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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Stop Press: WIRO's COVID-19 Matters September 2020 report is now available and can be viewed here.

Decisions reported in this issue:

1. Briggs v IAG Limited t/as NRMA Insurance [2020] NSWSC 1318
2. Handley v Canterbury City Council [2020] NSWWCCPD 59
3. Sikoski v Dolci Doro Pty Ltd [2020] NSWWCCPD 60
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Supreme Court of NSW – Judicial Review Decisions

Jurisdictional error – constructive failure to exercise jurisdiction

Briggs v IAG Limited t/as NRMA Insurance [2020] NSWSC 1318 – Harrison AsJ – 29/09/2020

This matter involved judicial review of a decision made by the Review Panel of SIRA.

On 22/05/2018, the plaintiff was injured in a MVA. Liability not in dispute. However, there was a dispute as to whether the plaintiff's injury was a "*minor injury*" under s 1.6 of the *MAI Act*, which has a significant bearing on his entitlement to damages.

Section 1.6 of the *MAI Act* defines "*minor injury*" as follows:

(1) For the purposes of this Act, a minor injury is any one or more of the following –

(a) a soft tissue injury,

(b) a minor psychological or psychiatric injury.

(2) A soft tissue injury is (subject to this section) an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage.

Under s 1.6 (2) of the *MAI Act*, an injury that includes "*complete or partial rupture of tendons, ligaments, menisci or cartilage*" is not a minor injury under the Act.

Clause 4 of the *Motor Accident Injuries Regulation 2017 (NSW)* further defines "*minor injury*" as follows:

4 Meaning of 'minor injury' (section 1.6 (4) of the Act)

(1) An injury to a spinal nerve root that manifests in neurological signs (other than radiculopathy) is included as a soft tissue injury for the purposes of the Act…

Under ss 7.1 and 7.17 of the *MAI Act*, the issue of whether the plaintiff's injury was minor is considered a "*medical assessment matter*". As such, the plaintiff's medical dispute was referred for assessment by a medical assessor on behalf of SIRA.

On 14/12/2018, Medical Assessor Carr issued a MAC, which certified that the plaintiff's injury was a minor injury for the purposes of the *MAI Act*.

The plaintiff applied for a review of that decision under s 7.26 of the *MAI Act* and argued that the Assessor mischaracterised the lumbar disc injury as a bulge rather than an annular tear. Under s 7.26, the review panel was required to conduct a fresh assessment.

However, the review panel determined the matter without re-examining the plaintiff and it issued a Certificate and reasons under ss 7.23 and 7.26 of the *MAI Act*, which certified that the injury was a minor injury. While it determined that the plaintiff did have an annular tear, it found that this was not causally related to the MVA. It revoked the MAC and issued a new Certificate, which certified that the cervical and lumbar spine injuries were minor injuries.

The plaintiff alleged that the review panel erred as follows: (1) by denying him procedural fairness, in that it did not give him notice of its intention to rely on the Spine Journal article; (2) by failing to apply the correct principles of causation of his injury; and (3) by failing to give proper and lawful reasons for its decision, in breach of s 7.23 (7) of *the MAI Act*.

Harrison AsJ upheld ground (1) and she stated, relevantly:

56 I accept that the Spine Journal article, read independently as medical literature, presents as a text written for the purpose of clarifying spinal terminology. However, its function within the Review Panel's reasons is not as clear. Over two pages of its reasons, the Review Panel reproduced the body of the Spine Journal article verbatim, without indentation or quotation, and then added its own conclusion with reference to the article's terms of "violent" and "less than violent" injury. Although the Review Panel prefaced the extract by stating that it "also noted [the Spine Journal article]", it is not clear to a reader that what follows is a direct quote from the article, unless the two texts are held up and compared.

57 I will address sufficiency of reasons in more detail later in this judgment, as it has been separately articulated as a ground of judicial review in relation to causation. For present purposes, it is sufficient to say that the Review Panel had an obligation to set out its actual path of reasoning so as to enable a reader to determine whether it fell into error: see *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; 303

ALR 64 ("*Wingfoot*") at [55]. It is not enough for counsel for the insurer to point to the abstract to the Spine Journal article, which states that the text is intended to provide a glossary of medical terms, and impute its contents to the reader of the Review Panel's reasons.

58 More to the point, even if the Review Panel had more clearly attributed the reproduced portions of the article, in my view its use was a denial of procedural fairness to the plaintiff. The Review Panel was entitled to refer to medical literature which was straightforward or contained common knowledge. It may be that the Spine Journal article can be described in these terms in isolation. However, the Review Panel seems to have made much of the final paragraph of the Spine Journal article, which it reproduced as follows:

> The category of trauma includes disruption of the disc associated with physical and/or imaging evidence of violent fracture and/or dislocation and does not include repetitive injury, contribution of less than violent trauma to the degenerative process, fragmentation of the ring apophysis in conjunction with the disc herniation, or disc abnormalities in association with degenerative subluxations. Whether or not a 'less than violent' injury has contributed to or been superimposed on a degenerative change is a clinical judgment that cannot be made on the basis of images alone; therefore, from the standpoint of description of images, in the absence of significant imaging evidence of associated violent injury, should be classified as degeneration rather than trauma.

