UNSW Faculty of Law, Edge Seminar

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PERSONAL INJURY COMMISSION UPDATE 2025

This paper is authored by President Judge G M Phillips and Deputy Presidents M Snell and E Wood

Contents

INTRODUCTION

1. Here we are at the start of another Law Term and I am back at UNSW Law School to deliver what is becoming for me an annual address. I thank the organisers for this opportunity to present this paper to practitioners early in the year on matters relevant to their work.

2. In this paper I will be looking back in history to the formation of the tribunal I now head. I will be delving into some legal topics which will interest practitioners and will help with the all-important CLE points you need to garner before 31 March. Finally, I will be addressing some developments we will be working on during 2025. I remember my old managing partner saying that a law firm is much like a shark, it is either moving forward or drowning, and that is the sense in which we are approaching this year – I can assure you that we will be moving forward in 2025! Each year presents challenges and opportunities, Artificial Intelligence being one of them, and I will have something to say about that later in this paper.

THE COMMISSION AND ITS FIRST CENTURY

3. In July 1926 the *Workers' Compensation Act 1926* (1926 Act) commenced. The Premier at the time was one larger than life figure in Jack Lang. Whilst there had been earlier workmen's compensation acts, with disputes being decided in the District Court of New South Wales, one notable difference with the 1926 Act was the creation of a dedicated, specialist tribunal to hear disputes under the 1926 Act. With this enactment, the Workers Compensation Commission of New South Wales (WCC) was created, first sitting in Newcastle on 3 August 1926. Its first head of jurisdiction, then designated as the Chairman, was a District Court Judge, Judge R.J. Perdriau. Writing in the 1941 Digest, which summarised the first fifteen years of the tribunal's work, Judge Perdriau emphasised the WCC's commitment to two things. Firstly, the adherence by the WCC to precedents of the British Courts and the High Court of Australia. Secondly, he committed the WCC to the conciliation of disputed matters. These were prescient remarks as this remains our approach to this day. In the last reporting year 2023-24, 93% of all workers compensation disputes were resolved by our members, with 50% of all applications being resolved within three months of filing. The Commission's decisions are durable, we have few extant matters in the Court of Appeal and very few are overturned, which reflects the maturity of the jurisprudence and our adherence to precedent.

4. Next year, 2026, marks the centenary of workers compensation disputes being heard by a specialised tribunal, initially the WCC, then the Compensation Court of New

South Wales, then back to the WCC, and from 1 March 2021 as the Workers Compensation Division of the Personal Injury Commission of New South Wales (Commission). In its various guises over the century, the Commission has faithfully served the community. No matter what was going on in the world, the Great Depression, World War II, the expansion of post war Australia and its industries coupled with waves of migration, into modern Australia where work is vastly different to that which was undertaken in 1926. And of course there was the small diversion of the COVID-19 pandemic. Through all of these travails the Commission has remained open to provide a civil process of resolving disputes between those who work and those who employ. The great development of modern Australia was due to the endeavours of its workforce and the ingenuity of its industry. The social compact between labour and employers requires the safety net that is workers compensation to look after those who built this country, who continue to do so, and who suffer the misfortune of injury at work. Looked at through this lens, workers compensation is very much part of Australia's commitment to a fair go for its citizens.

5. As a worker would say, we are just looking after our mates.

6. I think that there is much to celebrate in this history and of course, prominently, the people who made it.

7. The Commission will be marking this centenary in 2026 with the publication of a history of the Commission and a ceremonial sitting. We are currently undertaking research for the history, if anyone has any information, documents or photos touching upon the institution's history or characters, please forward them to history@pi.nsw.gov.au. We will be providing updates on the centenary in PIC News leading up to August 2026, so please keep a look out.

AI

8. One would have to have been marooned on a desert island to not be aware of the disruption being visited upon the legal system by the protean advancements taking place in Artificial Intelligence (AI). When I juxtapose the advent of AI, with all its promise and menace, and the celebration next year of the Commission's establishment in 1926, one can only marvel at what has taken place during that one-hundred-year period. Whilst the past might be a different country, the future is quite unrecognisable with the pace at which change is coming.

9. In late 2024, the Chief Justice of New South Wales published the Practice Note dealing with AI and earlier this year the UCPR amendments to support the Practice

Note commenced. The Chief Justice also issued Guidelines for all NSW Judges with respect to the use of generative AI.

10. These measures have all been picked up and adopted by the Land and Environment Court, the District and Local Courts.

11. The Commission will also be adopting these measures albeit tailored to our environment. Give the rules of evidence do not apply in Commission proceedings and we conduct an upfront filing dispute model, our approach will be slightly modified. Rather than requiring parties to seek leave to rely upon evidence which has been produced with AI, the Commission will require the disclosure of this fact, it will then be a matter for the member to ascribe such weight to such evidence as they see fit. Every expert will need to either declare that no AI was used in the production of the report/expert opinion OR if it was, the requirement will be to spell out how and where it was used. This is a matter for every expert, I would not expect every lawyer to be examining every expert report to identify if AI was used, but one should be advising expert witnesses of their obligations.

