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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.

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WCC – Presidential Decisions

The duty to give reasons - aggregation pursuant to s322 WIMA - application of Department of Juvenile Justice v Edmed [2008] NSWWCCPD 6

Anshaw v Woolstar Pty Ltd **[2020] NSWWCCPD 30 – Deputy President Snell – 19/05/2020**

On 7/11/2006, the appellant commenced work with the respondent as a picker at Woolworths Distribution Centre in Wyong. He initially carried out this function manually, which was heavy physical work. From 2008 to 2013, he worked on a high reach forklift. He stated that he began suffering neck pain about 12 months after he started working on the forklift and on 24/04/2013, he reported injuries to his right shoulder and neck and had arthroscopic surgery to his right shoulder involving a SLAP repair, bursectomy and decompression. When he resumed work after this surgery, he was returned to manual picking of confectionary, which was less heavy than some of the other products, but this was repetitive work and made his shoulder worse. He made multiple reports of injury to the right shoulder, neck and lower back between 2011 and 2017.

On 21/11/2018, Dr Guirgis (qualified by the appellant's solicitor) assessed 26% WPI, comprising 15% WPI (cervical spine), 5% WPI (lumbar spine) and 8% WPI (right upper extremity),.

Following a slip and fall on 4/11/2017, Dr Damodaran, neurosurgeon, recommended cervical discectomy and fusion at the C5/6 level in December 2018.

On 21/01/2019, the appellant's solicitors claimed compensation under s 66 *WCA* based upon Dr Guirgis' assessment, on the basis that the impairments could be aggregated. However, at arbitration, the appellant accepted that the incident on 4/11/2017 stands apart because it was a very different mechanism of injury.

In February/March 2019, Dr Bentivoglio (qualified by the respondent) agreed that the proposed surgery was appropriate and recommended decompression at the C6 and C7 levels with a 2-level fusion. However, the appellant decided against the surgery.

On 13/06/2019, the respondent disputed the claim on the basis that Dr Guirgis' assessment was attributed to the nature and conditions of employment and not the injuries on 16/03/2011, 5/01/2013, 4/09/2014, 2015, 19/11/2015 and 4/11/2017 and it disputed that the assessments could be aggregated for the purposes of s 322 *WIMA*.

Arbitrator Wynyard conducted an arbitration and on 24/10/2019, he delivered oral reasons and found that the injuries could not be aggregated and entered an award for the respondent. A COD issued on 25/10/2019. The Arbitrator stated that the pleaded mechanism of injury was "*the repetitive use of high reach forklift and lifting*", but he described the "*accepted injuries*" as described in the dispute notice and noted that the sole issue was whether the impairments could be aggregated.

The Arbitrator noted that the appellant argued that under s 322 *WIMA* and the decision in *Department of Juvenile Justice v Edmed*, "*similar pathologies can be aggregated if they are the same even if they arose in different events*", but the respondent argued that aggregation required the appellant to "*show that either pathology arising out of the separate incidents was identical or that the aetiology was identical*". He held that *Edmed* was authority for the proposition that "*… impairments resulting from the 'same injury' (the same pathology) are to be 'assessed together' regardless of whether they arise from the same 'incident' or separate incidents*" and that the argument for aggregation was based on "*this interpretation*". However, in a further passage in Edmed, Roche DP referred to a dictionary definition and said that "*the 'same' means 'identical'*". He asked whether the appellant suffered identical pathology in each injurious event? and held that "*it has not been shown that the pathology involved in the history of the development of [the appellant's] injuries is the same*" and that the "*injuries to the neck and right shoulder are not the same pathology as injuries to the lumbar spine*". Therefore the application for aggregation failed. He was not satisfied that the injuries "*could be lumped together on the date of claim, 21 January 2019*".

On appeal, the appellant alleged that the Arbitrator erred in law: (1) in failing to exercise statutory duty to remit to AMS for assessment of degree WPI; (2) in failing to provide adequate reasons for rejecting claim pursuant to s 4 (b) (ii); and (3) in failing to determine whether injuries arose of same incident pursuant to s 322 [sic].

Deputy President Snell determined the appeal on the papers. He noted that the primary case that the appellant ran before the Arbitrator was that the effects of the various incidents could be aggregated for the purpose of the assessment of permanent impairment (either under s 322 *WIMA* or by virtue of a finding of 'disease'. He decided to deal with grounds (2) and (3) before ground (1).

Snell DP upheld ground (2). He noted that the appellant relied upon the Presidential decision in *Newby*, which referred to *Sourlos v Luv a Coffee Lismore Pty Ltd*, in which Ipp JA referred to the need for a trial judge to address disputed issues "*on a rational and reasoned basis*". This "*required rational examination and analysis*". He cited the decision of McColl JA in *Pollard v RRR Corporation Pty Ltd,* in which her Honour provided a helpful summary of many of the principles governing the duty to give reasons, including:

> 58 The extent and content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties.
>
> 59 The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted…it is necessary that the primary judge '*enter into*' the issues canvassed and explain why one case is preferred over another. (references omitted)

Snell DP stated that the Arbitrator's reasons, for rejecting the appellant's argument that injury could be made out pursuant to s 4 (b) (ii), are essentially contained in the short passage quoted at [38] above. He referred to the decision of Burke CCJ in *Perry v Tanine Pty Ltd*, which was approved by Mason P in *Fletcher International Exports Pty Ltd v Barrow*, as follows:

> The failure of an area of the body to cope with repeated stress imposed upon it, leading to pain and loss of function is capable of being found to be a disease process (see generally *Armao v Ladue Holdings Pty Ltd* [1992] NSWCC 16; (1992) 8 NSWCCR 440; *Perry v Tanine Pty Ltd t/as Ermington Hotel* [1998] NSWCC 14; (1998) 16 NSWCCR 253). There was in the present case a substantial body of medical evidence as to the nature and origin of the worker's condition which allowed the Commission to conclude that the injury process as disclosed by the evidence was a disease. The evidence was also capable of showing that the disease had been aggravated by the nature and conditions of the work.

Snell DP held that a finding on the basis of the '*disease*' provisions can be made, on the whole of the evidence. It is not dependent on whether the medical evidence specifically employs the term '*disease*' and such a finding is not precluded because the injury may also be regarded as resulting from the '*nature and conditions*' of employment. However, the Arbitrator's reasons did not engage in a "*rational examination and analysis*" of the case run by the appellant, on whether injury was established on the basis of the '*disease*' provisions. The Arbitrator did not enter in an appropriate way into the issues canvassed on this topic, he did not explain why the respondent's case was preferred over that of the appellant. The Arbitrator indicated that he found the report evidence of Dr Guirgis confusing and unclear, and not of assistance. The appellant's case consisted not only of the views of Dr Guirgis. The argument made on the appellant's part was additionally based on the opinion of Dr Bentivoglio, the neurosurgeon qualified on the respondent's behalf, and by reference to material from treating specialists. Although the appellant's duties varied from time to time, there was no real issue regarding the fact that he had, for over a decade, 65.