59 The Review Panel's resultant conclusion that the plaintiff did not suffer a "violent" or "less than violent" injury was a finding informed by the terms of a source previously unknown to the parties. The terms "violent" and "less than violent", pulled from the article, introduce defined standards of severity which do not appear in the statue or relevant guidelines. Had the parties been advised that the Review Panel intended to rely on the Spine Journal article, they may have consulted their medico-legal experts to make submissions in relation to the concepts it introduced.

60 As in *Pascoe*, it is my view that the Review Panel in these proceedings used the article to draw an important adverse conclusion about the plaintiff's case. The Review Panel had an obligation to provide the plaintiff with notice, and an opportunity to respond, before taking into account concepts drawn from an unknown source. To fail to do so was to deny the plaintiff procedural fairness. As such, the decision of the Review Panel should be set aside.

However, her Honour rejected ground (2) and (3). She concluded that in denying the plaintiff procedural fairness, the review panel constructively failed to exercise jurisdiction and made errors of law as it relates to findings on whole person impairment arising from the MVA. Accordingly, she quashed the decision of the review panel and remitted the matter to SIRA for determination according to law.

WCC – Presidential Decisions

Application for an extension of time to appeal refused – alleged factual error

Handley v Canberbury City Council [2020] NSWWCCPD 59 – Deputy President Wood – 23/09/2020

The appellant claimed lump sum compensation for 9.7% binaural hearing impairment under s 66 *WCA* and the cost of hearing aids

However, the respondent disputed the claim and asserted that the appellant was not entitled to compensation because he had not made his claim within 6 months of his injury or within 3 years of becoming aware of his injury, as required by ss 261 (1), 261 (4) and 261 (6) *WIMA.* There was no dispute that employment with the respondent was noisy.

Arbitrator Burge identified the issues as: (1) when the appellant first became aware that he had suffered the injury (s 261 (6) *WIMA*); (2) whether the appellant had made his claim within the requisite 3 years of that awareness (s 261 (4) (a) *WIMA*), and if not; (3) did the appellant suffer a serious and permanent disablement as a result of his injury, so that he was entitled to claim compensation in any event (s 261 (4) (b) *WIMA*). On 15/04/2020, he issued a COD, which determined that the appellant was aware of his injury at least as early as 29/10/2015 and that he had not made his claim within 3 years of that date and that the appellant did not suffer a serious and permanent disablement as a result of his injury.

On appeal, the appellant alleged that the Arbitrator erred in law as follows: (1) in determining the issue pursuant to s 261 *WIMA* when the respondent failed to satisfy the statutory notice provisions under ss 279 and 281 *WIMA* being jurisdictional facts to found jurisdiction for a valid referral of a dispute under s 289 *WIMA*: and (2) in finding that: (a) he had knowledge of his injury from the time he was made aware of the contents of Dr Scoppa's report; (b) he had knowledge of his injury from approximately mid-2015 when Dr Scoppa's report was produced; (c) he had "knowledge" as that term is used in s 261 when he became aware that he had suffered a loss of hearing and that his employment was to blame, and (d) the claim had been brought outside of the three-year limit of becoming aware of the injury at issue. He also alleged that the Arbitrator erred in law and in fact in finding that he had not suffered a serious and permanent disablement within the meaning of s 261 (4) (b) *WIMA*.

Deputy President Wood determined the appeal on the papers. She noted that the appeal was lodged out of time and that the appellant asserted that there were difficulties in lodging the appeal via the Commission's portal. The appeal was initially lodged on 14/05/2020, but it was rejected by a delegate of the Registrar as it failed to comply with r 16.2 (7) of the Rules and Practice Direction 6. The appellant re-lodged the appeal on 19/05/2020 and on 26/05/2020, respectively, but both were rejected for failure to comply with the Commission's procedural requirements. He re-lodged it on 28/05/2020 and this appeal was accepted.

Wood DP stated that rule 16.2 (5) requires her to consider whether "*exceptional circumstances*" exist. Campbell JA considered this expression in *Yacoub v Pilkington (Australia) Ltd* and concluded (citations excluded):

> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered;
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors;
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional;
>
> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision, and
>
> (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case.

Wood DP held that if the recitation of the various communications between the appellant's solicitor and his counsel were intended to be reasons in support of the application for an extension of time, they are not satisfactory. It is the responsibility of the legal practitioner to ensure that the appeal is filed within the time required by s 352 (4) *WIMA* and that it complies with the procedural requirements. Practice Direction No 6 makes it clear that the appeal may be rejected for failure to comply with those requirements. Unfortunately, it is not entirely uncommon for appeals that do not comply with the procedural requirements to be filed on the eve of the expiration of the period within which an appeal must be filed. The decision in *Kula Systems* does not assist the appellant. In that case the appeal was accepted within the time prescribed, and a Direction was issued to the appellant to amend the appeal because of a certain procedural irregularity. In this case, the appeal was rejected because of significant procedural non-compliance and it was out of time. Accordingly, she held that the events referred to by the appellant cannot be considered exceptional.

