Bulletin

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

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

Decisions reported in this issue:

1. Martinovic v Workers Compensation Commission of New South Wales & Ors [2019] NSWSC 1532
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Supreme Court of NSW Decisions

Procedural fairness and jurisdictional error – decisions of Arbitrator and MAP quashed and matter remitted to WCC for determination by a different MAP

Martinovic v Workers Compensation Commission of New South Wales & Ors – N Adams J – 8 November 2019

On 29 August 2018, the plaintiff filed a summons seeking judicial review of three decisions: (1) Decision of Arbitrator Egan dated 30 May 2018, refusing the plaintiff's application for reconsideration under s 350 *WIMA;* (2) Decision of the MAP dated 7 April 2016, which assessed 12% WPI; and (3) Decision of Dr Adler (AMS) dated 16 December 2015, assessing 5% WPI.

His Honour noted that the plaintiff injured his lower back at work on 15 August 2013. On 10 April 2015, he claimed compensation under s 66 *WCA* for 20% WPI. However, the insurer disputed the claim based upon an assessment from Dr Ryan (11% WPI). The plaintiff filed an ARD and the dispute was referred to an AMS. On 16 December 2015, a MAC certified 8% WPI.

The plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and he asserted that a further assessment by required by a member of the MAP. He also sought to rely upon fresh evidence regarding radiculopathy from Dr Teychenne and a Statutory Declaration from his wife (both dated 11 January 2016). The respondent opposed the appeal.

On 8 February 2016, a Delegate of the Registrar determined that a ground of appeal under s 327 (3) (d) *WIMA* was established and the appeal was referred to a MAP. The MAP's decision dated 7 April 2016, did not refer to the plaintiff's "fresh evidence" and it decided that it was not necessary to re-examine the plaintiff. It did not explain why the request for re-examination was rejected. The MAP rejected the plaintiff's argument that the AMS did not provide his findings on examination of the cervical spine. In relation to scarring, the MAP confirmed that the AMS had used the proper method of assessment and it was not necessary for him to provide further details or reasons. However, it held that the AMS should have included the medication that the plaintiff was taking and that he omitted the history regarding "social activities/ADL". It disagreed with the AMS' finding that the plaintiff had surgery for spinal canal stenosis and found that the surgery was to treat radiculopathy at the L4/5 level. It awarded the plaintiff an additional 2% WPI for ADLs, revoked the MAC and issued a MAC that certified 12% WPI. On 12 May 2016, the Commission issued a COD (based upon the MAC) and the plaintiff was paid compensation under s 66 *WCA.*

On 15 May 2017, the plaintiff's previous solicitor wrote to the insurer requesting that it concede that the degree of permanent impairment was 15% WPI so that a WIDs claim could be made. However, the insurer declined to make that concession based upon the MAC.

On 15 March 2018, the plaintiff instructed new solicitors and on 15 March 2018, he applied for reconsideration of the MAP's decision under s 378 *WIMA.* However, on 22 March 2018, he was informed that s 378 *WIMA* did not apply in circumstances where a COD had been issued.

On 27 March 2018, the plaintiff applied to the Commission for reconsideration of the COD under s 350 *WIMA.* He argued that it was remiss of the MAP not to have undertaken a further physical medical assessment to determine whether or not there were residual symptoms of radiculopathy and that the MAP failed to remedy the following errors: (1) A failure by the AMS to fully assess the cervical spine so that he will be able to address the DRE criteria (failure to assess lateral bending); (2) A failure by the MAP to submit him to a physical examination based upon incomplete cervical examination; (3) A failure by the AMS to award 3% pursuant to the modifiers and the guide for the effects of surgery (i.e. discectomy); and (4) A failure by the MAP to also consider residual symptoms following surgery and applying the modifiers.

Arbitrator Egan set out the relevant legal principles regarding his discretion under s 350 *WIMA.* He accepted that there was "*a reasonably obvious error*" in the MAP's reasons, as it did not deal with the plaintiff's request for re-examination or the presence, or otherwise, of radiculopathy in the lower limbs and stated, relevantly:

> When considering the merits of this application, it is necessary to consider whether the applicant's submissions in the Medical Appeal are likely to have persuaded the panel that re-examination was necessary or desirable. Before that can be determined, it is necessary to determine whether or not it is likely the Appeal Panel would have considered there was an error in the original MAC by the AMS: *Midson v Workers Compensation Commission & Ors* [2016] NSWSC 1352.

The Arbitrator held that he was not "*authorised*" to make any findings or determine whether or not the merits of the appeal based on lumbar radiculopathy would or would not succeed for the purposes of s 350 (3) *WIMA.* He then stated:

> I conclude that it is most unlikely the panel would be swayed by the arguments raised by the applicant to establish error. The passages in the MAC set out in the foregoing paragraph clearly indicate the AMS gave considerable attention to the question of radiculopathy. Accordingly, I conclude that even if the panel directed its mind to lumbar radiculopathy it is most unlikely that it would consider an error to have been established to warrant re-examination.
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> Thus, even though I accept the panel was in error in omitting to deal with specific matters raised in the appeal, I do not consider that an injustice has been visited upon the applicant. In so concluding, I specifically note that I'm not conducting an administrative review of the Panel's reasons, but determining whether or not to exercise my discretion assured [sic] to s 350 (3) to revoke the COD.

Ultimately, the plaintiff sought judicial review on the following grounds:

The decision of the Arbitrator

> (1) Ground 17 (a) - The arbitrator correctly determined that the MAP fell into legal error in that it wholly failed to deal with the plaintiff's request for a re-examination and it wholly failed to deal with a substantial argument of the plaintiff before it, namely, the presence or otherwise of radiculopathy in the lower limbs. However, the Arbitrator wrongly failed to determine that these omissions vitiated the MAP's decision and that they were fundamental legal errors and the plaintiff had been denied procedural fairness – *Boyce v Allianz Australia Ltd* (2018) 83 MVR 403.
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> (2) Ground 17 (d) - The Arbitrator failed to engage with substantial aspects of the plaintiff's submissions and evidence and accordingly, the Arbitrator failed to afford the plaintiff procedural fairness.
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> (3) Ground 17 (f) - The AMS' decision, the MAP's decision and/or the COD were unlawful and the validity of the Arbitrator's decision depended on their lawfulness.

The decision of the MAP

> (4) Ground 18 (a) – The MAP failed to correct the legal errors made by the AMS in relation to the assessment of WPI of the plaintiff resulting from the subject work-related injury.
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> (5) Ground 18 (b) - The MAP failed to medically examine the plaintiff in circumstances where it was plainly warranted and failed to acknowledge and/or respond to the plaintiff's request to be medically examined - *Boyce v Allianz Australia Ltd* (2018) 83 MVR 403.
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> (6) Ground 18 (c) - The MAP wholly failed to deal with a clearly articulated and substantial argument of the plaintiff before it, namely, the presence or otherwise of radiculopathy in the lower limbs.
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> (7) Ground 18 (e) – The AMS' decision was invalid, and the validity of the MAP's decision depended on there being a valid AMS decision.

N Adams J stated that the judicial review does not involve any review of the merits of the MAP's decision. Consistent with the principles in *Kirk,* the judicial review proceedings against the Arbitrator's decision is confined to the establishment of jurisdictional error, but if the plaintiff establishes that the MAP fell into jurisdictional error or that there is error on the face of the record, he will be entitled to obtain the relief sought. However, an extension of time is required to review the MAP's decision.

Her Honour also noted that the application for judicial review of the MAP's decision was brought 2 years out of time. She decided to consider the grounds of review first and the questions of an extension of time regarding the MAP's decision.

Decision of the Arbitrator

Her Honour rejected ground 17 (a). She held that the Arbitrator's reasons indicate that he dealt with the plaintiff's submissions, found in his favour regarding error and then exercised his discretion in a manner that was unfavourable to him. The plaintiff argued that the Arbitrator was bound to find that the identified errors vitiated the MAP's decision and he relied upon the decision in *Boyce v Allianz Australia Insurance Ltd* (1018) 83 MVR 483, as authority for the proposition that a decision not to examine and interview the appellant is an essential step in the assessment process. She stated:

> 76 In *Boyce*, the Court of Appeal considered a motor accident victim that had been assessed with 10% WPI. The respondent insurer was granted a review of the assessor's certificate. The worker was notified of this review and told that she should advise them if she objected to the panel proceeding without re-examining her. The worker's solicitor wrote to the authority advising that the worker did object to this. Although this correspondence was received by the authority, the review panel was not made aware of the objection, and the panel made its assessment without conducting an interview or clinical examination with the worker.
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> 77 The worker commenced judicial review proceedings on the basis that if she had been notified of the fact that the panel was to proceed without a re-examination she would have provided further documentation. Basten and Macfarlan JJA held at [73]-[76] that while the need for a re-examination was a factual issue for the panel, the failure to inform the victim that one would not occur was a breach of the requirements of procedural fairness.

Her Honour accepted the respondent's argument that decision in *Boyce* does not apply because of the critical differences between the Motor Accidents and Workers Compensation schemes. It argued that the Motor Accidents scheme involves review of the decision of a single medical assessor by "*a review panel of medical assessors*" rather than an appeal to a MAP that which includes an Arbitrator and that Basten JA made it clear that the matter must be understood in the context.

Her Honour was not satisfied that an integral part of a review is to conduct a new medical assessment. She stated, "*As I observed recently in Lu v AAI Ltd t/as AAMI [2019] NSWSC 368 at [67] in relation to the Motor Accidents scheme:*

> *There is no guideline which provides that the "new assessment" must include a re-examination of the claimant by a review panel. Rather, sub-cl 16.21.2 provides that when the review panel holds its initial meeting it is to "determine whether re-examination of the claimant is required, and if so set a timetable for that to occur". Although the decision as to whether a re-examination is required is to be made by the panel, there is no reference to the re-examination itself having to be conducted by "the review panel*."

