Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

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

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Supreme Court of NSW Decisions

Judicial review — MACA 1999 — decisions of MA and delegate of President of PIC on review application — conflicting reports of psychiatric experts — whether MA applied correct test for causation, gave adequate reasons and disclosed path of reasoning and complied with applicable guidelines — whether delegate engaged with plaintiff's arguments and complied with s 63 — errors established — medical assessment and review determination set aside

Todev v AAI Limited t/as GIO [2023] NSWSC 836 – Acting Judge Schmidt – 17/07/2023

The plaintiff was involved in a MVA in October 2016, when she reversed out of a parking space and was struck by another vehicle, causing her vehicle to hit another. She alleged that she suffered physical and psychological injuries, as well as the loss of her employment as a nurse in 2019, following a medical assessment. She made a claim for both physical and psychological injury under the MACA 1999, but the insurer did not concede that she had suffered WPI exceeding 10% as the result of the MVA.

In November 2021 the medical dispute about her psychological injuries was considered by a MA, Dr Samuell. He found that the plaintiff suffered from psychological problems which were not caused by the MVA, having examined her and considered her medical history, as well as the reports of 2 psychiatric experts - Dr Vickery and Dr Gertler, who expressed different views about her condition.

Dr Samuell agreed with Dr Vickery that the plaintiff had a pre-existing condition which had no relationship to the MVA, namely somatoform symptom disorder, and he did not assess WPI. There was no dispute that this condition cannot be considered in assessing WPI under the scheme. Dr Gertler's opinion was that plaintiff suffered other psychological injuries as the result of the accident and he assessed 15% WPI.

The plaintiff unsuccessfully pursued an application for review of the MA's assessment under s 63 MACA, claiming that he applied the wrong test of causation, failed to provide adequate reasons and failed to comply with applicable guidelines.

In March 2022, Ms Brittliff, the delegate of the President of the PIC, was not satisfied that there was reasonable cause to suspect that the MA's assessment was incorrect in a material respect and she dismissed the review application.

In January 2023 another MA concluded that the plaintiff had suffered 27% WPI with respect to physical injuries, but attributed 25% of that impairment to unrelated pre-existing degenerative changes. That assessment was subject to a separate challenge.

The plaintiff applied to the Supreme Court of NSW for judicial review of the decisions of the MA and the delegate under s 69 of the Supreme Court Act 1970 (NSW), on the grounds that:

(1) The MA: (a) failed to apply the correct test for medical causation; (b) failed to adequately address that test as s 58(1)(d) MACA requires; (c) failed to state what test he was applying; and (d) failed to provide a statement of the reasons for his conclusions, disclosing his path of reasoning.

(2) The delegate: (a) failed to comply with s 63 MACA; and (b) failed to engage with her arguments in respect of medical causation.

Acting Judge Schmidt identified the following issues for determination with respect to the MA's assessment:

(1) did he misapply the test for medical causation;

(2) did he fail to make a necessary factual enquiry about whether any pre-accident condition had been exacerbated by the MVA;

(3) did he fail to provide adequate reasons for his decision; and

(4) did he fail to disclose his reasoning process.

The insurer argued that the application should be dismissed because none of the alleged errors were made out, but it conceded that if the challenge to the MA's assessment succeeded, the delegate's decision would also have to be set aside because the review application should have succeeded.

Schmidt AJ held that the MA erred because his Certificate did not disclose his reasoning process on the critical matters that had to be exposed.

The MA had to resolve the dispute about whether the plaintiff suffered a psychological injury as the result of the MVA. In doing so he needed to consider and come to a view about her history, psychological condition and its causes. He concluded that she suffered both a somatoform symptom disorder and a probable major depression, which was in remission, but he was mistaken in understanding that in 2008, the plaintiff was diagnosed with a somatoform disorder and he failed to explain why he concluded that her depression was in remission.

Dr Vickery referred to a somatoform symptom disorder, but in these proceedings it was common ground that there was no contemporaneous medical record evidencing such a diagnosis by any treating doctor. It may have been Dr Vickery himself who reached the conclusion that the plaintiff was suffering this disorder in 2008, on the medical records, or he could have been mistaken about what they established. Neither Dr Vickery nor the MA explained the basis for the view that the plaintiff suffered this condition in 2008.

While the MA noted that the plaintiff's case was that she had suffered PTSD, he did not consider whether she had suffered that condition, despite referring to the medical records which reflected that diagnosis and depression after the MVA accident. He did not explain why that diagnosis was not available.

Logically, it follows that the MA's view that the plaintiff suffered a somatoform disorder in 2008 rested on Dr Vickery's reports, rather than on his independent consideration of what her medical history established. Even if it did, he did not expose the reasoning process that led him to conclude that she suffered a somatoform disorder, as he needed to do.

This also supports the conclusion that what the MA did was impermissibly to choose between the competing opinions of Dr Vickery and Dr Gertler, but what he had to do was to arrive at his own opinion on the materials he had to consider, independently, in resolving the parties' dispute. It may be that the plaintiff does suffer a somatoform disorder, but in resolving this medical dispute that conclusion depended on the MA coming to his own view and disclosing his path of reasoning.

Further, the MA's conclusion that the plaintiff's depressive condition was in remission is inconsistent with the ongoing prescription of antidepressants and continuing treatment that she was receiving from her psychologist, but he gave no explanation for his conclusion.

Schmidt AJ also held that the MA erred in relation to the issue of causation. While she found that the plaintiff was not a good historian regarding the treatment that she had received, her history of ill health for which she pursued treatment at different times and her diagnoses were established by her extensive medical records. Before the MVA, she had been treated for depressive symptoms, including a 2015 mental health plan and medication. After the MVA she received further treatment for PTSD and depression, the latter continued after the termination of her employment in 2019. Even at the time of the MA's examination, she was being treated with a considerable array of medication used to treat depression and was still seeing a psychologist.

Under the motor accidents scheme, compensation for a depressive condition could not only result if it was caused by the MVA, but also if it aggravated, accelerated or exacerbated such a condition that the plaintiff was suffering when the MVA occurred. However, the MA did not consider whether the MVA aggravated, accelerated or exacerbated the pre-depressive condition. It must be accepted that the MA did not consider or resolve, as he had to, the question of whether the accident had aggravated, accelerated or exacerbated the depression that he concluded was in remission.

As her Honour concluded that the MA's Certificate, and the delegate's decision, were void and of no effect. She remitted the matter to the President of the PIC for determination by a different MA.

Judicial review – appeal from PIC Appeal Panel (PICAP) – deterioration – additional relevant information - "purple passages"

Luck v Workers Compensation Nominal Insurers & Ors [2023] NSWSC 842 – Weinstein J – 19/07/2023

In 2011, the plaintiff commenced employment with AHMG and in 2017, she worked in an IT role that included project management duties. In 2016, she returned from a period of maternity leave and worked 6.5 hpd, 3 dpw. In April 2017, her role changed again and she became a knowledge management analyst working under a new manager.

By November 2017, problems arose and the plaintiff was placed on a performance review. She said that she suffered workplace stress and was the target of conduct amounting to harassment and bullying by co-workers and management. In March 2019, she was placed on another performance review and in April 2019, following an incident that she alleges concerned minor spelling mistakes, she ceased work and her employment was terminated shortly thereafter. She was treated by Dr Singh (her GP) and she was referred to Ms Pham (a psychologist) in mid-2019.