Wood DP stated that whether there are exceptional circumstances and whether the party seeking an extension can show that a demonstrable or substantial injustice would occur if leave were not granted, is "*a composite expression in the rule to be dealt with within jurisdiction*." This requires consideration of the merits of the appeal.

On 24/07/2020, the appellant sought leave to file further submissions as "Submissions in Reply", on the basis that the appeal grounds and submissions were drafted without the transcript of the arbitral proceedings and while the Commission's link to the audio recording was sent to the appellant's counsel on 21/04/2020, he was unable to access it and the transcript was sent to him on 27/05/2020. He argued that procedural fairness should allow him to respond to the respondent's submissions. However, the respondent opposed that application.

Wood DP noted that there was no explanation as to why the appellant did not incorporate his submissions on the transcript in his primary submissions, or waited almost 2 months after receiving the transcript to make then, or why he failed to apply for leave to lodge those submissions under 24/07/2020. She held that the appellant's solicitors' delay was unacceptable and to allow the appellant's application would require the Commission to allow the respondent an opportunity to respond to them, which would cause further undue delay.

Wood DP held that to indulge the appellant's request is inappropriate and unmerited and she refused the application to rely upon the further submissions.

Alleged error in fact finding – the rule in Blatch v Archer

Sikoski v Dolci Doro Pty Ltd [2020] NSWWCCPD 60 – Deputy President Snell – 25/09/2020

On 8/08/2011, the appellant suffered a compression fracture of the L2 vertebra at work. injury was not disputed. He ceased work with the respondent when it closed in about March 2017 and then performed process work for another employer until about February 2019.

On 9/07/2019, the appellant claimed compensation under s 66 *WCA* for 31% WPI, based upon the following assessments: (1) Dr Giblin, orthopaedic surgeon, assessed 12% WPI (lumbar spine). In 2019; (2) Dr Herman, cardiologist, diagnosed hypertension in the setting of several cardiac risk factors that commenced after the injury and he assessed 10% WPI (cardiovascular system); and (3) Dr Harmor, respiratory and sleep physician, diagnosed mild sleep apnoea due to weight gain that was caused by inactivity after the accident, and assessed 9% WPI (ear, nose and throat structures). However, the respondent disputed liability for the alleged consequential injuries.

Arbitrator Homan issued a COD on 6/05/2020, in which she determined that she did not accept the necessary causal connection between the injury on 8/08/2011 and the alleged consequential injuries. She entered an award for the respondent with respect to hypertension and sleep apnoea. However, the respondent conceded that the appellant suffered 12% WPI with respect to the lumbar spine and the Arbitrator awarded the appellant compensation under s 66 *WCA.*

The appellant appealed against the findings regarding the consequential injuries.

Deputy President Snell determined the appeal on the papers. He stated that the grounds of appeal do not adequately identify the errors alleged, as they assert errors of fact and law in the Arbitrator's factual findings on the issues that were decided against the appellant, in that she decided that he: (1) did not suffer significant weight gain as a result of the subject accident; (2) did not suffer a consequential injury of sleep apnoea; and (3) did not suffer a consequential injury of hypertension.

The respondent sought to identify the grounds the appellant raises by reference to the subject matter of the appellant's submissions and it identified 2 grounds on this basis, namely: (1) There was alleged error in the Arbitrator's fact finding dealing with the "*intermediate factual matter*" of the appellant's weight gain, and the causal chain the appellant needed to establish to prove that his sleep apnoea and hypertension resulted from the lumbar spine injury in 2011; and (2) Whether there was error in the Arbitrator reaching her factual conclusion on causation of the alleged consequential conditions, in the absence of cross-examination of the appellant. Snell DP decided to dealing with the appeal by reference to these 2 grounds.

Snell DP held that the Arbitrator did not err in reaching her findings in the absence of cross-examination. He stated that an Arbitrator is not obliged to accept a witness' evidence on the basis that they were not cross-examined. In *New South Wales Police Force v Winter* [2011] NSWCA 330 (*Winter*), Campbell JA reviewed authorities relating to the rule in *Browne v Dunn* in the context of the Commission's procedures and he stated:

> The consequence of these decisions is that the circumstances in which *Browne v Dunn* will require matter to be put to a witness in cross-examination will depend upon the nature of the pre-trial preparation there has been, and whether that pre-trial preparation has been sufficient to give notice to a witness of the submission ultimately intended to be put to the court. An aspect of this is that *Browne v Dunn* will require more extensive cross-examination in a case where all the evidence is given orally, than is necessary in a case where the substance of the evidence proposed to be given by each side is notified in advance by affidavit or statement.
>
> Even when there has been an exchange of affidavits or statements, the rule in *Browne v Dunn* will require a cross-examining counsel to put to a witness the implications which counsel proposes to submit can be drawn from the evidence, if those implications are not obvious from the evidence, or from other pre-trial procedures, or the course of the case. ...