12. In terms of lay witness statement evidence, it is the lawyer's function to ensure that the author understands the requirements of disclosure and adheres to them.

13. In terms of the Commission's decision makers, legal and medical, I have directed that they all comply with the Chief Justice's Guidelines for all the State's Judges.

14. AI presents a real challenge for legal practice in Courts and Tribunals. Litigants have an entirely reasonable expectation that their cases will be decided upon the basis of the evidence of a real person, whether a lay or expert witness. An AI produced expert is unlikely to meet the requirements for expert evidence as described by the High Court in cases such as *Makita* and *Red Bull*.[1] The very real risk for a litigant is to base their case theory on an expert report which may ultimately be given little weight due to the presence of AI in its formation.

15. What is at stake is the public's confidence in our Courts and Tribunals, compliance with these requirements does become a solemn duty of all practitioners and those who decide cases.

16. The Commission's Rules and Procedural Directions relating to AI are currently being prepared and will be publicised as soon as they have been completed. My very real

[1] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705; 25 NSWCCR 218; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157.

recommendation to you all is to rapidly familiarise yourselves with all the requirements regarding AI. Don't be the lawyer on the front page of the paper who is demonised for presenting submissions which are the figment of your laptop's imagination.

MEDICAL REVIEW PANEL PILOT - PSYCHIATRY

17. In 2022/23–2023/24 reporting years, the Commission undertook a very high volume of medical assessments across both the Workers Compensation and Motor Accidents Divisions, over 8,000 in each year. This high volume of work was necessary in order to clear the COVID-19 created backlog of first instance medical assessments.

18. A large number of assessments in motor accidents has led to a marked increase in applications for reviews. Unsurprisingly, a significant proportion of these review applications relate to psychiatric injury claims. Our psychiatric list for reviews is under great pressure and as a result there are delays of in excess of 12 months from filing to allocation.

19. The pressure on the Commission's cohort of psychiatrists also reflects the pressure on psychiatric services in the general community, both public and private.

20. Our currently open Medical Review Panel matters total 716. This is of course a point in time number and will not remain current for long. But using this figure as a waypoint, 48% of this number are psychiatric claims, so approximately 345. Each Panel requires the Commission to convene a member and two of our psychiatrists. As the application is a review, and not an appeal, the claimant has to be re-examined by the Panel psychiatrists. This is time and resource intensive.

21. Commission staff have been working on various approaches to dealing with the problem of waiting times for such Panels. The result of this work has been the Psychiatry Medical Review Panel Pilot (Pilot).

22. The Pilot commenced on 1 March 2025 and will last for 12 months. Its purpose is to decrease waiting times and reduce the numbers of psychiatric medical reviews.

23. We are going to dedicate a group of psychiatrists and members to this Pilot. We will quarantine their availability to provide time to be dedicated to the Pilot.

24. We will allocate two disputes at the same time to each Panel – who will then convene a conference and settle all future events with support from our Medical Services branch.

25. We will strictly enforce compliance with the timetable as set by the Panel. We will require parties to promptly submit all the dispute related documents necessary for the

Panel review and to answer all directions in the stipulated timeframes. Finally, the claimant must attend the re-examination as and when scheduled. In return, the member and Panel assessors commit to the swift production of their reasons.

26. The key to making this work is the dedicated time we are making available for the Panel members to work on the Pilot. The key to making the best use of that time is compliance with timetables and the re-examination proceeding as scheduled.

27. The Pilot is not a panacea for the logistical challenges that the Medical Review Panel system creates. Our aim with the Pilot is to improve the life cycle of this category of case. As the 2017 Motor Accidents Scheme matures and we move further from the pandemic lockdowns, the expectation is that filings will increase. With around 70% of all motor accident matters requiring expert medical assessment with no early ADR, this is a structural problem which requires structural reform. The more permanent fix to this problem is the recommendation arising from the Statutory Review of the Personal Injury Commission Act, which recommended a change to the 2017 Motor Accidents dispute resolution model. This change would see a system less heavily dependent on expert medical assessment and one which brings to bear ADR processes soon after a case is filed in the Commission.

SKATES* AND *MANDOUKOS

Medical disputes in the Personal Injury Commission – the powers, functions and jurisdiction of a medical assessor and of a medical appeal/medical review panel

The Workers Compensation Division

28. Part 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) makes provision for the determination of disputes about workers compensation, including claims for lump sum compensation in respect of permanent impairment pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

29. Section 288(1) of the 1998 Act provides that a dispute about a claim may be referred to the President for determination by the Commission, however if the dispute is about a lump sum claim for permanent impairment brought pursuant to s 66 of the 1987 Act, the dispute can only be referred by the claimant. Section 289(3) places restrictions on when lump sum claims can be referred to the Commission, such as that the person on whom the claim is made wholly disputes liability for the claim or fails to determine the claim in accordance with the legislation.