In 2021, the plaintiff commenced treatment with a psychiatrist who prescribed her medication. Over time, management of her medical condition became difficult and she medical practitioners and perceived a reluctance by medical practitioners to assist her.

On 13 July 2022, the plaintiff was assessed by Dr Glozier via audio-visual link. At that time, she was still married to her husband. The MA described the relationship between the plaintiff and her husband as close, but he observed that there was some ongoing tension and anxiety which made the plaintiff worried about the security of the marriage. Soon after that examination, the plaintiff discovered that her husband was involved in an extra-marital affair and they separated. It appears that the affair had been ongoing for some time, but that the plaintiff says was not aware of it at the time of the examination.

On 19 July 2022, Dr Glozier issued a MAC that assessed 7% WPI after a 1/10 deduction in respect of a pre-existing condition.

On 15/08/2022, the plaintiff appealed against the MAC and alleged that the MA had made factual errors and that her PIRS categorisation in two particular categories, i.e. concentration, persistence and pace (CPP) and social functioning, should be increased from class 2 to class 3, respectively. She also sought to rely on an additional statement that set out, what was in her submission, relevant additional material not available at the time of the assessment with MA - being the discovery of her husband's affair and her marriage break-down. She sought a re-examination by the AP and reconsideration of her WPI.

On 4/10/2022, a delegate of the President of PIC referred the appeal to an AP on the basis that there was arguable case of error under s 327(3)(d) WIMA.

The parties agreed that once the delegate made this decision, the AP was not constrained to the ground that the delegate was satisfied was made out, but was constrained only by the grounds relied on by the plaintiff, citing *Lancaster v Foxtel Management Pty Ltd* [2022] NSWSC 929 (*Lancaster*) per Basten AJ at [16].

Further, in *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236, Leeming JA, Gleeson and Payne JJA agreeing, said at [62]:

> Fifthly, s 327(4) confers what was described in oral address as a "*gatekeeper*" function on the Registrar, who must reach a state of satisfaction that on the face of the application and any submissions at least one of those four grounds has been "*made out*". This provision has led to a deal of litigation, for example *Mahenthirarasa v State Rail Authority of New South Wales* [2008] NSWCA 101; 6 DDCR 61 . For present purposes, it matters only that subsection (4) is a further qualification upon the right of appeal, and is confirmatory of the limited nature of the four grounds specified in s 327(3).

The AP declined to re-examine the plaintiff and declined to admit her statement dated 12/08/2022. It confirmed the MAC and dismissed the appeal.

The plaintiff applied for judicial review of a decision of the AP's decision dated 16/11/2022, on the following grounds:

> (1) The AP misunderstood, and misapplied, ss 327 and 328 WIMA and the impact of the decision of *Petrovic v BC Serve No 14 Pty Ltd* [2007] NSWSC 1156 (*Petrovic*) and *Lukacevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112 when considering whether it should her statement. As a result of this misunderstanding, and misapplying, of the principles to be applied, the AP rejected that statement, including on a mistaken discretionary basis, and did not consider the statement. The statement dealt with the topic of the demise of her marriage, which included her discovery of her husband's relationship with another person a short time after the assessment by the AMS. The AP also erred in making findings based on expert opinion concerning the causal relationship between her injury and the demise of the marriage, including that marriage breakups are commonplace, without providing the parties the opportunity to submit expert opinion evidence on such topic, and without consulting with her on such topic;
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> (2) The AP erred in determining her challenge to the class ratings assessed by the AMS:
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> > (a) Failing to accept, and act on, her statement;
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> > (b) Failing to deal with her substantial and articulated case based on probative documentary records that were before the AMS, but which had been misunderstood, or not considered by the AMS as to their probative content; and
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> > (c) Failing to consult with her; and
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> (3) The AP erred in acting on fresh evidence when it had determined that it would not receive any fresh evidence. It erroneously relied on the fact of the statement submitted by the plaintiff to conclude that she was correctly assessed as to class rating by the AMS because she was "*clearly capable of 'typing a long document'*" and "*did not demonstrate any cognitive difficulties in so doing*." The AP erroneously attributed a statement that was prepared by legal representatives on instructions as having been prepared by the plaintiff.

Justice Weinstein held that it was open to the AP to reject the plaintiff's additional statement.

His Honour rejected ground (1). He observed that paras 1 to 16 of the statement criticised the manner in which the MA conducted his examination and falls squarely within the prohibition in *Petrovic*. Further, paras 17 to 24 of the statement was neither evidence of a deterioration (s327(3)(a) WIMA) or additional relevant evidence (s 327(3)(b) WIMA). The AP observed that the co-relationship between the events of August 2022 and the plaintiff's workplace injury are, on a generous view unclear. In my view, even accepting those matters, it would have been open to the MA to assign a class rating of 2.

His Honour stated, relevantly:

> 65. So far as the first "*purple passage*" is concerned, it must be seen in the context of the reasons given by the AMS for excluding the additional statement. It is entirely different from the second "*purple passage*," to which see below. I accept that the statement was unhelpful, irrelevant and superfluous. However, in my opinion, it did not form part of the Appeal Panel's reasoning and conclusions.
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> 66. I make one additional observation. Submissions were made before the Appeal Panel and before me as to how the dates of the discovery of the affair and the separation could be proved. In my opinion the plaintiff has done so in a conventional way in paras [18] to [20] of the additional statement.

His Honour upheld ground (2) and he stated, relevantly:

> 76. In my opinion it is clear from the record that the Appeal Panel engaged with the plaintiff's articulated case. It is not to the point that it extracted portions of the AMS's findings, with which it agreed. In my view no error has been demonstrated that it failed to engage independently with the material before the AMS. There was no failure to consult.
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> 77. But for the second "*purple passage*" which in my opinion was an irrelevant consideration taken into account by the Appeal Panel, I would have found that that that the adoption of the AMS's class ratings were open to the Appeal Panel. Indeed, in my opinion, the adoption by the Appeal Panel of the class rating with respect to social and recreational activities was clearly open to it on the evidence. For reasons that immediately follow, in my opinion the same cannot be said with respect to the assigned class for CPP.

His Honour also upheld ground (3) and he stated, relevantly:

> 86. As I have said, it is not in dispute in these proceedings that the Appeal Panel rejected the plaintiff's additional statement. It follows that after giving its reasons for rejecting the statement, it ought to have formed no part of its reasons. In my view, it clearly did.
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> 87. First, the Appeal Panel, having rejected the plaintiff's additional statement, as it was entitled to do, ought not to have relied upon it at all. Second, there was no evidence from any person that the plaintiff had in fact typed out the document. On its face, it appears that the document was prepared by Ms Luck's solicitors in pursuance of her appeal before the Appeal Panel. So much is apparent from the substance and form of the document. It would likely be rare for a plaintiff to use headings that correspond to sections of complex legislation, and numbered paragraphs. Third, having rejected the document, it was impermissible for the Appeal Panel to make any assumptions or express any conclusions or opinions arising from the making of the statement. In particular it was an error to make findings that went directly to the class descriptors of CPP. Fourth, in coming to the conclusion at the end of para [53], the Appeal Panel failed to give the plaintiff an opportunity to be heard. In my opinion, looking at paragraphs [48] to [63] of the Appeal Panel's reasons, it is clear beyond measure that it relied upon the plaintiff's statement – which it had rejected – to conclude that the AMS's assessment was open to him on the evidence.
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> 88. As to whether or not para [53] was material to the Appeal Panel's decision on CPP, it is difficult to understand the purpose of paragraphs [52] and [53] of the Appeal Panel's reasons other than that they logically form part of its reasons in concluding that the class categorisations made by the AMS were open to him: see generally *Minister for Immigration and Citizenship v Li* & Anor (2013) 249 CLR 332; [2013] HCA 18.
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> 89. To suggest that para [53] is a "*purple passage*" is a significant understatement. It is more than unhelpful, and hardly ornate. It is evident that the Appeal Panel took into account evidence which it had rejected and came to a conclusion based on that evidence which it found did not support the plaintiff's case. To have done so, in my opinion, means that the Appeal Panel took into account an irrelevant consideration which founds jurisdictional error, and is an error of law of the face of the record. Furthermore, in coming to the (impermissible) conclusion that the

plaintiff had no demonstrated cognitive difficulties when typing out the document, the Appeal Panel deprived the plaintiff of procedural fairness.