Further, in *JB Metropolitan Distributors Pty Ltd v Kitanoski* [2016] NSWWCCPD 17 *(Kitanoski*), Roche DP, applying *Winter*, said:

> The apparent suggestion that, if an Arbitrator has not heard oral evidence from a party, it is not open to the Arbitrator to form a view about that party's credit or consistency is plainly wrong. Subject to the relevant issues having been fully and fairly ventilated in the documentary evidence, and the parties having had a reasonable opportunity to make appropriate submissions on those issues, it is open to an Arbitrator to form a view about the credit of a witness or a party even if that witness or party has not given oral evidence or been cross-examined …

Snell DP referred to the transcript, which demonstrates that both parties had an opportunity to address on the matters that the Arbitrator considered. The Commission has an obligation to afford the parties procedural fairness. While the appellant argued that he was denied procedural fairness because the rule in *Browne v Dunn* was not complied with, he did not identify a basis for that argument and it was not made out.

Snell DP also rejected that the Arbitrator erred in fact finding. The appellant argued that the Arbitrator failed to give sufficient weight to the seriousness of the lumbar spine injury having regard to the fact that Dr Giblin and Dr Powell assessed 12% WPI. He noted that in *Shellharbour City Council v Rigby* [2006] NSWCA 308, Beazley JA (as her Honour then was) said:

> Questions of the weight of evidence are peculiarly matters within the province of the trial judge, unless it can be said that a finding was so against the weight of evidence that some error must have been involved.

Snell DP stated that the Arbitrator specifically referred to "*a discrepancy in the evidence as to the nature of the [appellant's] employment duties following the injury*". She referred to the differing histories recorded by Dr Powell, Dr Giblin and Professor Young and noted that the appellant did not address this in his statement. Against this background, the Arbitrator found that it was "*not possible to find with confidence what the [appellant's] duties post-injury entailed*" and she was "*not satisfied on the evidence before [her] that the [appellant] engaged in only sedentary work after the injury*".

In *Blatch v Archer* [1774] EngR 2; (1774) 1 Cowp 63 at 65; 98 ER 969 at 970, Lord Mansfield CJ stated:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

In *Ho v Powell* [2001] NSWCA 168; 51 NSWLR 572, Hodgson JA said:

> … in deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision. ...
>
> In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so.

Snell DP held that the Arbitrator gave clear reasons for why she did not accept the appellant's case regarding inactivity and associated weight gain and her conclusion was open to her on the evidence and did not reflect error.

Accordingly, Snell DP confirmed the COD.

WCC – Arbitrator Decisions

Consequential condition – lack of medical evidence and explanation for claim – assessment of permanent impairment for accepted injuries does not satisfy statutory threshold to allow referral to an AMS

Katirci v Programmed Integrated Workforce Limited [2020] NSWWCC 333 – Arbitrator Isaksen – 22/09/2020

On 30/12/2016, the worker injured his left shoulder and upper arm at work. The respondent admitted liability and paid s 60 expenses for a biceps tendonesis and arthroscopy, which was performed by Dr Dave and 10/01/2018.

The worker alleged that he suffered consequential conditions to his right shoulder and neck and claimed compensation under s 66 *WCA* based upon an assessment of 16% WPI from Dr Bodel, which comprised 7% WPI for the cervical spine, 8% WPI for the left upper extremity and 2% WPI for the right upper extremity. However, the respondent disputed the consequential conditions and asserted that the worker was not entitled to recover compensation under s 66 *WCA* for his left upper extremity based upon an assessment of 7% WPI from Dr Panjratan.

Arbitrator Isaksen identified the issue for determination as whether the worker suffered consequential conditions in his right shoulder and cervical spine as a result of the accepted left shoulder/arm injury on 30/12/2016.

The worker alleged that his left shoulder deteriorated after the surgery in 2018 and he was unable to return to work. he suffered continuing pain in his right shoulder and neck and that he relied upon his right arm because he could hardly use his left arm due to pain and the pain from his right shoulder radiated into his neck.

The Arbitrator noted that on 8/01/2019, Dr Khan took a history of pain in the right arm & shoulder due to overuse because of left shoulder pain. He subsequently diagnosed right shoulder bursitis and impingement.

The Arbitrator confirmed that the test of causation is whether the loss resulted from a relevant work injury: *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267. He held that "*results from*" should be applied using the principles set out by Kirby P in *Kooragang* (at [462]):

> It has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.

(at [463-4]):

> …What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death '*results from*' the impugned work injury… is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions.

The Arbitrator held that the medical evidence establishes a causal connection between the right shoulder symptoms and the accepted left shoulder and upper arm injuries.

