Workers Compensation Commission

Last Updated: 11 September 2020

On Review

Summary of Judicial Review Decisions

Decisions by chronological order

On Review is prepared by the Legal Unit of the Workers Compensation Commission for the benefit of its members and staff, Approved Medical Specialists, and the legal profession.

It provides a summary of all decisions of the Supreme Court and the Court of Appeal in relation to judicial review applications against decisions of the Registrar, Approved Medical Specialists and/or Appeal Panels.

On Review consists of two publications. The first document contains a list of all decisions and case summaries by chronological order. The second document contains the same resource, but grouped by subject matter. Each document contains a hyperlink to the decision and a hyperlink to a summary of the decision.

The case summaries provide an overview and introduction to each decision. They are not intended to substitute for reading the decisions in full, nor are they a substitute for independent research in relation to a particular issue or area of the law.

The list of decisions includes judicial review applications that were finalised by settlement, discontinuance or strike out.

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NOTICE

ABBREVIATIONS AND TERMINOLOGIES

Where referenced, this document uses the following abbreviations and terminologies:

AMS	Approved Medical Specialist
MAP / Appeal Panel / Panel	Medical Appeal Panel
MAC	Medical Assessment Certificate
COD	Certificate of Determination
ARD	Application to Resolve a Dispute
SC	Supreme Court of NSW
NSWCA / NSW CA / CA	NSW Court of Appeal
WPI	Whole Person Impairment
s. / s	A section of the workers compensation acts
WCC	Workers Compensation Commission of NSW / NSW Workers Compensation Commission
DP	Deputy President of the Workers Compensation Commission of NSW
ADP	Acting Deputy President of the Workers Compensation Commission of NSW
President	The President of the Workers Compensation Commission of NSW
Registrar	The Registrar of the Workers Compensation Commission of NSW
Delegate	Delegate of the Registrar
Commission	Workers Compensation Commission of NSW / NSW Workers Compensation Commission
Referral	Referral for Assessment of Permanent Impairment to Approved Medical Specialist
1987 Act	*Workers Compensation Act* 1987
1998 Act	*Workplace Injury Management and Workers Compensation Act* 1998
WorkCover Guides	*WorkCover Guides for the Evaluation of Permanent Impairment 3rd edition*
AMA5 / AMA 5 Guides	*American Medical Association Guides for the Evaluation of Permanent Impairment Fifth Edition*
Reply	Reply to Application to Resolve a Dispute
Review	Judicial review application to the Supreme Court of NSW
Medical appeal	Application to Appeal Against Decision of AMS
TOD / TOM	Table of Disabilities / Table of Maims
DRE / DBE	Diagnosis-Related Estimate / Diagnosis-Based Estimate
PIRS	Psychiatric Impairment Rating Scale
TEMSKI	Table for Evaluation of Minor Skin Impairment
NAL	National Acoustic Laboratory Tables
ADL	Activities of Daily Living

R	**Reported decision (see citations, where provided)**
DOJ:	**Date of judgment of the Supreme Court of NSW / NSW Court of Appeal**
On appeal to NSWCA	**A current appeal action is either lodged or intended to be lodged in the NSW Court of Appeal**
Appeal upheld	**The NSW Court of Appeal set aside the decision of the primary judge, allowed the appeal and upheld the summons**
Appeal dismissed	**The NSW Court of Appeal confirmed the decision of the primary judge, dismissed the appeal and dismissed the summons**
Appeal dismissed / cross appeal upheld	**The NSW Court of Appeal confimed parts of the decision of the primary judge, dismissed the appeal and the summons and upheld the cross appeal**
Confirmed on appeal	**A judicial review decision that was subject of an appeal and that was confirmed by the NSW Court of Appeal**
Overturned on appeal	**A judicial review decision that was subject of an appeal and that was set aside by the NSW Court of Appeal**

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2020 (Number of decisions: 7 at 11 September 2020) [Return to Index]

Murray v Woolworths Group Ltd [2020] NSWSC 1033
DOJ: 20 August 2020

The Court held that the decision of 20 November 2018 was a purely administrative decision of a registry official employed under s 374(2) of the 1998 Act. The decision-maker did not purport to be a delegate of the Registrar and her decision did not attach the seal of the Workers Compensation Commission. The Court held the position in this case was unlike that in *Ballas v Department of Education (State of NSW*) [2020] NSWCA 86, as the decisions were made within WCC Registry and did not affect the appellant's rights. *Ballas* concerned judicial review of a delegate's decision for jurisdictional error and made clear that where a section 327(4) decision has jurisdictional error the resulting Certificate of Determination will be set aside.