Snell DP also upheld ground (3). He held that the Commission is required to afford parties procedural fairness. He noted that the Arbitrator referred to *Edmed* and briefly summarised its effect. He also noted that the appellant's counsel dealt with the issue of aggregation based upon s 322 (2) *WIMA.* However, the Arbitrator's reference to it being obvious that "*injuries to the neck and right shoulder are not the same pathology as injuries to the lumbar spine*" suggests that he missed the distinction drawn in the appellant's case, between s 322 (2) and s 322 (3). It was not the appellant's argument that injuries to the neck, right shoulder and lumbar spine all involved the same pathology and the reasons failed to deal with the articulated argument, which constitutes error.

Accordingly, Snell DP revoked the COD and remitted the matter to another Arbitrator for re-determination.

Section 32A (1) WCA – the obligation to give reasons

Popal v Myer Holdings Pty Ltd [2020] NSWWCCPD 32 – Deputy President Snell – 27/05/2020

On 7/07/2014, the appellant witnessed an assault at work in which the victim was fatally stabbed and suffered a psychological injury (PTSD). She was off work and was paid compensation until 10/01/2015. Her employment was terminated on the basis that she had abandoned it and she has not been in paid employment since then. She claimed continuing weekly payments, s 60 expenses and lump sum compensation for 24% WPI.

Arbitrator McDonald conducted an arbitration hearing on 24/10/2019. She summarised the evidence and submissions and found that the appellant's evidence was "*unsatisfactory with respect to a number of important issues".* In particular, the appellant failed to disclose any previous psychological complaints, including a history of significant anxiety and while she asserted that her employment was terminated in 2015 "*without explanation*", but at the arbitration her counsel conceded that she was married on 14/02/2015 and travelled to Thailand on her honeymoon. The appellant also omitted to mention her marriage in her statement.

The Arbitrator ultimately preferred the evidence of Dr Roberts (qualified by the respondent) and she held that the appellant's social media activity shoed that she had a significant capacity for work. She found that the appellant was fit for employment from January 2015 and that she would have been able to earn an amount equivalent to her pre-injury earnings in suitable employment. On 12/11/2019, she issued a COD which directed the respondent to pay weekly payments under s 37 *WCA* from 11/01/2015 to 20/01/2015, with an award for the respondent thereafter. It also awarded the appellant s 60 expenses and remitted the dispute under s 66 *WCA* to an AMS.

The appellant appealed against the award of weekly payments and asserted that the Arbitrator: (1) erred in law in finding that she had an ability to earn an amount equivalent to her pre-injury earnings in suitable employment, without determining the nature of such employment with regard to the factors listed in s 32A *WCA;* (2) erred in fact in asserting that counsel did not address on the amount that it would be appropriate to award, when he did in fact address on that topic; (3) erred in fact by asserting that the appellant's social media activity shows that she had a significant capacity for work without providing sufficient reasons to demonstrate the nature and significance of that capacity; and (4) took into account irrelevant considerations with respect to her marital status, or failed to provide adequate reasons disclosing the relevance of such circumstances.

Deputy President Snell determined the appeal on the papers.

Snell DP rejected ground (2) and he found that the Arbitrator was clearly aware of the submissions going to weekly payments on both sides of the record. The reasons had to be read as a whole and to the extent that there was any misstatement regarding the submissions made, there was no meaningful error. He accepted the respondent's submission that its relevance is unclear as was any basis for concluding that this could have affected the result.

Snell DP also rejected grounds (1) and (3). He referred to the decision of Roche DP in *Dewar,* as follows:

> Thus, the task requires the identification of whether there are any 'real jobs' (*Giankos v SPC Ardmona Operations Ltd* [2011] VSCA 121 at [102]) which, having regard to the matters in sub-s (a) of the definition, the worker is able to do, regardless of whether those jobs are 'available' (to the worker) or are 'of a type or nature that is generally available in the employment market'.

Snell DP held that the reference to “real jobs” needs to be read in light of the issues being argued in *Dewar*. The employer supplied light work to the worker that consisted of a job that was made up for the purpose of supplying suitable duties. The employer argued this demonstrated an ability to perform ‘suitable employment’ for the purposes of s 32A, regardless of whether an employer exists who would provide that work. The Deputy President rejected the employer’s argument on this point; work that was “not real employment or work that was potentially available in the labour market at large” was not ‘suitable employment’. He stated that the decision in *Mani*, to which the appellant referred, raised a similar issue. The employer in submissions at the arbitration hearing in that matter said it could provide suitable duties to the worker. The employer’s counsel said “the duties would involve retraining, guidance and coaching, the particular duties were not identified and were not the subject of medical scrutiny as to their suitability”. Wood DP said:

> The Commission has identified in a number of cases that for the purposes of s 32A of the 1987 Act, ‘suitable employment’ encompasses the identification of an actual position that the injured worker could do, rather than a ‘light duty’ job that the employer created that is not a real job.

Snell DP observed that *Dewar* and *Mani* deal with the same point, whether a made up job, not potentially available in the labour market at large, can constitute ‘suitable employment’. That is different to the issue in the current matter and those decisions do not assist the appellant. He noted that in *Cronje v Leighton Contractors Pty Ltd,* Roche DP observed:

> The extent and scope of a trial judge’s (or Arbitrator’s) duty to give reasons depends upon the circumstances of the individual case (*Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 per Samuels JA (with whom Clarke JA and Hope AJA agreed)). The obligation to give reasons is related to and dependent upon the submissions presented to the judicial officer.

Snell DP held that the parties’ submissions clearly raised the application of s 32A (1) *WCA*. The Arbitrator referred to these submissions in her reasons, including specific reference to the respondent’s submission that, if the ability to earn was found to exceed earnings in pre-injury employment, an award for weekly compensation would not be made. The finding on the appellant’s fitness for work was open to the Arbitrator on the evidence and her reasons were adequate.