30. Section 293 of the 1998 Act provides that when a medical dispute within the meaning of Part 7 of the 1998 Act is referred to the Commission, the President may refer the

dispute for medical assessment by a medical assessor. In Part 7, s 319 of the 1998 Act defines a medical dispute as:

> "… a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim—
>
> (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
>
> (b) the worker's fitness for employment,
>
> (c) the degree of permanent impairment of the worker as a result of an injury,
>
> (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
>
> (e) the nature and extent of loss of hearing suffered by a worker,
>
> (f) whether impairment is permanent,
>
> (g) whether the degree of permanent impairment of the injured worker is fully ascertainable."

31. A medical assessor is required to issue a medical assessment certificate as to the matters referred for assessment,[2] and the medical assessment certificate is conclusively presumed to be correct in respect certain matters, including the degree of impairment.[3]

32. An appeal against a medical assessment lies to a medical appeal panel constituted by two medical assessors and a member assigned to the Workers Compensation Division of the Commission,[4] but the appeal can only be brought on the following grounds:

> "**327 Appeal against medical assessment**
>
> …
>
> (3) The grounds for appeal under this section are any of the following grounds—

[2] Section 325 of the 1998 Act.

[3] Section 326 of the 1998 Act.

[4] Section 328 of the 1998 Act.

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

(c) the assessment was made on the basis of incorrect criteria,

(d) the medical assessment certificate contains a demonstrable error."

33. The appeal is by way of review of the original assessment but is limited to the grounds of appeal made by the appellant.[5]

34. In *Skates v Hills Industries Ltd*,[6] the worker suffered a significant injury in the form of a fractured wrist and an injury to the left little finger in a fall from a ladder. He made a lump sum claim for whole person impairment in respect of the left wrist, little finger and scarring pursuant to s 66 of the 1987 Act. The degree of impairment was disputed by the workers compensation insurer (a medical dispute within the meaning of s 319(c) of the 1998 Act). The worker lodged an Application to Resolve a Dispute in the then Workers Compensation Commission. The disputed claim was referred to an approved medical specialist (AMS) for assessment. The body parts listed in the referral were "Left Upper Extremity (joint ring finger), scarring (TEMSKI)". The AMS assessed the worker's impairment as 61% on the basis that the worker's left upper extremity had become functionally useless and issued a medical assessment certificate accordingly. The insurer appealed to the Commission's medical appeal panel (the appeal panel), who determined that the AMS had erred by going outside of the terms of the referral. Despite the insurer having conceded in the appeal that the referral should have included the left wrist, the appeal panel considered itself bound by the terms of the referral, revoked the medical assessment certificate and issued a new certificate assessing the worker's whole person impairment as 7% of the left upper extremity (joint ring finger)" and scarring.

35. The worker sought judicial review in the NSW Supreme Court and the review was upheld on the basis that the appeal panel ought to have given effect to the insurer's concession that the wrist should have been included in the referral, however the Court confirmed that the AMS was bound by the terms of the referral to him. The decision of

[5] Section 328(2) of the 1998 Act.

[6] [2021] NSWCA 142 (*Skates*).

the appeal panel was set aside, and the dispute was remitted to the Registrar of the Commission.

36. The worker lodged a summons seeking leave to appeal to the Court of Appeal against the judgment of the Court below, despite the fact that the orders made by the primary judge fell in his favour. After making remarks about how the parties could have remedied the defective referral to the AMS in a simpler and more timely manner, Basten JA (with whom Leeming JA agreed) concluded that:

> "Leave should be granted for two limited purposes. The first is to make an order setting aside the decision of the arbitrator, so as to permit further steps to be taken in the Commission. The second is to remit the matter with a direction that any further referral to be made to an AMS should identify the left wrist as an affected body part. That is appropriate because it is likely that the Appeal Panel took a stricter view of its function, which did not allow it to extend the scope of the assessment required by the Registrar's referral, even with consent of both parties. It is not necessary to determine whether it was correct in that regard, because there is no challenge to the primary judge's finding that led to the setting aside of its decision. However, the Registrar's referral did not cover the full extent of the dispute."[7]

37. Agreeing with Basten JA's reasons, Leeming JA added:

> "The starting point is a 'medical dispute'. That term is defined in s 319 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), reproduced in the other judgments. The term is defined by reference to the existence of a 'dispute between a claimant and the person on whom a claim is made' about any of seven related subject matters including the degree of permanent impairment as a result of an injury, whether the impairment is permanent, whether it is partly due to a previous injury or pre-existing condition and whether it is fully ascertainable. It may be expected that as a consequence of the ordinary operation of the regime at least in most cases the *dispute* will have been identified by a written exchange of competing *claims*."[8]

And

> "The dispute between Mr Skates and the insurer was crystallised by the correspondence attached to Mr Skates' application; indeed, it was why the

[7] *Skates*, [38].