Skates v Hills Industries Ltd [2020] NSWSC 837
DOJ: 30 June 2020
Adamson J held that an AMS is bound by the terms of the referral to confine the matters determined to those which have been referred. An AMS is not entitled to assess a body part/system that is not identified in the terms of the referral, except where the parties have agreed that other body parts/systems ought to be included in the referral. In this case the Appeal Panel erred in law by finding that the AMS was not entitled to assess the WPI by reference to the Claimant's left wrist since the employer, to the Appeal Panel's knowledge, conceded that this ought to have been included in the referral. This error led the Appeal Panel to omit the left wrist from its own assessment of WPI.
"Skates" Summary

Peachey v Bildom Pty Ltd (Quality Siesta Resort Pty Limited and Quality Hotel) [2020] NSWSC 781
DOJ: 22 June 2020
The worker suffered a psychological injury in the course of her employment. The AMS assessed the worker as having a whole person impairment of 13%. The Plaintiff worker then appealed the MAC on the basis that the AMS failed to properly apply clauses 1.31 and 1.32 of the of the Guidelines. The Appeal Panel reached the view that no adjustment should be made for the effects of treatment. The worker appealed to the Supreme Court in which Adamson J was satisfied that to the reasons of the AMS which were insufficient to record that he had considered clause 1.32 of the Guidelines at all. His Honour was satisfied that the Appeal Panel failed to fulfil its obligation to address the question of an adjustment under cl 1.32. The Court ordered that the matter be remitted to the Registrar for referral to an Appeal Panel.
"Peachey" Summary"

Starr v Pendergast Painting Pty Ltd [2020] NSWSC 725
DOJ: 11 June 2020
The worker suffered an injury to the right and left shoulder in the course of his employment. The worker appealed the MAC on the basis that the AMS's observations of scarring were a better fit for 1%. The worker requested a reconsideration of the MAC that the AMS reconsider the certificate. The application was supported by submissions and three photographs. The AMS confirmed his original findings and as a result, the worker appealed the further certificate. The Appeal Panel confirmed the findings of the AMS on the basis that the photographs relied upon were clear and in focus. The court was not satisfied that the Appeal Panel's reasons for not re-examining the claimant were inadequate.
"Starr" Summary"

CSR Limited v Ewins [2020] NSWSC 511
DOJ: 8 May 2020
The worker suffered a psychological injury in the course of her employment. The AMS assessed the worker as having a whole person impairment of 17%. The Plaintiff employer then appealed the MAC and sought to admit surveillance material pursuant to section 327(3)(b) of the 1998 Act. His honour accepted that the Panel's reasons that the Panel was satisfied that the surveillance report was not information that was not available to, or could not reasonably have been obtained by the Employer, before the medical assessment by the AMS. His honour further noted that it was then immaterial whether the Panel considered the

information to be relevant or not, since the ground under s 327(3)(b) would not be made out in any event. Held – Summons dismissed.
"Ewins" Summary"

Ballas v Department of Education (State of NSW) [2020] NSWCA 86
DOJ: 6 May 2020
The Court of Appeal allowed the applicant worker's appeal and held that the Delegate of the Registrar misconstrued the "gatekeeper" role under s 327(4) of the 1998 Act. The role of the Delegate was to determine whether the grounds of appeal in s 327(3) of the 1998 Act were capable of being made out, rather than determining the appeal. The Court found the Delegate erred in her application of s 327(3) of the 1998 Act and conflated the concepts of "scales" and "classes" in the Guidelines. The Court held the primary judge erred in failing to find that the Delegate's decision was affected by jurisdictional error. The Certificate of Determination issued by the WCC and the reconsideration decision did not place the Delegate's decision beyond the supervisory jurisdiction of the Court.
"Ballas" Summary

Maguire v Lis-Con Services Pty Ltd [2020] NSWC 3
DOJ: 10 January 2020
The Plaintiff worker, in the course of his employment, suffered an amputation as a result of a workplace accident. The AMS assessed the worker to have 14% WPI with no award for scarring. The Appeal Panel confirmed the MAC. The Court considered whether constructive failure to exercise Panel's jurisdiction. The Court held that the Panel misdirected itself, or failed to ask itself the right question, representing a constructive failure to exercise its jurisdiction. The Appeal Panel ought to have applied a broader approach to the evaluation of impairment due to a skin condition than mere scarring. When applying the broader approach, the Appeal Panel should have taken into consideration that the evidence was capable of supporting the conclusion that the skin condition resulting from the amputation of the thumb did significantly interfere with activities of daily living. The Court further held that any aspect of disfigurement, scarring or skin grafting is to be rated separately in accordance with Section 16.2d of the AMA5 and then combined with the total upper extremity impairment due to amputation. The Court ordered that the matter be remitted to the Registrar for referral to an Appeal Panel.
"Maguire" Summary"