Her Honour held that the decision in *Midson v Workers Compensation Commission & Ors* [2016] NSWSC 1352 assists the respondent's argument. In *Midson* the AMS determined that a worker's WPI was 15%. The employer's insurer appealed to the MAP and the MAP ordered a new examination as a matter of course. The new examination arrived at a lower WPI of 12%. It was in that context that she held in *Midson* that the MAP needs to find an error relevant to the medical examination before a further examination is ordered. The principle derived from *Midson* does not apply to a situation where a worker seeks a new assessment and that request is ignored without reasons.

Her Honour also held that it was not mandatory for the Arbitrator to quash the MAP's decision after being satisfied that it failed to consider, inter alia, the plaintiff's request for a further medical examination.

Her Honour rejected ground 17 (e). The plaintiff argued that he was completely taken by surprise by the Arbitrator's process of reasoning and that he had no notice that the Arbitrator could, or would, dismiss his review even if clear error was found. He alleged a breach of the *"hearing rule*", which requires the decision-maker to hear a person before making a decision affecting his interests, which the High Court considered in the context of sentencing proceedings in *DL v The Queen* (2018) 358 ALR 666; [2018] HCA 32 at 772 [39]. She stated:

> 86 Procedural fairness is implied as a condition of the exercise of a statutory power. That is, as a matter of statutory construction, any statute conferring a power that can affect the interests of an individual is to be construed as conferring the power conditionally in that it must be exercised in a manner that affords procedural fairness to that individual. This presumption operates unless a contrary intention is clearly indicated: *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 at [75]…
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> 88 The issue upon which Mr Martinovic contends he was denied procedural fairness was the options available to the Arbitrator in the event that he found error. Having considered the written submissions made to the Arbitrator by the parties I am satisfied that neither party addressed this issue at all; Mr Martinovic's submissions to the Arbitrator focussed on establishing error whereas the submissions filed by Corporate Projects focussed on establishing that no error could be established and that discretionary factors militated against the review being successful. I am satisfied that at no time did either party squarely address the question of what should happen in the event that the Arbitrator found error in the decision of the Appeal Panel.
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> 89 It seems to be that determination of this ground of review turns on whether the Arbitrator was required by principles of procedural fairness to invite submissions from the parties on what course was open to him should he find clear error was established. This question requires a consideration of the scope of s 350 of *the 1998 Act*.
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> 90 Section 350 (3) of *the 1998 Act* provides that *"[t]he Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission*".

The parties argued that the principles relevant to a review under s 350 *WIMA* are set out in the decision of Roche ADP in *Samuel v Siebel Furniture Ltd* [2006] NSWWCPD 141. After citing that decision, her Honour held that the Arbitrator applied the relevant test and proceeded on the basis that he was required to consider the "*substantial merits of the case in accordance with his duty to do justice between the parties*". He set out the relevant principles in some detail and referred to the decision in *Nan v Country Road Freight Services Proprietary Limited* [2006] NSW WCC PD 160 where ADP Snell observed at [58], *…. It is inappropriate to restrict exercise of the reconsideration power contained in s 350 (3) of the (1998 Act) to "exceptional circumstances" were reconsideration is necessary to address to manifest injustice.*

Her Honour noted that the Court previously held that the principles in *Samuel* apply to s 350 *WIMA: See* McCallum J in *Ljubisavljevic v Workers Compensation Commission of New South Wales* [2019] NSWSC 1358 at [43], Stevenson J in *Ali v Rockdale City Council* [2015] NSWSC 1481 at [43]-[44] and Harrison AsJ in *Rail Corp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231 at [54]-[56]. Further, in *Rail Corp NSW, Harrison AsJ* stated at [56]:

> It is my view that the discretion of the Court, when it conducts a reconsideration, is wide ranging. Overall, the task of the Court is to balance the policy requirement of finality of litigation with the obligation to rectify any clear cut injustice. One of the circumstances where a reconsideration can take place is where there is fresh evidence (as opposed to more evidence).

Her Honour noted that the principles stated by Roche ADP in *Samuel* relied heavily on the decision of the Court of Appeal in *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413. But *Schipp* did not concern s 350 of *the 1998 Act*. In this matter, the respondent relied upon *Schipp* as authority for the proposition that an Arbitrator considering s 350 *WIMA* has the power to refuse to rescind a COD, notwithstanding the identification of an error of law: 414 per Reynolds JA, at 426 per Samuels JA and at Mahoney JA at 437G, 439B-440B. However, she held that the decision in *Schipp* can be distinguished in a number of ways, namely: (1) It is a 1975 decision determined long before the present statutory scheme for workers compensation was established; (2) The relevant administrative law principles regarding jurisdictional error and invalidity have developed considerably since that time; and (3) The Court of Appeal gave weight to issue estoppel when determining that the lower decision was not a nullity, because the original application was before Gibson J who made an unfavourable award and the subsequent application was also before Gibson J. That is not the case when a matter is considered under s 350 *WIMA*. She held, relevantly:

> 100 Despite this, although there is no express reference in *Samuel* to any principle to the effect that in a review under s 350, an Arbitrator may decline to intervene even if "*clear*" error is noted. Both Mr Martinovic and Corporate Projects accepted that the principles in *Samuel* were applicable. Those principles include that an Arbitrator exercising his or her power under s 350 has a "*duty to do justice between the parties according to the substantial merits of the case*". I am satisfied that the reference to the "*merits of the case*" in this context of balancing competing interests necessarily implies that it is open, within the broad discretion conferred in s 350 (3), to find error and yet dismiss the application.

Accordingly, her Honour held that the plaintiff should have contemplated that this was one way in which the review could have been disposed of. He was afforded procedural fairness to the extent that he was able to put any arguments he wished to the Arbitrator. Despite this, the Arbitrator was not obliged to seek further submissions once he was satisfied that error was disclosed.

Her Honour rejected ground 17 (f). The plaintiff argued that the Arbitrator's decision was void because the MAP's decision was void due to jurisdictional error. He relied upon the decision in *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 202 CLR 597; [2002] HCA 11. Her Honour stated:

> 104 In *Bhardwaj*, Gaudron and Gummow JJ made the following observation about the effect of jurisdictional error on the validity of an administrative decision:
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> > 54.There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.

105 The High Court's decision in *Bhardwaj* was later considered by Gray and Downes JJ in *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care* [2003] FCAFC 288. Their Honours stated:

> 42. In our view, *Bhardwaj* cannot be taken to be authority for a universal proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that the legal and factual consequences of the decision, if any, will depend upon the particular statute. As McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388 – 389:
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> > An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

106 In *Jackson v Purton* [2011] TASSC 28, Wood J referred to *Jadwan* with approval when considering the same issue:

> 54. In *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 the Full Court of the Federal Court conducted a careful analysis of the judgments in Bhardwaj and concluded that the High Court case is not authority for the universal proposition that jurisdictional error leads to the decision having no consequences whatsoever. Instead, *Bhardwaj* supports the proposition that the legal and factual consequences of the decision will depend upon the particular statute (see joint judgment of Gray and Downes JJ at par[40] and Kenny J at par[64]). See also Porter J in *Jackson v Building Appeal Board*.
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> 55. I agree with the analysis by the Federal Court of the judgments of *Bhardwaj*. It is evident from the High Court judgments that the consequences of a decision affected by error, including jurisdictional error, are determined primarily by consideration of the statute pursuant to which the decision is made: Gleeson CJ at pars [11] and [12], Gaudron and Gummow JJ at pars [54] – [60], McHugh J at par [63], Hayne J at par [153], Kirby J at par [113] in dissent but not on this point.

107 More recently in *Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the ACT* [2019] ACTSC 58, McWilliam AsJ stated:

> 19. However, as the following discussion demonstrates, the principle to be followed is that the statute will determine what the legal consequences are and whether a decision-maker can simply ignore a decision he or she considers to be made without jurisdiction.

108 Her Honour went on to hold that the legal and factual consequences of a decision will depend on its statutory context. In relation to *Bhardwa*j, she commented that:

> 27. Neither *Bhardwaj* nor *Leung* (cases relied upon by the Authority) are inconsistent with the principle just discussed. In *Leung*, Finkelstein J referred to a number of authorities in Australia and the United Kingdom, including *Ousley* per Gummow J (stating the presumption of validity of the decision unless set aside in appropriate proceedings) and the contrary argument in *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461 at 483, which was relied upon by McHugh J in *Ousley* in stating that an administrative act made outside the court's jurisdiction can be challenged in collateral proceedings for the reason that it is void and therefore need not be set aside by a court that has supervisory jurisdiction.

> 109 As the authors of Aronson, Groves and Week, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017, Thomson Reuters) note, the usual result of a jurisdictional error is that the relevant decision is a nullity. However, this requires judicial determination and relies on context. As they state: "*the High Court has said that labels such as nullity, voidness, invalidity, and vitiated have no fixed meaning, but announce conclusions about the legal effects of a challenged decision and about the legal powers of the court to say so*".

Her Honour rejected the argument that the Arbitrator erred by not concluding that the MAP's decision was void for jurisdictional error.

Decision of the MAP

Her Honour stated that in determining whether the Arbitrator's decision is invalid because the MAPs decision is vitiated by jurisdictional error, it is necessary to consider whether jurisdictional error is disclosed in the MAP's decision. She noted that the Arbitrator held that there was "*a reasonably obvious*" error in the Appeal Panel's Reasons in that it "*did not deal with the applicant's request for re-examination, nor did it deal with the presence or otherwise of radiculopathy in the in the lower limbs*". Although the Arbitrator stated that the MAP did not deal with the fresh evidence, he found that it was not fresh evidence. He was satisfied that 3 of the 3 errors asserted by the Plaintiff were established, but dismissed the review on the basis that none of those matters would have affected the WPI. She held:

> 117. I have examined these four alleged errors for myself. I am satisfied that the first three of them are apparent from the terms of the decision. All three errors concern matters that were not dealt with by the Appeal Panel: Mr Martinovic's application for a new medical examination was not addressed at all, the new evidence was not addressed at all and the question of whether there should be an additional 3% for radiculopathy was not addressed at all…

> 125. I am satisfied that three jurisdictional errors have been established. Whether they be classified as a failure to engage with Mr Martinovic's arguments (*Dranichnikov v Minister for Immigration and Cultural Affairs* (2003) 77 ALJR 1088) or as a failure to provide reasons (*Campbelltown City Council v Vegan* (2006) 67 NSWLR 272), jurisdictional error is established. It follows that there are grounds to quash the decision of the Appeal Panel for jurisdictional error(s).