Snell DP rejected ground (4). He held that the Arbitrator referred to the ending of the appellant’s employment with the respondent on 21/02/2015, and to a concession by her counsel that she married and went to Thailand on her honeymoon on 14/02/2015. She noted that the marriage was not mentioned in the appellant’s statement and that other documents suggested that her employment was terminated based on abandonment because she went overseas without telling the respondent. She referred to significant omissions in the appellant’s evidence, which resulted in a difficulty accepting her evidence when it was not supported by contemporaneous documents. The appellant specifically did not challenge that credit finding,

Snell DP stated that the appellant had not identified specific references by the Arbitrator to matters such as marriage or children, which she asserted were inappropriate or reflected error, and she has not identified any specific factual findings that are allegedly tainted by error and/or how any such alleged errors affected the result. As there was no reasonable argument made in support of this ground, it should not have been raised.

Accordingly, Snell DP confirmed the COD.

Section 352 (3A) WIMA - Leave to appeal against interlocutory decision refused – matter remitted to the Arbitrator for determination of the dispute

University of New South Wales v Lee [2020] NSWWCCPD 33 – Deputy President Wood – 28/05/2020

The worker claimed weekly payments and treatment expenses with respect to an alleged psychological injury (deemed date: 8/01/2020). The appellant accepted provisional liability under s 267 *WIMA*, but on 10/020/2020, it notified the worker that an IME had been arranged for her on 18/03/2020. The reason put forward by the appellant for the IME was that clinical notes had been requested from the worker's GP, but had not been received.

By email dated 1/02/2020, the worker's solicitor objected to the IME on the basis that the GP only received the request the week before and had sent a tax invoice to the appellant for payment for the provision of the notes. He referred to s 119 *WIMA*, which required that any IME must be arranged in accordance with the Guidelines.

On 17/02/2020, the appellant responded to Mr Brennan, asserting that the IME was in accordance with the Guidelines and that weekly payments would be suspended if the worker did not attend it. Thereafter a "stand-off' ensued, in which the worker refused to attend the IME and the appellant insisted that her weekly payments would cease. On 2/03/2020, the GP confirmed that his tax had not yet been paid and on 18/03/2020, the appellant suspended the worker's weekly payments.

The worker commenced WCC proceedings, seeking an order that the proposed IME did not comply with s 119 *WIMA* or the Guidelines and under s 119 (4) *WIMA*, she was not required to the attend it.

On 7/04/2020, ***Arbitrator Rimmer*** conducted a telephone conference. Mr Brennan appeared for the worker and Mr Taylor appeared for the appellant. The Arbitrator heard oral submissions from Mr Brennan and on 8/04/2020, she directed the respondent to file and serve submissions by 9/04/2020, with the dispute to be determined on the papers.

Following the telephone conference, Mr Macken applied for a transcript of the telephone conference and was advised that it had not been recorded. On 9/04/2020, the appellant lodged an Appeal against the Arbitrator's decision, but this was rejected as it did not comply with Practice Direction No. 6.

On 14/04/2020, the Arbitrator issued a further direction in the following terms:

> In the telephone conference on 7 April 2020 I directed the respondent is to lodge and serve written submissions by 9 April 2020. I note that the respondent was represented by Mr Michael Taylor from Leigh Virtue & Associates in the telephone conference. Following the telephone conference Mr Makin [sic, Macken] of Leigh Virtue & Associates requested a transcript of the telephone conference proceedings. It appeared that Mr Makin, rather than Mr Taylor, was now to make submissions on behalf of the respondent. The telephone conference was not recorded and a transcript is not available. Mr Makin advised the Registry that the lack of a transcript made it 'essentially impossible to comply with the order' made on 7 April 2020. Mr Makin then lodged an Application - Appeal Against Decision of Arbitrator on 9 April 2020, which was rejected by the Registrar on 9 April 2020. To enable this matter to be determined in a timely manner, I will determine this matter on the papers and make the following directions:
>
> 1. Applicant to file and serve written submissions by 17 April 2020.
> 2. Respondent to file submissions in reply by 22 April 2020.
> 3. The matter will then be determined on the papers.

The parties filed submissions in compliance with the direction, but on 14/04/2020, the appellant filed a fresh Appeal against the Arbitrator's decision dated 8/04/2020, and asserted that the Arbitrator: (1) erred in law in denying it procedural fairness; (2) by failing to give any reasons; (3) erred in discretion in failing to deal with the application for leave to issue directions; and (4) erred in law by failing to use her best endeavours to bring the parties to a resolution in accordance with her obligations under s 355 *WIMA.*

The worker opposed the appeal, but consented to the name of the appellant being amended to reflect the correct legal entity.

Deputy President Wood determined the appeal on the papers.

The worker sought to rely upon an Affidavit of Mr Brennan, which set out the procedural background of the matter and his recollection of the teleconference. He deposed that when the Arbitrator indicated that she proposed dealing with the matter as an expedited assessment, Mr Taylor stated that he was not ready to make submissions because Mr Macken had carriage of the matter. The Arbitrator considered the matter to be urgent and said that she would hear submissions for the worker and give the appellant leave to lodge written submissions by 9/04/2020. He did not recall any application for an adjournment, but stated that if such an application was made he would have opposed it. He did not recall Mr Taylor asking the Arbitrator to issue any Directions, but stated that he would have opposed such an application because there was sufficient material before the Arbitrator. He did not recall Mr Taylor indicating that he had any instructions to resolve the dispute by settlement. However, as Mr Macken requested a transcript so that he could prepare submissions, he "*…plainly intended to resist the worker's application, and had no interest in engaging in settlement discussions…*"

The appellant opposed the admission of Mr Brennan's affidavit. It disputed his assertions and asserted that the appropriate way to determine what occurred at the telephone conference is by reference to a transcript, which is not available and this is a basis for revoking the Arbitrator's determinations. It asserted that directions were sought at the teleconference and that Mr Taylor applied for the matter to be stood over and Mr Brennan's failure to recall that does not mean that it did not happen.

Wood DP considered s 352 (6) *WIMA* and held that Mr Brennan's affidavit constitutes fresh evidence. With the exception of the appellant's submission regarding the transcript, its submissions did not address s 352 (6) *WIMA* and were an attempt to respond to the fresh evidence. She stated that without a transcript, the only avenues to ascertain what decisions were made by the Arbitrator were the recollection of the parties who were present and the Arbitrator's directions. She held that the appellant had an opportunity to respond to Mr Brennan's evidence by way of an affidavit from Mr Taylor, which it did not do. Accordingly, there is no prejudice to the appellant if the fresh evidence is admitted.

Wood DP held that the appellant requires leave to appeal under s 352 (3A) *WIMA,* which provides that the Commission is not to grant leave unless it is of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute.

Wood DP rejected ground (1) and found that there was no denial of procedural fairness. Both parties filed submissions and, but for the appeal, the Arbitrator was in a position to fairly determine the matter. She was not satisfied that the Arbitrator proceeded to arbitration without adequate notice and she held that the absence of a transcript was immaterial.