2019 (Number of decisions: 14 at 7 January 2020) [Return to Index]

Secretary, New South Wales Department of Education v Johnson [2019] NSWCA 321
DOJ: 20 December 2019
The Court of Appeal accepted accepted the common law causation principles enunciated in State Government Insurance Commission v Oakley (1990) 10 MVR 570 applied. The primary judge was satisfied that section 323 of the 1998 Act did not apply in the present case and would only apply in respect of an earlier injury and the injury under consideration. The orders sought in the Supreme Court were properly made and the proceedings properly remitted to the Commission to be determined according to law.
"Johnson" Summary

Broadspectrum (Australia) Pty Ltd v Wills [2019] NSWSC 1797
DOJ: 17 December 2020
Amended summons dismissed. The Plaintiff employer submitted that the Panel failed to take into account of the fact that the worker's pre-existing conditions were being effectively managed and controlled by medication. The plaintiff employer further submitted that the reasons of the Panel were inadequate. The court held that no error was made and that the reasons provided by the Panel were adequate.
"Broadspectrum" Summary

Kitanoski v JB Metropolitan Distributors Pty Limited [2019] NSWSC 1802
DOJ: 16 December 2019
The Plaintiff worker, in the course of his employment with the Defendant, suffered an injury when a box fell from a shelf. The Court considered whether it was open to an Appeal Panel to refuse to re-examine the Plaintiff in circumstances where the Approved Medical Assessor noted disparities in history given and effort on examination. The Court further considered whether an Appeal Panel is obliged to receive additional reports served by a Plaintiff after a decision under review. The Court found that the Plaintiff failed to make out any of the grounds and dismissed the summons. The Court ordered the Plaintiff to pay the first Defendant's costs of the proceedings.
"Kitanoski" Summary

Martinovic v Workers Compensation Commission of New South Wales & Ors [2019] NSWSC 1532
DOJ: 8 November 2019
The Plaintiff, in the course of his employment, lifted some heavy exit doors and experienced pain in his lower back. After the AMS assessed the Plaintiff's WPI at 8%, the Appeal Panel assessed the respective WPI at 12%. The Arbitrator refused the Plaintiff's application for a reconsideration made pursuant to section 350 of the 1998 Act. The Court held that the Appeal Panel's decision was vitiated by jurisdictional error and thus the Arbitrator's decision is liable to be quashed. The Court was satisfied of the appropriateness to extend time to seek judicial review of the Appeal Panel's decision and to grant the relief sought regarding the Arbitrator's decision.
"Martinovic" Summary

Bosch v McCain Foods (Australia) Pty Ltd [2019] NSWSC 1390
DOJ: 15 October 2019
The Appellant, in the course of her employment, lifted a heavy box and experienced sudden severe pain as well as painful symptoms in her pelvic region. The Appellant underwent prolapse surgery involving hysteroctomy. The Court held that the Appeal Panel's certificate contained error by failing to provide any explanation for agreeing with the conclusion of the AMS that the hysterectomy was an elective procedure, nor, for concurring with the AMS's findings that the hysterectomy was not the result of the work injury. The Court held that as a result, there was a failure on the part of the Appeal Panel to exercise the jurisdiction conferred.
"Bosch" Summary

Ljubisavljevic v Workers Compensation Commission of New South Wales [2019] NSWSC 1358
DOJ: 9 October 2019
Appellant suffered neck and left shoulder injuries while moving boxes at work and consequential injured her right shoulder and the digestive system. The AMS assessed the worker's whole person impairment to be 14% which was below the threshold for an award of damages. Applicant's appeal of the AMS' decision on incorrect criteria and a demonstrable error was affirmed by an Appeal Panel. Appellant's application to reconsider this determination was refused by an Arbitrator. The plaintiff unsuccessfully challenged the Arbitrator's and Appeal Panel's decisions. HELD – APPEAL DISMISSED.
"Ljubisavljevic" Summary

Ziraki v The Australian Islamic House Liverpool Area [2019] NSWSC 1158
DOJ: 9 September 2019
The Plaintiff's appeal seeking judicial review from a Medical Appeal Panel was dismissed. The Court found that in order to re-examine a plaintiff, the Appeal Panel must first have identified an error in the MAC, which in this case the Appeal Panel declined to do. The Court further held that he Appeal Panel was entitled to determine that the plaintiff did not satisfy the criteria for scenario 1 carpal tunnel syndrome, governed by p 495 AMA5 Guides
"Ziraki" Summary