Her Honour held that the MAP's decision was vitiated by jurisdictional error and that the Arbitrator's decision must also be quashed. However, this could only occur if the Court granted the plaintiff an extension of time to seek review of the MAP's decision. She held that it was appropriate to grant an extension of time and therefore ordered that the decisions of the Arbitrator and MAP be quashed and that the appeal be remitted to the Commission for determination by a different MAP. She ordered the respondent to pay the plaintiff's costs.

WCC – Presidential Decisions

Sections 4, 105 and 287-289 WIMA – WCC has no jurisdiction to determine a dispute between a claimant and an insurer where the insurer is not a licensed insurer for the purposes of WIMA

National Transport Insurance Limited v Chapman [2019] NSWWCCPD 54 – Deputy President Wood – 29 October 2019

On 1 September 2014, the first respondent injured his left forearm, wrist and hand, and he also suffered psychological problems. On 31 August 2017, he commenced proceedings in the District Court under the *Civil Liability Act 2002* (*CLA*) against the second respondent (the occupier of the premises where he was injured) and her son (who worked in those premises). The Statement of Claim alleged that he was an employee of the second respondent and her son and that the second respondent owed him a duty of care. The second respondent and her son (through the applicant) filed a Defence, which alleged that the first respondent was a worker or deemed worker and that he had not complied with the pre-conditions for making a claim for WIDs under *WIMA.*

However, in his Reply to the second respondent's Defence, the first respondent denied that he was a worker or deemed worker within the meaning of *WCA* and *WIMA,* but *he later* made a claim under s 66 *WCA* for 33% WPI. On 6 September 2018, the licensed insurer of the second respondent issued a dispute notice under s 74 *WIMA*, which disputed that the first respondent was a worker or deemed worker.

On 1 November 2018, the first respondent filed an ARD claiming compensation under s 66 *WCA*. During a teleconference on 29 November 2019, ***Arbitrator Scarcella*** granted him leave to join the appellant as an interested party under Part 11 of the WCC Rules.

At an arbitration hearing on 25 January 2019, the appellant argued that: (1) The Commission had no jurisdiction to hear the matter; (2) It should not have been joined to the proceedings; and (3) The proceedings should have been dismissed. It argued that the first respondent was a worker within the meaning of *WIMA,* but both respondents argued that he was not a worker or deemed worker. On 15 March 2019, the Arbitrator issued a COD, which rejected the appellant's argument that the proceedings should be dismissed and determined that the first respondent was neither a worker nor a deemed worker.

Deputy President Wood noted that ground (2) of the Appeal asserted that the Arbitrator erred by failing to dismiss the proceedings, and the balance of the grounds alleged that he erred regarding the joinder and by determining that the first respondent was neither a worker nor a deemed worker.

The appellant argued that the *WCA* and *WIMA* only apply to workers and employers (as defined) and it has no standing because it is not a licensed insurer. Therefore, it cannot be joined as a party and it is not amenable to an order made by the Commission. It argued that there was no dispute between "*the purported worker*" and, through its licensed insurer, the "*employer*" and the Commission only has jurisdiction to determine a dispute. It also argued that the proceedings are an abuse of process because the first respondent was seeking to prosecute a claim that he did not wish to succeed in and he was seeking an advantage by having his claim determined by the Commission, rather than the District Court, where the decision would create an estoppel in the District Court.

The appellant argued that the Arbitrator's error is of the kind referred to in *Micallef v ICI Australia Operations Pty Ltd* and that he: (1) Erred in law by finding there was a triable issue; (2) Failed to take into account that the first respondent's position at arbitration altered the fundamental adversarial system of the Commission with respect to legal and evidentiary onuses, which placed it at a procedural disadvantage; and (3) Arrived at a result that was no unjust or unreasonable that an error of the kind referred to in *Micallef* occurred.

The first respondent argued that in the District Court proceedings, the appellant asserted that he was a worker, which he and the second respondent denied, and a justiciable issue arose that needed to be "*effectually and completely determined*". It was open to the Commission to exercise its discretion under Rule 11.1 to join the appellant as a party to the proceedings and the definition of "*party*" in Rule 1.4 is not limited to an applicant and an employer. The dispute is in connection with a claim and the party must be a party to the dispute, but not necessarily a party to the claim itself. Wood DP also noted, relevantly (citations excluded):

> 59. The first respondent submits that the appellant's position is inconsistent. He says that on the one hand, the appellant alleges that the first respondent was a worker, and seeks the advantage of a finding in its favour, but on the other hand is saying that the first respondent ought not to have the right to invoke the jurisdiction of the Commission to determine the first respondent's claim. The first respondent contends that a party cannot simultaneously approbate and reprobate, and relies on the judgment of Sackar J in Sydney *Attractions Group Pty Ltd v Frederick Schulman (No 2)*.
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> 60. The first respondent says that he did not understand the appellant's submissions to go so far as to suggest that the Commission did not have jurisdiction to determine its jurisdiction, and contends that it is beyond doubt that a court has jurisdiction to do so. The first respondent refers to relevant authorities for that proposition. The first respondent contends that there is nothing inconsistent with the first respondent making a submission that he does not accept the legal arguments made by the appellant. He says he submitted himself to the jurisdiction of the Commission to determine the fact in issue as to whether he was a worker. The first respondent says that had the fact in issue been determined in the appellant's favour, then the first respondent had accordingly claimed compensation.
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> 61. The first respondent submits that his claim, like any other claim in which worker is an issue, was dependent upon the Commission finding that he was a worker as defined by the legislation. The first respondent says he repeats the submission that there was no contract of service or contract for services, and that this was a fact in issue and correctly determined by the Commission. The first respondent contends that it would be entirely artificial to suggest that the first respondent's legal representative ought to have made submissions of law contrary to the first respondent's honestly held belief. The first respondent maintains that it is not the role of the legal representative and "*nor could the jurisdiction of the Commission depend upon such an arbitrary and capricious circumstance.*"

Wood DP held that the "*insurer*" referred to in s 287 *WIMA* is not defined for the purposes of Div 1 of Part 4, but is consistently defined in the *WCA* and *WIMA* as meaning a "*licensed*" insurer - an insurer who is licensed to provide a workers compensation insurance policy to employers. She held that the first respondent's argument that the appellant could have referred the dispute to the Commission fails to acknowledge the restriction in s 288 (1) *WIMA*, which provides that only a claimant can refer a s 66 dispute to the Commission. She stated:

> 77. The exclusive jurisdiction provided for in s 105 of *the 1998 Act* is expressed to be subject to the specific provisions of *the 1998 Act*, in this case ss 287–289 of *the 1998 Act*. *The 2011 Rules* must also be read subject to ss 287–289. The sections of *the 1998 Act* require that the claim (defined by s 4 of *the 1998 Act* as a claim for compensation) can only be referred to the Commission if there is a dispute between the claimant and the person upon whom the claim is made or the employer and the insurer…

82. The subsequent joinder of the appellant, who was not an insurer within the meaning of the Act, could not operate to create jurisdiction, thus enabling the Commission to hear and determine the matter. Firstly, the appellant was not an "insurer" within the meaning of *the 1998 Act*. Secondly, the first respondent did not make a claim for compensation (as defined by s 4 of *the 1998 Act*) against the appellant. Subsection (5) of s 289 of *the 1998 Act* prohibits the Commission from hearing or otherwise dealing with a dispute if s 289 provides that a dispute cannot be referred to the Commission.

83. The Commission does have the power to determine its jurisdiction, but that power must be exercised in accordance with the 1987 and 1998 Acts. The Arbitrator clearly erred in determining that he had jurisdiction to hear and determine the matter on the basis that there was a dispute between the first respondent and the appellant.

Wood DP held that the matter was not properly before the Commission when the application was lodged and there was no basis upon which the Arbitrator had power to determine the matter, which was fundamentally a dispute between the first and/or second respondent and a third party (the appellant). Accordingly, she revoked the COD.

No right of appeal because threshold under s 352 (3) WIMA is not satisfied

Howlader v FRF Holdings Pty Ltd [2019] NSWWCCPD 55 – Deputy President Wood – 30 October 2019

The appellant was employed by the respondent as a truck driver. On 13 October 2016, he injured his back at work and also suffered a secondary psychological condition. The insurer accepted liability for a musculoligamentous strain injury and paid weekly compensation until 28 June 2017, but then disputed liability for weekly payments and s 60 expenses. The appellant filed an ARD that claimed continuing weekly payments, past s 60 expenses of $54,409.36 and future s 60 expenses estimated at $29,628.21 (in respect of a proposed laminectomy at the L4/5 and L5/S1 levels) plus Anaesthetist's fees. On 20 December 2018, he appellant underwent that surgery and on 12 March 2019, he filed a Schedule of Treatment Expenses indicating a total claim of $68,011.83 under s 60 *WCA.*

Arbitrator Harris conducted an arbitration hearing on 26 March 2019. On 17 April 2019, he issued a COD, which awarded the appellant continuing weekly payments from 29 June 2017 under s 37 *WCA.* He made a general order under s 60 *WCA*, but held that the surgery did not result from the work injury. The appellant appealed against that determination.

Deputy President Wood noted that the respondent disputed that the quantum threshold under s 352 (3) *WIMA* was satisfied. She provided the appellant an opportunity to reply to this issue, but he did not do so. A Delegate of the Registrar then directed him to reply.

The appellant argued that the amount ultimately claimed in respect of treatment was $68,011.83 and that if the amount of $61,012.66" is deducted from it, the sum of $6,999.17 is capable of being regarded as the "*amount awarded*". He also asserted that the Arbitrator determined that he had no work capacity and there is "*a very real potential*" that an entitlement in respect of whole person impairment resulting from the injury would be directly affected by the Arbitrator's erroneous finding. If the surgery was not related to the injury, there is a real prospect that the appellant will fall below the 11% WPI threshold to claim compensation under s 66 *WCA*. Therefore, the threshold requirements are met.