90. In oral submissions, Ms Roberts conceded that if I were to make this finding, it was inevitable that I would quash the Appeal Panel's decision, set aside the Certificate of Determination and remit the matter to PIC before a differently constituted Appeal Panel.

Accordingly, his Honour set aside the AP's decision and remitted the matter to the PIC for redetermination by a different AP.

PIC - Presidential Decisions

A tribunal can accept uncorroborated testimony Chanaa v Zarour [2011] NSWCA 199; Woolworths Ltd v Warfe [2013] VSCA 22; Bi-Lo Pty Ltd v Brown [2013] NSWWCCPD 66 discussed – tribunal not bound to accept evidence that was not the subject of cross-examination – Insurance Australia Limited t/as NRMA Insurance v John Checchia [2011] NSWCA 101; Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234 applied – evidence may be rejected if it is inconsistent with accepted evidence – Jackson v McDonald's Australia Ltd [2014] NSWCA 162 applied – where evidence is unreliable, it is open to the tribunal to look for assistance from other evidence – Devries v Australian National Railways Commission [1993] HCA 78 applied – no necessity for the Member to advert to an adverse finding if the risk of the finding is apparent – Ucar v Nylex Industrial Products Pty Ltd [2007] VSCA 181 applied

Al Hadidi v Form 1 Building and Construction Pty Ltd [2023] NSWPICPD 42 – Deputy President Wood – 26/07/2023

The appellant commenced PIC proceedings seeking weekly compensation in respect of a back an injury while he was working for the respondent on 9/09/2019. He also alleged that he suffered a consequential psychological condition and that he was in an employment relationship with the respondent and that his PIAWE was $1,800.

The respondent disputed that it employed the appellant, or in the alternative that he was a "*deemed worker*" within the meaning of cl 2 of Sch 1 WIMA. It asserted that the appellant was an independent contractor.

Member Homan conducted an arbitration and issued a COD dated 28/06/2022, in which she determined that the appellant was a "*deemed worker*" within the meaning of cl 2 of Sch 1 WIMA and that PIAWE was $625.

The appellant appealed and alleged that the Member erred as follows:

(1) in fact in determining that the tax invoices and ABN xx xxx 641 belonged to the appellant;

(2) in law by failing to respond to substantial, clearly articulated arguments;

(3) in law by making findings and determinations without putting the appellant on notice that she intended to do so;

(4) in law by requiring the appellant to corroborate his evidence in order to succeed, and

(5) in fact by determining that PIAWE was $625 per week.

Wood DP determined the appeal and dismissed it. Her reasons are summarised below:

Wood DP dismissed ground (1). She stated that the Member recorded in her reasons that the appellant disputed that the tax invoices and the ABN were his on the basis that the handwriting was not his own, the invoices were not in his name and the ABN appearing on the invoice was not his. However, a document from the Australian Government Business Register headed "*ABN Lookup*" annexed to the ARD and bearing the business number of ABN xx xxx 641 recorded that the entity name of the business was "*Al Hadidi, Ahmed*", it was registered on 28/04/2017 and was current, it was not registered for GST reporting and the main business location postcode was "*NSW 2161*".

Wood DP stated, relevantly:

> 108. The Notice of Assessment issued by the Australian Taxation Office for the financial year ending 30 June 2020 indicates that the appellant's taxable income was $21,730. The "*Pre-filling*" report for the same year referred only to income received from AZZ Form Pty Ltd ($6,062, plus allowances of $902) and the receipt of special benefits from the Australian Government totalling $15,636 commencing on 7 August 2019. It did not include the income the appellant received from the respondent. The fact that the Australian Taxation Office issued a Notice of Assessment for the financial year ending 30 June 2020 indicates that a return was lodged for that financial year. There was no such document produced by the appellant in these proceedings and no explanation was provided by the appellant as to why that was the case, when his claim was dependent upon evidence of his earnings with the respondent. The failure by the appellant to rely on that critical document at best indicates that the document does not assist in relation to whether ABN xx xxx 641 belonged to the appellant or the veracity of the tax invoices. As the Member suggested, the documents produced appear to indicate that the appellant may not have disclosed his earnings with the respondent in his taxation return, which, on the appellant's case was said to be in the order of $9,000. The Notice of Assessment issued by the Australian Taxation Office for the financial years ending 30 June 2020 is of no assistance in relation to ascertaining the appellant's earnings with the respondent.
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> 109. The appellant conceded that at times his name was shortened to Ahmed Al Hadidi.
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> 110. Mr Doali's assertion in his letter dated 9 December 2021 that the appellant's accounting records do not match with ABN xx xxx 641 and the search record was proof that ABN xx xxx 641 did not belong to the appellant is not borne out. On the totality of the evidence relied upon in relation to whether the ABN belonged to the appellant, it was open to the Member to conclude that she was not satisfied that the ABN did not relate to the appellant.
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> 111. In response to the appellant's assertion that the name on the tax invoices was not his, the Member observed that the evidence in this matter showed that the English spelling of Arabic names was frequently recorded differently.
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> 112. The respondent asserted that the appellant submitted tax invoices to him each Tuesday and the appellant was paid according to those invoices each Thursday. The appellant asserted that the tax invoices were not his. Apart from the reference to the ABN, which has been dealt with above, the appellant claimed that the invoices were not his because his name was spelt incorrectly, and he did not speak or write English. It is important to note that the respondent did not give evidence as to the author of the invoices submitted and the Member did not attribute the authorship of the invoices to the appellant. The Member was not persuaded by the appellant's evidence that the invoices (among other documents provided by the respondent) were *"unreliable."*
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> 113. Given that the invoices were concisely written in clear English, it could be inferred that they were prepared by someone other than the appellant. That does not mean, however, that the invoices were "unreliable." There are other possible explanations for how the documents came into being. However, how the tax invoices actually came into being was not canvassed in the submissions of the parties or in queries raised by the Member. It remains that the only documentary evidence of the appellant's earnings in the employ of the respondent was the evidence produced by the respondent.
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> 114. The appellant's assertion that the time sheet was also fraudulent was entirely based upon the appellant's allegation that the tax invoices were fraudulent. The appellant put no other argument forward as to why the time sheet should not be accepted, other than his recollection of the hours and days that he worked, which recollection was inconsistent with his earlier admission that there were days when he did not work because he was ill.