Hanna v Delta Electrical and Security Pty Ltd [2019] NSWSC 1127
DOJ: 5 September 2019
Appellant suffered an injury to his right ankle and his cervical spine on 21 January 2016 in the course of his employment with the defendant when he fell from a ladder; Appellant made a claim for lump sum

compensation and was assessed as suffering from a 11% WPI of the right lower extremity, scarring and consequential condition in the cervical spine at 0% WPI; delegate of the Registrar satisfied that a ground of appeal was made out and the delegate referred the appeal to the Appeal Panel; the Appeal Panel confirmed the certificate of the AMS; Appellant appealed to Supreme Court in respect of assessment of the cervical spine; Judicial review; application to set aside Appeal Panel decision on grounds of jurisdictional error and/or error on the face of the record; the ground 2 failure to consider whether there was evidence of a herniated disc was not made out causing no error of law; the grounds 1 and 4 failure to properly consider the plaintiff's argument that he satisfied the criteria for DRE Category II was also not made out causing no error of law; the ground 3 failure to give reasons why alternative criteria for DRE Category II were not met was also not made out causing no error of law; the application for judicial review fails; the summons filed 27 June 2019 is dismissed; the plaintiff is to pay the first defendant's costs on an ordinary basis; HELD – APPEAL DISMISSED.
"Hanna" Summary

Thomas Gray v Geoff Groom Building Pty Ltd [2019] NSWSC 1081
DOJ: 22 August 2019
Appellant suffered an injury to his left hand on 21 October 2015 in the course of his employment with the defendant while using a circular saw; partial amputation through the proximal phalanx of his left little finger and severed tendons in the fourth and fifth fingers; Apellant underwent multiple surgical procedures including the taking of skin grafts from his left thigh which were then grafted to the back of his left hand; Appellant made a claim for lump sum compensation and was assessed as suffering from a 10% WPI of the left upper extremity and consequential scarring of 3% WPI; Appellant retained Professor Alan Meares who expressed the view that Mr Gray's scarring equated to 9% WPI and a 13% WPI of the left hand; Appellant appealed to Supreme Court in respect of scarring finding; Judicial review; application to set aside Appeal Panel decision on grounds of jurisdictional error or error of law on the face of record; whether medical Appeal Panel entitled to rely on medical examination by one of its members; significance of "clinical judgment"; whether Panel failed to make findings or give reasons; Campbelltown City Council v Vegan considered; whether Panel failed to address substantial argument; whether appeal panel misapplied workers compensation guidelines; Held - APPEAL DISMISSED.
["Gray" Summary]

Johnson v NSW Workers Compensation Commission [2019] NSWSC 347
DOJ: 3 May 2019
The Court held that the Appeal Panel's certificate contained error in regards to the issue of apportionment between the subject psychological work injury (with NSW Education) and a later psychological injury sustained with a subsequent employer (Aboriginal Hostels Ltd). The Appeal Panel had revoked the MAC because of the incorrect use by the AMS of the mechanism provided for in s 323 of the 1998 Act. Instead of applying s 323 according to its terms (which relate to a pre-existing condition) the AMS had applied those provisions to the subsequent Hostels injury. The Appeal Panel held that the psychological injury sustained in the worker's post-employment significantly contributed to her WPI and apportioned WPI accordingly. The Court held that the task of assessing WPI does not involve any process of apportionment between injuries, where there was no break in the causal chain, and the Appeal Panel was in error. The Court also found that, although the Appeal Panel failed to clearly identify the condition which was diagnosed, and which gave rise to the whole person impairment, in the unusual circumstances of this case the condition could readily be inferred, and the Appeal Panel was not in error in that regard. The Court ordered the matter to be remitted to the Commission.
["Johnson" Summary]

Gatt v State of New South Wales [2019] NSWSC 451
DOJ: 24 April 2019
The court dismissed the Plaintiff's judicial review of decision of Appeal Panel. The Appeal Panel revoked the MAC and issued a new certificate on the basis that AMS had erred in not applying a s 323 deduction. The worker sought judicial review on the basis that the Appeal Panel exceeded the limitation upon its powers imposed by s 328(2). The court held that the grounds were not made out and that the AMS had not applied incorrect criteria. The Appeal Panel's MAC was confirmed.
["Gatt" Summary]

Pascoe v Mechita Pty Ltd [2019] NSWSC 454
DOJ: 24 April 2019

The Court held that the Decision of the Medical Appeal Panel was void and of no effect on the basis that the Plaintiff worker had been denied procedural fairness. The Appeal Panel applied the ISO (International Organisation for Standardisation) tables. The Plaintiff worker submitted that he had never seen the ISO tables referred to and therefore had no opportunity to make submissions to the Panel on the ISO tables which were the basis of the Panel's decision. Button J relied on Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326; [2015] HCA 40 to find that there was a stricter standard of procedural fairness owing to the financial consequences for the plaintiff should his medical assessment fall below 10% WPI. The court also held that the decision-maker can consider new evidence where it is common knowledge between the parties but the ISO tables did not meet this description.