However, the respondent argued that the total award of weekly payments was $67,380.14 and the sum of $6,999.17 is approximately 10% of the award for weekly payments and s 60 expenses. There is no evidence that the cost of the surgery exceeded the 20% threshold and the appellant has not paid the amount claimed (it was paid by Medicare). It also noted that an invoice from Royal North Shore Hospital dated 21 June 2017 for $50,910.16, clearly did not relate to the surgery in 2018.

Wood DP held that s 352 (3) *WIMA* is expressed in clear terms and provides that there is no appeal unless the amount of compensation at issue exceeds $5,000 and is at least 20% of the amount awarded in the decision appealed against. There is no discretion in the Commission to dispense with the threshold requirements and if either requirement is not met, then the appeal cannot proceed. She stated, relevantly (citations excluded):

> 37. The parties agree that the amount awarded in respect of weekly payments up to the date of the award totalled $67,380.14. The Arbitrator did not award a particular sum in respect of the claim for treatment expenses pursuant to s 60 so that no amount was awarded for those expenses.
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> 38. Where no sum was awarded, the amount of compensation in issue is the amount claimed in the proceedings. In this case, the appellant, in addition to claiming weekly payments, claimed a total amount of $68,011.83 in respect of treatment already provided, supported by invoices indicating those expenses had already been incurred. Included in that sum was an amount of $10,102.50, supported by an invoice from Dr Khong, in respect of the surgery performed by him on 20 December 2018.
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> 39. The appellant argued that the quote from Sydney Adventist Hospital dated 22 November 2018 in respect of the proposed surgery ought to be included in the amount claimed. I reject that submission. By the time the matter came to arbitration, the appellant had in fact undergone the surgery, not at a private hospital but at a public hospital, where he was admitted as a public patient, and the admission form recorded that there would be no charge for the admission.
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> 40. The only evidence presented in respect of the cost of the surgery is the invoice from Dr Khong for $10,102.50…
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> 44. Neither party put forward a case that because the Arbitrator made a general order for s 60 expenses, there was no sum awarded for treatment expenses, so that the only amount awarded for the purposes of s 352 (3) (b) was the amount ordered in respect of weekly payments of compensation. The Commission has previously held that a "*general order*" for the payment of s 60 expenses is of "*limited efficacy*" because the costs are not payable until a specific sum is sought and a determination is made that it is payable. That potential argument was not raised, so I have not given it consideration. Even if it had been raised before me, on the calculation of the amount in issue in the appeal, that amount falls below 20% of the agreed total $67,380.14 awarded for weekly payments up to the date of the order, so that the threshold requirement would fail in any event.
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> 45. The amount of $12,373.10 at issue in the appeal falls short of being at least 20% of the weekly award ordered by the Arbitrator, and well short of 20% of the total award if an assessment of the value of the general order is included…
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> 47. The appellant cannot rely on his potential s 66 entitlements, or further entitlements in respect of compensation flowing from a future assessment of his WPI, in the calculation of the amount in issue in the appeal. There was no such amount claimed in these proceedings.
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> 48. In *Sheridan*, the injured worker claimed weekly payments and treatment expenses, quantified by the Arbitrator as a total amount of $3,736.46. The worker had also been assessed by Dr Alan Hopcroft, orthopaedic surgeon, as suffering from 10% permanent impairment pursuant to s 66 of the 1987 Act. Dr Hopcroft's report was in evidence, but a lump sum was not claimed in the proceedings before the Arbitrator. The appellant worker submitted that the amount in issue was $9,736.00, which included the amount of $6,000.00 in respect of the 10% permanent impairment. Deputy President Fleming observed as follows:

> The amount of compensation at issue on the appeal must be determined by reference to the amount of compensation at issue in the proceedings before the Arbitrator at first instance. The Application to Resolve a Dispute does not identify an amount of $6000.00 for a 10% permanent impairment of the Applicant's back as being in dispute. On any reading of the Arbitrator's statement of reasons for decision it is clear that he was not considering any such claim.

Accordingly, Wood DP held that the appellant has no right to appeal.

Death claim – drawing of inferences – weight of evidence – dealing with competing expert evidence – procedural fairness and warning parties of an Arbitrator's proposed course

State of New South Wales v Barrett [2019] NSWWCCPD 56 – Deputy President Snell – 4 November 2019

The deceased worker was employed as a nurse from 1999 and last worked at Westmead Hospital. She was promoted to the position of Clinical Nurse Specialist from 7 November 2012. She suffered work-related physical and psychological injuries. On 30 March 2015, she died from liver failure and her husband claimed death benefits under s 25 *WCA.* The insurer disputed causation, but not dependency.

On 28 February 2019, ***Arbitrator Perry*** conducted an arbitration hearing. The respondent conceded that the deceased injured her right knee on 1 September 2008, suffered a psychological injury caused by bullying and harassment by co-workers between November 2012 and late-July 2013 and injured her right ankle on/about 15 April 2013. The Arbitrator noted that the applicant alleged that the deceased consumed large amounts of medication after the 2008 injury, which caused liver damage, and that she drank excessive amounts of alcohol as a result of her psychological injury, which caused her liver failure and death.

On 11 April 2019, the Arbitrator issued a COD, which determined that the deceased suffered a psychological injury as a result of the nature and conditions of her employment with the respondent on 22 July 2013 (deemed) and that she died on 30 March 2015, as a result of that injury. He awarded the applicant $517,400 under s 25 *WCA* plus interest under s 109 *WIMA* from 2 November 2018 to the date of the COD.

The Arbitrator held that there was an increase in the deceased's alcohol use after the psychological injury. He accepted Dr Talley's opinion that before this injury occurred, the deceased's drinking was "*intermittent and more in the nature of binge drinking*" and he accepted the applicant's evidence that he noted a significant increase in the deceased's drinking after that injury. He noted that De Sethi (qualified by the insurer) did not consider the histories heavy alcohol intake over the previous 18 to 24 months taken in relation to the deceased's hospital admissions in 2014 and 2015. He also found that the deceased was obese and that Dr Talley accepted that paracetamol contributed to the death.

The Arbitrator stated that he needed to apply the relevant principles in cases such as *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 ((*Kooragang*) in deciding whether the death resulted from an injury. He held that it resulted from the psychological injury and while there were multifactorial causes, it would not have occurred on 30 March 2015, were it not for the substantially increased alcohol intake after that injury. He also held that the increased drinking was resulted from that injury. He noted that the respondent's case was put on the basis that the heavy drinking really did not change, after that injury, from what had been occurring many years before.

The appellant appealed on three grounds: (1) The Arbitrator erred in fact and discretion in placing weight on: (a) the bank records, (b) the applicant's belief, and (c) the medical evidence; (2) The Arbitrator erred in law and discretion in accepting Dr Talley's opinion and rejecting Dr Sethi's opinion; and (3) The appellant was denied procedural fairness.

Deputy President Snell determined the appeal on the papers.

Snell DP rejected ground (1). He noted that the appellant argued that the bank records were in the applicant's name and there was no relevant evidence regarding the patterns of spending between the applicant and the deceased. However, the Arbitrator inferred that the alcohol spending was by the deceased where the circumstances were insufficient to give rise to a definite conclusion on the issue: *Fuller-Lyons v New South Wales* [2015] HCA 31; 89 ALJR 824 *(Fuller-Lyons).* He rejected the applicant's evidence regarding the deceased's pre and post-injury drinking on the basis that he did not witness it or the deceased hid it from him. If the inference could be drawn the weight would be minimal. The bank records did not show cash purchases or what was bought and they did not date back to 2007 and could not support Dr Talley's opinion regarding intermittent and binge-drinking patterns. In the absence of appropriate evidentiary foundation, the records were of no weight and the Arbitrator erred in relying on them. It asserted that the Arbitrator accepted that the deceased increased her alcohol consumption from November 2012 based upon the applicant's belief and that the applicant's beliefs lacked any evidentiary weight and the Arbitrator erred by accepting or using that evidence.

The appellant noted that the Arbitrator also based his finding of increased alcohol use in the 2-years prior to the deceased's death on medical histories. However, it argued that it could not be established where those histories came from and the Arbitrator found that there was a lack of significant reference to alcohol in medical records before 2014. This supports a proposition that the deceased was an unreliable historian. Similarly, Dr Co'burn's report could not support the relevant factual finding as he had limited expertise on the topic and he did not identify his assumptions or reasoning process. Dr Talley's opinion could not be accepted because it was based upon an incorrect assumption.

Snell DP referred to the decision in *Luxton v Vines* [1952] HCA 19; 85 CLR 352 *(Luxton)* in which the plurality cited the following passage from *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 *(Bradshaw)* as the test to be applied:

> In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise. (excluding references)

In *Seltsam Pty Limited v McGuinness* [2000] NSWCA 29; 49 NSWLR 262, Spigelman CJ referred to the test in *Luxton* and stated:

> Causation, like any other fact can be established by a process of inference which combines primary facts like 'strands in a cable' rather than 'links in a chain', to use Wigmore's simile.

Further, in *Flounders v Millar* [2007] NSWCA 238, Ipp JA said:

> It remains necessary for a plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inferences of an equal degree of probability or plausibility. The choice between conflicting inferences must be more than a matter of conjecture.

