Bulletin

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Independent Review Office

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. Bjekic v State of New South Wales (Western Sydney Area Local Health District) [2023] NSWPICPD 27
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4. Carver v Lake Machinery Repairs Pty Ltd [2023] NSWPIC 258

PIC - Presidential Decisions

Section 4(b)(ii) WCA - employment was not the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the appellant's sinusitis condition which was caused by the requirement to wear a surgical mask at work – AV v AW [2020] NSWWCCPD 9 discussed

Bjekic v State of New South Wales (Western Sydney Area Local Health District) [2023] NSWPICPD 27 – Deputy President Wood – 10/05/2023

The appellant was employed by the respondent as a security officer at Mt Druitt Hospital. For a period of approximately 2 months in 2020, he was unfit for work because of an undisputed work-related injury. He returned to work in October 2020, performing suitable duties as a COVID-19 Marshall.

In order to deal with the spread of COVID-19, a number of Public Health Orders and Directives were issued with respect to the requirement to wear a mask in all public hospitals and community settings.

In October 2020, the appellant was advised that he was required to wear a face mask for the duration of his shift as a COVID-19 Marshall. He suffered from a pre-existing sinus condition and alleged that as a result of this requirement, his sinus condition was aggravated. In order to alleviate his symptoms, he appellant would, from time to time, wear his mask under rather than over his nose.

When further restrictions came into effect on 23/06/2021, the appellant was stood down because of his inability to wear a mask covering his nose. He claimed compensation and the respondent disputed the claim under ss 4(a), s 4(b) and s 9A WCA.

On 18/03/2022, Member Wynyard conducted an arbitration and he issued a COD, which entered an award for the respondent. He determined that the appellant's employment was not a substantial contributing factor or the main contributing factor to the injury.

The appellant appealed and alleged that the Member erred: (1) in concluding that he had not suffered an injury pursuant to s 4 WCA; (2) in concluding that the respondent was in any way different to the mandating authority that required him to wear a mask during the COVID-19 pandemic; (3) in concluding that he agreed that there was an issue in dispute concerning s 9A WCA; and (4) in taking into account irrelevant considerations when making his decision and failing to take into account relevant considerations.

Deputy President Wood conducted an oral hearing, during which grounds (1) and (2) were not pressed and ground (3) was amended to allege that the Member erred in concluding that s 4(b)(ii) WCA was not satisfied in the circumstances of the case.

Wood DP rejected ground (3). She noted that in *AV v AW*, Snell DP observed that the requirement in s 4(b) inserted by the 2012 amendments, that employment be '*the* main contributing factor' (emphasis added) permits the existence of only one such factor. Snell DP went on observe that:

> In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole.

And:

> The test of 'main contributing factor' is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related.

The appellant argued that the Member "*introduced a dispute [in respect of s 9A of the 1987 Act] that was not advanced by either party in order to justify and reinforce his erroneous decision in relation to causation.*" However, he conceded that while neither party chose to make submissions in respect of s 9A, this was raised as an issue in the dispute notice. Both parties proceeded on the basis that the appellant's injury was an aggravation of a disease and submitted accordingly, however, it was not an error for the Member to have dealt with an issue raised which ultimately was not a matter that was necessary to the ultimate outcome.

The appellant asserted that the Member's purpose was "*to justify and reinforce his erroneous decision in relation to causation*." However, she rejected that submission.

Following this criticism of the Member for dealing with s 9A, the appellant makes submissions as to the principles established in *Badawi*, a decision about s 9A which did not involve consideration of s 4(b)(ii) or the requirement that the employment be the main contributing factor. The appellant submits that there was no dispute that the appellant was required to wear a mask and wearing the mask caused the appellant injury. The appellant says that the requirement was "real and substantial" so that s 4(b)(ii) of the 1987 Act was satisfied because the employment was the main contributing factor to the injury.

The consideration of whether the requirement was "*real and substantial*", which was a term applied in *Badawi* about a substantial contributing factor, is not sufficient to establish the necessary element within s 4(b)(ii) WCA.

The appellant argued that his employment was the only contributing factor and while the Member's reasons in respect of his ultimate finding were sparse, the appellant does not challenge the outcome on the basis of a failure to give reasons for that conclusion. Rather, the ground is limited to the assertion that the Member's factual conclusion was wrong.