["Pascoe" Summary]

Ballas v Department of Education (State of NSW) [2019] NSWSC 234
DOJ: 8 March 2019
The Court upheld the Delegate of the Registrar's decision that the application to appeal against the MAC should not proceed. The plaintiff sustained a significant psychological injury during the course of her employment with the respondent. The plaintiff submitted that the Delegate failed to consider the submission that the AMS took into account irrelevant considerations when assessing the PIRS categories. The Court was satisfied that the Delegate did not misinterpret of fail to understand the plaintiff's submissions. The summons was dismissed and the MAC confirmed.
["Ballas" Summary]

Wentworth Community Housing Limited v Brennan [2019] NSWSC 152
DOJ: 27 February 2019
The decision of the Delegate of the Registrar in not allowing the employer's appeal quashed. The Court found that the Delegate had erred in finding that the AMS had regard to the material placed before him, where the AMS had not referred to the discrepancy between the claimant's evidence and the surveillance and social media reports submitted by the employer. The Court held that the Delegate had offered an explanation for, rather than a consideration of, the error alleged that the AMS had overlooked or failed to consider material in evidence. The Court found that the Delegate had misconstrued his statutory task.
["Wentworth" Summary]

2018 (Number of decisions: 15) [Return to Index]

Vannini v Worldwide Demolitions Pty Ltd [2018] NSWCA 324
DOJ: 17 December 2018
The Court of Appeal found that the Panel had implicity found error in the AMS MAC when making a 50% deduction. The Court of Appeal held that there is no "fixed and formulaic way" in which the Panel must make a finding of error, and that the error in the MAC was capable of being demonstrated and the Panel found so by reference to the relevant evidence before the AMS.
["Vannini CA" Summary]

State of New South Wales v Ali [2018] NSWSC 1783
DOJ: 21 November 2018
The plaintiff's summons seeking judicial review of the Delegate's decision was dismissed. The Court found that the addititonal relevant information the employer sought to rely upon was not qualitatively different from the information available to the AMS. Section 327(3)(b) contemplates more than mere quantitative difference. The Court was also not satisfied that the information could not reasonably have been obtained prior to the assessment.
["Ali" Summary]

Elsworthy v Forgacs Engineering Pty Ltd [2018] NSWSC 1638
DOJ: 31 October 2018
The Court dismissed the summons of the plaintiff for review of the MAC and MAP decision. The Court found that the Panel was not required to conduct an independent clincical examination of the plaintiff, where the

Panel had found no error on the part of the AMS in relation to the lack of signs presented for a diagnosis of CRPS.
["Elsworthy" Summary]

Hearne v Spamil Discretionary Trust [2018] NSWSC 1631
DOJ: 30 October 2018
The Court found an error of law on the face of the record in relation to the Appeal Panel's decision. The Court found that the Panel did not consider whether the worker had reached MMI, or if they did, the Panel did not provide reasons for such a conclusion. The Court found jurisdictional error insofar as the Panel was required to find that the plaintiff was MMI before they could engage in an assessment of impairment.
["Hearne" Summary]

Cincotta v Police Citizens Youth Clubs NSW Ltd & Ors [2018] NSWSC 1588
DOJ: 23 October 2018
The plaintiff's appeal was dismissed, with the Court finding that the Panel had asked itself the correct question and carried out its statutory task. The Panel upheld the finding of the AMS that the worker's left foot drop was a consequence of pre-existing peripheral neuropathy and not a ratable impairment. The Court found that the AMS and Panel were required to engage in an assessment of causation in order to discharge their statutory task.
["Cincotta" Summary]

Chalkias v State of New South Wales [2018] NSWSC 1561
DOJ: 17 October 2018
The Court dismissed the plaintiff's appeal of a Medical Appeal Panel decision on the basis that there was no error of law or jurisdictional error. The Court found that the reasoning of the Medical Appeal Panel demonstrated that it correctly understood its jurisdiction. The Court was satisfied that having identified error, the Medical Appeal Panel was entitled to review the assessment in respect of "self care and personal hygiene".
"Chalkias" Summary

Mercy Connect Limited v Kiely [2018] NSWSC 1421
DOJ: 21 September 2018
The second Appeal Panel's decision was set aside and the matter remitted to the Commission. In this instance, the Court found that the Panel had failed to exercise its statutory task and misconstrued its statutory duty. The Court found that the Panel failed to address the grounds of appeal raised by the appeallant, and that the Panel incorrectly conducted a re-examination of the injured worker without first identifying a demonstrable error.
["Kiely No 2" Summary]

