner*", a finding which is not challenged on this appeal. I accept the respondent's submission that the Arbitrator's reasons at [105] involved a straightforward application of the words of the section. The Arbitrator made the necessary findings to satisfy the requirements of para (b). It followed from those findings that the matter fell within the definition in para (b), and therefore provision of the assistance dog fell within the definition of '*medical or related treatment*' in s 59.

Accordingly, Snell DP confirmed the COD.

Journey claim – Section 10 (3A) WCA – real and substantial connection between employment and the injury

Mission Australia v Eves [2020] NSWWCCPD 49 – Deputy President Wood – 31/07/2020

The worker was employed by the appellant as a Community Support Worker in Bourke, NSW. She suffered a psychological injury as a result of multiple work-related stressors. And was certified as having no work capacity from 11/02/2016. On 18/02/2016, she was cleared to resume normal duties from 19/02/2016, on the proviso that her work environment was conducive and free from workplace bullying.

On 19/02/2016, the worker resumed work and the arrangements required that she have no face-to-face contact with a named superior. However, that superior spoke directly to the worker and the injury management adviser directed the worker to cease work for 2 weeks, to enable the appellant to put a return to work plan in place. The worker left the workplace in a distressed and shocked state that morning and decided that she would travel to Cobar to stay at her Mother's home. She spent most of that day packing bags, arranging medications and attempting to pay rent to cover the period of her absence. She left for Cobar at about 6:30pm. However, at about 8:30pm, she was severely injured when her car veered off the road and hit a tree.

The worker claimed compensation for physical injuries suffered in the MVA and a psychological injury suffered on 10/01/2016. However, the appellant disputed the physical injuries under ss 4, 9A, 10 and 10 (3A) *WCA* and it disputed the psychological injury claim under ss 4, 9A and 11A *WCA..*

On 30/01/2020, ***Arbitrator Batchelor*** issued a COD, in which he found for the worker with respect to both claims. He issued an amended COD on 3/01/2020, with respect to the worker's entitlement to weekly payments. He concluded that the worker was on a journey for the purposes of s 10 *WCA* when she left the appellant's premises on 19/02/2016, with the intention of going to her mother's home in Cobar that night. He held that the fact that there were several hours of delay between leaving the workplace and setting out on the journey to Cobar did not alter the fact that the worker was on a journey for the purposes of s 10 *WCA* when the MVA occurred. He found that there was a real and substantial connection between the employment and the MVA and that it was not necessary to apply the more stringent test of whether the injury arose out of the worker's employment.

The appellant did not seek to appeal the determination regarding the psychological injury, but it challenged the Arbitrator's findings that the worker was on a journey within the meaning of s 10 *WCA* when the MVA occurred and that there was a real and substantial connection between the worker's employment and the MVA. It alleged that the Arbitrator: (1) erred in finding that the worker was on a journey within the meaning of s 10 *WCA. (2)* In the alternative, if the worker was on a journey, the Arbitrator erred in finding that there was a real and substantial connection between the employment and the MVA.

Deputy President Wood determined the appeal on the papers.

Wood DP rejected ground (1). While she noted that the appellant argued that the worker did not form the intention to travel to Cobar until after she left the workplace, the noted that the Arbitrator quoted from the decision of the High Court of Australia in *Vetter v Lake Macquarie City Council* [2001] HCA 12, which established:

> (a) there is no obligation upon a worker to take the shortest and most direct route, provided that the journey can be said to be a journey between the worker's place of abode and place of employment, and
>
> (b) there is no reason why a worker could not choose a longer and more indirect route to achieve a purpose in addition to the purpose of reaching the worker's residence, again provided that the journey is a journey between his or her place of work and place of abode, and provided there is no material increase in risk.

Wood DP stated:

> 91. If it is accepted that the respondent intended her destination to be Cobar, then, applying the High Court's observations, the fact that the respondent first went to her Bourke residence does not detract from the character of the journey as a whole. As the Arbitrator pointed out, the High Court in Vetter adopted the reasoning of Mahoney JA in *Minchinton v Homfray* that:

> Having regard to the statutory reference to 'interruption or duration', the relevant meaning for present purposes is, I think: 'a spell of going or travelling, viewed as a distinct whole'.