> 115. As the Member observed, the appellant's evidence was "*problematic or inconsistent, and [was] unsupported by any corroborative evidence*."[38] In that context, the limited documentary evidence adduced by the respondent was the only other evidence available to the Member upon which she could make any determination as to the appellant's pre-injury average weekly earnings.
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> 116. The appellant submits that the Member "*overlooked*" the appellant's evidence that he denied the tax invoices were submitted by him and "*overlooked*" the appellant's evidence that the appellant lacked skills in English. The Member clearly took into account those matters and engaged with the appellant's submissions, but determined otherwise.

Wood DP rejected ground (2). She stated, relevantly:

> 119. The Member did not "*overlook*" the appellant's evidence that he did not read or write English. The Member noted the appellant's assertions but expressed dissatisfaction with the appellant's evidence because it was internally inconsistent, problematic and unsupported by any documentary evidence. As the Member concluded, the complaint that the ABN did not relate to the appellant was not made out and her reasoning about the name on the tax invoice was that there could be an explanation in relation to misspelling of the appellant's first name on those documents. The Member clearly dealt with the appellant's submissions.
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> 120. The appellant submits that he made submissions to the Member that the information on the time sheet should also not be accepted because of the issues with the respondent's evidence as a whole. That is, the issues with the tax invoices and the allegedly unrelated ABN. The probative value of the evidence relating to those matters is dealt with above and, for those reasons, the appellant's reliance on those submissions is misplaced.
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> 121. The appellant adds that he submitted to the Member that the appellant and Mr Doali were not cross-examined, there was an inconsistency in the evidence about whether Mr Sobeih attended the doctor with the appellant, and the respondent failed to call evidence to explain the inconsistencies.
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> 122. The evidence provided by Mr Doali was, on the face of it, unsatisfactory. The documents attached to Mr Doali's letters (that is, both the ABN searches and the taxation documents) did not support Mr Doali's assertion that they were proof that ABN xx xxx 641 did not belong to the appellant. It was therefore not necessary to test the evidence of Mr Doali by cross-examination in order for the Member to reject it.
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> 123. It appears that the respondent did not make an application to cross-examine the appellant. Nor did the appellant seek to cross-examine the respondent about the purported inconsistencies in its case. In this case, where there was a direct conflict between the appellant and the respondent in relation to the calculation of the appellant's pre-injury average weekly earnings and little documentary evidence to assist the Member, the Member may well have benefitted from the oral testimony of the parties. However, the Member was not bound to accept evidence unchallenged by cross-examination.[39] The fact that evidence was untested does not mean the tribunal of fact is obliged to accept it. It may be rejected if it is inconsistent with other evidence which the tribunal accepts.[40]
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> 124. The Member referred to the inconsistency between Mr Sobeih's evidence that he did not attend the general practitioner with the appellant and an entry in the clinical notes that recorded "*attendd [sic] with Ahmad his supervisor*".[41] The Member reasoned that:
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>> Whilst the clinical records do tend to suggest that the [appellant's] evidence on this issue is preferable, I am not satisfied that the inconsistency renders the entirety of Mr Sobeih's evidence unreliable.
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> 125. It was open to the Member to accept Mr Sobeih's evidence despite that inconsistency. The decision-maker is not required to accept the whole of the evidence of any one witness.

126. The appellant asserts that the Member accepted the respondent's time sheet over the appellant's evidence of the hours he worked without addressing his submissions that the time sheet was fraudulent. In his statement dated 17 December 2021, the appellant said that he was paid in accordance with a time sheet, which he signed at the beginning and end of each day's work. He conceded that he sometimes missed work due to illness. The time sheet was not inconsistent with that evidence from the appellant.

127. In his subsequent statement dated 24 March 2022, the appellant disputed the accuracy of the respondent's time sheet and precisely recorded his recollection of the times that he worked. The Member's task was to assess the evidence of both parties, which consisted of a document from the respondent and the appellant's later recollection. She preferred the documentary evidence. In considering the appellant's assertions of the hours that he worked, the Member reasoned that it was unusual that the appellant could recall with such precision the times and days that he worked on particular days in the past. It cannot be said that the Member accepted the respondent's time sheet without addressing the appellant's submissions. There are other reasons why the Member was entitled to prefer the documented time sheet over the appellant's recollection. In his first statement, the appellant conceded that there were days when he did not work for the respondent because he was ill and he gave evidence that the respondent did not pay him leave entitlements, including sick pay. The appellant's recollection of the days and hours that he worked for the respondent did not account for those missed days. The appellant's assertions made in his statement dated 24 March 2022 are inconsistent with his earlier evidence and the respondent's time sheet, which indicated that there were days when the appellant did not work. For that reason alone, it was open for the Member to prefer the evidence recorded in the respondent's time sheet.

128. The appellant's assertion that the Member failed to address his submissions about the time sheet is not made out and there was no error on the part of the Member in preferring the respondent's time sheet over the appellant's later recollection of the hours and days that he worked. It follows that this ground of appeal fails.

Wood DP also rejected ground (3) and she stated that the assertion that the Member determined the matter on a basis that was not subject to submissions and that he was denied an opportunity to address on the issues canvassed by the Member are not made out.

Wood DP rejected ground (4) and she stated, relevantly:

139. In *Woolworths Ltd v Warfe*, Kaye AJA (with Tate and Whelan JJA agreeing) said:

> Notwithstanding the absence of corroborative witnesses who the party might be expected to call, the tribunal of fact is free, nevertheless, to accept the evidence of the particular party as credible. That proposition is trite law.

140. *Chanaa* and *Warfe* were considered in the context of the former Workers Compensation Commission by Roche DP in *Bi-Lo Pty Ltd v Brown*. Roche DP said that in civil proceedings:

> it is not the law that a worker must have corroboration before he or she can succeed, and
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> It is trite law that, even without corroborating witnesses, a tribunal of fact is free to accept the evidence of a claimant as credible.

141. However, given the inconsistencies in the appellant's evidence noted by the Member, it was open to the Member to find his evidence unreliable and look to other evidence to assist her in her determination of the appellant appellant's pre-injury average weekly earnings.

142. The Member did not apply a higher standard of proof than that of the balance of probabilities. Her task was to consider the evidence and weigh up that evidence in an objective manner, which she did. She accepted the respondent's submissions that the evidence provided by the appellant was inconsistent and looked to the only other material before her that went to the calculation of the appellant's pre-injury average weekly earnings.

Wood DP also rejected ground (5). She stated, relevantly:

> 146. In order to disturb a Member's factual decision, the appellant must show the kind of error consistent with the principles distilled from relevant authorities by Roche DP in *Raulston v Toll Pty Ltd*. That is, that:
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> > (a) [A Member], though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if '*other probabilities so outweigh that chosen by the [Member] that it can be said that his [or her] conclusion was wrong*'.
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> > (b) Having found the primary facts, the [Member] may draw a particular inference from them. Even here the '*fact of the [Member's] decision must be displaced*'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the [Member] was wrong.
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> > (c) It may be shown that [a Member] was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Member] is so preponderant in the opinion of the appellate court that the [Member's] decision is wrong.
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> The decision of Allsop J (as his Honour then was) in *Branir Pty Ltd v Owston Nominees (No 2)* Pty Ltd [2001] FCA 1833 Drummond and Mansfield JJ agreeing) is also instructive in the context of the need to establish error. His Honour observed (at [28]):
>
> > in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.'
>
> 147. Thus, in order to disturb the Member's factual determination in respect of the calculation of the appellant's pre-injury average weekly earnings, which is the only determination disputed in this appeal, the appellant must establish that the Member:
>
> (a) ignored material facts;
>
> (b) made a critical finding of fact which has no basis in the evidence;
>
> (c) showed a demonstrable misunderstanding of relevant evidence, or
>
> (d) demonstrably failed to consider relevant evidence.