Broadspectrum (Australia) Pty Ltd v Fiona Louise Wills [2018] NSWSC 1320

DOJ: 31 August 2018
The Appeal Panel acknowledged that the AMS had failed to provide reasons for making only a 1/10th deduction for the worker's pre-existing condition. However, the Panel did not conduct a review, but rather engaged in an exercise justifying the final assessment of the AMS. The Panel misconstrued its statutory task by simply filling in the gaps omitted by the AMS.
["Wills" Summary]

Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the late Ryan Messenger [2918] NSWCA 178
Appeal upheld
DOJ: 16 August 2018
The Panel's decision was set aside and the application to appeal was dismissed. The Court of Appeal overturned the decision to award the worker was 100% WPI on the basis that in order for there to be "permanent impairment" there must be a continued and enduring experience of living. The term does not encompass an impairment resulting from an injury so serious that death will inevitably follow, within a short time.

["Mexon Appeal" Summary]

Ingham Enterprises Pty Ltd v Belokoski [2018] NSWSC 1233

DOJ: 10 August 2018

The appellant employer had sought an oral hearing before the Appeal Panel, and a re-examination of the worker by a member of the Panel. The Panel mistakenly believed that the appellant had consented to the matter being determined without a further medical examination. The Court found that a factual error had been committed by the Panel, and that they were required to consider the requests for oral hearing and re-examination. The Court held that the Panel had failed to take into account a relevant consideration.
["Belokoski" Summary]

Cobar Shire Council v Harpley-Oeser [2018] NSWSC 964

DOJ: 27 June 2018

The AMS commented that the worker had developed a chronic pain condition, but excluded a diagnosis of complex regional pain syndrome. The AMS assessed the worker on the basis of loss of range of motion. The Panel upheld the MAC. The Court found that the Panel had committed a jurisdictional error, in failing to address an issue raised by the appellant, namely that the AMS had impermissibly assessed chronic pain as part of the worker's WPI.
["Harpley-Oeser" Summary]

Tomislav & Ranka Divljak (trading as DTR Ceilings) v Workers Compensation Commission & Ors [2018] NSWSC 760

DOJ: 28 May 2018

The Panel rejected the appeal of the employer, where the AMS had assessed a body part not claimed by the worker. The Court held that referral of the digestive system did not include the anus, and that the employer would be subject to a "practical injustice" on the basis of an assessment on which it had no notice, no opportunity to address and no opportunity to provide medical evidence. The Panel's decision was quashed on the basis that it did not engage with the argument of the employer beyond simply referring to it. The Court held that this constituted a denial of procedural fairness and a constructive failure to exercise jurisdiction.
["Tomislav" Summary]

Vannini v Worldwide Demolitions Pty Ltd [2018] NSWSC 572

DOJ: 3 May 2018

Whether the Panel erred in assessing a 50% deduction for pre-existing injury, where the original AMS had made nil deduction. The Court held that the Panel had done more than simply substitute their preferred view, and had correctly made a finding of factual error. In considering the evidence, the Panel determined that the AMS's finding was an error of fact, and this is within jurisdiction.
["Vannini" Summary]

Nicol v Macquarie University [2018] NSWSC 530

DOJ: 27 April 2018

Worker had suffered psychological injury with respondent employer, and a further aggravation of symptoms with a second employer. The Panel overturned the AMS MAC on the basis that the AMS had not considered the "injury" sustained whilst with the second employer. Whether the Panel had misapplied its statutory task in relation to causation. The Court held that the Panel had failed to make its decision in accordance with statutory requirements, including s9A(1) of the 1987 Act. The Court held that the worker's improvement in symptoms before commencing employment with the second employer did not constitute the required novus actus to snap the causative connection.
["Nicol" Summary]

Glenn William Parker v Select Civil Pty Limited [2018] NSWSC 140

DOJ: 21 February 2018

The worker sought review on the basis that the Appeal Panel did not identify any real error when overturning the AMS's MAC. Whether the PIRS categories had been misapplied by the original AMS. The Court held that the findings of the AMS were open on the material before him, and that there must be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense.