The Member summarised the principles enunciated by Snell DP in *AV v AW*. He observed that the onus rested on the appellant and the relevant test was one of causation, which involved a consideration of all of the evidence, including the non-work-related factors. He noted that it was "*common ground*" that the mandating authority was the New South Wales Government, who issued "*restrictive regulations*." That observation was ultimately not challenged by the appellant.

The Member concluded that, while the injury occurred in the course of the appellant's employment, the "*substantial*" cause of the injury was not his employment, but was the NSW Government, which imposed upon the respondent the change in the appellant's employment. There was no error in that approach.

Wood DP also rejected ground (4). The appellant argued that the Member should have raised the New South Wales Media Release dated 23/06/2021, which set out the lawful reasons for not wearing a mask (including illness), with the parties. However, she noted that this document does not refer to "*lawful reasons for not wearing a mask*" and it refers to further significant restrictions being introduced in Greater Sydney and in fact states that "*Masks will be compulsory in all indoor non-residential settings, including workplaces, and at organised outdoor events*."

Accordingly, Wood DP confirmed the COD.

Section 60 WCA – hearing loss - whether provision of hearing aids is reasonably necessary – employer disputed that the worker's tinnitus was not work-related but the Member proceeded on the basis that tinnitus was not disputed – Member proceeded on an incorrect basis – COD revoked

Cessnock City Council v Thatcher [2023] NSWPICPD 28 – Acting Deputy President Nomchong SC – 23 May 2023

On 15/05/2020, the worker made a claim for industrial deafness under s 17 WCA with the deemed date of injury being 30/06/2018. Liability was accepted on the basis that the appellant was the last noisy employer.

However, the worker also made a claim for the cost of hearing aids in the amount of $6,426.00. The appellant denied liability for the hearing aids under s 60 WCA.

On 31/01.2022, Member J Snell determined that binaural hearing aids were reasonably necessary treatment for the work-related hearing loss and tinnitus sustained by the worker.

The appellant appealed on 2 grounds, namely: (1) the Member erred in her reasons that liability for tinnitus had been conceded; and (2) the Member erred in her finding that the hearing aids were compensable.

Acting Deputy President Nomchong SC determined the appeal on the papers. She revoked the COD and remitted the matter for redetermination by another Member. Her reasons are summarised below:

- At first instance, the sole dispute was the appellant's denial of the hearing aids claim. The appellant argued that the worker's tinnitus was not caused by work-related noise exposure and it should be disregarded when assessing the degree of noise-related hearing loss. If the hearing loss assessments were reduced by the amount that had been added in for tinnitus, the work-related hearing loss (after deduction for presbycusis) was very low, being between 2.7% (Dr Fernandes) and 4% (Dr Macarthur). Therefore, the test in s 60 WCA was not met because the hearing aids were not reasonably necessary for the hearing loss caused by the work injury.
- The worker argued that his claim for hearing loss included " tinnitus" predominantly because Dr Williams included it in his assessment of permanent impairment in the MAC and Dr Fernandes' opinion (that it was not work-related) should be given no weight.
- The Member's decision-making was predicated on the assumption that liability had not been disputed for the hearing loss and tinnitus that the worker had sustained
- The Member stated that she preferred the opinions of Dr Macarthur and the AMS to that of Dr Fernandes in circumstances where the worker reported a significant benefit during the trial period with the hearing aids. Accordingly, she concluded that the digital binaural hearing aids were reasonably necessary treatment for the work-related hearing loss and tinnitus that the worker had sustained.
- The issue of whether the hearing loss attributable to the tinnitus could be relied on to assess the necessity for hearing aids under s 60 WCA was a matter squarely in issue between the parties and the Member erred in asserting that the appellant had not disputed liability for the tinnitus. Further, the Member was required to address the argument and then provide reasons for whatever decision she reached in relation to that issue and fell into error by not doing so.
- There is authority for the proposition that tinnitus is compensable for an assessment of impairment pursuant to s 69A WCA (since repealed) as required pursuant to the then WorkCover Guidelines (now 9.11 of SIRA Guidelines to the Evaluation of Permanent Impairment). The Guidelines allow up to an additional 5% for work-related binaural hearing impairment for severe tinnitus as a result of a work injury.
- However, the general principles of causation would need to be applied to determine, on the evidence, whether the tinnitus is part of the occupational hearing loss. This was the argument that the appellant invited through its submissions at the hearing and this is the issue which the Member did not address.