Wood DP was not satisfied that the appellant applied for leave to issue directions and found that there was no evidence from Mr Taylor that supported Mr Macken's assertions. The Arbitrator's direction dated 8/04/2020, did not refer to such an application and her direction dated 14/04/2020, incorporated a procedural history of the matter. Mr Brennan's evidence

tended to indicate that no application was actually made. Accordingly, she was not satisfied that the Arbitrator made a decision or failed to consider or make a decision against which the appellant has a right to seek leave to appeal.

Wood DP rejected ground (2). She stated that the failure to record a teleconference is not unusual and it consistent with the Commission's policy that they are not recorded so that the parties may feel free to engage in a frank exchange of views. A party may request the conference to be recorded in whole or in part, but it was apparent that Mr Taylor did not do so. The parties are obliged to take sufficient notes of what transpires, including the elements of their arguments put to the decision maker, but no such record has been produced by the appellant.

Accordingly, Wood DP held that the absence of a transcript does not amount to a failure to provide reasons or a denial of procedural fairness. She did not accept that the Arbitrator refused to adjourn the matter or proceeded to arbitration without giving the appellant adequate notice and that the appellant applied for leave to issue directions for the production of documents.

Wood DP rejected ground (3) based on her reasons in relation to grounds (1) and (2).

Wood DP also rejected ground (4). She held that it was contentious that after the appellant arranged the IME, the worker refused to attend it, the appellant suspended her weekly compensation payments and a "stand-off" ensued. Both parties filed written submissions that strongly asserted that they were entitled to maintain their respective ground. She stated:

> 59. The issue which the Arbitrator was required to determine was narrow in concept and considered by her to be urgent. Neither party has given any indication that they were, or are, prepared to move from their fixed positions.
>
> 60. In the context of this case, whether the Arbitrator did or did not make a vigorous attempt to resolve the matter, the Arbitrator was entitled to rely on her own experience and move swiftly into the arbitration phase on the basis that "*a settlement acceptable to all*" was not even a remote possibility.
>
> 61. It is of course open to the parties to enter into negotiations to resolve the matter of their own accord. This has not happened to date.
>
> 62. More importantly, the Arbitrator is not in breach of s 355 of *the 1998 Act* because she has not "*ma[d]e an award or otherwise determine[d]*" the dispute as required.

Accordingly, Wood DP refused the appellant leave to appeal and held that referring the matter to a different Arbitrator would not assist in the proper and effective determination of the matter. She also stated:

> 66. In her opposition to the appeal, Ms Lee makes lengthy submissions about the conduct of Mr Macken and UNSW and urges the Presidential member to take certain referral action that is outside of the ambit of determining the appeal. Those submissions are inappropriate, particularly when the issue is yet to be determined by the Arbitrator at first instance. I note that if the matter is determined in Ms Lee's favour, it is open for her legal representatives to pursue such action on her behalf on their own account if they choose to do so.
>
> 67. I also take this opportunity to note that in lodging this appeal, Mr Macken, a legal practitioner, certified that on the basis of provable facts and a reasonably arguable view of the law, this appeal has reasonable prospects of success. Section 352 (7A) of *the 1998 Act* provides:

(7A) Clause 2 of Schedule 2 to the *Legal Profession Uniform Law Application Act* 2014 applies to and in respect of the provision of legal services in connection with an appeal to the Commission under this section in the same way as it applies to and in respect of the provision of legal services in connection with a claim or defence of a claim for damages referred to in that clause.

Note. Clause 2 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 prohibits a law practice from providing legal services in connection with a claim or defence unless a legal practitioner associate responsible for the provision of those services believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success."

68. Mr Macken, and indeed the profession generally, are reminded that the pursuit of an action that is without reasonable prospects of success is capable of being unsatisfactory professional conduct or professional misconduct by the legal practitioner who is responsible for the provision of the service. Such a certification should not be made lightly.

WCC – Medical Appeal Decisions

Traumatic brain injury – expert fails to apply correct guideline – AMS alleged to have not considered particular evidence- presumption of regularity considered – Bojkp applied – MAC confirmed

Brown v Active Energy Pty Ltd [2020] NSWWCCMA 90 – Arbitrator Wynyard, Dr M Fearnside & Dr R Fitzsimons – 20/05/2020

Pursuant to Consent Orders dated 22/11/2019, the Registrar referred a dispute under s 66 *WCA* to an AMS for assessment of WPI for injuries to the head and cervical spine that occurred on 8/09/2016.

On 20/12/2019, Dr O'Neill issued a MAC, which assessed 0% WPI for both the head and cervical spine.

On 16/01/2020, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* He argued that the AMS applied incorrect criteria in finding that the head injury was not of a kind that would be expected to give rise to any permanent impairment of cognitive function. He also argued that the AMS made a demonstrable error in finding that there was no limitation in neck movements, neck pain or associated symptoms of cervical radiculopathy or myelopathy and he failed to grapple with the evidence before him.

The MAP noted that the AMS considered the opinion of Dr Teychenne, who assessed 28% WPI as a result of a mild concussive traumatic brain injury and an incomplete cervical cord lesion. He stated:

> For the reasons I gave above, Mr Brown has no symptoms, signs or radiological evidence of either traumatic brain injury or incomplete cervical cord lesion and I totally disagree with Dr Teychenne.

The MAP held that the evidence was not commensurate with the description in the Guides of a severe or high impact to the head and that it is not the typical type of head injury that would lead to cognitive deficit in the opinion of its medical experts. Therefore, the appellant failed to establish that he suffered a traumatic brain injury on 8/09/2016. There was also no suggestion that he suffered a loss of consciousness and/or post-traumatic amnesia. There was also no evidence of significant intracranial pathology on CT scan or MRI. It rejected Dr Teychenne's assessment by reference to the CDR scale.

The MAP also rejected Dr Teychenne's diagnosis of an incomplete cervical cord lesion and stated that his findings on examination, some 2 years after the event, must be viewed with caution. The MAP's medical experts opined that there was no radiological basis for the diagnosis.

Accordingly, the MAP held that there was no application of incorrect criteria or any demonstrable error and it confirmed the MAC.

AMS did not err in setting out results of testing - re-examination not possible because the worker was dead – MAC confirmed

Thorn v State of New South Wales [2020] NSWWCCMA 91 – Arbitrator McDonald, Dr M Hong & Dr L Kossoff – 21/05/2020

The appellant suffered PTSD as a result of the nature and conditions of his employment as a police officer and he was medically retired on 20/09/2018.