Snell DP held that the decision in *Fuller-Lyons* is not inconsistent with these matters. The question was whether the inference was available on the probabilities. The Arbitrator held that it was implicit in the applicant's statement that the deceased was "*essentially making the purchases for herself*" and that inference was properly available. He stated, relevantly:

> 58. In *Shellharbour City Council v Rigby*, Beazley JA (Ipp and Basten JJA agreeing) said:
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> > 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.
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> 59. The weight the Arbitrator gave the evidence of the banking records was to regard them as generally corroborative of Dr Talley's opinion, that Mrs Barrett's alcohol consumption was greater after November 2012. This was, in any event, generally consistent with the histories recorded at Blacktown Hospital on 12 December 2014[68] and 16 March 2015.[69] In saying this, I am cognisant of the histories recorded at Blacktown Hospital in December 2014 *("[s]ince 8 y ago drinking 3–4 large glasses of white wine a day, now 4 per day due to recent illness"),[70] and on 16 March 2015* ("*Alcohol abuse for 8 years and ongoing*").[71] This was not necessarily inconsistent with how Mr Barrett's case was ultimately presented, on the basis of Dr Talley's opinion. Mr Barrett's medical case accepted that there had been excessive alcohol use dating back to 2007, but argued it had increased from November 2012, leading to death.[72]
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> 60. The banking records dated back to 2010. Mr Barrett submits the appellant's argument that the records were without weight as they did not date back to 2007, was not pursued by the appellant at the arbitration hearing, and it should not be permitted on appeal. The appellant submits that because it challenged whether the alcohol abuse was longstanding, this implicitly challenged the reliability of the banking records. It did not. This is a valid basis for why this argument should not be allowed on appeal.[73] In any event, there is no rational submission dealing with why the records were deprived of all weight, because they did not extend back to 2007. They were relevant to Mrs Barrett's alcohol consumption from 2010 to her death in 2015. This was relevant to one of the major areas of controversy in the case, whether the consumption increased after November 2012, when bullying started after Mrs Barrett received a promotion.

Accordingly, it was open to the Arbitrator to draw the inference that the deceased was essentially making the alcohol purchases referred to in the banking records for herself. The weight that he gave to this evidence was largely a matter for him. There was a significant increase in the level of purchases from liquor outlets after November 2012, and it was open to him to adopt the approach that he did, treating this evidence as of limited weight, but generally confirmatory of Dr Talley's opinion regarding the deceased's levels of alcohol consumption over time. He also rejected the appellant's arguments based upon the applicant's belief regarding alcohol consumption.

Snell DP held that the argument that the applicant was an unreliable witness is without merit. In relation to the available history regarding alcohol consumption taken in December 2014, he stated, relevantly:

78. The histories taken on 12 December 2014 and 16 March 2015 were described by the Arbitrator as "*important*". This was appropriate. They referred to a heavy alcohol intake over the period of 18 to 24 months leading up to when they were recorded.[93] The history on 16 March 2015 additionally associated that alcohol consumption with "PTSD". The basis on which the appellant argues the histories cannot assist, is that both Mr and Mrs Barrett were "*unreliable*". That submission is rejected, both histories were entitled to weight in the circumstances in which they were recorded.

79. The appellant additionally submits that the analysis in the reasons at [44] cannot be accepted, as the drinking levels referred to in the histories were "current alcohol intake", rather than "*what level she was previously drinking at*". The histories on 12 December 2014 and 16 March 2015 specifically refer to the intake over a period of 18 to 24 months, which is generally consistent with the effluxion of time since shortly after the time the bullying commenced in November 2012. Dr Gupta's history, quoted at [77] above, specifically refers to his history of the recent consumption rate (one bottle of wine per night for two years) and the previous rate (three to four drinks per night). The appellant's attack on the analysis in the reasons at [44] is without merit. It should be noted also that the Arbitrator's analysis involved a consideration of the lay evidence relevant to consumption history, in tandem with the medical evidence of Dr Talley (who he accepted). These were "*strands in the cable*" of the Arbitrator's reasoning.

Snell DP noted that while the Arbitrator described Dr Co'burn's report as "*less weighty than those of Drs Talley or Sethi, because of Dr Co'burn's relative lack of expertise, and the lack of supporting reasoning*", he considered it as being "*still relevant"* and consistent with his view that the deceased's alcohol consumption significantly increased after the psychological injury. The appellant argued that it could not be used in this way because it did not reveal its assumptions or reasoning process. Snell DP stated, relevantly:

84. The nature of the appellant's argument is explained sufficiently by its short submission. In *Hevi Lift (PNG) Ltd v Etherington* McColl JA (Mason P and Beazley JA agreeing) said "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".[99] Her Honour subsequently described this statement as "*apposite in the context of Commission hearings",[100] and said it was necessary to determine whether a report went beyond "a bare ipse dixit*".[101]

85. The appellant's submission on this point also raises *Makita (Australia) Pty Ltd v Sprowles*, in which Heydon JA said:

> The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are '*sufficiently like*' the matters established '*to render the opinion of the expert of any value*', even though they may not correspond '*with complete precision*', the opinion will be admissible and material. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved.[102] (excluding references)

86. In *Australian Securities and Investment Commission v Rich* Spigelman CJ discussed these principles, saying:

> What Heydon JA identified as the expert's '*prime duty*' is fully satisfied if the expert identifies the facts and reasoning process which he or she asserts justify the opinion. That is sufficient to enable the tribunal of fact to evaluate the opinions expressed.

87. Dealing with application of these principles in the Commission, Beazley JA said:

> In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of admissibility but of weight.

88. Dr Co'burn's report did not identify the reasoning process on which it was based, sufficiently to allow the Commission to evaluate the doctor's opinion. It was a "*bare ipse dixit*". As an expression of expert opinion, the report did not carry weight, and did not provide probative evidence on which the Commission could act, on its stated topic. That was the issue of whether there was a causal relationship between Mrs Barrett's excessive drinking after the psychological injury, and her death from liver disease. The Arbitrator was aware of the deficiency in the report, and correctly referred to the lack of supportive reasoning.

89. In *Hancock* Beazley JA said:

> A deficiency in one part of an expert's evidence may be made good by other material, either in another report or in oral evidence: see the discussion in *Rhoden v Wingate* at [55]–[73] ...The question as to whether there was a scientific or intellectual basis for Dr Summersell's opinion had to be determined by reference to all of his reports. It was not a determination that could be made by singling out an isolated part from the whole of that witness's material before the Commission.

90. … The Arbitrator, correctly, did not accept Dr Co'burn's opinion on causation of the deteriorating liver disease and death. It was inherent in how Dr Co'burn expressed himself, that the doctor accepted there had been an excessive consumption of alcohol since the psychological injury. The only use the Arbitrator made of Dr Co'burn's opinion was to regard it as confirmatory, of an opinion the Arbitrator had formed in any event, that Mrs Barrett's alcohol consumption had significantly increased since the psychological injury.[110] In my view, it was available to the Arbitrator to accept Dr Co'burn on this limited issue. For the doctor, it would have been a matter of history and impression. It did not, in any event, affect the result, as the Arbitrator had independently reached that conclusion based on other evidence. This part of the appellant's attack on the decision fails.

Snell DP rejected ground (2). He noted that the appellant argued that the primary contest was between Dr Talley and Dr Seth and that the Arbitrator based his decision on "*demeanour*" and his preference for Dr Talley was based upon the presentation of the argument and not the argument itself. If the Arbitrator was considering such an approach, he should have informed the parties. He held, relevantly:

> 127. There is a single issue on which the case turns, being whether Mrs Barrett's death on 30 March 2015 resulted from the conceded psychological injury, deemed to have occurred on 22 July 2013 (which involved bullying and harassment in her employment from November 2012 to 22 July 2013). There was an important related issue, which was whether the evidence supported the proposition that Mrs Barrett's alcohol consumption increased from the time of the bullying injury, November 2012 and subsequently.

128. The Arbitrator's reasons are summarised at [9] to [26] above. In *Hume v Walton* it was said:

> The primary judge's duty was not only to record the evidence but also to record the findings she made based on that evidence. While the extent of that duty may depend upon the circumstances of the individual case, where there is disputed expert evidence, the '*parties are entitled to have the judge enter into the issues canvassed before the Court and to an explanation by the judge as to why the judge prefers one case over the other'*. (references omitted)

129. In *Eckersley v Binnie* Bingham LJ said:

> In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons ...

130. Examples of the other good reasons may be found in the passage of *Wik*i on which the appellant relies, an expert who is "*found to be dishonest, or misleading, or unduly partisan, or otherwise unreliable*"…

133. The Arbitrator was critical of how Dr Sethi expressed himself. He referred to Dr Sethi's treatment of Mr Barrett's statement regarding Mrs Barrett's allegedly moderate drinking habits prior to the psychological injury (see [115] above). He said Dr Sethi's opinion on this factual issue contained "*much argument and many intensifiers*".[151] The Arbitrator was critical of how Dr Sethi dealt with Dr Talley's view that the psychological injury was "". The Arbitrator said Dr Sethi dealt with this in "*a dismissive fashion*".[152]

134. The Arbitrator expressed his views on the competing expert opinions:

> *Again, putting aside the strident fashion in which the opinion is expressed,* the reasoning for dismissing [sic, preferring] Dr Talley's opinion in this regard is, again, the fixed and general position of Dr Sethi that Mrs Barrett's alcohol intake had been heavy for several years. This opinion does not attempt to delineate the levels of drinking in any way; remembering that Dr Talley has accepted there was heavy drinking prior to the psychological injury – but in an intermittent and binge-type fashion. Against that background, Dr Talley says that the heavy and constant drinking after the psychological injury from late 2012 into 2014 caused the GGTP to spike massively (2156) by 2014. In this way, Dr Talley's opinion has a basis which is more persuasive to me.[153] (emphasis added)

Snell DP held that the Arbitrator did not rely on how Dr Sethi expressed himself as a basis for reaching his conclusion and his reasons were careful, thorough, and referenced to the evidence before him. He correctly observed that Dr Sethi did not allow for the possibility that the deceased's alcohol consumption changed after the bullying commenced in November 2012. The Arbitrator's preference for Dr Talley's opinion was clearly open to him and he gave reasons for that conclusion, which was based not only on the expressed opinions of Dr Talley and Dr Sethi, but also on other lay evidence and medical histories that were identified. He therefore rejected the argument that the issue was decided on the basis of demeanour and he cited the following passage from *Fox v Percy*:

> Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. (excluding footnotes)

Snell DP held that the Arbitrator sought to apply these principles. He had regard to objective factors such as the biochemistry results from time to time, contemporary materials such as the recorded histories in December 2014 and March 2015, and his view of the apparent logic of events. He was required to deal with the conflict of expert evidence consistent with established principles and, consistent with settled principle, he entered into the issues canvassed and explained why he preferred one case over the other.