[8] *Skates*, [44]

documents setting out both sides' claims were attached. That was the dispute which was referred to the Commission pursuant to s 288. It was a 'medical dispute' because the parties had made different claims about the degree of permanent impairment suffered by Mr Skates as a result of the injury. It was therefore apt to be referred for medical assessment. The point of doing so was to resolve the dispute."[9]

38. In 2021, by the time Mr Skates' appeal came before the Court of Appeal, the Workers Compensation Commission was abolished and the power to determine disputes about a workers compensation claim was vested in the Personal Injury Commission. The "approved medical specialist" became a "medical assessor," an "arbitrator" became a "non-presidential member" and the functions of the Registrar of the former Commission in relation to referring a dispute about permanent impairment to a medical assessor were transferred the President (or the President's delegate) of the new Commission.

39. The scope of the medical appeal panel's functions and powers was subsequently discussed in *Scone Race Club Ltd v Cottom*.[10] In that case, the worker suffered an injury to his knee which ultimately required a knee replacement. Mr Cottom made a claim for whole person impairment which was disputed by the insurer. He commenced proceedings in the Personal Injury Commission, and the dispute was referred to a medical assessor who assessed Mr Cottom as having 20% whole person impairment. The medical assessor issued a medical assessment certificate accordingly. Mr Cottom lodged an appeal from that assessment on the basis that, inter alia, there was further documentation available that showed a deterioration in his knee condition and disclosed a back injury. Mr Cottom sought to have that documentation brought to the attention of the medical appeal panel. The appeal panel declined to consider the new evidence and dismissed the appeal. Mr Cottom sought judicial review in the Supreme Court and the primary judge upheld the appeal, holding that the appeal panel ought to have considered those documents.

40. In the appeal to the Court of Appeal, Basten AJA summarised the legislative framework in respect of making an appeal from a medical assessment and observed that it was first necessary that there existed a "medical dispute" after which a medical assessment was made and then a medical assessment certificate was issued. His Honour considered Leeming JA's observations in *Skates* (quoted above), noting that

[9] *Skates*, [46].

[10] [2024] NSWCA 34 (*Cottom*).

on appeal to the appeal panel in that case, the appeal panel correctly found a demonstrable error on the part of the medical assessor by failing to be limited to the terms of the claim. His Honour observed, however, that there was also an error on the part of the appeal panel by failing to address the left wrist injury, which was part of the worker's claim.

41. Acting Justice of Appeal Basten referred to the Court of Appeal decision in *Queanbeyan Racing Club Ltd v Burton*,[11] in which the Court observed that:

    (a) the Registrar [since 1 March 2021 a delegate of the President] is required to consider the demonstrable error or errors relied upon by the applicant in determining whether a demonstrable error has occurred;

    (b) the appeal panel is not limited to the ground upon which the application is made that was accepted by the delegate of the President but may consider all grounds raised in the application;

    (c) the appeal panel is not permitted to look for errors which are not part of the grounds of appeal brought in the application, and

    (d) the appeal panel is obliged to dismiss the appeal unless is satisfied that there was an error and that the error is material.

42. Applying those principles, Basten AJA concluded that there was no error on the part of the appeal panel in failing to consider the further documents sought to be included in Mr Cottom's appeal. His Honour observed:

> "It is not in doubt that a ground of the appeal to the Appeal Panel in the present case did not involve 'deterioration' of the worker's condition, resulting in an increase in the degree of permanent impairment. Secondly, it is beyond doubt that the locus of the injury which was the subject of the medical assessment certificate was the right knee: it did not include a separate injury to the lumbar spine."[12]

And

> "Accordingly, on its own views as to the scope of its functions, which involved no legal error, the two matters raised in the additional documents were beyond the scope of the appeal. On the basis that, even if considered, they could not, consistently with legal principle, have affected the outcome of the appeal in any

[11] [2021] NSWCA 304.

[12] *Cottom*, [54].

respect, any failure to consider them was immaterial and did not give rise to reviewable error."[13]

43. The Court of Appeal cited both *Skates* and *Cottom* in *Wright v State of New South Wales*.[14] In that case, Mr Wright brought previous proceedings for a psychological injury with a deemed date of injury of 5 December 2018, as well as an aggravation of that injury (the additional injury) subsequent to that date. Consent orders were entered into in which it was agreed that there be an award for the employer in respect of the additional injury.

44. Mr Wright subsequently made a claim for permanent impairment, in which the degree of whole person impairment was disputed on the basis that an estoppel arose from the consent orders so that the effect of the additional injury should be excluded from the assessment. The dispute was referred to a medical assessor and the medical assessor certified that Mr Wright's whole person impairment was 19%. The State of New South Wales appealed, asserting that the Medical Assessor erred as he had included in the assessment the impairment resulting from the additional injury, for which there had been an award in its favour. The appeal panel confirmed the medical assessor's assessment. The State of New South Wales sought judicial review of both the medical assessor's assessment and the decision of the medical appeal panel. Basten AJ (the primary Judge) upheld the contention that the medical assessor had exceeded his jurisdiction and that the appeal panel was in error by confirming the medical assessment certificate.