On 16/02/2020, Dr Andrews issued a MAC. Which assessed 9% WPI. That assessment did not satisfy the threshold under s 65A *WCA.*

On 12/02/2020, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* A delegate of the Registrar was satisfied that the latter ground had been made out and referred the appeal to a MAP.

Following a preliminary review, the MAP determined that the appellant should undergo a further psychiatric examination because the AMS had not clarified the results of his mental state examination and any tests of concentration. However, the MAP was not provided with an email from the appellant's solicitors, stating that he had died, until after that review. The appeal was then determined on the papers.

In effect, the appellant argued that the MAC showed a misunderstanding or unsupportable reasoning process in relation to three of the PIRS categories. He argued that the AMS should have assessed class 3 for Social and Recreational Activities, Social Functioning and Concentration, Persistence and Pace. The respondent opposed the appeal.

The MAP held, relevantly:

> 33. The submissions prepared for Mr Thorn stress the examples in the PIRS tables as though they were criteria which the AMS was required to apply. That is not an appropriate application of the PIRS.
>
> 34. In *Jenkins v Ambulance Service of NSW* Garling J said:
>
> > The submission of the plaintiff that, in assigning a class of impairment to each scale, the AMS is restricted only to the examples of activities listed in the tables or, alternatively, to those activities as a minimum, cannot be accepted.
> >
> > There are a number of reasons for this. First, the submission pays no heed to the importance, to which I have referred, of clinical assessment and judgment, both of which are required in formulating an opinion.
> >
> > Secondly, as clause 11.7 of the WorkCover Guides records, there is an expectation that the psychiatrist will provide a rationale for the rating which is assigned. That rating is said to be: '… based on the injured worker's psychiatric symptoms'.
> >
> > But the activities (or perhaps lack of them) listed in the various tables go beyond symptoms. Those examples attempt to explore the ways in which a psychiatric condition impacts upon the activities of daily living of an individual, and their capacity to function in the areas described.

> Next, the submission pays insufficient attention to the words in clause 11.13 of the WorkCover Guides. The words require the AMS to use the standard form when scoring the PIRS. It specifically then provides that the examples of activities are 'examples only'. It then enjoins the AMS to take account of a person's cultural background and to consider the individual's activities that are usual '… for the person's age, sex and cultural norms'....
>
> In my opinion, it is to misread the WorkCover Guides to require, as the plaintiff's submissions would, that the AMS can only proceed either by using the examples in the tables solely as the basis for a rating, or as the minimum basis for a rating.
>
> I am satisfied that the descriptions of the activities which give rise to a conclusion by an AMS of the extent of a disability of an individual by reference to each table in the PIRS, are simply, in my view, examples of activities which would indicate an assessable level of disability. Those examples, on their face, are not necessary to be found in each case, but may, in any particular case, be sufficient to support a conclusion as to the level of disability.

35. The task of the AMS is to assess a worker on the day that he or she presents for examination. A difference of opinion between the AMS and other examiners or the appeal panel does not, of itself, constitute an error. The role of the appeal panel is not to determine if the MAC should be preferred to other evidence.

36. With respect to the medical reports in the file sent to the AMS, Campbell J said in *State of New South Wales v Kaur* (*Kaur*):

> In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480, the High Court of Australia dealt with the nature of the jurisdiction exercised by a medical panel under cognate Victorian legislation. The legislation is not entirely the same but it is broadly similar in purpose. Allowing for some differences, the High Court said at page 498 [47]:
>
> > The material supplied to a medical panel may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on the medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the functions of the panel as being either to decide a dispute or to make up its mind by reference to completing contentions or competing medical opinions. The function of a medical panel is neither arbitral or adjudicative: It is neither to choose between competing arguments nor to opine on the correctness of other opinions on that medical question. The function is in every case to perform and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.
>
> Not all of this, as I have said, is apposite in the context of the New South Wales legislation. In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in *Wingfoot Australia*. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise…

37. The submission that the AMS was in error because his assessment did not accord with the other material in the file cannot be accepted. He was required to assess Mr Thorn and provide his own opinion of his impairment on the date of the examination.

The MAP held that the AMS' assessments in relation to two of the disputed PIRS categories were open to him based on his observations and his comparison with the other medical reports. The examples in the PIRS tables are no more than examples. He considered the history he obtained, the evidence in the file and the examples given in the guidelines. His conclusions are an appropriate application of those matters to the Guidelines and the examples provided. However, it held that an assessment of Class 3 was appropriate for "Concentration, Persistence and Pace". Otherwise, the MAP held that the AMS' reasons for declining to make an allowance for the effects of treatment were valid.

Accordingly, the MAP assessed median class 2 under PIRS and an aggregate score of 16, which reflects 9% WPI. It revoked the MAC and issued a fresh MAC, which did not satisfy the threshold under s 65A *WCA.*

WCC – Arbitrator Decisions

Disease injury – employment with a subsequent employer was employment to the nature of which the disease injury is due – deemed date of injury is the date on which the claim for permanent impairment was made – award for the respondent entered

Cahir v **Coles Supermarkets Australia Pty Ltd [2020] NSWWCC 170 – Arbitrator Burge – 26/05/2020**

The worker injured his left wrist while working as a baker for the respondent from August 2002 until 16/09/2018. There was no dispute that the injury was in the nature of a disease process caused by the nature and conditions of employment, or alternatively an aggravation of that disease. After leaving the respondent in 2018, he began working in the bakery at a Woolworths store and he complained of symptoms in both wrists and arms. He asserted that his employment with Woolworths was of a lighter nature than his work with the respondent and did not claim compensation from Woolworths.

On 12/06/2019, the worker claimed compensation under s 66 *WCA* with respect to an injury alleged on 1/08/2009 (the date he reported his left wrist injury to the respondent). However, it disputed the claim and asserted that the injuries to each wrist were diseases to which the worker's later employment with Woolworths was employment to the nature of which the injury was due (s 15 *WCA*) or employment to the nature of which an aggravation of the disease process is due (s 16 *WCA*).

Arbitrator Burge conducted an arbitration hearing. He stated, relevantly:

19. There is a long line of authority which has dealt with the meaning of the phrase "employment to the nature of which" a disease injury was due. In *Hay v Commonwealth Steel Company Pty Ltd* [2018] NSWWCCPD 31 (31 July 2018) (Hay), Deputy President Wood dealt with the phrase "employment to the nature of which" a disease is due in the context of a hearing loss claim.