However, the Arbitrator was not satisfied that the cervical spine symptoms resulted from the accepted injury. He noted that Dr Bodel noted symptoms in the left arm and shoulder and right shoulder, but he did not record any complaints regarding the cervical spine and the doctor did not explain how a soft tissue injury to the neck developed "*while favouring that side to protect to the injured left side*." McColl JA (Mason P and Beazley JA agreeing) said in *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 (*Hevi Lift*) at [84]:

> It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it.

The worker argued that the cervical spine symptoms are related to the shoulder injuries due to Chronic Regional Pain Syndrome (CRPS). However, the Arbitrator held that there was no definitive diagnosis of CRPS. He concluded that the worker had not discharged his onus of proof with respect to the cervical spine.

As Dr Bodel's assessments of permanent impairment for the upper extremities did not satisfy the statutory threshold to enable a referral to an AMS.

Claim under s 66 WCA made prior to 19/06/2012 – under Cl 11 Pt 1Sch 8 of the Workers Compensation Regulation 2016, the worker is entitled to have further claims under s 66 WCA referred for assessment by an AMS

Brown v Exbal Pty Ltd [2020] NSWWCC 336 – Senior Arbitrator Bamber – 23/09/2020

In this matter, the worker alleged injuries as follows: (1) injury to the right elbow on 21/06/1999; (2) Injuries to the cervical and thoracic spines on 10/02/2005; (3) injuries to the right arm, neck and back on 1/04/2005.

On 30/04/2008, the parties entered into a Complying Agreement with respect to the injury on 21/06/1999, for 10% permanent loss of efficient use of the right arm at or above the elbow.

On 23/08/2008, the appellant filed an ARD that claimed compensation under s 66 *WCA* as follows: (1) Injury on 21/06/1999 - 12% permanent loss of efficient use of the right arm at or above the elbow; (2) Injury on 10/02/2005 – 6% WPI (thoracic spine); and (3) Injury in April 2005 (deemed) – 11% WPI (right elbow and shoulder) due to the nature and conditions of employment.

On 25/05/2009, a MAP issued a MAC, which assessed: (1) Injury on 21/06/1999 - 5% permanent loss of efficient use of the right arm at or above the elbow; (2) Injury on 10/02/2005 – 0% WPI (thoracic spine); and (3) Injury in April 2005 – 2% WPI (right upper extremity).

On 3/05/2012, a COD was issued for 6% WPI (thoracic spine) based upon a MAC from Dr Rowe dated 26/03/2012.

On 24/08/2012, a further COD was issued for an additional 5% permanent loss of efficient use of the right arm at or above the elbow based upon a MAC issued by Dr Rowe dated 3/07/2012.

In these proceedings, the parties agreed to resolve the further claim for the 1999 injury for an additional 5% permanent loss of efficient use of the right arm at or above the elbow. However, the respondent disputed the allegation of injury to the neck on 10/02/2005 and argued that as Dr Stephenson assessed only 7% WPI with respect to the thoracic spine, which did not satisfy the threshold under s 66 (1) *WCA*, a referral to an AMS could not be made an award for the respondent should be entered. It also argued that the s 66 (1) threshold was not satisfied with respect to the nature and conditions claim, based upon Dr Stephenson's assessment of 10% WPI.

Senior Arbitrator Bamber held that the worker injured his thoracic spine on 10/02/2005, but she was not satisfied she sustained an injury to her neck/cervical spine. She also found that the worker had an "*existing impairment*" with respect to the thoracic spine, for which a claim was made before 19/06/2016: Cl 11 (6), Part 1, Sch 11 of the *Workers Compensation Regulation 2016* were met. Therefore, the worker did not have to satisfy the threshold under s 66 (1) *WCA*. She applied the same reasoning with respect to the claim for the right upper extremity due to the nature and conditions of employment.

Accordingly, the Senior Arbitrator remitted the disputes with respect to the thoracic spine and right upper extremity to the Registrar for referral to an AMS.

Injury on a journey between place of abode and place of employment – no real and substantial connection between employment and the incident out of which the injury arose

Hitchings v State of New South Wales (Department of Finance, Services and Innovation) – Arbitrator Isaksen – 23/092020

The worker was employed by the respondent as an Aboriginal Procurement Manager. His employment commenced on 4/02/2019 and his offer of employment indicated that his "commencing location" was Queanbeyan and that his place of abode was in Port Macquarie.

The worker alleged that on 8/10/2019, he commenced driving from his place of abode to Queanbeyan to meet clients when, just past Kew, he suffered severe pain in his lower back and left leg. He stopped driving, returned to Port Macquarie and sought medical attention. He did not return to work.

The worker claimed compensation and alleged that he sustained an injury to his lower back arising out of or in the course of his employment or, alternatively, he was on a journey to his place of employment and there was a real and substantial connection between his employment and the accident or incident out of which his personal injury arose.

The respondent disputed the claim on the grounds that there was no real and substantial connection between the employment and the accident or incident out of which the personal injury arose and if the injury occurred in the course of the employment, then that employment was not a substantial contributing factor to the injury.