In particular, the appellant asserted that the Member ignored Mr Doali's evidence. However, Wood DP held that this evidence had little probative value and it could not be considered to be material evidence which, if not accepted, would lead to error on the part of the Member by failing to accept it.

Accordingly, Wood DP confirmed the COD.

Whether the PIC may deal with a previously unnotified Anshun estoppel argument – principles in Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services [2007] NSWWCCPD 227 considered and applied – whether claims for medical or related treatment expenses pursuant to s 60 WCA are estopped by failure to claim in earlier proceedings - Geary v UPS Pty Ltd [2021] NSWPICPD 47; Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; 147 CLR 589; Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231; Secretary, Department of Communities and Justice v Miller & Anor (No 5) [2020] NSWWCCPD 38 and Miller v Secretary, Department of Communities and Justice (No 10) [2022] NSWCA 190 applied and considered

Racing NSW v Goode [2023] NSWPICPD 43 – President Judge Phillips – 28/07/2023

The worker was a jockey. On 29/06/2009, he suffered a serious accident in a horse race., including a complete spinal cord injury with resultant paraplegia at the T4 level and a injuries including a fracture of his C2 vertebrae, multiple fractures of his discs from T4 to T7, fractured ribs, a left rotator cuff injury

and pulmonary contusions to his lungs. He is permanently confined to a wheelchair and requires assistance in daily living as well as ongoing medical care.

The appellant accepted liability for these injuries.

On 21/10/2010, the worker signed a Complying Agreement pursuant to s 66A WCA under which the appellant agreed to pay him $220,000 under s 66 WCA for 85% WPI and $50,000 for pain and suffering.

On 16/06/2012, the worker and his wife returned to live in the United Kingdom, because of a desire and need for him to be close to family and friends who assist in his care.

Over the years since the accident, the worker has submitted various claims to the appellant for the payment or refund of various expenses to do with his treatment including medication, rehabilitation, housing amendments and maintenance. Some of these expenses have been paid by the appellant, others have been disputed.

On 18/02/2020, the worker filed an ARD and claimed medical and related treatment expenses under s 60 WCA for house repairs and hotel expenses. On 22/04/2020, Arbitrator Scarcella issued a COD – consent orders, under which some claims were paid, some were subject to an award for the appellant and others were discontinued.

On 10/12/2021, a further ARD was filed with the PIC, which made a number of claims under s 60 WCA. However, the appellant disputed these claims in their entirety.

Member Wynyard conducted an arbitration on 1/03/2022. The appellant disputed that the claims were allowable claims under the definition contained in s 59 WCA and also disputed that they were reasonably necessary for the purposes of s 60 WCA. It also indicated that it opposed the claims on the basis that an Anshun estoppel applied, although it accepted that it had not previously given notice of that ground of dispute.

On 10/06/2022, the Member issued a COD, which declined to grant the appellant leave under s 289A WIMA to rely on Anshun estoppel to defend the application, and made orders in the worker's favour under s 60 WCA.

The appellant appealed on the following grounds:

(1) at all relevant times during the 2020 claim and 2021 claim, both the appellant and worker were legally represented;

(b) at all relevant times the appellant had accepted liability for the worker's injuries;

(c) the then WCC and its successor, the PIC, are the tribunals of competent jurisdiction to hear and determine both applications, and

(d) the parties to the 2020 and 2021 claims are the same. Both claims involved a dispute regarding expenses incurred by the respondent as a result of his injuries. Both claims involved various claims all pursued under s 60 WCA.

President Judge Phillips conducted an oral hearing on 18/07/2023.

His Honour upheld ground (1). He stated, relevantly (citations excluded):

> 64. Before turning to a consideration of the individual grounds of appeal, I set out several factual matters which are not in dispute, and which are relevant to a consideration of this ground of appeal. They are:
>
> > a) at all relevant times during the 2020 claim and 2021 claim, both the appellant and respondent were legally represented;
> >
> > (b) at all relevant times the appellant had accepted liability for the respondent's injuries;
> >
> > (c) the then Workers Compensation Commission and its successor, the Personal Injury Commission, are the tribunals of competent jurisdiction to hear and determine both applications, and

> (d) the parties to the 2020 claim and 2021 claim are the same. Both claims involved a dispute regarding expenses incurred by the respondent as a result of his injuries. Both claims involved various claims all pursued under s 60 of the 1987 Act.

65. The appellant, at no stage prior to the hearing of this matter on 1 March 2022 before Member Wynyard, had given the respondent notice that Anshun estoppel was a ground relied upon by the appellant to dispute the respondent's claims. As a result of this fact, the appellant is only permitted to avail itself of this argument if leave is granted pursuant to s 289A of the 1998 Act. I would also make this remark about the appellant's submissions for the sake of clarity. In the appellant's Submissions on Appeal at [4] and Reply Submissions at [2] and [8], reference is made to a Certificate of Determination dated 11 August 2014. This document prima facie appeared to be unrelated to the application. I issued a Direction to the parties dated 31 May 2023 to clarify the status of this document. The appellant has, quite properly, eschewed any reliance on this document noting that it was probably filed in error. I will, as a consequence of this concession, have no regard to that document nor any submission based on that document.

66. The Member dealt with the issue ventilated on appeal briefly at reasons [94] to [97]. At [95] the Member stated that he had to be satisfied that it was in the interests of justice to allow the appellant to rely on the previously unnotified Anshun argument, noting that it had not been raised before the hearing, and quoted paragraph [123] of my decision in *Geary* before making the following finding:

> The application of the estoppel depends on whether the facts and circumstances constitute an appropriate case. The [respondent] has not had an opportunity to even consider, let alone obtain such further facts it deems necessary to enable an evaluative exercise to be undertaken. The [respondent] is prejudiced, and the application is dismissed.

67. While both parties drew the Member's attention to *Mateus*, only the respondent submitted, in terms, how the Mateus factors ought be construed and applied in this matter.[49] The appellant made reference to Mateus but failed to deal with the factors in terms, rather submitting that "*the overriding principle is the interests of justice*". The appellant's approach before the Member was to concentrate on the Anshun argument itself rather than addressing in detail the requirements to substantiate the s 289A application.

68. In any event the correct authority (*Mateus*) was brought to the Member's attention. The Member has only had regard to two of the *Mateus* factors, namely when the insurer notified its intention to rely on the unnotified matter and prejudice to the worker. The interest of justice point was referred to, but not engaged with. None of the other non-exhaustive factors were considered. Nowhere did the Member grapple with the sole matter put forward by the appellant, which was to the effect that its failure to rely on the Anshun principle was an "*oversight*". I have examined the papers and could not identify where the oversight explanation was given so this may be the reason why it was not dealt with in terms. By definition, there can be no error in failing to deal with a point not taken. Importantly, nowhere did the Member evaluate the merits of the proposed Anshun defence for which leave was sought. Whilst the Member only has to publish "brief reasons"[51] this does not absolve the Member from engaging with the essential question he was called upon to decide, which was whether leave would be granted under s 289A of the 1998 Act. This required engaging with the parties' arguments and the Mateus factors.