20. The Deputy President noted the purpose of sections 15 and 16 is "to avoid unnecessary litigation, simplify the assignment of liability and remove the debate about "true causation". In such a case, it is not appropriate to look behind the nature of the employment to "true causation" (see also the decision of Roche DP in *StateCover Mutual Ltd v Cameron* [2014] NSWWCCPD 49 (Cameron). In both *Hay* and *Cameron*, it was held that to approach the question of causation of a disease injury (in those cases hearing loss) by reference to an inquiry as to actual causation as opposed to that required by the statute is "fundamentally wrong".

21. In *Hay*, Wood DP referred to the High Court decision in *Smith v Mann* (1932) 47 CLR 426. That case dealt specifically with the phrase at issue in this matter, namely a disease arising "from the nature" of employment. Starke J in that matter took the view that: "It must arise, no doubt, from the nature of the employment. But it is not necessary that it should arise 'out of the particular service of the particular employer sued': it is enough if the disease is 'incidental to that class of employment so that it can be attributed to service therein'."

22. In C*ommonwealth v Bourne* (1960) 104 CLR 32 the High Court further considered the meaning of the phrase in s 10 (1) (b) of *the 1926 Act* "due to the nature of the employment in which the employee was engaged". The Court concluded that the phrase referred to is not concerned with the particular activity with a particular employer, but rather the results which are incidental to the class of employment by virtue of its tendencies, incidents or characteristics. It is not concerned directly with something arising out of the particular service of the particular employee.

23. Dixon CJ said that the phrase "due to the nature of the work" was used:

> to provide for ready recourse by the employee to the latest employer who employed him in work to the nature of which his complaint was due independently of the question of whether working for that particular employer contributed at all to his condition ... It was accordingly necessary to make the nature of the work the test and not the actual work done or the employment as it actually affected the man ...
>
> The word 'nature' is a wide as well as a vague word and one must be careful not to narrow its application or attempt to reduce it to too much precision. But it does seem to refer to a connection between the 'disease' in the defined sense and the description of employment by virtue of its tendencies, incidents or characteristics.

24. Applying the above line of authority, it is not necessary to delve into the specific work carried out by the applicant after leaving the respondent's employ. Rather, it is simply enough that the employment is to the nature of which the disease is due. On the applicant's own case, he continues to carry out work as a baker. There is no basis upon which to draw sufficient distinction between the work with the respondent and with Woolworths. Notwithstanding a reduction in heavy tasks and lifting, longer breaks and a less busy store the relevant enquiry for the Commission is whether the work with Woolworths is employment "to the nature of which" the disease is due.

The Arbitrator noted that the worker's evidence was that his essentially the same duties with Woolworths, albeit they are somewhat less strenuous in nature and he did not accept that his employment with Woolworths is not of the same nature to that which he carried out with the respondent which, on his own case, has caused the disease injury. He was therefore satisfied that the current employment with Woolworths had aggravated the disease process.

In accordance with the decision in *SAS Trustee Corporation v O'Keefe* [2011] NSWCA 326, the date of injury is the date of the claim for compensation under s 66 *WCA* – 12/06/2019. As the worker was employed by Woolworths at that time, and it was not a party to the proceedings, he entered an award for the respondent.

Assessment of degree of permanent impairment by an Arbitrator & application of statutory deduction of 1/10 under s 323 WIMA

Knight v X-Rail Specialists Australia Pty Ltd [2020] NSWWCC 172 – Arbitrator Harris – 26/05/2020.

On 15/08/2013, the worker injured his lumbar spine at work.

On 3/12/2013, the respondent disputed liability for weekly payments on the basis that the worker had fully recovered from the injury and was not incapacitated for work. On 20/11/2019, it repeated its denial of liability, but accepted that there was an aggravation of a pre-existing degenerative condition of the lumbar spine consistent with an agreement recorded in a COD dated 2/07/2019.

On 26/09/2018, the worker underwent spinal fusion surgery at the L5/S1 level. He then claimed compensation under s 66 *WCA* for permanent impairments of the lumbar spine and skin, but the insurer disputed the claim. It argued that the worker recovered from the injury within a short period and that the need for surgery did not result from the accepted work injury.

Arbitrator Harris conducted a teleconference, during which the parties agreed that the permanent impairment must be determined consistent with the decision of the President in *Etherton v ISS Property Services Pty Ltd* . The respondent accepted that the worker had suffered 20% WPI and that the issues in dispute were whether the impairment resulted from the injury and whether he had recovered from the surgery.

The Arbitrator referred to the decision of the Court of Appeal in *Secretary, Department of Education v Johnson* [2019] NSWCA 321*,* which confirmed that common law principles must be applied in the field of workers compensation. Emmett JA stated:

> In common law contexts, an injury or incapacity may be attributable, in the legal sense, to more than one cause operating concurrently. There is no difference between the legal view of causation in tort and causation in the field of workers compensation, subject to the qualification that, in a claim for workers compensation, it is unnecessary to prove that the incapacity was the natural and probable consequence of the injury. That is to say, the question of foreseeability does not arise. It is sufficient that the incapacity results from the injury by a chain of legal causation unbroken by a novus actus interveniens.

The Arbitrator was satisfied that the worker has discharged the onus of proving that the work injury aggravated the degenerative process in the low back resulting in him becoming vulnerable to further exacerbations. As a result of the ongoing condition caused by the work injury, he underwent the surgery performed by Dr Tait. It is the surgery which is the basis for the permanent impairment and he was satisfied that the injury resulted in a degree of permanent impairment.

The Arbitrator assessed permanent impairment as being 22% WPI, but he applied a deductible of 1/10 under s 323 *WIMA,* which reduced the assessment to 20% WPI and awarded the worker compensation under s 66 *WCA.*

Worker injured on deployment in Puerto Rico – s 9AA WCA – Consideration of the "usually based" test and "Principal place of business" tests set out in Workers Compensation Nominal Insurer v O'Donohue– "principal place of business" test satisfied – Order made against Nominal Insurer for payment of compensation

<u>Moses v Workers Compensation Nominal Insurer (Icare) & Others</u> [2020] NSWWCC 175 – Arbitrator Isaksen – 27/05/2020

On 22/11/2017, the worker injured his lumbar spine while working in a Disaster Assistance Response Team (DART) for the second respondent in Puerto Rico. His deployment was from 15/10/2017 to 14/12/2017, and he returned to Australia on 20/12/2017. On 16/08/2018, he underwent spinal fusion at the L5/S1 level and on 13/12/2018, he underwent a left L4/5 microdiscectomy. With the exception of some Uber driving, he has not resumed paid employment since December 2017.