Arbitrator Isaksen identified the issues in dispute as: (1) whether the personal injury on 8/10/2019 arose out of or in the course of his employment with the respondent; and (2) whether on the journey from his place of abode to his place of employment there was a real and substantial connection between the employment and the accident or incident out of which the personal injury arose. However, at the arbitration, an additional issue was noted – whether the lower back pain that the worker suffered was a personal injury as defined in the *WCA.*

The Arbitrator stated:

> 56. In *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWWCCPD 47 (*Kear*), DP Roche said at [38]:
>
> > The authorities establish that a '*personal injury*' is '*a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state*' (Gleeson CJ and Kirby J in [*Petkoska Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45; 200 CLR 286] at [39]). In other words, as stated at [81] in [*North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 (*Felstead*)] it is '*a sudden identifiable pathological change'*.

After considering the evidence, the Arbitrator held that the worker suffered a personal injury to his lower back on 8/10/2019. However, he found that the onset of that pain, while driving, was not part of an overall period or episode of work and it occurred during a journey to work and before the activities of employment had commenced. He was not satisfied that the respondent encouraged or induced the worker in the activity of driving from Port Macquarie to Queanbeyan, thereby bringing the injury within the course of his employment. He noted that the contract of employment required the worker to work in Queanbeyan and that while he lived in Port Macquarie, he needed to undertake a journey each week so that he could undertake his employment duties.

The Arbitrator held that the injury on 8/10/2019 did not arise out of the worker's employment. He stated:

79. The decision of *Bina v ISS Property Services Pty Limited* [2013] NSWWCCPD 72 (*Bina*) will be referred to when addressing the claim made by the applicant pursuant to section 10 of *the 1987 Act*.

80. However, the worker in that matter also claimed compensation on the grounds that she sustained an injury arising out of her employment. The worker had sustained injuries in a motor vehicle while on her way home after the first of two shifts that she worked as a cleaner at a public school.

81. In the arbitral decision (WCC13437-12), Arbitrator Sweeney undertook a review of the law as it had developed in regard to "*arising out of employment*." He said at [25]: "*It is beyond dispute that the phrase 'arising out of the employment' requires a causal connection with the employment.*"

82. Arbitrator Sweeney said at [38]:

> …I do not believe that it is open to an arbitrator to hold that an injury on a journey, between a worker's place of abode and place of employment, arises out of the employment unless there is some greater connection with the employment than having to get to and from the place of employment.

83. Arbitrator Sweeney then said at [39]:

> …If a journey arose out of the employment why was it necessary for the legislature to enact a provision whereby such an injury was to be treated or deemed an injury arising out of the employment?

84. On appeal, the reasoning of Arbitrator Sweeney was approved by Keating P, where he said at [62]:

> The Arbitrator's Reasons establish that he identified and applied the correct causal connection test to his consideration of whether the injuries sustained by Ms Bina during the journey between her place of work and her home arose out of her employment. He concluded (at [44]) that the mere fact that a worker must travel to or from work, of itself, does not establish a causal connection between her injury and the activities of, or incidental to, her employment. In the present case, there is no causal relationship between Ms Bina's employment and her injury. For the reasons given, I am satisfied that the Arbitrator identified and applied the correct test.

85. In my view the mere fact that the applicant had to drive from his home to Port Macquarie to start work at Queanbeyan does not establish a causal connection between the onset of his lower back pain while doing that driving and his employment as a procurement officer. Although the applicant was required to drive long distances each week to work at several of the respondent's offices, there was no greater connection to the applicant's employment in the journey which he undertook on 8 October 2019, because it was merely a journey that he was taking from his place of abode to his place of work.

The Arbitrator found that there was not real and substantial connection between the activities of the worker's employment and the onset of low back pain while driving on 8/10/2019. The journey was not reasonably required, expected or authorised by reason of the worker's employment, other than what would ordinarily be expected of an employee to travel from hid place of abode to attend his place of employment. The worker's driving was simply a journey to his place of work that was required as part of his contract of employment, which fits with what Keating P said in *Bina* that "*the mere fact that a worker must travel to and from work is insufficient to establish a real and substantial connection between the employment and the accident*" and "*if merely travelling to and from work was sufficient to establish the relevant connection, s 10 (3A) would be otiose*."

The Arbitrator distinguished this matter from *Wickenden, Field* and *McCoy* on its facts, because the onset of low back pain did not result from an activity of employment or something that was incidental to that employment. He held that the worker had not satisfied the requirements of s 10 (3A) *WCA.*

Accordingly, the Arbitrator entered an award for the respondent.

Section 11A WCA – reasonable action with respect to performance appraisal, discipline and transfer of a worker

Younan v Inner West Council [2020] NSWWCC 343 – Arbitrator Batchelor – 29/09/2020

The worker was employed by the respondent as a Planning, Building and Technical Officer. She claimed compensation *for* a psychological injury that she allegedly suffered as a result of bullying, abuse, discrimination, and harassment from other employees from 2008 to 21/06/2018. She ceased work on 25/06/2018.