- Section 294 WIMA requires a member to give reasons. This obligation is further addressed in r 78 of the Personal Injury Commission Rules 2021. It is also a matter of settled principle.
- The erroneous assumption that liability in relation to the tinnitus had not been disputed means that the Member did not engage in the debate and therefore did not give reasons as to the conclusion that she proceeded upon, being that the tinnitus was part of the overall compensable hearing loss.
- The Member's failure to meet and determine the causation argument necessarily means that her conclusion is infected by error. This error is substantial.

Validity of a claim under s 66 WCA – Claim made and resolved by way of a Complying Agreement – construction of a complying agreement under s 66A WCA – Finality of a complying agreement – principles of finality adopted

Walters v Good Guys Discount Warehouse (Australia) Pty Ltd [2023] NSWPICPD 29 – President Judge Phillips – 24/05/2023

The appellant worked for the respondent as a shop assistant. On 31/03/2012, she injured her left knee at work. She claimed compensation and the respondent accepted the claim.

On 20/01/2014, the appellant made a claim under s 66 WCA for 4% WPI (2014 claim) and the claim was resolved by way of a Complying Agreement dated 26/02/2014, by which the respondent agreed to pay her $5,500 + costs. The agreement provided that the appellant had received independent legal advice before it was entered into.

In November 2018 the appellant underwent left total knee replacement, after which she developed right knee developed symptoms and in March 2020, she underwent right total knee replacement.

On 30/08/2021, the appellant made a further claim under s 66 WCA for 34% WPI, based on assessments from Dr P Giblin (20% left knee and 18% right knee, less 4% previously awarded).

The respondent disputed that claim and argued that the appellant had already made her one claim under s 66 WCA arising from the injury and had no further entitlement by operation of s 66(1A) WCA. In the alternative, it relied upon a report from Dr R Powell, who assessed combined 7% WPI after deductions under s 323 WIMA (3% left knee and 4% right knee) and argued that the s 66(1) threshold was not satisfied.

Member Garner found that the appellant had no entitlement to pursue the 2021 claim and entered an award for the respondent.

The appellant appealed and asserted that the Member erred in fact and law in determining that the effect of the complying agreement was to resolve the claim: (1) It was an error of fact as it accepts that the entry into a Complying Agreement made contrary to law was valid; and (2) It was an error of law as it determined that such a Complying Agreement was capable of bringing resolution to an invalid claim.

President Judge Phillips dismissed the appeal. His reasons are summarised below.

The appellant argued that the 2014 claim could not have been a valid claim at the time that it was made and it not a claim that was capable of being paid because it did not exceed the 10% WPI threshold. The Member was correct in determining that the 2014 claim was invalid and there was no basis for finding that the complying agreement was valid.

The appellant also argued that the Member's reliance upon the Court of Appeal's decision in *Cram Fluid* was mistaken, as any principle to be derived from that decision can only be applied to a valid claim and a valid complying agreement. The 2021 claim had the effect of amending the 2014 claim and validated it. Therefore, the Member's decision should be set aside.

The respondent argued that the appellant wrongly assumed the requirement for a valid claim" and, whether it was valid or not, the Member correctly determined that the 2014 claim was "*validly made*" (emphasis in original) and was resolved by the Complying Agreement. Therefore, it could not be amended at a later time and the appellant had made her one claim under s 66(1A) WCA.

The respondent relied upon the reasoning of Arbitrator Harris (as he then was) in *Yildiz*. In that matter, the worker had obtained an assessment of 10% WPI by an AMS and a COD was issued to that effect. The worker filed a further claim for WPI arising from the same set of facts and the Arbitrator found that his rights had merged by the issuing of the COD and he could not pursue the second claim. The respondent stated that whilst the merger at judgement and res judicata issues are not relevant to this matter, the status of a determined or resolved claim remains relevant.

The respondent relied upon *Cram Fluid*, in which the Court of Appeal held that the complying agreement had the effect finally resolving a claim for a permanent impairment compensation under s 66 WCA, and it also relied upon the President's decision in *Fullview Plastics* as to what constitutes a new claim and what constitutes an amended claim.