69. The Member has not dealt with the s 289A application in accordance with law in that the Member failed to take into account relevant matters, namely the factors referred to in Mateus, including assessing the merit or otherwise of the proposed Anshun defence.

70. Error in the *House v The King* sense in terms of the failure to exercise a discretion in accordance with law has been established.

His Honour redetermined the issue of whether leave should be granted to the appellant to rely upon *Anshun* estoppel.

> 78. Before embarking upon this reconsideration, I would make the following remarks. It is clear that Anshun as a defence applies to statutory compensation schemes. I will approach the consideration of the s 289A application on this basis, which requires an assessment of the relative merits of the appellant's proposed *Anshun* defence in accordance with *Mateus*. In terms of how the *Anshun* defence ultimately came to be characterised by the appellant, it was only sought to be applied to claims that were existing but not advanced before the institution of the 2020 claim. The appellant quite properly eschewed any reliance on this defence to that category of claims that were "*new*" in the 2021 claim. I also record that there has only been the single prior set of proceedings before the 2021 claim, being the 2020 claim which I have described above and which resulted in the making of the orders made by consent contained in the COD in relation to various claims for expenses. There is no earlier decision on the merits of matters in dispute that could possibly be in conflict with any decision in these proceedings, so that is not an issue that arises.
>
> 79. *Mateus*, as I have described (above), sets out a number of non-exhaustive factors to be considered when dealing with a s 289A leave application and whether it is in the interests of justice to grant leave. The starting point is to undertake a broad review of all of the circumstances surrounding this matter.
>
> 80. The respondent, as is evident, is a paraplegic. Axiomatically, he will have needs that will change from time to time depending upon his condition, the advice he is given by his treating practitioners and possible developments in medical science which may assist in the management of his condition. In short, the needs will not always be the same and may be based upon different facts or expert opinions. As Hutley JA said in *Thomas v Ferguson Transformers Pty Ltd*, "*the process of dealing with an incapacitated person may involve a continual war with disease, atrophy of muscles by lack of use, and even psychological decay by reason of lack of something to do*." *Thomas* was also a case involving a catastrophically injured worker who suffered from paraplegia who contested a number of claims under the former provisions, now reflected in s 60 of the 1987 Act. The words of His Honour have considerable resonance with the circumstances of this matter.
>
> 81. The respondent and the appellant will have a long relationship into the future dealing with these issues as they come and go. Whilst this should not matter, the fact is that for very good reasons, the respondent has returned to live in his native United Kingdom and so the appellant has to deal with his needs in that country.
>
> 82. I now move to a consideration and application of the various principles from *Mateus* to the determination in this matter as to whether it is in the interests of justice to grant the appellant leave to rely on an *Anshun* defence.
>
> 83. The application to rely upon the *Anshun* defence was made very late, namely at the commencement of the hearing before the Member. Before then, there had been a telephone conference in the Commission before the Member, pleadings had been filed and before the proceedings commenced there had been numerous exchanges between the parties, as I have set out in the Evidence part of this decision. In terms of the pleadings filed by the appellant, at the hearing before me, counsel for the appellant submitted as follows: "*The point that we raised was one of Anshun estoppel. It is one that ordinarily, a body like Racing NSW or the insurer would not have in mind, so the section 78 notices did not raise it. It was in our Reply, but there was an assertion that there would be additional submissions, in addition to what had been raised. We accept, without reservation, Anshun wasn't mentioned*."

84. The relevant section of the Reply, after confirming that the relevant dispute notices were attached and that there was no failure to determine a claim, says as follows:

> The [appellant] relies on its notices issued pursuant to sections 74 and 78 of the [1998 Act] dated 29 May 2013, 19 December 2013 and 29 April 2020.
>
> For abundant clarity, the [appellant] confirms the following:
>
>> Medical and Treatment expenses
>>
>> The [appellant] disputes that the medical and related treatment expenses claimed by the [respondent] are not reasonably necessary and as a result of a work related injury (which is disputed and denied) as required by sections 59 and 60 of the 1987 Act.

His Honour found that the appellant had not acted promptly in bringing the Anshun estoppel to the notice of the PIC or the worker and while counsel for the appellant referred to a "*pleading oversight*", there was no explanation from the appellant as to how this came about. He stated that the timing of the raising of this issue gave the worker no opportunity to consider what evidence may be required to answer the defence. This claim was advanced on the basis of the worker's condition known as poikilothermia, which means that he has trouble regulating his core body temperature. Nowhere did the appellant respond appropriately to the claim based upon this condition, nor was any issue taken with the need as expressed.

His Honour found that there had been a substantial but not complete compliance by the appellant with its obligations to notify the grounds of the dispute. It was unreasonable for the appellant to expect the worker to contend an Anshun claim without notice, as happened before the Member. He stated, relevantly:

> 91. In terms of the *Anshun* argument though, I do not consider that it has been articulated in a manner that is compelling. A fundamental precept in the establishment of an Anshun defence is that the later claim was so relevant to the subject matter of the earlier dispute, that it was unreasonable not to have advanced it in the earlier proceedings. In *Miller No 10*, Brereton JA remarks that Anshun "*is **engaged** only where the party has unreasonably failed to assert a right or defence in connection with or in the context of the earlier proceeding*." (emphasis in original)
>
> 92. Other than the fact that both sets of proceedings are about claims for expenses under s 60 of the 1987 Act, I do not accept that the claims were such that they all had to brought at once before the Commission. The dispute between the parties is about various expenses incurred by the respondent in the ongoing management of his paraplegia. Each expense may give rise to a different consideration, both legal and factual, from another expense. From an Anshun point of view, the mere fact that a claim could have been brought in earlier proceedings does not automatically mean that it should have been brought. What is required is the evaluative exercise spoken about by McColl JA in *Habib,* particularly at [84]. In *Champerslife Pty Ltd v Manojlovski* the Court of Appeal said in deciding whether the matter in question was so relevant that it can be said to have been unreasonable not to rely upon it in the first proceedings involves a value judgment to be made referrable to the proper conduct of modern litigation.
>
> 93. Performing this evaluative exercise reveals that whilst both proceedings have a superficial resemblance to each other in terms of both being claims for expenses under s 60 of the 1987 Act, an examination of the substance of each claim advanced shows that they are different to each other. For example, the claim for heating oil as opposed to the claim for a robotic lawnmower involve quite different considerations. Each claim may require a different legal consideration of the terms of ss 59 and 60 of the 1987 Act and the decided cases on the particular type of claim.

94. "*Unreasonableness*", as I have set out above, is a key feature of *Anshun* estoppel. Namely, was it unreasonable not to have advanced the claims in the earlier proceedings? Counsel for the respondent, with some force, submits that it is for the appellant to establish the Anshun point and further that there is no evidence of unreasonable conduct. In response, the appellant asserts that I can infer unreasonable conduct from the materials. It is said that there is a high degree of correlation between the claims and evidence relied upon by the respondent in both proceedings. This submission can only relate to the expenses incurred prior to the filing of the 2020 claim and which were not advanced in those proceedings. This complaint cannot relate to the two matters discontinued in the 2020 proceedings, which were by definition brought forward by the respondent at that time.[76] The question therefore is in relation to that group of expenses incurred before, and in some cases well before, the 2020 claim was commenced, whether it was unreasonable not to have brought them forward in the 2020 claim. I bear in mind that *Anshun* is not an inflexible principle. As the High Court in Anshun said, "*there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings*". I also referred to this aspect of Anshun in the context of workers compensation claims in *Miller No 5* at [194].