45. On appeal to the Court of Appeal, Stern JA (Gleeson and Mitchelmore JJA agreeing), applied *Skates* and *Cottom*, confirming that:

    (a) it is the medical dispute between the parties that is referred for assessment, and

    (b) the medical assessor's jurisdiction was therefore constrained by the ambit of the medical dispute referred for assessment.[15]

[13] *Cottom*, [56].

[14] [2024] NSWCA 77 (*Wright*).

[15] *Wright*, [64].

46. Ultimately, the Court determined that:

(a) the medical assessor did not exclude from consideration the aggravation and exacerbation of Mr Wright's injury by the additional injury and thus the medical assessment certificate contained a demonstrable error;

(b) the appeal panel erred in its analysis of the medical assessor's assessment, and

(c) the primary judge (Basten AJA) was correct in determining that the medical assessment certificate contained a demonstrable error.

The Motor Accidents Division of the Personal Injury Commission

47. Medical assessments in motor accident claims are provided for in Division 7.5 of the *Motor Accident Injuries Act 2017* (the 2017 Act). Relevantly, the Division provides:

(a) a medical dispute is defined as "a dispute between a claimant and an insurer about a medical assessment matter";[16]

(b) the medical assessor is "to give a certificate as to the matters referred for assessment";[17]

(c) a medical dispute may be referred again for assessment;[18]

(d) a claimant or insurer may apply to refer a medical assessment by a medical assessor to a review panel constituted by two medical assessors and one member of the Commission assigned to the Motor Accidents Division of the Commission for review, but only on the grounds that the assessment was incorrect in a material respect;[19]

(e) on the application by the claimant or the insurer, the medical assessment is to be referred to a review panel, but only if the President (or a delegate of the President) "is satisfied that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application"[20], and

[16] Section 7.17 of the 2021 Act.

[17] Section 7.23(1) of the 2021 Act.

[18] Section 7.24 of the 2021 Act

[19] Section 7.26 of the 2021 Act.

[20] Section 7.26(5).

(f) the review of a medical assessment is not limited to a review of only that aspect of the assessment that is alleged to be incorrect and is to be by way of a new assessment of all the matters with which the medical assessment is concerned.[21]

48. In *Mandoukos v Allianz Australia Insurance Limited*,[22] the Court of Appeal considered the concept of a "medical dispute," and the roles of the medical assessor and the review panel in determining the dispute in the context of the 2017 Act.

49. Mr Mandoukos injured his cervical spine in a motor vehicle accident and referred a medical dispute about his claim to the precursor of the Commission, the Dispute Resolution Service of the State Insurance Regulatory Authority. The dispute was identified to be whether the pathological changes in the cervical spine and the neurological symptoms were caused by the motor vehicle accident (in circumstances where there was an earlier motor vehicle accident) and whether the injury was a "minor" injury as defined by s 1.6 of the 2017 Act. The dispute was referred to a medical assessor who determined that the injury to the cervical spine was sustained in the accident but was a minor injury and accordingly issued a medical assessment certificate to that effect.

50. Mr Mandoukos appealed to a medical review panel who upheld the medical assessor's decision.

51. Mr Mandoukos subsequently underwent cervical surgery in the form of a C5/6 foraminotomy, after which he lodged an application for a further assessment by a medical assessor seeking a determination that his cervical injury was not a minor injury because of the surgery. The application was refused.

52. Mr Mandoukos lodged a further application, asserting that the previous assessments were in error because it was assumed that he did not experience radiculopathy or it was assumed that there was no evidence of radiculopathy. He contended that he did in fact experience radiculopathy, which was addressed by the surgery, and consequently his injury was not a minor injury. The medical assessor assessed Mr Mandoukos as suffering a soft tissue injury to his cervical spine which was caused by the motor accident and determined that this was a minor injury. In forming that view, the medical assessor had considered whether or not there was evidence of radiculopathy.

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[21] Section 7.26(6).

[22] [2024] NSWCA 71 (*Mandoukos*).

53. Mr Mandoukos applied for a review of the medical assessor's decision pursuant to s 7.26(1) of the 2017 Act. Mr Mandoukos then some four weeks later sought to submit additional material alleging that the type of cervical surgery involved the removal of a portion of bone in order to relieve the pressure on the spinal nerve, which was more than a soft tissue injury and thus was a non-minor injury. The application for review was declined by a delegate of the President on the basis that there was no reasonable ground to suspect that the medical assessment was incorrect in a material respect.

54. Mr Mandoukos lodged an application in the Supreme Court for judicial review of both the medical assessor's decision and the delegate's decision. Chen J determined that the Medical Assessor's decision was made according to law and that there was no basis for the delegate to conclude that the medical assessor's decision was "incorrect in a material respect."

55. Mr Mandoukos appealed to the Court of Appeal.

56. The Court (per Stern JA, Leeming and Kirk JJA agreeing) dismissed the appeal. Stern JA took the approach that the first necessary task was to identify what constituted the dispute that was referred to the medical assessor, which in this case was whether or not Mr Mandoukos suffered from radiculopathy and thus the cervical injury could not be a minor injury. He observed that Mr Mandoukos' submissions before the medical assessor did not contend that the surgery itself was a component of his injury or that the removal of the bone during the foraminotomy led to the injury being non-minor. He determined that on that basis, there was no medical dispute between the parties in respect of those matters before the medical assessor.