However, the respondent disputed the claim under s 11A *WCA* (performance appraisal, discipline and transfer) and it asserted that the worked demonstrated a pattern of behaviour that whenever she was subject to performance appraisal or objectively reasonable attempts to correct *her performance, she refused to accept them.* She saw these as an attack on her personally and lodged grievances whenever she was the subject of performance appraisal or discipline. These were investigated and were found to have no substance. The worker also falsely claimed that there was a conspiracy to get rid of her.

Arbitrator Batchelor noted he following issues: (1) Did the worker suffer a primary psychological injury arising out of or in the course of her employment with the respondent as a result of bullying, harassment, intimidation, or unfair treatment (s 4 *WCA*); (2) Was the primary psychological injury wholly or predominantly as a result of reasonable action taken by the respondent with respect of performance appraisal, discipline and/or transfer?; and (3) In the event that there is a finding that the worker is entitled to an award of weekly benefits, what is the extent of her incapacity for work?

The Arbitrator noted that the evidence indicated a clear picture of a deteriorating relationship between the worker and other work colleagues. He stated that it does not matter that the worker's perception of events did not pass some qualitative test based on an "*objective test of reasonableness*" and that her reaction to the events did not have to be "*rational, reasonable or proportionate*". This is a subjective test and if psychological injury resulted, it is open to the Commission to conclude that causation is established.

The Arbitrator found that the worker perceived an offensive or hostile working environment during the period from 2008 when she came under the supervision of Mr Bas, which is clearly evidenced by the warnings issued to her and her lodgement of grievances in response to those warnings. Mr Bas issued 2 further warnings on 7/12/2016 and 12/12/2016, and that period culminated in the incident in March 2017, when Mr Bas refused to amend the date of a DA that the worker assessed, which she alleged had been sitting in his in-tray for 7 weeks. This occurred before May 2017, when the worker transferred to the Leichhardt section of the respondent and she then worked without incident until she came under the supervision of Mr Betts in December 2017. He stated:

> 93. As noted above at [67], an event, or a series of events having a cumulative effect, can be causative of a psychiatric condition which does not become manifest until a later time. Dr Papatheodorakis does not express an opinion on the causation of the applicant's condition diagnosed by him, he just notes the applicant's allegations. I accept that the psychological injury diagnosed by the doctor at that time was triggered by the March 2017 incident against the background of the deteriorating relationship the applicant had with Mr Bas. I think that it was the culmination of events that occurred in the workplace from 2008 when the applicant first came under the supervision of Mr Bas.

The Arbitrator stated that the reasonableness of the actions of Mr Bas and Mr Betts must be considered objectively. He stated, relevantly (citations excluded):

> 123. The applicant alleges that Mr Betts treated her in an abusive and condescending manner which triggered depressive memories of incidents which occurred while reporting to Mr Bas at Ashfield. She also alleges aggression on the part of Mr Betts which, along with the previous bullying alleged by Mr Bas, affected her performance. I do not accept this to be the case. Apart from the evidence of Mr Betts which I accept, both Ms Murphy and Mr Atwal give evidence that Mr Betts did not treat the applicant in any way other than in a professional manner and that the applicant did not raise any suggestion of an issue with him until the meeting of 21 June 2018. It is understandable that the applicant would have been upset at undergoing performance management, but Mr Betts was only trying to do his job in managing the performance of the applicant as her Team Leader, and attempting to improve her substandard performance which he inherited after the restructure on 4 December 2017.
>
> 124. Further, I do not accept the applicant's submission that the respondent's treatment of the applicant from December 2017 should have been different from what occurred or coloured by the fact of the diagnosis of Dr Papatheodorakis in April 2017. Mr Betts was unaware of the allegations of the applicant as to the way she had been treated at the Ashfield Council until its merger with IWC in May 2016 and thereafter until March 2017 when she went on stress leave and saw Dr Papatheodorakis. In any event, as noted above at [90], the respondent accepted the recommendations of the doctor and transferred the applicant away from the Ashfield depot. Dr Papatheodorakis found that the applicant was fit to resume her normal duties in an alternative area of the same council under another manager. Having regard to the favourable prognosis of the doctor, the respondent was entitled to assume that this was the appropriate course of action for the applicant.
>
> 125. My finding is that the actions of the respondent through Mr Betts from December 2017 onwards were reasonable.
>
> 126. That leaves consideration of the actions of Mr Bas. The respondent submits that if there is no finding of injury prior to March 2017, the reasonableness or otherwise of his actions is not relevant. I have found that the applicant sustained injury on 23 March 2017 as diagnosed by Dr Papatheodorakis in April 2017 when Mr Bas refused to date a DA which had been amended on that day and that, according to the applicant, had been on his desk for seven weeks. There is no evidence from Mr Bas on this point and I accept what the applicant says.
>
> 127. However, viewed as a whole, if it is suggested that the applicant suffered injury from 2008 onwards when she first came under the supervision of Mr Betts, I think that the actions of Mr Bas with respect to performance appraisal and discipline from 2011 onwards when he issued the applicant with her first warning were reasonable. This is particularly so when one looks at the history of the applicant's employment with the respondent subsequent to the transfer to the Leichardt section of IWC in May 2017. The standard of the applicant's work did not improve, as is evident from the notes made by Adele Cowie covering the period from 17 July 2017 to 30 October 2017 (see [90] above), and from the evidence of Mr Betts.
>
> 128. During the period that the applicant was under the supervision of Mr Bas she consistently refused to accept any criticism of her work and lodged grievances in response to a number of the warnings issued by him, none of which were substantiated on investigation. These included an external investigation carried out by Ms Sarah Nicita in response to the grievance complaint lodged by the applicant on 11 November 2015, and the grievance lodged by the applicant addressed to Ms Elizabeth Richardson dated 13 December 2016 and her response dated 23 March 2017. Further