92. The appellant further challenges the Arbitrator's finding on the basis that the journey could not be a "periodic journey" because there was no evidence that the respondent had taken that journey on any other occasion. The Arbitrator considered that submission made by the appellant. He concluded that, in accordance with Glass JA's observations in Hook, the place of abode is the place where the worker intended to spend the night having the character of his or her place of abode, even though he or she may travel to that particular place on one occasion only. There is no error in the Arbitrator's reasons in respect of accepting that the journey was a periodic journey, despite the fact that it may have been undertaken on one occasion only.

93. The Arbitrator proceeded to further consider the meaning of "place of abode." The Arbitrator referred to the statutory definition contained in s 10 (6) (b) of the 1987 Act that the place of abode is the place the worker intended to spend the night following the journey.

94. The Arbitrator noted that there was no issue in the present case in respect of whether there had been a deviation or interruption that materially increased the risk of injury. The Arbitrator concluded (in this case, correctly) that it was immaterial that there had been a delay of some hours before the respondent set out for Cobar and that when the respondent left her place of employment in her car, she was on a journey to which s 10 of the 1987 Act applied.

95. The evidence establishes that:

> (a) both the respondent's friend and the respondent's mother encouraged her to return to Cobar;
> (b) the respondent expressed that her intention was to "go home," and
> (c) the respondent's activities during the day included:
> (i) packing her bags;
> (ii) arranging her medications, and
> (iii) attempting to pay her rent for two weeks.

96. Those facts are indicative that the respondent, before arriving at her Bourke residence, had formed her intention of returning that evening to her family home in Cobar in order to spend the night (and indeed several nights thereafter).

97. In accordance with the legislation and authorities relied on by the Arbitrator and discussed above:

> (a) the fact that the respondent did not take a direct route to her intended destination did not detract from the character of the travel being a journey within the meaning of s 10 of the 1987 Act;
>
> (b) the travel, when viewed as a distinct whole, had the intended destination of the respondent's family residence in Cobar, and
>
> (c) the destination was a place to which the worker was journeying with the intention of spending the night.

Wood DP concluded that the Arbitrator's finding that the worker was injured while on a journey within the meaning of s 10 *WCA* was based on the evidence, consistent with the relevant authorities and open to him.

Wood DP also rejected ground (2). She noted that the appellant argued that the relevant authorities required it to have encouraged, required or expected the worker to ultimately make the journey to her mother's house in Cobar. However, she also noted that the appellant did not address the Arbitrator on this issue and she stated that the obligation to give reasons is dependent upon the submissions presented to the judicial officer and there is no duty to give reasons for failing to accept submissions that were never put. In any event, she found that the Arbitrator's reasons were sufficient when considered as a whole, as he reached a conclusion by applying the principles established in *Bina*.

Accordingly, Wood DP confirmed the COD.

Alleged factual error – Arbitrator's duty to provide adequate reasons – Application of Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110

Ausgrid v Parasiliti [2020] NSWWCCPD 51 – Deputy President Snell – 6/08/2020

The worker was employed by the appellant as an electrical cable technician from 1986 to 9/01/2015 (when he accepted a voluntary redundancy). He developed problems with his left shoulder and back due to the nature of his work. He also alleged that he developed right shoulder problems.

The worker claimed compensation under s 66 *WCA* for 17% WPI, for permanent impairment of the lumbar spine and both shoulders/upper extremities, based upon assessments from Dr Giblin. However, the appellant disputed the claim and it disputed the alleged injury to the right shoulder.

The worker filed an ARD, in which he claimed compensation for his right shoulder on alternative bases, namely: (1) the injury was caused by the nature and conditions of his employment (deemed date: 1/05/2012); and (2) the injury was consequential to the accepted injury to the left shoulder.

Arbitrator Homan conducted an arbitration on 12/11/2019. On 12/12/2019, the Arbitrator issued a COD, which determined that the worker had not discharged his onus of proving injury to the right shoulder as a result of the nature and conditions of his employment, but that he had suffered a consequential injury to the right shoulder. She remitted the matter to the Registrar for referral to an AMS to assess permanent impairment of the lumbar spine and both upper extremities (shoulders).

The appellant appealed and asserted that the Arbitrator erred in finding that the worker suffered a consequential condition of his right shoulder and in so doing, she failed to provide adequate reasons.