Therefore, the Member correctly decided that the final resolution of the 2014 claim precludes the appellant from pursuing the 2021 claim by virtue of the operation of s 66(1A) WCA and as the 2014 claim was resolved, it cannot be amended in the 2021 claim.

His Honour stated, relevantly:

> 62. Consistent with the decision of the Court of Appeal in *Cram Fluid*, the execution of the Complying Agreement had the effect of resolving the 2014 claim. Is this agreement then rendered invalid by the High Court's later decision in *Goudappel No 2*? The answer to this question must be no. My reasons are these. Firstly the 2014 claim, having been resolved, was no longer a live claim capable of being affected by the High Court decision. Secondly, this result sits comfortably with the principles of finality which I have set out above, discussed in *Yildiz,* arising from the cases of R v Unger and Despot. Whilst these cases dealt with decisions which would have been made differently if decided after a later appellate decision, for the reasons described above, the earlier decisions stand unaffected. There is no reason in principle not to apply the same approach to the circumstance of a matter being resolved by virtue of a statutorily recognised agreement such as a complying agreement provided for in s 66A. One of the objects of the Act is "to [encourage] early dispute resolution". One way of achieving this object is by way of a s 66A complying agreement. Thirdly, the 1987 Act provides for the making of complying agreements and in s 66A(3) provides for limited circumstances where additional compensation might be later sought. No such circumstance exists in this matter. Fourthly, there is a significant public policy benefit which attaches to resolution of claims by agreement. Scarce court and tribunal resources are then not taken up with hearing matters that ought to be resolved by agreement. Pausing here, I note that there is no issue taken with any aspect of the Complying Agreement or the circumstances by which it was entered. The scheme of the 1987 Act provides for parties to resolve lump sum claims by way of entering a complying agreement, which as I have described above the Court of Appeal in Cram Fluid confirms has the effect of resolving the claim. Disturbing agreements otherwise lawfully entered is contrary to the public policy benefit I have identified above. Further, given the terms of s 66A, it is the clear intent of the legislature that such agreements be final and binding subject only to the limited capacity to obtain additional compensation as provided for in s 66A(3).

His Honour held that the Member did not err in finding that the Complying Agreement had the effect of resolving the 2014 claim. Whilst he did not agree with finding that the 2014 claim was invalid, given the state of the law of the time it was made and the fact that the 2014 claim was resolved before the High Court decision in *Goudappel No 2*, nothing turns on that finding and the error regarding the validity of 2014 claim does not affect the result.

His Honour referred to his decision in *Yildiz v Fullview Plastics Pty Ltd* [2019] NSWWCCPD 24 (*Fullview Plastics*), in which he stated:

> 67. A 'claim' is defined in s 4 of the 1998 Act. It means a 'claim for compensation or work injury damages that a person has made or is entitled to make'. 'Compensation' is also defined in s 4 of the 1998 Act. It means 'compensation under the Workers Compensation Acts, and includes any monetary benefit under those Acts'. The term 'made' is not defined in the Act.

> 68. As discussed in the Presidential decision in *Ottomen Pty Ltd ATF Labour ADM t/as Otto Design Interiors v Lee-Chee* [[2013] NSWWCCPD 42], the provisions dealing with the manner of making a claim for compensation have had a long history of legislative amendment. The relevant claim provisions are those contained in Ch 7 of the 1998 Act, in particular ss 260 and 261 of the 1998 Act. Section 260 provides for how a claim is to be made and s 261 provides the time within which a claim for compensation must be made. Relevantly, s 261(1) provides that compensation cannot be recovered unless a claim for compensation has been made."

In *Fullview Plastics,* his Honour found that a later claim could not be attached to an earlier claim that was resolved by way of a complying agreement. He held that the same situation exists in this matter and there was no claim existent that could be amended by a later claim.