I do not consider it unreasonable that Mr Bas investigated the first grievance lodged by the applicant lodged in respect of his conduct in November 2011. Subsequent grievances were not investigated by him.

129. The pattern of the applicant's behaviour in response to criticism of her performance continued beyond 21 June 2018 when she lodged a complaint with Mr Rik Hart on 8 July 2018 to which he responded on 9 August 201865. After a thorough review of the applicant's complaints, Mr Hart concluded, based on his findings, that the warning issued to Mrs Younan in June 2018 would not be overturned and was to remain.

130. The respondent submits, and I accept, that the whole of the conduct relied upon by the applicant as giving rise to the psychological injury suffered by the applicant must be considered. This is consistent with what Spigelman CJ said at [96] in *Department of Education and Training v Sinclair* in respect of actions, in that case, with respect to discipline:

> Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the '*whole or predominant cause*' is the entirety of the conduct with respect to, relevantly, discipline.

The Arbitrator found that the whole or predominant cause of the worker's psychological injury was the reasonable action taken by the respondent with respect to performance appraisal, transfer and discipline until 21/06/2018.

Accordingly, the Arbitrator entered an award for the respondent.

WCC – Registrar Decisions

Work Capacity dispute – suitable employment as defined in s 32A WCA – IPD made for a 4-week closed period to account for a gradual return to work

Chalker-Howison v Community Gateway Incorporated [2020] NSWWCCR 10 – Delegate McAdam – 30/09/2020

The worker worked in the Aged Care industry in a number of different roles since 2016, when she completed a Certificate III in Aged Care. On 10/11/2018, she slipped while cleaning a shower at work and suffered shoulder pain. She then performed some light duties, but ultimately resigned and has not worked since June 2019.

On 4/05/2020, the respondent issued a WCD that the worker had current capacity for employment as a social support worker for 30 hours per week (7.5 hpd, 4 dpw). However, the worker argued that she is not trained for that role and that this work would exacerbate her anxiety and depression. She also argued that her work capacity should not be assessed as exceeding 15 hours per week, which is the total hours she was performing in a volunteer role. However, she conceded that once she completes her current work trial, she will be fit for the role after a 4-week period of a graded return to work.

The respondent argued that the worker has extensive transferrable skills and that she has the capacity to perform the role for which she is currently training.

Delegate McAdam held that the vocational assessment reports identified the role of recreation and activities coordinator, which appear to perform identical functions and fit within the umbrella of "*diversional therapist*" and he is therefore able to determine whether that role is suitable employment as defined in s 32A *WCA.* He said that he has considerable difficulty in accepting that the role for which the worker is currently training would not be suitable employment. He stated:

77. I find the evidence in the labour market analysis persuasive. It suggests that Ms Chalker-Howson, whilst not having completed her studies, would still be able to apply be considered for, and potentially be a competitive applicant in roles as a leisure and lifestyle coordinator. This is the exact role she is currently performing on a volunteer basis and she is currently studying for the relevant qualification to be more competitive in securing such a role on a paid basis.

78. As the respondent submits, to find that this role was not suitable employment I would have to ignore the fact that Ms Chalker-Howson is currently performing it for 15 hours per week. I find I am unable to put that fact aside.

79. In *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55, DP Roche stated:

> Therefore, the determination of whether a worker is "*able to return to work in suitable employment*" is not a totally theoretical or academic exercise and Mason P's reference to the "*eye of the needle*" test may still be relevant in many cases. To use his Honour's example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of *the 1998 Act*, and do not exist in any labour market in Australia, will be suitable employment. (at [60])

80. I do not think this this role is "*a totally theoretical or academic*" one. Whilst there is some suggestion that Ms Chalker-Howson's volunteer work is limited in scope and does not represent the full breadth of the actual position, there is no evidence before me that it is a collection of work tasks that are totally artificial.

However, the Delegate decided that the worker was entitled to some weekly payments for the period of the gradual return to work and he assessed her ability to earn during that period as $345 per week. He noted that the parties agreed that PIAWE is $756 and that as 80% of this is $604.80 per, he awarded weekly payments from 13/08/2020 to 10/09/2020 at the rate of $259.80 per week. However, he entered an award for the respondent thereafter.