Deputy President Snell determined the appeal on the papers. He noted that the ground of appeal raised 2 alleged errors, namely: (1) error in finding a consequential condition in the right shoulder; and (2) failure to provide adequate reasons. He noted that the appellant was critical of the weight that the Arbitrator gave to Dr Giblin's opinion, as she rejected his opinion that supported the nature and conditions claim on the basis that he had not engaged with the absence of contemporaneous evidence of right shoulder symptoms until well after the worker was incapacitated by his other injuries. He stated that this factor was not relevant to a finding of a consequential injury, which could result from overuse of the right shoulder that post-dated the worker's employment with the appellant and it is open to a judge or Arbitrator to accept the evidence of a witness on one issue, but not on another.

Snell DP held that the Arbitrator made the ultimate finding of fact based upon the decision in *Kooragang* and she referred to the proposition that "*the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.*" He held that the appellant's challenge is subject to the principles discussed in *Raulston v Toll Pty Ltd* and that the Arbitrator's findings were clearly open to her on the evidence and no error was established. He stated (citations excluded):

57. It is necessary that the Arbitrator's reasons be read as a whole. The submission that the Arbitrator did not explain why she found the right shoulder condition resulted from overuse, subsequent to the respondent's employment with the appellant, is without merit. The Arbitrator made clear findings which were referenced to evidence and for which she gave reasons.

58. In *Pollard v RRR Corporation Pty Ltd* McColl JA (Ipp JA and Bryson AJA agreeing) summarised a number of the authorities governing the duty to provide adequate reasons. Her Honour observed that the "*extent and content of reasons will depend upon the particular case under consideration and the matters in issue*". Her Honour said:

> The reasons must do justice to the issues posed by the parties' cases: see *Moylan v Nutrasweet Co* [2000] NSWCA 337 (at [61]) per Sheller JA (Beazley and Giles JJA agreeing). Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted: *Soulemezis* (at 279) per McHugh JA. As Santow JA (with whom Meagher and Beazley JJA agreed) explained in *Jones v Bradley* [2003] NSWCA 81 (at [129]) it is necessary that the primary judge '*enter into*' the issues canvassed and explain why one case is preferred over another; see also *Flannery v Halifax Estate Agencies Ltd t/as Colleys Professional Services* [1999] EWCA Civ 811; [2000] 1 All ER 373 (at 377-378) per Henry, Laws LJJ and Hidden J.

Snell DP held that the Arbitrator's reasons complied with her duty to give reasons and with her statutory obligation: *NSW Police Force v Newby* [2009] NSWWCCPD 75, [147]–[151].

Accordingly, Snell DP confirmed the COD.

WCC – Medical Appeal Panel Decisions

Incorrect assessment criteria – inadequacies of examination by video conferencing – appellant denied procedural fairness - MAP assessed permanent impairment

Prince v Seven Network (Operations) Ltd [2020] NSWWCCMA 128 – Arbitrator Harris, Dr J Parmegiani & Dr L Kossoff – 29/07/2020

The background to this matter was reported in Bulletin no. 44. However, by way of summary, the Commission determined that the appellant was a worker and that she suffered a psychological injury while she was a contestant on a reality television show known as "House Rules". The dispute under s 66 *WCA* was referred to an AMS and on 31/03/2020, Dr Shaikh issued a MAC that assessed 7% WPI. This did not entitle the appellant to compensation under s 66 *WCA.*

The appellant appealed under s 327 (3) (b), (c) and (d) *WIMA* and sought re-examination by a member of the MAP with respect to 2 separate PIRS assessments, namely "*self-care and personal hygiene*" and "*social and recreational activities*". The respondent opposed the appeal.

The MAP was satisfied that the AMS erred with respect to the assessment for "*social and recreational activities*" and expressed concern that because of the manner in which the examination was conducted, a full elucidation of the facts did not occur and that breaks in transmission clearly impacted on the effectiveness of the process. As a result, the AMS incorrectly characterised conduct and this extended beyond a PIRS scale and as the Court noted in *Ballas v Department of Education* [2020] NSWCA 86 at [94]:

If conduct is wrongly assigned to one scale, when it should have been assigned to another, this will result in an AMS taking into account an irrelevant consideration in the context of assigning a class to each of the distinct scales. This will inevitably bear upon the calculation of the WPI which is critical for an injured worker's entitlement to compensation.