["Parker" Summary]

2017 (Number of decisions: 10) [Return to Index]

Department of Education v TF [2017] NSWSC 1596
DOJ: 23 November 2017
Whether the Panel is limited to considering grounds of appeal identified by the Registrar as "made out." Whether the Panel's finding of error in the MAC a mere "professional disagreement." The Court held that the Panel is not limited to considering grounds of appeal identified by the Registrar as "made out on the fact of the application." Held that there is no obligation upon the Registrar to identify more than one ground of appeal, and that that the Panel may consider all grounds of appeal submitted. Held that the Panel had considered relevant factors in finding error.
["TF"Summary]

Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587
Overturned on appeal
DOJ: 22 November 2017
Whether Panel had erred in assessing a worker at 100% WPI where death resulted shortly after injury. The Court held that Appeal Panel had found evidence establishing that upon injury the worker had suffered a permanent impairment giving rise to an entitlement to compensation under ss9 and 66 of the 1987 Act even though death followed shortly after. The workers death gave rise to a separate entitlement to compensation. This did not amount to double compensation.
["Mexon" Summary]

Mercy Centre Lavington Ltd v Kiely & Ors [2017] NSWSC 1234
DOJ: 14 September 2017
Panel applied s323 deduction where the worker had suffered both primary and secondary psychological injury. The Court held that it was not open to the appeal Panel to use s323of the 1998 Act to determine secondary psychological impairment pursuant to s65A of the 1987 Act. The Court held that the two sections are not intended to work together, and the Panel had made an error of law.
["Mercy Centre" Summary]

Mirarchi v CPA Australia Ltd [2017] NSWSC 1161
DOJ: 31 August 2017
AMS did not assess all injuries referred on the basis that he did not consider the impairments to be related to employment. MAC confirmed on Appeal. Both parties agreed that the MAC ought to be set aside on the basis of jurisdictional error, as it was common ground that both parties had intended all body parts referred to be assessed. The AMS and Panel had missaprehended the ambit of the dispute by considering the declinature notice issued to the worker, which included an IME's opinion as to causation. MAC and MAP set aside.
["Mirarchi" Summary]

Ferguson v State of New South Wales & Ors [2017] NSWSC 887
DOJ: 4 July 2017
Application of PIRS rating for social functioning. The Court held that the Panel had failed to inquire into the critical question of whether the worker's relationship had markedly changed when altering the AMS's assessment. The Court held that the judgment of the AMS could support the initial finding, and the Panel's assessment that the evidence did not support his finding was an error of law.

["Ferguson" Summary]

McKeough v Zoological Parks Board of New South Wales [2017] NSWSC 868
DOJ: 3 July 2017
Court held that both the Panel decision confirming the MAC, and the MAC ought to be quashed as made without jurisdiction. The worker sustained injuries to three body parts with a distinct date of injury for each. Held that the AMS had impermissibly attributed a percentage of impairment in one body part to a different injurious event. In accepting this approach as correct, the Panel had also exceeded jurisdiction.
["McKeough" Summary]

Favetti Bricklaying Pty Limited v Benedek and Anor [2017] NSWSC 417
DOJ: 24 April 2017
Applicant commenced proceedings in the Commission as a threshold dispute only and matter was referred to an AMS. The plain text of s 321(4) of the 1998 Act did not allow the Commission to refer the matter to an AMS where liability was in dispute. Held that this applies to threshold disputes and that the Commission has jurisdiction to determine injury related to a claim for work injury damages. Commission must refer threshold disputes where liability is in issue to an arbitrator before an AMS can make an assessment.
["Benedek" Summary]

Robbie v Strasburger Enterprises Pty Ltd t/as Quix Food Stores & Ors [2017] NSWSC 363
DOJ: 7 April 2017
Whether the gatekeeper misinterpreted Table 4.2 (modifiers for surgery) and clause 4.37 of the SIRA Guidelines. Held that the Guidelines were delegated legislation and the ordinary principles of statutory interpretation apply to their construction. Neither jurisdictional error nor error on the face of the record was disclosed.
["Robbie" Summary]

Ivaneza v Dalsil Constructions Pty Ltd [2017] NSWSC 218
DOJ: 9 March 2017
Whether the AMS failed to give adequate reasons and provide an explanation for comparing the range of motion of the shoulders. Held that the AMS's reasons complied with the test set out *in Wingfoot Australia Partners Pty Ltd v Kocak* and were legally adequate. Held that the proceedings that led to the MAC were settled by way of Consent Orders and it would be inappropriate for the Court to make an order given that there is no medical dispute on foot between the parties.
["Ivaneza" Summary]

Midson v Workers Compensation Commission & Ors (No 2) [2017] NSWSC 147
DOJ: 1 March 2017
Costs of judicial review proceeding where all defendants, including the employer, filed submitting appearances in the substantive proceedings. The plaintiff was successful in the substantive proceedings and sought costs from the employer. Held that no order was to be made in respect of costs of the substantive proceedings. The employer genuinely played no active role in the proceedings and did nothing which put the plaintiff to further costs.
["Midson No. 2" Summary]

2016 (Number of decisions: 12)

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Phillips v JW Williamson and RW Williamson trading as Williamson Bros [2016] NSWSC 1681

DOJ: 30 November 2016

The Panel erred in rejecting the relevant and probative additional material that the worker tendered, unopposed by the employer, to demonstrate the AMS's errors. Application of Wednesbury unreasonableness to the Panel's discretion under s 328(3) of the 1998 Act. The Panel also failed to consider the worker's case that his degree of impairment was not fully ascertainable, given the further investigations being pursued into the cause of his worsening symptoms.