The worker claimed compensation from the first respondent, which had been involved in arranging his deployment in Puerto Rico and he was made weekly payments and s 60 expenses until 30/04/2019. However, on 20/03/2019, its insurer disputed that he was a worker and that his employment was not connected to NSW. He joined the Nominal Insurer as third respondent, but it disputed liability on the basis that his employment was not connected with NSW. He claimed continuing weekly payments from 1/05/2019 and compensation under s 66 *WCA* for 24% WPI.

Arbitrator Isaksen noted the issues as: (1) whether the employment was connected with NSW to as to allow the payment of compensation to the worker (s 9AA *WCA);* (2) the extent of any incapacity for work and calculation of any entitlement to weekly payments (ss 32A & 37 *WCA*); and (3) determination of the claim under s 66 *WCA.*

At arbitration, counsel for the worker conceded that he was at all relevant times employed by SP USA. The Arbitrator referred to the decision of Roche AP in *Workers Compensation Nominal Insurer v O'Donohue*, which provided an overview of the application of s 9AA *WCA* as follows:

> 47. The section provides that compensation is only payable under the 1987 Act in 'respect of employment that is connected with the State'. The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under the 1987 Act 'in respect of employment that is connected with this State' (s 9AA (2)).
>
> 48. To determine whether the employment is connected with New South Wales, sub-s (3) of s 9AA provides a series of cascading tests. First, a worker's employment is connected with the State 'in which the worker usually works in that employment' (s 9AA (3) (a)) (the 'usually works' test). If that test provides an answer the question, there is no need to proceed further. …
>
> 50. If no State, or no one State, is identified by the 'usually works' test, one applies the test in section 9AA (3) (b), which looks for the State 'in which the worker is usually based for the purposes of that employment' (the 'usually based' test). If that test provides the answer, there is no need to proceed further.
>
> 51. If no State, or no one State, is identified by the 'usually based' test, one applies the test in section 9AA(3)(c), which looks for the State 'in which the employer's principal place of business in Australia is located' (the 'principal place of business' test).

The worker argued that he satisfied the "usually based" test, or alternatively, the "principal place of business" test. The Arbitrator noted that in *O'Donohue,* Roche AP quoted from his previous decision in *Martin v R J Hibbens Pty Ltd* [2010] NSWWCCPD 83 (Martin), wherein he accepted the correct test for determining where a worker is "usually based" as that set out by Commissioner Herron in *Tamboritha Consultants Pty Ltd v Knight* [2008] WADC 78 (Knight). AP Roche said at [53]:

> ‘usually based’ can include a camp site or accommodation provided by an employer (Knight at [83]). Where a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so. In considering where a worker is ‘usually based’, regard may be had to the following factors, though no one fact will be decisive: the work location in the contract of employment, the location of the worker routinely attends during the term of employment to receive directions or collect materials or equipment, the location where the worker reports in relation to the work, the location from where the worker’s wages are paid.

Roche AP also said at [75]:

> It should be remembered that the ‘usually based’ test does not involve the application of any specific, pre-set, criteria. Each case will depend on its own facts.

In *O’Donohue* the employer was registered and based in Hong Kong and produced live shows that were performed in different countries in Asia, the Middle East and Australia. The worker was injured when performing a show in Bahrain. Arbitrator Foggo found that the worker was usually based in the state of New South Wales for the purposes of his employment, and this finding was not disturbed by AP Roche on appeal. The main reasons for the Arbitrator making this finding was that the worker had stated at the outset of his claim that he was based in New South Wales; that the contract between himself and the employer acknowledged that the worker was based in New South Wales; and that the worker received directions in relation to the work, and to rehearse for the role he had in the show, in New South Wales. Roche AP also noted that the travel route in the contract was “Sydney – Bahrain – Sydney”, which confirmed the worker’s base to be in Sydney.

The Arbitrator stated:

> 85. I consider there are significant differences in the circumstances of *O’Donohue* compared to this dispute which I have to determine, and in the factors referred to by AP Roche to be considered in the “usually based” test, which causes me not to be satisfied that the applicant meets this particular test.
>
> 86. Firstly, there is no acknowledgement in the MOU of the applicant being based in New South Wales.
>
> 87. Secondly, the MOU reads as a standard agreement for an employee to work anywhere in the world and on an intermittent basis at the direction of SP USA. The terms of the MOU anticipate the applicant being required to perform job duties as required by SP USA. The applicant’s deployment in Puerto Rico was extended for one month, consistent with the terms of the MOU. That contrasts with the situation in *O’Donohue* where AP Roche noted the worker’s work duties were restricted to a finite location for a finite period of time.
>
> 88. Thirdly, although the applicant was given some initial instructions before he left Australia, the directions for the actual work he undertook occurred in Puerto Rico. The actual work undertaken by the applicant in Puerto Rico, which I have previously summarised, was varied and extensive. This is in contrast to the circumstances in *O’Donohue*, where the worker’s directions for a discrete job were given in Sydney, those duties were performed in Bahrain, and then he returned to his base in Sydney.
>
> 89. The applicant refers to training which he underwent on 6 to 8 February 2018 and from 7 to 8 March 2018, which might be regarded as analogous to the rehearsals which the worker undertook in *O’Donohue*. However, the evidence does not support a finding that the applicant’s ongoing employment was contingent upon this. The training was voluntary and the applicant was not paid to attend.

> 90. The factors identified by AP Roche in *O'Donohue* (and which are derived from *Knight*) also do not assist the applicant in succeeding with the "usually based" test.
>
> 91. The work location described in the contract of employment (the MOU) is "Global", and not in New South Wales.
>
> 92. I have already referred to the location of where the applicant attended during his employment to receive directions to undertake his work duties. That was in Puerto Rico. It was not in New South Wales.
>
> 93. The location of where the applicant reported for the work which he actually undertook was in Puerto Rico. It was not in New South Wales.
>
> 94. The applicant's wages were paid in US dollars. Bank records of the applicant which are attached to the Reply filed by SPAL indicate that wages were paid through INTL FCStone in London…

The Arbitrator held that the worker was not usually based in NSW. He noted that in *O'Donohue* Roche AP was not required to consider the "principal place of business" test because the worker had succeeded on the "usually based" test. The Acting President made observations on this issue, but expressed no concluded view, including the following at [78]-[79]:

> 78. Accepting the reasoning in *Knight*, I said in *Martin* that an employer's principal place of business is not necessarily the same as its principal place of business registered with the Australian Securities and Investment Commission under the Corporations Act 2001. I also agreed with Knight that principal place of business means 'chief, most important or main place of business from where the employer conducts most or the chief part of its business' (*Martin* at [56]).
>
> 79. In the present case, it is important to note that s 9AA (3) (c) is concerned with the 'State in which the employer's principal place of business in Australia is located' (emphasis added). It therefore does not matter that the employer's main business, or registered office, is located overseas. The provision directs attention to the employer's principal place of business in Australia. That does not exclude the possibility that its main business activities may be based overseas…
>
> 85. … What is required to establish a State of connection in s9AA (3) (c) is a place in a State in which the employer's principal place of business in Australia is located. That requires a consideration of the nature of the business concerned and the nature of the activities conducted in New South Wales to further that business.