The MAP determined that there should be a re-assessment of all PIRS categories and that Dr Parmegiani would conduct that assessment by way of video conferencing. Based upon his re-examination, the MAP revoked the MAC and issued a fresh MAC that assessed 22% WPI

WCC – Arbitrator Decisions

Arbitrator determines disputes under s 66 WCA with respect to ADL's and scarring by analysing deficiencies in qualified reports and applying facts from the treating specialist's opinion

Dodd v Qantas Airways Ltd [2020] NSWWCC 249 – Arbitrator Harris – 21/07/2020

The worker claimed compensation under s 66 *WCA* for permanent impairment of the lumbar spine and skin. There was no dispute that on 29/01/2018, she injured her low back at work and on 15/05/2018, she underwent a left L5/S1 discectomy and rhizolysis.

The worker was assessed by Dr Bodel and Dr Harrington and the only difference in their opinions was whether the skin should be assessed as 0% or 1% and whether there should be an allowance for ADLs.

Arbitrator Harris conducted a teleconference on 17/07/2020, during which the worker asked the Arbitrator to determine the dispute under s 66 *WCA,* but the respondent requested that it be referred to an AMS. He concluded that this is an appropriate matter for him to determine given the similarity in the assessments of the qualified specialists. Both qualified specialists agreed that the appropriate assessment for the lumbar spine was DRE category III, and that maximum medical improvement had been reached and there should be no deductible under s 323 *WIMA.*

With respect to ADLs, the Arbitrator was satisfied that Dr Bodel's assessment of 2% WPI is consistent with para 4.35 of the Guidelines and he allowed 2% WPI for ongoing radiculopathy. However, he held that Dr Bodel did not provide an explanation for his assessment of 1% WPI for the skin and he assessed 0% WPI. Accordingly, he issued a COD that assessed 15% WPI.

Claim for weekly payments after the end of the second entitlement period on the basis of no current work capacity – consideration of "no current work capacity" and "suitable employment" in s 32A WCA – Held: Worker failed to establish that he has no current work capacity during the period for which compensation is claimed

Morcos v Deosa Enterprises Pty Ltd [2020] NSWWCC 267 – Arbitrator Isaksen – 5/08/2020

On 23/05/2017, the worker injured his right knee at work. He suffered a consequential condition to his right elbow on 4/12/2017, when his right knee gave way, and he required surgery for that injury. He also suffered a secondary psychological injury due to chronic pain and disability.

The worker received weekly payments for a total of 130 weeks under ss 36 and 37 *WCA.* On 129/11/2019, the respondent's insurer notified him that his weekly payments would cease from 1/01/2020, due to the effect of s 38 (3) *WCA,* as he had not returned to at least 15 hours of work per week.

The worker alleged that he was entitled to continuing weekly compensation because he has had no current work capacity since 12/01/2020 and he is likely indefinitely to continue to have no current work capacity.

Arbitrator Isaksen conducted an arbitration on 30/07/2020. On 5/08/2020, he issued a COD which determined that the worker had failed to establish that he has had no current work capacity from 12/01/2020 to date. His reasons are summarised below:

- There was available medical evidence that supports a finding that although the worker could not resume full duties as an electrician, he was capable of engaging in suitable work having regard to the injury to the right knee and condition of his right elbow. In June 2018, Dr Chugh stated that the worker could work as a customer service manager or electrical training technician. In July 2018, Dr Smith (IMC) assessed the worker fit for full-time work within some physical capabilities set out by an exercise physiologist. In February 2019, Dr Powell stated that the worker was fit for suitable duties;
- On 13/05/2019, Dr Chugh certified the worker as having capacity for some employment for 15 hours per week. However, in August 2019, Dr Kirsh, in consultation with Dr Chugh stated that the worker was not fit for work. Dr Chugh reported that he would be unfit for work for the next 3 to 6 months, but there is no evidence from either doctor that extends beyond February 2020; There is also no adequate explanation why they considered that the worker would be unfit for work for that period;
- In the absence of a more detailed explanation from Dr Kirsh, or at least Dr Chugh, as to whether the worker has had no current work capacity since August 2019, there is a consistent line of medical opinion from mid-2018 which supports a finding that he would be at least fit for part time sedentary work, despite the ongoing problems he has been having with his right knee and right elbow;
- In *Dewar*, DP Roche said at [62] that the determination of what is suitable employment for an injured worker "*is a practical exercise*" having regard to the definition of '*suitable employment*' in s 32A *WCA*. That includes having regard to the nature of the worker's incapacity and the worker's age, education, skills, and work experience;
- While the worker alleged that he has always worked in physically demanding jobs and would not be able to work in a sedentary role, there is evidence that contradicts these allegations. He was running his own business when he was injured and it is reasonable to assume that this involved some rudimentary management skills and he had also owned and operated a service station from 2003 to 2016;
- The evidence of past work experience and education, along with the medical evidence that was accepted regarding the physical injuries, results in a finding that the worker could do a few hours of work for a few days per week in some menial clerical or administrative job;
- The determination of whether an injured worker is fit for suitable employment is to be made regardless of whether the work or employment is available, or generally available in the employment market, although there must be a real job which the worker can perform;
- He held that the worker is at least fit for part time work in basic clerical or administrative work, or basic retail managerial work, despite the ongoing effects of the injury to his right knee and consequential condition affecting his right elbow. The worker has failed to establish that, as a result of those physical injuries, has had no current work capacity from 12 January 2020; and