57. Appeal Justice Stern said that, as observed by Chen J, the first time Mr Mandoukos contended that the type of surgery involved the removal of bone and that that was a part of his injury was in late documents before the review panel. Stern JA referred to Mr Mandoukos' submissions, noting that the key contention was that the medical assessor had a duty to consider and determine whether the nature and consequences of the foraminotomy procedure was such that his injury was not a soft tissue, and thus not a minor, injury. He said that a medical dispute does not encompass the whole of the medical assessment matter but is a dispute which has in fact arisen between a claimant and an insurer. Justice Stern observed that:

> "It is unlikely that Parliament intended that the whole of that matter be referred for medical assessment in circumstances where the dispute between the parties related only to a limited aspect of that treatment or care."[23]

And

> "it is apparent that the medical dispute will not necessarily encompass the whole of the 'decision' or 'claim'. Rather, the word 'about' denotes the subject matter in respect of which the medical dispute in fact arises.
>
> Thus, the medical dispute 'about a medical assessment matter' will, in each case, be a question of fact depending upon the ambit of the dispute between the parties at the relevant time having regard to the competing claims made. Whilst it is of course possible that a dispute about a medical assessment matter might comprise the whole of the relevant medical assessment matter, that is not necessarily so.
>
> My preferred construction is also consistent with the construction of the somewhat analogous, and similarly worded, s 319 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) reached by this Court in *Skates v Hills Industries Ltd* and *Scone Race Club Ltd v Cottom*."[24]

In conclusion

58. The Court of Appeal's observations in all of the above authorities clearly identify what constitutes a "medical dispute" and the jurisdictional constraints that apply in the exercise of making a medical assessment in both the Workers Compensation Division and the Motor Accidents Division of the Personal Injury Commission. They also identify the jurisdictional constraints on a medical review panel constituted in accordance with the 2017 Act in its determination as to whether the assessment was incorrect in a material respect, and on a medical appeal panel constituted in accordance with the 1998 Act in a determination of any of the matters provided for in s 327(3) of the 1998 Act.

PROCEDURAL FAIRNESS/CREDIT

59. There have been recent Presidential decisions in which appellants have raised grounds going to procedural fairness, where the Commission dealt with credit findings in the absence of cross-examination. An understanding of the relevant principles

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[23] *Mandoukos*, [76].

[24] *Mandoukos*, [77]–[79].

requires reference to the legislation and delegated legislation within which the Commission operates.

The procedural environment of the Commission

60. Section 43 of the *Personal Injury Commission Act 2020* (the 2020 Act) provides:

> "**43 Procedure before Commission generally**
>
> (1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.
>
> (2) The Commission is not bound by the rules of evidence but may inform itself on any matter in the manner the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.
>
> (3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."

61. Rule 34 of the Personal Commission Rules 2021 (the Rules) provides:

> "**34 Calling witnesses**
>
> (1) A party to Commission proceedings who proposes to rely on the oral evidence of a witness must lodge, together with the information and documents required to be lodged and served under Part 7, Division 2, a document containing—
>
> (a) the name of the witness, and
>
> (b) a written statement of the evidence to be given by the witness, signed by the witness.
>
> (2) The party must also serve the documents and information on the other parties to the proceedings.
>
> (3) A party may not, in Commission proceedings, call a witness to give oral evidence that has not been included in a document lodged and served as required under this rule unless—
>
> (a) the party has lodged and served with the information and documents required under Part 7, Division 2 a statement indicating—
>
> (i) the specific nature of the evidence, and
>
> (ii) the reliance the party intends to place on the evidence, and

(iii) the reasons why the evidence has not been included in a statement as required under this rule, and

(iv) the time the evidence is expected to be included, and

(b) the evidence is included in a written statement lodged and served on the other parties as soon as practicable after the statement can be obtained.

(4) Subrule (3) does not prevent the party from calling a person to give the evidence if—

(a) the person refuses to sign a statement of the oral evidence to be given in proceedings by the person, and

(b) the party has served a summons issued under rule 56 in relation to the person.

(5) Despite subrule (3), the Commission may, for the avoidance of injustice, allow a party to introduce oral evidence that the party would otherwise be prevented from introducing by subrule (3).

(6) If a party proposes to give oral evidence, this rule applies to the party as though the party was a witness for the party."

62. Rule 67 of the Rules provides:

"**67 Documents lodged under division**

(1) A document or bundle of documents must not be lodged under this division unless the document or bundle—

(a) has consecutively numbered pages, and

(b) does not contain a document or part of a document that—

(i) has previously been lodged in the applicable proceedings, or

(ii) is included more than once in the document or bundle of documents, and

(c) is indexed and sorted by document category.

(2) A party may not introduce evidence that has not been—

(a) lodged and served as required by this division, or

(b) provided to another party as required by enabling legislation or these rules.