Snell DP rejected ground (3). He noted that the appellant argued that the Arbitrator was in some way under an obligation to warn it of the basis on which he proposed dealing with the case and held that the premise of this ground was essentially misconceived. He stated:

> 164. In *Kuhl v Zurich Financial Services Australia Ltd* the plurality said:
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> > Judges are not entitled to inform themselves before taking judicial notice without giving the parties an opportunity to comment on the material referred to. Judges are not entitled to criticise expert witnesses by reference to expert material not in evidence without those witnesses having an opportunity to respond. Judges are entitled to take into account the demeanour of party-witnesses, not only in the witness box, but while they enter and leave it, and also while they are sitting in court before and after giving evidence; but observations by the judge of conduct outside the witness box which the representatives of the parties may not have observed, should, if they are influential in the result, be drawn to the attention of the parties so that they may have an opportunity of dealing with the problem. There is thus no general duty on a judge to advise the representatives of the parties of what they can see for themselves, namely the demeanour of the party-witness in the witness box. Nor, a fortiori, is there a duty on a judge to advise the parties that the party-witness's evidence is not adequate to make out the case of that party-witness. But there was held to be a breach of the duty of procedural fairness where a party claiming compensation for injury was held to have feigned or exaggerated her symptoms although this had not been suggested in cross-examination and the respondent disavowed that possibility. (footnotes omitted)
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> 165. Even if it were accepted that the way in which the Arbitrator dealt with the expert evidence involved a consideration of demeanour, such a consideration could only have been based on the written evidence of Dr Talley and Dr Sethi. How those witnesses expressed themselves must have been plain to the parties and their legal representatives, something the parties could see for themselves.
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> 166. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* the High Court said:
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> > Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

Accordingly, Snell DP confirmed the COD.

WCC - Medical Appeal Panel Decisions

Assessment of deductible under s 323 WIMA – Admission of fresh evidence *– Cole v Wenaline* and *Vitaz v Westform discussed – MAC revoked*

Chavez v Briben Group Pty Ltd atf Briben Unit Trust [2019] NSWWCCMA 158 – Arbitrator Dalley, Dr J Bodel & Dr M Burns – 4 November 2019

On 8 June 2015, the worker suffered low back pain while lifting a bucket at work. In July 2016, she underwent decompression and microdiscectomy at the L5/S1 level. On 26 March 2018, she underwent a right S1 rhizolysis.

On 4 March 2019, the worker claimed compensation under s 66 *WCA* for 16% WPI based upon an assessment from Dr Pillemer (DRE lumbar category III + 2% ADLs + 5% for residual radiculopathy). He made no deduction under s 323 *WIMA.* However, the insurer disputed the claim based upon an assessment from Dr Hughes (8% WPI, which was not work-related).

The dispute was referred to an AMS and on 5 July 2019, Dr Crocker issued a MAC, which assessed 16% WPI and did not apply a deductible under s 323 *WIMA.* However, the appellant appealed under ss 327 (3) (c) and (d) *WIMA.*

The MAP determined that the appeal should be determined on the papers and that a further medical examination was not required.

The Appellant sought to adduce fresh evidence in the appeal, namely a COD dated 1 March 2016, to establish that the injury that was the subject of that referral was an injury under s 4 (b) (ii) *WCA* and that it was relevant to support the existence of a "*pre-existing condition/impairment*". However, the MAP declined to admit the fresh evidence because it was available to the parties before the AMS' examination. It noted that the respondent agreed that the subject injury was an aggravation of a pre-existing degenerative condition.

The MAP held that the AMS erred in concluding that there was no evidence to support a deduction by reason of any pre-existing lumbar degeneration as that finding was not available on the evidence. It stated, relevantly (citations excluded):

> 45. In *Vitaz v Westform (NSW) Pty Ltd*, Basten JA said (at [43]) (McColl JA and Handley AJA agreeing):
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> > The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury. In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available.

The MAP held that an MRI scan performed two days after the onset of symptoms clearly establishes a pre-existing degenerative condition in the lumbar spine. It was open to the AMS to give no weight to the opinion of Dr Hughes, or to disagree with it, it was incorrect to say that there was no evidence to support a deduction by reason of any pre-existing lumbar degeneration. The weight to be given to that evidence was a different matter and required consideration by the AMS.

Accordingly, the MAP held that there was a demonstrable error on the face of the MAC and that it is appropriate to apply a deductible of 1/10 under s 323 *WIMA.* It therefore revoked the MAC and issued a MAC that assessed 14% WPI as a result of the injury.

WCC – Arbitrator Decisions

Whether worker was an employee of the respondent – insufficient evidence to satisfy onus of proof that the worker was an employee of the respondent

Naem v Ram Dubey [2019] NSWWCC 353 – Arbitrator Burge – 30 October 2019

The worker claimed weekly payments, s 60 expenses and compensation under s 66 *WCA* with respect to an injury to his right wrist that allegedly occurred at the respondent's premises on 24 January 2012. He alleged that he was employed as a labourer on 24 January 2012, being the date on which he was injured, and that the respondent agreed to pay him $250 per day in cash and said that he would call him "*when needed*". While on the site, he took instructions from the respondent.

However, the respondent denied that he ever employed the applicant. He also disputed the issues of injury, notice and the allegation of incapacity. He asserted that he employed a carpenter, Mr Singh, and that Mr Singh employed the applicant. He paid Mr Singh on a daily rate on a casual basis, on a Friday, for the days that Mr Singh and the applicant physically worked.

Arbitrator Burge conducted an arbitration hearing on 9 September 2019 and he identified the following issues: (1) whether the applicant was a worker or deemed worker; (2) whether the applicant suffered an injury in the course of or arising out of his employment with the respondent; (3) whether the applicant provided any and/or timely notice of his injury as required by the legislation; and (4) whether the applicant suffered an incapacity for employment as a result of the alleged injury.

The Arbitrator held that the applicant bears the onus of proving that he was a worker or deemed worker, as defined in s 4 *WIMA.* The essential feature of that definition is the "*contract of service*" between the "*employer*" and "*worker*". This relationship must be distinguished from that of the "*contract for services*", which is generally referred to as the rendering of services by an independent contractor. He stated, (at [37]), "…*Put simply, the difference is between a person who serves his employer in the employer's business and a person who carries on a trade or business of his own. As noted, the onus is on the worker to prove the employment contract.*"

The Arbitrator stated that the principal criterion remains the employer's right of control of the person engaged, but this is not the sole determinant. In *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8, Ipp JA stated:

> The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 36):
>
> > [I]t remains the surest guide to whether a person is contracting independently or serving as an employee. (at [54])

In the leading case of *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (*Stevens)*, the High Court set out a number of relevant indicia, which include but are not limited to the following: (a) The mode of remuneration; (b) The provision and maintenance of equipment; (c) The obligation to work; (d) The timetable of work and provision for holidays; (e) The deduction of income tax; (f) The right to delegate work; (g) The right to dismiss the person; (h) The right to dictate the hours of work, place of work and the like, and (i) The right to the exclusive services of the person engaged.

The Arbitrator stated, relevantly:

41. As can be seen from cases such as *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21, the task of determining whether someone is an employee or a contractor is often not straightforward. That is the case in this matter…

50. In my view, whilst there is some evidence suggestive of an employment relationship, such as weekly payment at a regular daily rate, the balance of the evidence is insufficient to satisfy the applicant's onus of proof. It is not necessary for an applicant to satisfy the Commission to a scientific certainty of a relevant fact or circumstance; however, it is necessary to examine the relevant evidence and conduct an exercise in fact-finding to determine whether the relevant standard has been met…

62. In relation to the operation of section 20 of *the 1987 Act*, I note there is insufficient evidence to satisfy me that the circumstances of the matter support a finding the applicant was employed by Mr Singh, or that Mr Singh did not have relevant insurance. I also note this issue was raised only as an aside by Mr Doak, and was not pursued as a basis of claim by the applicant during the hearing.

63. Having found there is no employment relationship between the parties, it is not necessary to determine whether the applicant suffered an injury as alleged or to determine the level of any incapacity.

The Arbitrator held that it was not necessary to consider the remaining issues and he entered an award for the respondent.

Section 10 (3A) WCA – Worker fell on stairs of a double-decker bus while travelling to work – Held: no real and substantial connection between employment and the accident out of which the personal injury arose

Carter v Clinical Laboratories Pty Ltd [2019] NSWWCC 355 – Arbitrator Homan – 4 November 2019

The worker was employed on a casual basis as a pathology collector. On 4 March 2019, she injured her lumbar spine when she fell down the stairs of a double-decker bus while on a journey to work. She claimed compensation, but the insurer disputed the claim under s 10 (3A) *WCA*. The worker then filed an ARD claiming continuing weekly payments and s 60 expenses.

Arbitrator Homan conducted an arbitration hearing on 10 September 2019, at which the ARD was amended to claim weekly for a closed period claim from 4 March 2019 to 22 July 2019. The parties agreed that PISWE is $348.55 per week and that if liability was determined in the worker's favour, a general order under s 60 *WCA* would be appropriate. The issues in dispute were identified as: (1) Whether there was a real and substantial connection between employment and the accident or incident out of which the injury arose for the purposes of s 10 (3A) *WCA*; (2) The entitlement to weekly benefits; and (3) the entitlement under s 60 *WCA*.

The worker stated that she usually worked at Gordon and travelled there by car. However, the respondent instructed her to work at Haymarket on 4 March 2019, and after doing some research, she decided that the best way to get to work was to catch a bus from the Northern Beaches (where she lived) to Haymarket. She boarded a double-decker bus and proceeded upstairs to try to find a seat. However, the upper deck was full and she began to descend the stairs in order to exit the bus. As she was doing so, the bus took off, causing her to fall from the upper deck to the lower deck. She said that she travelled by bus because the respondent did not reimburse her for parking or petrol costs and the cost of an Uber would have been more than $100. She would not have been on the bus if she had not agreed to work at Haymarket.

The medical evidence indicated that the worker suffered a non-displaced transverse fracture of the L3/4 vertebra and an overlaying subcutaneous haematoma. She was certified as having no work capacity from 4 March 2019 to 17 March 2019.