The Arbitrator held that in this matter, the principal place of business of the employer was overseas. The available evidence indicates that the principal place of business was in Boone, North Carolina, in the United States of America. However, as Roche AP said in *O'Donohue*, it does not matter that the employer's main business, or registered office, is located overseas or that the employer's main business activities may be based overseas. The test imposed by section 9AA (3) (c) is whether SP USA had a principal place of business in Australia and he was satisfied that for the purposes of the worker's deployment to Puerto Rico, the employer's principal place of business in Australia was in NSW.

Accordingly, the Arbitrator awarded the worker weekly payments and he remitted the dispute under s 66 *WCA* to an AMS for assessment.

Application for Arbitrator to recuse herself based on apprehended bias granted – Livesey v NSW Bar Association, Inghams Enterprises Pty Ltd v Belkoski, Gomez v Padding Product Pty Ltd, Elmer v Official Trustee in Bankruptcy & Tran v Westpac Banking Corporation discussed

Lee v University of New South Wales [2020] NSWWCC 184 – Arbitrator Rimmer – 3/06/2020

This decision relates to an application made by the respondent following the determination of its appeal against an interlocutory decision by the Arbitrator: *University of New South Wales v Lee* [2020] NSWWCCPD 334.

Wood DP refused leave to appeal and remitted the matter to Arbitrator Rimmer for determination of remaining issues. However, in its submissions dated 20/04/2020, the respondent argued that the Arbitrator should recuse herself on the grounds of apprehended bias. The respondent argued that a reasonable bystander would form the view that the matter may not be fairly and reasonably dealt with so far as the respondent's position was concerned and that recusal was appropriate: *British American Tobacco Australia Services Ltd v Laurie* (2011) HCA 2.

Arbitrator Rimmer stated:

> 22. The basis of the application is the respondent's perception of my conduct in the telephone conference on 7 April 2020. The respondent submitted that I had already determined issues in a manner adverse to the respondent in a matter of *Taylor* (Matter No 1353/20) and indicated words to the effect that insurers should not flagrantly ignore the requirements of the Guidelines. The respondent submitted that I had dealt with the matter on 7 April 2020 and then proceeded to issue a further direction dated 14 April 2020 requiring the exchange of written submissions and indicating that the matter would then be determined on the papers.
>
> 23. In *Livesey v New South Wales Bar Association* [1983] HCA 1; (1983) 151 CLR 288 (*Livesey*) the Court held:
>
> > a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he [or she] might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. (at [7])
>
> If there is no allegation of actual bias, the Court stated:
>
> > the question whether a judge who is confident of his [or her] own ability to determine the case before him [or her] fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he [or she] has expressed in his [or her] judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters 'of degree and particular circumstances may strike different minds in different ways. (at [8])
>
> 24. The principles concerning the question of apprehended bias from a decision of the Deputy President were discussed in *Inghams Enterprises Pty Ltd v Belokoski* (*Belokoski*) [2017] NSWCA 313 where Basten JA stated:
>
> > 15. There was no dispute as to the relevant legal test. As explained in *Johnson v Johnson*, the question is '*whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide*.' It was not submitted that a different test should apply to the Deputy President of the Commission, although it was accepted that the application of the test must have regard to the statutory function of an arbitrator and the role played by a Deputy President on an appeal.

25. In *Gomez v Padding Products Pty Ltd* [2005] NSWWCCPD 128 (*Gomez*) Sheahan P said of the dual role of Arbitrators in relation to apprehended bias [at 26]:

> Given the unique role of the Commission arbitrator, acting both as conciliator and then as arbitrator, it is crucial, in the interests of justice and public confidence, that the arbitrator act, and be seen to act, fairly, impartially, independently, and free from bias throughout the entire dispute process. (at [26])

Sheahan P said at [21]:

> The decision of an adjudicator not to disqualify him/herself on grounds of bias, after an application by a party, is not a mere procedural decision of case management or pre-trial preparation, but it is a decision, albeit interlocutory, that goes to the heart of due process, making a fundamental impact on both the scope and the outcome of the proceedings.

26. The High Court in *Elmer (sic) v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (*Ebner*) identified two steps required to assess an apprehension of bias:

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

27. I accept that the test of bias is based on the reasonable person, that is, would a fair-minded person reasonably apprehend or suspect that a decision-maker might have prejudged a case.

28. The absence of a transcript of the telephone conference on 7 April 2020 creates a significant problem in this matter. It is not possible for any party to the proceedings to identify precisely what it is said that might lead me to decide the case other than on its legal and factual merits.

29. I noted that Mr Brennan filed an affidavit in the proceedings before Woods DP and in relation to a number of issues stated that he had no recollection of what had occurred in the telephone conference although he made assumptions based on what his response would have been to certain applications being made.

30. The matter had proceeded to arbitration in the telephone conference on 7 April 2020 once I requested Mr Brennan to make submissions on behalf of the applicant. The proceedings should have been recorded at that stage.

31. This results in me being in a position where in order to determine this application I would be forced to rely on any recollections that I have of what took place in the telephone conference on 7 April 2020. This is not satisfactory and it is not appropriate, in my view, for an arbitrator to become a witness in a matter. Further, if I proceed to determine the matter and the respondent appealed my decision, relying on grounds of appeal that included a refusal to recuse myself following this application, it would not only delay the final determination of this matter but also would leave the further resolution of all issues far more difficult than would be the case if a transcript recording had been ordered by me. Such a situation would create potential problems in the Presidential Division.

32. I note that in *Tran v Westpac Banking Corporation* [2018] NSWWCCPD 4, Snell DP concluded that he could not properly carry out the task of conducting an appeal in the absence of an appropriate transcript.

The Arbitrator held that this is not a matter were a lack of transcript can be accommodated by evidence as to what was said in the telephone conference on 7/04/2020 and that this has resulted in an inability to decide whether a reasonable person might or might not reasonably apprehend or suspect that she had prejudged the case. It is essential that an arbitrator be seen to act fairly, impartially, independently and free from bias throughout the entire dispute process. She therefore recused herself and ordered that the matter be reallocated to another arbitrator for determination.