- The medical evidence supports a finding that the applicant suffered a secondary psychological injury, but the evidence supports a finding that the worker's cognitive functions are intact and there is no evidence of memory impairment. There is therefore no impediment to the worker working part-time in that employment despite his psychological condition.

WCC – Registrar's Decisions

Gatekeeper decision under s 327 (4) WIMA – AMS determined that MMI was not reached – Worker appealed and argued that it is not the AMS' role to recommend treatment and that the AMS failed to consider that the respondent was no longer liable for treatment expenses – Delegate not satisfied that a ground of appeal had been made out

Neal v Secretary, Department of Education [2020] NSWWCCR 4

On 28/05/2020, Dr Morris issued a MAC and determined that MMI had not been reached.

The appellant appealed under s 327 (3) (d) *WIMA* and asserted that it is not the role of the AMS to recommend treatment and/or to assume that a worker is obliged to follow treatment recommendations by an AMS. She also alleged that the AMS failed to consider that the respondent was no longer liable for medical treatment costs and that no further treatment had been proposed by the treating doctors.

Registrar's Delegate McAdam referred to the Court of Appeal's decision in *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86, which held that the Registrar's process is considering whether a ground of appeal was made out does not involve the Delegate in assessing the correctness of the argument but simply that what has been put forward is arguable. He considered that the appellant had not raised an arguable case of error and his reasons are summarised below:

- The appellant's submissions are general and broad and no reference is made to any part of the MAC, any evidence or the Guidelines.
- An AMS is required to assess a worker in accordance with the Guidelines and para 1.16 provides that if the AMS considers that the treatment has been inadequate and maximum medical improvement has not been achieved, the assessment should be deferred and comment made on the value of additional treatment and/or rehabilitation – subject to para 1.34 of the Guidelines.
- Para 1.34 of the Guidelines provides that if the worker has been offered, but has refused, additional or alternative medical treatment that the assessor considers likely to improve their condition, the medical assessor should evaluate the current condition without consideration of potential changes associated with the proposed treatment. The assessor may note the potential for improvement in their condition in the evaluation report, and the reasons for refusal, not adjust the level of impairment on the basis of their decision.
- Reading the MAC as a whole, the AMS has considered all relevant considerations under the Guidelines and has advised when maximum medical improvement might be reached based on his recommended treatment.
- There is no evidence, from a fair reading of the MAC, that the AMS assumed that the worker is obliged to follow his treatment recommendation.
- The worker has not pointed to any judicial authority or section of the Guidelines that supports the argument that the AMS failed to consider that the respondent is no longer liable for her medical treatment. If this is a reference to s 59A *WCA*, neither the *WIMA* nor the Guidelines provide that this is a relevant consideration when determining whether maximum medical improvement has been reached.

- The argument that there is no plan or proposal for any further medical treatment by treating health providers does not present an arguable case of demonstrable error by the AMS. There is no evidence to support that assertion and the absence of any updated treatment plan was one of the reasons why the AMS concluded that the worker had not reached maximum medical improvement.
- As the worker did not rely upon s 327 (3) (b) *WCA*, he was not required to consider her further statement dated 4/06/2020.
- In any event, his decision does not finally determine the dispute between the parties and the Commission will issue a COD granting the appellant liberty to restore once maximum medical improvement has been reached, although this will require medical evidence addressing the AMS' concerns.