The worker referred to the decision in *Dewan Singh and Kim Singh t.as Krambach Service Station v Wickenden* (*Wickenden*), which held that the connection between employment and the incident in which the injury arose need not be a causal connection, but an association or relationship between the employment and the incident was required.

The worker argued that there was a real and substantial connection between employment and the incident because the employer required her to travel to Haymarket and, in practical terms, she had no other choice but to catch the bus. She argued that her situation was similar to that of the worker in *Field v Department of Education and Communities* (*Field*), where the worker was hurrying to get to work and looking ahead when he tripped and was injured. The worker was not performing the activities of a casual teacher when the injury occurred. She also argued, based on the decision in *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd,* that the connection did not have to be significant, but rather something more than tenuous, and that this was fulfilled in this matter.

The respondent argued that the worker decided to use the bus as in her mind it was the best way to get to Haymarket. However, the evidence did not suggest that she was unable to use other means of transport, such as driving, taking a cab or taking an uber. There was no evidence to suggest that the activities associated with her employment had caused or contributed to the injury and the only connection between the injury and employment was that she was travelling on a bus on her way to work when it occurred. The injury was caused by the actions of the bus driver and had nothing to do with the worker's employment and travelling on a bus did not give rise to any additional risk and it was not something that it directed her to do. Therefore, there was no real and substantial connection as required by the Act.

The Arbitrator noted, relevantly (citations excluded):

> 39. The respondent referred to the cases of *Field, Wickenden, Mitchell v Newcastle Permanent Building Society Ltd (Mitchell) and Bina v ISS Property Services Pty Limited (Bina)* and said there must be a connection of substance between the injury and the activities of employment. In *Field* the substantial connection lay in the late notice provided by the employer and the worker rushing to get to the school on time. In Wickenden, the worker had been required to undergo additional training which meant that she was working late and leaving work at a time when it was dark. The darkness contributed to the accident in which the worker was injured. The respondent submitted that in the present case, there was no actual connection of substance between the applicant's employment activities and the incident causing injury.
>
> 40. The respondent submitted that the mere fact of being employed was not sufficient to establish a real and substantial connection. The connection had to be to the activities of or incidental to the employment. Referring to *Bina*, the respondent submitted that just travelling to work also did not satisfy the criteria.
>
> 41. The respondent submitted that the applicant was requested, not directed, to attend work at the Haymarket site. The applicant was approached by her employer as to her availability to work at short notice at the site, being a site at which she had previously worked and for which attendance was consistent with her contract of employment. The applicant was unable to attend on the 11th but could on the 4th, for the mutual benefit of both parties.

> 42. The respondent submitted that to accept that there was a real substantial connection to employment in the circumstances of this case would render s 10 (3A) otiose because obviously a worker has to get to and from the place of work to undertake their duties.

After discussing the relevant case law, the Arbitrator held that on the day of the accident, the worker was to work at a location that was not the usual location at which she worked. She did not usually travel by bus to work and did not usually travel by bus at the time she did on the day of the accident. However, the evidence does not indicate that she had never worked at the Haymarket location previously or that she had not travelled by B-Line bus previously. She noted that the worker had previously travelled to work on the bus on one occasion that the worker said that she travelled by B-Line bus "*a lot*" although not for work. She was therefore not satisfied that the worker was unfamiliar either with travel on the B-Line bus or with travel to the Haymarket work location.

While the Arbitrator was prepared to accept that the worker may not have previously travelled on the B-Line bus at the time she did on 4 March 2019, and that the bus may have been busier at the time of the accident than at other times when she had caught it for nonwork purposes, this alone did not establish a real and substantial connection between employment and the accident. Rather, the accident was caused by the sudden acceleration of the bus while the worker was on or at the top of the stairs between the two decks. There was no connection between the employment and the sudden acceleration of the bus.

The Arbitrator considered the facts in this matter to be similar to those in *Bina*, in which the Arbitrator concluded that there was no real and substantial connection between the employment and the injuries sustained in a motor vehicle accident while she was driving home from work. Neither the unavailability of public transport nor the fact that the worker was required to work a split shift were connected with the activities of the worker's employment. No error was found in the Arbitrator's approach. She also stated:

63. In my view, the facts of this case are distinguishable from those *Field, Wickenden* and *McCoy*. There is in this case no suggestion that the applicant was tired for any reason related to work. Although the applicant says she was given little notice of the location change, there is nothing to suggest she was rushing to get to work. I do not accept that the applicant was unfamiliar with travel on the B-Line bus, having caught it "a lot" previously…

> 64. I do not accept that the respondent compelled or required the applicant to work at the Haymarket location at the early time. The applicant was under no contractual obligation to accept the engagement in Haymarket. Her ability at both a contractual and personal level to decline the engagement is evidenced by the text message in which she declined the engagement on the 11th. The applicant's acceptance of the engagement on 4 March 2019 was to the parties' mutual benefit.
>
> 65. While the applicant says the time at which she was required to travel on 4 March 2019 contributed to the fall because the bus was crowded, I do not accept that this is sufficient to establish a real and substantial connection between the particular activities of and incidental to the applicant's employment with the respondent. There is no indication that the applicant's employer directed or required her to catch the bus at that time or any other time. The applicant could have chosen from a number of methods of travel to work. Her decision was to take the most convenient and cost-effective method but this does not establish a real and substantial connection between her employment and the accident.
>
> 66. The applicant was in no different position to any other commuter travelling on the bus to work in peak hour. The applicant's particular employment did not require her to be standing on the bus's stairs at the moment of sudden acceleration. Nothing about the applicant's particular employment placed her at any greater risk of injury.

Accordingly, the Arbitrator held that there was no real and substantial connection between the worker's employment and the accident or incident out of which the personal injury arose and that the requirements of s 10 (3A) *WCA* are not met. She entered an award for the respondent.

Section 39 WCA - Injury to low back in 1993 – worker sought an assessment of whether his WPI was greater than 20% and alleged that weight gain since his injury had resulted in consequential injuries to his thoracic spine and legs – Held: while the back injury had led to weight gain, it did not result in the alleged consequential conditions

Karam v Amaca Pty Ltd (previously called James Hardie and Co Pty Ltd) (in liquidation) – Arbitrator McDonald – 6 November 2019

The worker injured his back in 1993 and was awarded compensation under s 66 *WCA.* He sought an assessment of WPI for the purposes of s 39 *WCA* and he alleged that he had suffered 12% WPI (lumbar spine), 5% WPI (thoracic spine) and 4% WPI (both lower extremities) as a consequence of obesity, caused by inactivity, which resulted from his back injury. However, the respondent disputed the alleged consequential injuries.

Arbitrator McDonald conducted an arbitration hearing on 11 October 2019. She noted that on 13 September 1995, Commissioner Ashford awarded the worker compensation under s 66 *WCA for* 15% permanent impairment of the back, but she was not satisfied that he had suffered any permanent loss of use of either leg. She noted that on 7 March 2005, Dr Scougall issued a MAC, which assessed 12% permanent impairment of the back, which he reduced by 1/10 under s 323 *WIMA,*5% permanent loss of use of the right leg at or above the knee and 5% loss of use of the sexual organs. A COD dated 9 May 2005, awarded the worker compensation for those losses.

On 28 June 2016, Dr Anderson issued a MAC. He noted that the worker complained of pain in his lower lumbar spine. He was requested to assess the legs and sexual organs, but was not persuaded that there was any additional loss of use if either leg. He felt that the majority of the loss of sexual function was due to gross excess wright, raised blood pressure and type 2 diabetes and he assessed 30% loss of use of the sexual organs as a result of the 1993 injury.

The Arbitrator referred to the statements of principle set out in *Kooragang* (per Kirby P), *Murphy* (per Roche DP), *Etherington* (per McColl JA) and *Edmonds* (per McColl JA). She noted that the treating general practitioners support the connection between the worker's inactivity and weight gain. The worker did heavy work before the injury and because of the injury he had done little since and she was satisfied that he had gained weight as a result of the injury.

However, she was not satisfied that there is a chain of causation between the weight gain and the alleged consequential conditions and her reasons are summarised below:

- In relation to the thoracic spine, Dr Patrick's report does not fulfil the requirements of probative evidence set out in *Etherington* and *Edmonds*. He did not disclose his reasoning and it is unclear whether he considered that the worker suffered an injury or a consequential condition – his report suggests both. The only reference to dorsal pain is found in Dr Sanki's report in 1997. However, the worker did not complain of thoracic pain to Dr Truskett in June 2019 and Dr Truskett did not observe muscle guarding. Therefore, she preferred Dr Truskett's evidence on this issue.
- In relation to the lower extremities and loss of sexual organs, the Guidelines provide that the effects of radiculopathy and impact of sexual function are comprised in the WPI assessment resulting from the lumbar spine injury. If the worker is to be assessed in respect of his legs, it must be as a result of another condition.

- While Dr Patrick diagnosed "*pitting oedema*", his reasoning was speculative and he did not explain his reasoning and/or record any examination findings on which he based his opinion. His reference to his qualification as a vascular surgeon is insufficient to raise his opinion beyond a "*bare ipse dixit*".
- Dr Truskett opined that mild swelling of the legs is a recognised side effect of the blood pressure medication that the worker had taken since about 2015. She preferred his evidence to that of Dr Patrick.

The Arbitrator noted that the worker conceded that if she found against him regarding the alleged consequential conditions, she would not remit the matter to the Registrar for referral to an AMS as the assessment of WPI for the lumbar spine alone did not satisfy the threshold under s 39 *WCA.* Accordingly, she made no order.

WCC – Decisions of the Registrar's Delegate

WCD – Strict compliance with the legislation is not required – Delegate issued an IPD and directed respondent to pay weekly compensation at a higher rate

Hassett v Secretary, Department of Communities and Justice [2019] NSWWCCR 5 – Senior Arbitrator Capel – 22 October 2019

On 2 October 2017, the worker injured his left wrist at work. The insurer accepted liability and made payments of weekly compensation.