(3) A document is taken to be served on each other party to proceedings if lodged and served in accordance with Divisions 4.3 and 4.4."

63. Practice Direction PIC10 at paragraph [12] provides:

> "Questioning or cross-examination of witnesses (including parties) may be permitted if the presiding member decides that it is necessary or is otherwise significantly preferred, in the interests of justice or for any other reason."

64. It is helpful to refer to two important cases in the Court of Appeal that discuss cross-examination and procedural fairness in the context of the former Workers Compensation Commission of NSW, which like the current Commission had restrictions on oral evidence and cross-examination.[25] *Aluminium Louvres and Ceilings Pty Ltd v Zheng*[26] was a case in the former Workers Compensation Commission of NSW, in which cross-examination was by way of leave. The employer was granted leave to cross-examine the worker. Following 35 minutes of cross-examination the arbitrator placed a time restriction on further cross-examination. The employer, on a Presidential appeal, argued unsuccessfully that the arbitrator erred in restricting cross-examination in this way. In the Court of Appeal, Bryson JA (Handley JA and Bell J agreeing) said:

> "There is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission, and decisions whether to allow cross-examination or to limit it are discretionary decisions which must be made in a context of the legislation and practices which the Commission follows, and, at least as importantly, in the context of the facts and circumstances of the case under consideration.
>
> … I see no ground upon which it could be doubted that the Deputy President acted within her discretionary powers in disposing of the matter as she did. No rule of law required the Arbitrator not to limit cross-examination, and the view that there was no want of procedural fairness was a view which the Deputy President could reasonably reach without any error of law."[27]

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[25] See *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421, [65], [86]–[96].

[26] [2006] NSWCA 34, 4 DDCR 358 (*Zheng*).

[27] *Zheng*, [37]–[38].

65. *New South Wales Police Force v Winter*[28] was another matter in the former Workers Compensation Commission of NSW, in which the employer's counsel cross-examined by leave. Following a relatively short period of cross-examination the worker's counsel objected and, after an exchange between counsel and the arbitrator, the cross-examiner did not persist. The worker failed in his claim. On a Presidential appeal, a Deputy President concluded the arbitrator's reasons demonstrated she had formed an adverse view of the worker's credit, following stopping cross-examination on the basis that notes from the relevant doctor were in evidence. The Deputy President concluded the worker was denied procedural fairness as he did not have a reasonable opportunity to answer this line of questioning because the Arbitrator prematurely terminated the cross-examination. The Deputy President also found the arbitrator's reasons were inadequate. In the Court of Appeal Campbell JA said the procedural fairness argument arose from an alleged breach of the rule in *Browne v Dunn*.[29] His Honour quoted from his reasons in *West v Mead*,[30] in which he analysed the extent to which the rule in *Browne v Dunn* has been affected by the exchange of documents between parties prior to a hearing. His Honour quoted from *Cross on Evidence* where it was said:

> "… the rule in *Browne v Dunn* did not apply where all parties were on notice of the evidentiary issues, eg by reason of affidavits having been exchanged ..."

66. His Honour said:

> "The consequence of these decisions is that the circumstances in which *Browne v Dunn* will require matter to be put to a witness in cross-examination will depend upon the nature of the pre-trial preparation there has been, and whether that pre-trial preparation has been sufficient to give notice to a witness of the submission ultimately intended to be put to the court."[31]

67. His Honour concluded the exchange of documents would have been sufficient to inform the worker that there was a live issue regarding whether his absence from work resulted from a psychological injury and whether there was ongoing incapacity. It would not have been sufficient to inform him a submission would be made "that the theory that he was suffering from PTSD had its origins in his union, or that his

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[28] [2011] NSWCA 330 (*Winter*).

[29] (1893) 6 R 67, referred to in *Winter,* [80].

[30] [2003] NSWSC 161, quoted in *Winter*, [81].

[31] *Winter*, [81].

statement incorrectly created the impression that Dr Gordon had diagnosed him with PTSD on 8 September 2008". His Honour described procedural fairness as requiring that:

> "… a party be given notice of the case that is put against him or her, and *a reasonable opportunity* to put evidence and submissions before a tribunal concerning that case. In the present case, that obligation was satisfied. The Respondent had the opportunity, until his counsel took an objection, of giving his account concerning the matters on which Mr Stanton's submissions ultimately succeeded. Further, no attempt was made to recall the Respondent to give evidence on those topics. When it was the Respondent's counsel who took objection to the question being opened up, the present case is quite different to what it would have been if the Arbitrator, unprompted, had refused to permit Mr Stanton to explore the topics he wished to raise."[32] (emphasis in original, excluding references)

68. His Honour also said that whether a party is represented by counsel can be relevant to assessing procedural fairness. His Honour said there may well have been sound tactical reasons for why the objection was taken by the worker's counsel. The employer's appeal to the Court of Appeal succeeded.