His Honour also set out the following principles regarding the making of a complying agreement:

> 44. The fundamental principle is what reasonable parties would take a clause to mean at the time of making the contract, taking into account the text and structure of the written agreement and its background (*Synergy Protection Agency Pty Ltd v North Sydney Leagues Club Limited* [2009] NSWCA 140). It is not necessary to identify ambiguity as a pre-condition before contextual and background material can be considered in interpreting the contract (*Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234* ('*Masterton Homes'*)). The construction of a written contract takes into account the text of the document and the context of the surrounding circumstances known to the parties (*Franklins Pty Ltd v Metcash Pty Ltd* [2009] NSWCA 407). The surrounding circumstances attributed to a reasonable person in the situation of the contracting parties is to be understood by reference to what the parties knew in the context of their mutual dealings (*QBE Insurance Australia v Vasic* [2010] NSWCA 166).
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> 45. Essentially, what is required is that, by reference to the surrounding circumstances known to the parties, and the purpose and object of the transaction, I must determine what reasonable parties would objectively understand the complying agreement to mean.

The appellant argued that the complying agreement could not finally resolve an otherwise invalid claim and/or that it offended s 234 of the *WIMA* (no contracting out). However, his Honour held that s 66A(5) is an express statutory exception to the s 234 prohibition against contracting out.

In relation to the "invalid claim" argument, his Honour stated, relevantly (citations removed):

> 59. The real question for consideration is the effect, if any, of the High Court's decision in *Goudappel No 2* upon the validity of the 2014 claim and its resolution. A similar question had been considered by the former Workers Compensation Commission in *Yildiz*. The difference between *Yildiz* and this case is the manner in which each claim was resolved. In *Yildiz*, the claim was resolved by the issuing by the then Commission of a Certificate of Determination following a Medical Assessment Certificate. This case involved the settlement of the 2014 claim by way of a complying agreement. Whilst Arbitrator Harris (as he then was) in *Yildiz* had to consider the principle of merger in judgement, the principles discussed in that case regarding finality apply equally to the resolution of the matter by way of a complying agreement. With respect, I endorse and adopt the approach of Arbitrator Harris in *Yildiz* and the principles he set out arising from the cases regarding finality and which I set out below…
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> 61. The Arbitrator also discussed the Court of Appeal authority of *Despot v Registrar-General of New South Wales*. *Despot* relevantly provided as follows:
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> > It has been said that a central tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. This is because underpinning the system is the need for certainty and finality of decision. This tenet finds reflection, among others, in the restriction upon the reopening of final orders after entry, and the doctrines of res judicata and issue estoppel: *Achurch v The Queen* [2014] HCA 10; 253 CLR 141 at [14]–[17].

His Honour stated that consistent with the decision of the Court of Appeal in *Cram Fluid*, the execution of the Complying Agreement had the effect of resolving the 2014 claim. Is this agreement then rendered invalid by the High Court's later decision in *Goudappel No 2*? The answer to this question must be no. My reasons are these:

> (1) The 2014 claim, having been resolved, was no longer a live claim capable of being affected by the High Court decision.
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> (2) This result sits comfortably with the principles of finality which I have set out above, discussed in *Yildiz*, arising from the cases of *R v Unger* and *Despot*. Whilst these cases dealt with decisions which would have been made differently if decided after a later appellate decision, for the reasons described above, the earlier decisions stand unaffected. There is no reason in principle not to apply the same approach to the circumstance of a matter being resolved by virtue of a statutorily recognised agreement such as a complying agreement provided for in s 66A. One of the objects of the Act is "to [encourage] early dispute resolution". One way of achieving this object is by way of a s 66A complying agreement.
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> (3) The 1987 Act provides for the making of complying agreements and in s 66A(3) provides for limited circumstances where additional compensation might be later sought. No such circumstance exists in this matter.
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> (4) There is a significant public policy benefit which attaches to resolution of claims by agreement. Scarce court and tribunal resources are then not taken up with hearing matters that ought to be resolved by agreement. Pausing here, I note that there is no issue taken with any aspect of the Complying Agreement or the circumstances by which it was entered. The scheme of the 1987 Act provides for parties to resolve lump sum claims by way of entering a complying agreement, which as I have described above the Court of Appeal in *Cram Fluid* confirms has the effect of resolving the claim. Disturbing agreements otherwise lawfully entered is contrary to the public policy benefit I have identified above. Further, given the terms of s 66A, it is the clear intent of the legislature that such agreements be final and binding subject only to the limited capacity to obtain additional compensation as provided for in s 66A(3).