His Honour declined to infer that the worker had behaved unreasonably. Whilst the issue of the existing claims that were not advanced in the 2020 claim is a factor perhaps pointing towards unreasonableness on his part, there is nothing in his conduct or the conduct of the proceedings that would allow that inference to be drawn. This submission was effectively asking him to elevate the *Anshun* principle from what could have been brought in the earlier proceedings to a principle which requires that it should have been brought. As a consequence of this finding, the *Anshun* claim in this case has little merit. Whilst the appellant has identified that the prejudice it would suffer if leave were not granted is the inability to advance an *Anshun* defence, it light of the merit of the *Anshun* claim, there is little or no prejudice accruing.

His Honour also referred to the *Mateus* factor, that the decision to dispute a claim should not be made lightly or without proper consideration of the factual and legal issues involved. In this matter, the insurer completely neglected any consideration of the Anshun defence. At the very least, it should have been referred to in the Reply. Indeed, the matter was only contemplated once counsel was briefed to defend the application. The Member found that the worker was prejudiced and that finding is not the subject of any challenge on this appeal. Even absent that finding, it would not be difficult to find prejudice. Shutting out a claim without hearing it on the merits is, based on *Habib*, a serious matter.

His Honour was not satisfied that the discontinuances had the quality or effect of an abandonment of those claims and he found that the facts do not bear out the appellant's assertion that it was entitled to treat those claims as no longer being pursued. He noted that:

- The appellant never acted on this basis once it received the 2021 claim or in its dealings with the worker before that claim was filed. The Reply filed by the appellant fails to make this assertion. Rather the Reply frames the defence of the claims on the basis that they were not allowable claims under ss 59 and 60 WCA. The COD is not a bar to the respondent pursuing the two discontinued matters.
- This matter can be distinguished from the circumstances in *UBS*. In *UBS* there was a positive finding of unreasonable conduct on the part of Tyne. No such situation exists in this matter, the highest the appellant says is that unreasonable conduct can be inferred. He therefore declined to draw this inference.
- While the various s 60 claims have a superficial similarity, the situation is not that simple. Once each claim is examined, it may be argued or justified on a differing factual and/or legal basis. This is in contrast to *UBS*, where the second set of proceedings was essentially the same as the prior proceedings except for the identity of the moving party. Fourthly, this matter did not proceed to a contested judgment in the earlier proceedings, as occurred in *UBS*.

His Honour declined to grant leave to the appellant and confirmed the COD.

Issue estoppel and res judicata – Blair v Curran [1939] HCA 23 discussed and applied; Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine [2016] NSWCA 213 discussed and distinguished – where the relief sought is different from that sought in the earlier proceedings – Cassegrain v Gerard Cassegrain & Co Pty Limited [2013] NSWCA 454 applied – jurisdiction of the Personal Injury Commission to determine "injury" pursuant to s 4 of the Workers Compensation Act 1987– Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd [2014] NSWCA 264 applied

Gimis v Tweed Shire Council [2023] NSWPICPD 44 – Deputy President Wood – 1/08/2023

The decision at first instance was reported in Bulletin issue 119, but the following summary is provided.

The worker injured his neck, back and left shoulder as a result of operating a ride-on lawnmower at work on 1/03/2019. On 22/10/2020 he claimed weekly benefits, but the respondent disputed the claim under ss 4 and s 9A WCA. He filed an ARD claiming weekly benefits and s 60 expenses.

At conciliation/arbitration on 25/06/2021, the worker accepted an offer from the respondent to pay weekly benefits @ $400 per week from 4/02/ 2021, on the following terms:

1. The ARD was amended to claim primary psychological injury as a result of the nature and conditions of employment.
2. Award for the respondent in respect of primary psychological injury.
3. Award for the respondent in respect of allegation of secondary psychological injury.
4. Award for the respondent in respect of allegation of injury to the neck/cervical spine.
5. Award for the respondent in respect of allegation of injury to the left shoulder.
6. The balance of the proceedings be discontinued.

NOTATIONS

1. Respondent to pay voluntary weekly compensation of $400 per week from 4/02/2021 to date and continuing.
2. Respondent to pay voluntary s.60 expenses in respect of treatment to the back/lumbar spine upon production of accounts, receipts or Medicare charge.
3. Upon receipt of above compensation the applicant will have received all his past weekly compensation entitlements and s.60 entitlements to date.

On 22/10/2021, the worker claimed compensation for 18% WPI (cervical spine), 10% WPI (lumbar spine) and 6% WPI (left shoulder). However, the disputed liability on the basis that the lumbar spine was assessed at 7% (less than the 10% threshold) and it was not liable for compensation with respect to the cervical spine and left shoulder because of the previous agreement.

The issue for determination were: (1) whether the worker could make a claim for permanent impairment considering the terms of the previous agreement?

Senior Member Beilby noted that the worker relied upon the decision in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA (*Hine*). The dispute in that matter concerned consent findings that were made in earlier proceedings such that the worker had "*fully recovered*" from the effects of a psychological injury. The worker then filed a claim for lump sum compensation. The employer argued that it had the benefit of an issue estoppel, precluding the worker from denying that she had fully recovered and maintaining that there was a dispute that she was permanently impaired.

The Senior Member noted that *Hine* referred to medical disputes as defined in s 319(a) WIMA and that it is authority that the determination of the degree of impairment that results from an injury is a matter wholly within the jurisdiction of the AMS, or on Appeal the AP. That is if there is a medical dispute, the matter must be referred for assessment.

In this matter, the factual matrix of *Hine* - issue Estoppel - did not arise and that decision is not directly relevant to this dispute. In this matter, there is no referral as there was an agreement or Consent Order that there is no "*injury*". A finding of injury, in the sense of s 4 WCA, is not one which is covered by the definition of a medical dispute as provided by s 319(a) WIMA. This is confirmed by s 65 WCA.

The Senior Member therefore rejected the worker's submission. Whilst the PIC has exclusive jurisdiction to determine the worker's disputed claims, the question of primary injury is one which is reserved for Members of the Commission to determine. Once a Member has made a finding that there has been in fact an injury pursuant to s4 (or there has been agreement) then the matter is referred to a MA for assessment. Unless a finding or agreement is made that an injury has occurred there is no referral to a MA.

It is quite clear by the language used in s 65 WCA, that the degree permanent impairment is to be assessed is one that 'results from an injury". That is, it is the domain of the MA to assess impairment, once it has been established that an injury has occurred. Simply put, the determination of "*injury*" pursuant to s 4, is the domain of the Member not a MA.

The applicant also argued that it was entirely reasonable for them to resolve their claim in the previous proceedings for the most financially advantageous amount possible and it was not unreasonable for him to act in that way at that time.