69. Issues of procedural fairness in the absence of cross-examination came up in *E B Murray Family Investments Pty Ltd t/as Bede Murray Racing Stables v Howard*.[33] The employer was granted leave to cross-examine the worker, and it did so at length. The employer's lay witnesses provided statements on which it relied. There were no applications to cross-examine these lay witnesses, who did not give oral evidence. The worker succeeded in her case. The employer submitted there were a series of unchallenged statements contradicting the worker. It submitted the Member ought to have heard cross-examination of its lay witnesses or alternatively accepted their evidence where it was contrary to that of the worker.

70. Deputy President Snell noted s 43 of the 2020 Act and rr 34 and 67 of the Rules. Reference was made to *Spencer v Bamber* in which the Court of Appeal (Campbell JA, Basten and Macfarlan JJA agreeing) said:

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[32] *Winter*, [84].

[33] [2024] NSWPICPD 70 (*Howard*).

> "… compliance with the principle in *Browne v Dunn* does not always require an allegation to be put to a witness in the witness box. In particular, exchange of affidavits before trial can adequately give each side the opportunity to respond to allegations made concerning them. Further, there is no rule of law requiring that evidence not challenged in cross-examination be accepted - a judge can reject evidence that has not been cross-examined on if, for example, it was inconsistent with other evidence that he or she accepted, or if it was inherently incredible."[34]

71. The Deputy President noted the parties would each have been aware of the case made by the other. It was open to the employer to seek to call evidence from its lay witnesses, there was no indication it had sought to do so. The Deputy President said, "I do not accept that the Member erred in failing 'to have heard cross examination of the [employer's] lay witnesses' in circumstances where the appellant, which was capably represented, did not itself seek to call them". The employer's appeal (including on this point) failed.

72. The matter of *Paterson v State of New South Wales (NSW Police Force)*[35] involved a claim by a former police officer in respect of psychological injury, relying on various traumatic events in a career spanning more than 20 years. The employer argued the psychological injury was caused not by the events in the course of the worker's employment, but rather from a disciplinary process relating to various criminal offences. The issues went to 'injury' (s 4 of the 1987 Act), substantial contributing factor (s 9A of the 1987 Act), s 11A(1) of the 1987 Act and 'serious and wilful misconduct' (s 14(2) of the 1987 Act). The worker's claim failed at first instance, and his appeal came before the President, Phillips DCJ.

73. The various grounds of appeal raised by the worker failed. One of these asserted that the worker was denied procedural fairness, in that procedural fairness should have involved cross-examination to provide him with an opportunity to explain his presentation "and address any conclusions the Member may come to". It also sought to rely on a Practice Direction issued pursuant to the former Workers Compensation Commission Rules, which was said to suggest "cross-examination should occur when credit is in issue". The President dealt with a number of the worker's arguments in the following passage:

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[34] [2012] NSWCA 274, [134].

[35] [2025] NSWPICPD 6 (*Paterson*).

> "Firstly, the rules of evidence do not apply to Commission proceedings. Secondly, I agree with the respondent's submission that the Workers Compensation Commission Rules have no application, those rules having been repealed on the establishment of the Commission on 1 March 2021. To the contrary, the situation is governed by the following rules and instrument. The applicable rules are the Personal Injury Commission Rules 2021, r 34 (Calling witnesses) and r 67 (Documents lodged under division). These rules are supported by Procedural Direction PIC1 at paragraph [38], which states that leave is required for the examination of a witness. I will deal with this ground on the basis of the applicable rules and Procedural Direction. Thirdly, by a combination of the rules I have just recorded, each party must lodge and serve the material, including witness statements, which they intend relying upon. Fourthly, there is no right to cross-examine in the Commission. While the principles set out in *Aluminium Louvres* at [37] were stated in respect of the former Workers Compensation Commission, the principles are equally applicable to the Commission having regard to the legislation, rules and Procedural Direction I have set out above. Fifthly, in the context of Commission proceedings, there is no denial of natural justice if the party is aware of the case that he or she has to answer and there is an opportunity to reply. Sixthly, a Member of the Commission is bound to observe the obligations of procedural fairness. However, the extent and application of this right must be considered in the light of legal context in which the decision maker is operating. Seventhly, a tribunal decision maker is not required under the rules of procedural fairness to give a 'running commentary' upon what the Member is thinking about the evidence. Eighthly and finally, a party is bound by the conduct of their case."[36] (excluding footnotes)

74. Dealing with whether procedural fairness required that certain matters should have been put to the worker in cross-examination, the President noted the worker was well aware of "issues pertaining to his credit and how he responded to the criminal charges". The President noted there was no right to give oral evidence and leave would have been required for this to occur. There was no such application by either party. The worker was bound by the way in which his case was conducted. The President dealt with the argument that the Member should have informed the worker of the view he was taking and given him an opportunity to be heard on it. The President

[36] *Paterson*, [102].

referred to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[37] in which the High Court said:

> "Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment."[38]

75. In short, if a party seeks to give oral evidence in support of his own case, it is up to the party to make such an application.

[37] [2006] HCA 63; 228 CLR 152 (*SZBEL*).

[38] *SZBEL*, [48].