Therefore, the Member did not err in finding that the Complying Agreement had the effect of resolving the 2014 claim. Whilst he did not agree with the Member's finding that the 2014 claim was invalid, given the state of the law of the time it was made and the fact that the 2014 claim was resolved before the High Court decision in *Goudappel No 2*, nothing turns on that finding and this error does not affect the result.

PIC – Member Decisions

Workers Compensation

Claim for provision of gratuitous domestic assistance to the worker under s 60AA during a period of hospitalisation – respondent disputed that the provision of assistance was reasonably necessary as the worker was being cared for by hospital staff – Award for the respondent entered

Carver v Lake Machinery Repairs Pty Ltd [2023] NSWPIC 258 – Member Haddock – 5/06/2023

The worker was employed by the respondent as a mechanic. On 6/01/2000, he injured his back, neck and right foot as a result of a fall at work and he suffered multiple secondary conditions.

On 21/11/2002, the respondent agreed to pay compensation under s 66 WCA (45% back, 30% left breast, 22.5% right leg at or above the knee, 15% left leg at or above the knee and 5% severe bodily disfigurement) and $45,000 for pain and suffering under s 67 WCA. In addition, it agreed to pay $61,776 under s 60 WCA for personal care provided by Mrs Carver from 5/01/2000 to 5/01/2002, $33,120 to Mrs Carver under s 60AA WCA (for 40 hpw 6/01/2002 to 21/11/2002). The parties agreed that from 22/11/2002, payments under s 60AA would be made at the rate of $540 per week (30 hpw) and that from 2/12/2002, payments would also be made to a professional care provider for up to 10 hpw for a period of 3 months, after which it would be reviewed by the insurer and the costs of home modifications under s 60 WCA.

On 14/11/2003, the parties entered into a complying agreement under s 66A WCA, whereby the respondent agreed to pay the worker the sum of $47,000 for 100% loss of sexual organs and a further $5,000 for pain and suffering under s 67 WCA.

On 2/03/2006, the parties entered into Consent Orders in WCC proceedings, under which the matter was discontinued but it was noted that the respondent would pay Mrs Carver $751.30 pw for 35 hpw of domestic assistance from 8/05/2004 to date and continuing, on a voluntary basis, with credit to the respondent for payments made.

On 13/10/2015, the parties entered into further Consent Orders in WCC proceedings, which discontinued the matter but it was noted that the respondent agreed to pay the worker $15,342.43 on a voluntary basis for medical expenses related to surgery undertaken on 19/12/2013.

On 13/09/2017, the insurer issued a dispute a notice and disputed liability for gratuitous care provided by Ms Susan Simshauser, and for respite care, on the basis that the claim for gratuitous care did not meet the criteria of reasonably necessary treatment or service for the applicant's injury, pursuant under s 60AA WCA.

On 28/06/2018, the insurer reviewed its decision and decided to accept the gratuitous care claim for 25 hpw and that it would pay for a further 10 hpw to be provided by an external support worker. It acknowledged the applicant's need for 35 hours of domestic assistance per week.

On 1/90/2018, the worker's claim was transferred to EML and on 25/03/2022, EML disputed liability for gratuitous assistance for the period from 3/03/2022 to 15/03/2022, during which the worker was admitted to hospital for surgery to his back. EML had approved Mrs Carver's accommodation costs for that period, to allow her to be close to the hospital and to visit the worker.

On 16/02/2023, the worker filed an ARD, which claimed $3,024.15 for domestic assistance, although the period for this claim was specified.

On 19/05/2023, the solicitors for the respondent advised the worker's solicitors that it had paid for gratuitous care provided on 3/03/2022 and 15/03/2022 and they were invited to withdraw the claim for those dates.

Member Haddock entered an award for the respondent. She accepted that Mrs Carver's presence was important to and supportive of the worker, as she helped improve his level of comfort. However, she accepted the respondent's submission that this support was of the type that would be expected of a spouse whose partner was hospitalised.

The respondent was already required to bear the costs of the hospitalisation and he "*was in a hospital staffed with professional nursing and other staff and fully cared for by them*". Therefore, the respondent should not also be required to compensate the worker for Mrs Carver's services during the disputed period. The necessity for Mrs Carver to provide domestic assistance in accordance with the care plan/s resumed once the worker was discharged from hospital.