The Senior Member stated, relevantly:

> 27. The position the applicant was in is outlined at paragraph 1.9 of the applicant's submissions when they said they were faced with a complex paradox which was:
>
> > (a) in the event that the applicant succeeded on hearing and established liability for any of his various injuries, the offer of $400 per week backdated to 4 February 2021 was in the likely range of weekly payments to be awarded by the Commission irrespective of which of his various injuries was determined to be work-related, and
> >
> > (b) in the event that the applicant succeeded on hearing and establish liability for all his various injuries, he could have been awarded less than the offer of $400 per week backdated to 4 February 2021.
>
> 28. It is then said that the applicant understandably accepted the insurer's offer rather than proceed to hearing because even if he succeeded on the issue of liability with respect to the neck, left shoulder and secondary psychological injuries at the hearing, he could have been awarded less than the amount offered for weekly payments, leaving the applicant worse off financially.
>
> 29. This is a conundrum that workers find themselves in the Commission frequently. One would have to ask, such an attractive offer of $400 per week must have had some benefit to the respondent. The 'devil' in the offer to my mind, is the Awards that were offered for the respondent to offset the attractive financial offer of $400 per week.
>
> 30. In those circumstances, I cannot see the real merit or relevance in relation to how the applicant is said to have acted reasonably. It seems to me that it is a compromise position that he has found himself in on the basis of giving Awards in favour of the respondent.

The Senior Member noted that the worker relied on a report of Dr Poplawski dated 14/10/2021 with respect to claim for permanent impairment of the lumbar spine. Dr Poplawski assessed 10% WPI, but after deducting 1/10 under s 323 WIMA he assessed 9% WPI. This did not satisfy the s 66(1) threshold.

The Senior Member stated that the parties agreed that if the applicant's arguments regarding estoppel were not successful then there was no jurisdiction to refer this claim to a MA. She concluded that there is no work for the PIC to do and she dismissed the ARD.

On appeal the appellant alleged that the Senior Member erred as follows: (1) by determining that he was estopped by either res judicata or issue estoppel from claiming lump sum compensation in respect of the cervical spine and left shoulder because of the orders recorded in the COD dated 1 July 2021; (2) by failing to understand, consider and determine the appellant's submissions, either properly or at all, and (3) by failing to give any or any adequate reasons in support of her COD.

Deputy President Wood dismissed the appeal and confirmed the COD and her reasons are summarised below.

Wood DP rejected ground (1). She held that there is no issue raised as to whether consent orders in the PIC can create an estoppel or that not all decisions made in the PIC are final and binding. However, in the prior proceedings, the appellant relied upon allegations of injury to the cervical spine and left shoulder as the threshold foundation that, if found in his favour, would lead him to an entitlement for compensation. The present proceedings concern identical injuries as the foundations for further entitlements. Those foundations are legally indispensable and are undoubtedly determinations of ultimate facts. Noting Dixon J's observations, to agitate the issue of those injuries having occurred amounts to an assertion that the former findings of the Commission were wrong.

While the appellant asserts that, in the earlier proceedings, the PIC did not have jurisdiction to determine the permanent impairment claim and that is correct, that fact is irrelevant. The PIC clearly had jurisdiction to determine the question of injury in circumstances where injury was a justiciable issue for determination in those proceedings. The determinations referrable to injury to the cervical spine and left shoulder are the impediments that the appellant now faces.

The appellant submits that an *Anshun* estoppel does not arise in the present matter because the appellant acted reasonably in resolving the earlier proceedings. He also relies upon *Tomlinson* as authority to say that the test in relation to estoppel is one of reasonableness, and a party cannot assert a claim or issue that is so connected with the subject matter of the prior proceedings that it was unreasonable for the party not to have raised the issue in those earlier proceedings. *Tomlinson*, which involved an issue as to whether the parties in both proceedings were privy in interest, is not authority for the proposition put forward by the appellant.

The appellant challenges the Senior Member's finding that the question for determination was not a "*medical dispute*" within the meaning of s 319 WIMA and argues that the issue of the aetiology of his cervical spine and left shoulder is a medical dispute and thus the PIC does not have jurisdiction to determine it. Wood DP stated, relevantly:

> 52. In *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd*, Emmett JA said:
>
> > It is for the Commission to determine whether a worker has suffered an injury within the meaning of s 4 of the [1987 Act]. The Commission must also determine whether there are any disentitling provisions, such that compensation is not payable in respect of that injury.
>
> 53. There are also a number of Presidential decisions in the Commission, holding that questions of 'injury', 'substantial contributing factor' and causation are matters for a decision by a member of the Commission.
>
> 54. Whether the appellant suffered injuries to his cervical spine and left shoulder were issues for determination wholly within the jurisdiction of the Member when the 2021 consent orders were made, and whether those consent orders created an estoppel disentitling the appellant to compensation was an issue well within the jurisdiction of the Senior Member in these proceedings.
>
> 55. The Senior Member reasoned:
>
> > The decision of Hine is not directly relevant to this dispute. In the present factual matrix, there is no referral as there has [been] an agreement or Consent Order that there is no 'injury'. It must be observed that the consent orders use the words 'injury'. The ordinary meaning of this must refer to an injury pursuant to s 4 of the 1987 Act.

> > Having considered that definition, a finding of injury, in the sense of s 4 of the 1987 Act, is not one which is covered by the definition of a medical dispute as provided by [s 319] of the [1998 Act].
> >
> > This is also confirmed by s 65 of the 1987 Act which provides:
> >
> > > '(1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.'
>
> I therefore cannot agree with the [appellant's] submission. Whilst the Commission has exclusive jurisdiction to determine the [appellant's] disputed claims, the question of primary injury is one which is reserved for Members of the Commission to make [a] determination. Once a Member has made a finding that there has been in fact an injury pursuant to s 4 (or there has been agreement) then the matter is referred to a Medical Assessor for assessment. Unless a finding or agreement is made that an injury has occurred there is no referral to a Medical Assessor.
>
> It is quite clear by the language used in s 65 of the 1987 Act, that the degree [of] permanent impairment ... to be assessed is one that 'results from an injury'. That is, it is the domain of the Medical Assessor to assess impairment, once it has been established that an injury has occurred. Simply put, the determination of 'injury' pursuant to s 4, is the domain of the Member not a Medical Assessor.

Wood DP held that the Senior Member was correct in her observations and determination.

While the appellant relies on *Hine* to submit that issue estoppel only applies to "*ultimate*" facts and does not extend to "*mere evidentiary facts*", the matter concerned a claim for permanent impairment, which was brought after prior proceedings in which an arbitrator of the former WCC had made a finding that the worker had recovered from the effects of the injury. The Court determined that an estoppel did not arise because the later claim was in respect of a claim for permanent impairment (a medical dispute within the meaning of s 319(c) WIMA). The Court held that the WCC did not have jurisdiction in the earlier proceedings to make a finding that bound the then AMS in the assessment of whole person impairment.

However, in this matter, the PIC clearly had jurisdiction in the earlier proceedings to make the findings in respect of the question of injury. An entitlement to a lump sum pursuant to s 66 WCA rested on whether the appellant suffered injury. The decision in *Hine* is plainly distinguishable. The Senior Member dealt with this issue and her decision that the dispute before her was not a "*medical dispute*" was well reasoned and accurate.

Accordingly, the appellant failed to establish that the Senior Member erred in her determination that he was estopped from bringing a lump sum claim because of the earlier consent orders.

Wood DP also rejected ground (2). She held that the Senior Member summarised the appellant's submissions and provided reasons as to why she did not accept them as relevant, and there was no issue raised before the Senior Member that an Anshun estoppel applied.

Wood DP rejected ground (3). She held that as this ground is dependent upon the Senior Member's purported failure to "*consider*" and "*analyse*" the appellant's submissions, this ground of appeal must also fail. In any event, the Senior Member's reasons, partly reproduced at [55] and summarised at [13] to [19], were more than adequate to discharge her obligation to articulate the essential grounds upon which the decision rests and to fulfil her statutory duty to lawfully and fairly determine the matter.