On 15 May 2019, the insurer advised the worker that it was assessing his work capacity and that based upon the information that was available, the assessment would likely result in a decision that he had current capacity for suitable employment and that his weekly payments would be reduced. It invited him to send any information by 5 June 2019, set out the information that it had already received and advised him that it indicated that he was able to work 20 hours per week as a Disability Service Officer and Retail Assistant, in which he was able to earn $607.20 per week. On 7 June 2019, it issued a document described as a Work Capacity Decision under s 43 *WCA,* which reduced his weekly compensation to $393.90 per week from 14 September 2019.

The worker disputed the WCD and filed an Application for Expedited Assessment that claimed continuing weekly payments from 14 September 2019 under s 37 *WCA.*

Senior Arbitrator Capel, as Delegate of the Registrar, conducted a teleconference on 27 September 2019. During that conference, counsel for the worker disputed that the insurer had issued a notice under s 78 *WIMA* and that the letter dated 7 June 2019 was a valid WCD. As these disputes were not previously raised, the Senior Arbitrator directed the parties to file and serve written submissions and he identified the issues as follows: (1) whether the insurer issued a valid s 78 Notice; (2) whether the insurer issued a valid WCD on 7 June 2019; and (3) the extent and quantification of the worker's capacity.

As to whether the insurer issue a valid s 78 Notice, the worker's arguments included that it is mandatory for an insurer to issue a s 78 notice and where there is no notice, there is no dispute and leave cannot be granted to the insurer under s 289 *WIMA.* He argued that s 297 (3) *WIMA* provides a presumption that an IPD is warranted, but this is subject to cl 42 of the 2016 Regulation, which provides that it is not to be presumed that an IPD for weekly payments is warranted in circumstances where the insurer has given the worker notice under s 78 *WIMA.* He asserted that the notice dated 15 May 2019, did not give notice of a decision as required by s 78 *WIMA* and did not identify all reports of the type to which cl 41 of the 2016 Regulation applies and that the legislature and natural justice require that the totality of the prescribed material be provided as part of the s 78 notice. As it had not done so, the insurer should be directed to pay him continuing weekly compensation from 14 September 2019 at the rate of $1,008.38 per week.

However, the insurer's arguments included that its obligations respect to dispute notices issued under s 74 *WIMA* were discussed by Roche DP in *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services* and *Irvin v LA logistics Pty Ltd.* These principles apply equally to ss 78 and 79 (2) *WIMA.* Once an issue has been squarely raised in proceedings, there is no obligation to refer to all of the evidence or submissions because this would be unworkable. It provided a notice about its decision to reduce the weekly payments under s 78 (1) *WIMA* and made it clear to the worker that the extent of his capacity was in dispute. The worker was aware that his capacity was being assessed. It also argued that in accordance with cl 42 of *the 2016 regulation*, it is not to presumed that an IPD for weekly payments of compensation is warranted, and therefore the Registrar should not exercise his discretion to direct it to make interim payments under s 297 (3) *WIMA.* Section 84 *WIMA* has no role to play because a s 78 Notice has been issued.

The Arbitrator held that s 78 *WIMA* makes it mandatory for an insurer to give notice to a worker if it intends to dispute liability in respect of any claim or any aspect of a claim, to discontinue payments of weekly compensation or to reduce the amount of compensation. These can be combined into a single notice, subject to the Guidelines. Section 79 *WIMA* prescribes how the notice is to be given to a worker and it must contained a concise and readily understandable statement of the reasons for the decision and the issues relevant to it, by reference to the legislative provisions relied upon. Section 80 *WIMA* makes it mandatory for the insurer to provide a worker with a required period of notice, and in the case of a WCD, the period of notice is three months. He stated, relevantly:

> 115. There is no provision in the 1998 Act that specifies that a WCD issued by an insurer must specify that it is a notice issued pursuant to s 78 of the 1998 Act, or that it is to be described as a "*Section 78 Notice*". Further, there is no provision that makes it mandatory for an insurer to issue a Section 78 Notice and a separate WCD.
>
> 116. The notice that was issued by the insurer on 7 June 2019 was described as a WCD on page one. It concerned a decision to reduce weekly payments and was addressed to the applicant. The insurer provided details of the reasons and the relevant issues in concise and understandable terms and it confirmed that the decision had been made in accordance with s 43 of *the 1987 Act*. The required notice of three months was provided.
>
> 117. Therefore, for the purposes of ss 78, 79 and 80 of *the 1998 Act*, the insurer complied with the legislation. However, these sections are subject to the provisions in *(the) 2016 Regulation* and *the Guidelines*.
>
> 118. The current *Guidelines* contain no provisions regarding an insurer's obligations with respect to WCDs, so they are of no assistance. The provisions in the previous guidelines described the content of WCDs and directed the insurer to ss 32A, 43, 44A and 54 of *the 1987 Act*.

The Senior Arbitrator stated, relevantly (citations excluded):

> 130. Therefore, in this matter, one has to determine whether the insurer's actions achieved the intent and object of *the 1998 Act* and *the 2016 Regulation*, whether noncompliance affects the validity of the insurer's WCD, and whether strict compliance was "*relatively unimportant*" in the context of the present dispute. It must be borne in mind that the current dispute only concerns the applicant's capacity since 14 September 2019.
>
> 131. It is true that the insurer did not identify each and every document on the applicant's claim file. It did not attach copies of the material submitted by the applicant when making his claim for compensation, or the material obtained by the respondent.

132. However, in my view, the legislature would not have intended that the failure by the insurer to strictly comply with cl 38 of *the 2016 Regulation* and attach all of the documents in the applicant's claim file would invalidate the WCD that concerned a dispute as to his capacity two years after his accepted injury.

133. This would make the whole dispute process overly complicated and unworkable. It would draw the focus away from the nature of the dispute and the fact that cl 41 of *the 2016 Regulation* refers to the provision of "*any relevant report*" seems to acknowledge this.

134. Clauses 41 (2) (b), 41 (3) and 41 (4) of *the 2016 Regulation* makes it mandatory for an insurer to provide a copy of any relevant report, which includes the applicant's medical reports, clinical notes, health service providers' reports and certificates, as well as the respondent's medical reports in respect of a decision to reduce the amount of weekly benefits as in the present case. The clause refers to "*any relevant report*", whether it supports the decision or otherwise. It does not refer to irrelevant reports relating to the decision.

135. In *Bonica*, Deputy President Snell stated:

> The respondent, in its Amended Reply (which was not objected to) relied on the dispute notices, including that dated 16 February 2017. The causation issue was squarely raised in the proceedings. There is not an obligation to refer to all of the evidence which may become relevant, or all of the submissions that may ultimately be made. Such an obligation would be unworkable, and is not required by s 74. Section 289A (1) of *the 1998 Act* prevents referral of a dispute for determination by the Commission unless it concerns only matters previously notified as disputed. Section 289A (2) provides relevantly that a matter is previously notified as disputed if it was notified in a notice of dispute. The reference to a "matter" is a reference to what was required in the notice of dispute (the s 74 notice), being notice of the dispute about liability.

136. Although the Deputy President did not discuss whether all documents, either relevant or not, should be attached to a dispute notice or a WCD, his comments regarding the unworkable nature of referring to all evidence in a dispute notice could easily apply to the present case.

The Senior Arbitrator noted that injury and the extent of the worker's capacity before 14 September 2019 are not in dispute and one could infer that he has in his possession copies of the documents that he submitted to the insurer. The material in the insurer's claim file that came into existence in 2017 and 2018 would be of minimal probative value and is of no relevance to the insurer's recent WCD. He stated, relevantly:

> 143. The applicant was given notice that a work capacity assessment was being undertaken on 15 May 2019. The Application was filed by the applicant's solicitor on 13 September 2019, the day before the WCD came into effect. The applicant had three months to seek legal advice, obtain relevant evidence and confer face to face with counsel.
>
> 144. If the applicant had concerns about the contents of his claim file, he could have made a request pursuant to s 126 of the 1998 Act for copies and his solicitor could have served a Notice to Produce on the respondent and the insurer when he served the Application. There was ample opportunity to address any perceived prejudice or unfairness to the applicant…

146. The Application was filed by the applicant's solicitor on 13 September 2019. This matter could well have been finalised at the telephone conference on 27 September 2019 or shortly afterwards, but on that occasion, Mr Goodridge raised for the first time the issue regarding the Section 78 Notice and the validity of the WCD. These previously unnotified matters took me and the respondent's solicitor by surprise. On the grounds of procedural fairness, I ordered that written submissions be filed.

147. The applicant's submissions comprised a total of almost 35 pages and identified further issues of complexity. This has contributed to an unnecessary delay in the determination of the dispute.

148. What was essentially a simple matter became unnecessarily complicated. Nevertheless, both parties were provided with the opportunity to provide detailed written submissions, which often happens in contested arbitration hearings, and I have provided detailed reasons in this Direction. Hopefully this will allay Mr Goodridge's concerns about the interim payment direction process employed in the Commission.

Accordingly, the Senior Arbitrator held that the insurer did not fail to comply with ss 78 and 79 *WIMA* and cl 41 of *the 2016 Regulation* and that the WCD was valid. Further, the insurer does not require leave under s 289A (4) *WIMA* to rely upon a dispute with respect to unnotified matters.

Application for Expedited Assessment

The Senior Arbitrator held that given the worker's lack of experience as a Disability Services Officer, he expected that he would only secure an entry-level position, which would pay at a lower hourly rate than that assessed by the insurer. He considered the position of Sales Assistant as being more suitable and that the worker would be able to earn $440 per week in suitable employment.

The Senior Arbitrator assessed the worker's entitlement to weekly payments under s 37 *WCA* and ordered the respondent to pay weekly compensation as follows:

(1) From 14 September 2019 to 15 September 2019 at the rate of $561.10 per week (s 37 (3) (a));

(2) From 16 September 2019 to 22 September 2019 at the rate of $561.10 per week (s 37 (1) (a)); and

(3) from 23 September 2019 to date and continuing at the rate of $561.10 per week (s 37 (3) (a) *WCA*).

He also ordered that the respondent is to have credit for payments made after 14 September 2019.

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Kim Garling