["Phillips" Summary]

Workers Compensation Nominal Insurer v Arcaba [2016] NSWSC 1647

DOJ: 24 November 2016

The AMS complied with the requirements in *Vegan* and discussed the different medical opinions. It cannot be said that a prior medical report, even of the first Panel, was a factor that by law was bound to be taken into account. Differences of clinical judgment could not produce error based on perversity. Inconsistency between *Wingfoot v Kocak* and *Vegan*.

["Arcaba" Summary]

Roads and Maritime Services v Rodger Wilson [2016] NSWSC 1499

DOJ: 14 October 2016

Once the Panel determined to revoke the MAC it was incumbent on the Panel to apply the WorkCover Guides fully in arriving at a fresh assessment. In order to provide the basis for generating a new certificate, the whole matter of the assessment had to be redone. The fact that the worker resides in New Zealand was of no consequence or effect on the Panel's power to request a re-examination.

["Rodger Wilson" Summary]

Midson v Workers Compensation Commission & Ors [2016] NSWSC 1352

DOJ: 23 September 2016

There is no statutory power for the Panel simply to direct the worker to be examined again in order to find error in the MAC. The Panel can only consider the grounds of appeal relied upon by the appellant. Section 328(2) of the 1998 Act extends to "submissions" detailing the grounds of appeal, including any additional submissions requested by the Panel.

["Midson" Summary]

Najjar v Agar Cleaning Services (unreported)

DOJ: 7 September 2016

Panel adopted the examination findings of the AMS. Held that the AMS's examination results were fully articulated in the MAC and the Panel was entitled to treat them as not in contest. As the worker had not asked to be re-examined, it was open to the Panel to reach the same conclusion as the AMS.

["Najjar" Summary]

Fullford v Maccas Ferry Services Pty Ltd [2016] NSWSC 1161

DOJ: 23 August 2016

Interpretation of clause 1.39 of the Guidelines and application of the Combined Values Chart. Held that percentages for disabling or impairing conditions have to be arrived at separately before they are combined under the Chart. Effect of the pre-existing condition of epileptic seizures. Held that reasons of the Appeal Panel were entirely adequate and that Panel's reasons need not be extensive.

["Fullford" Summary]

Drosd v Workers Compensation National Insurer [2016] NSWSC 1053

DOJ: 5 August 2016

Once the Panel determined to set aside the MAC, it was required to undertake a fresh assessment of the worker's whole person impairment in accordance with the Guides. Role of the Panel under s 328 of the 1998 Act. Panel did not err in making a deduction under s 323 greater than 10%. Effect of typographical error.

["Drosd" Summary]

Schofield v Abigroup Limited [2016] NSWSC 954

DOJ: 11 July 2016

Whether the defendant was liable to compensate the worker for hearing loss sustained outside NSW after the deemed date of injury. Court held that the worker's hearing loss was caused by a gradual process predating the deemed date of injury. Therefore, in assessing the degree of permanent impairment as a result of that injury, the AMS was required to make an appropriate adjustment for injury that was the result of the worker's employment outside NSW after the deemed date of injury.

["Schofield" Summary]

The UGL Rail Services Pty Ltd v Attard [2016] NSWSC 911

DOJ: 1 July 2016

Worker submitted that skin disorder would be more in line with a higher level of impairment. Court held that an error suggesting that symptoms should be characterised in a particular way does not amount to a "demonstrable error". Held that an assessment that symptoms fall within a particular specified class or assessed at some particular percentage amount to clinical judgments that ought not to be cavilled with.

["Attard" Summary]

Azzopardi v Liquorland Australia Pty Limited (unreported)

DOJ: 17 June 2016

Court held that the Panel's reasons were entirely inadequate. The Panel provided no scientific reasoning as to how the pre-existing condition would have contributed to the worker's back symptoms in the degree of 50 per cent or in any other degree.

["Azzopardi" Summary]

State of New South Wales (NSW Department of Education) v Kaur [2016] NSWSC 346

DOJ: 29 March 2016

The definition of secondary psychological injury in s 65A (5) of the 1987 Act should be read as meaning a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical work related (s 4) injury. Whether an injury is a secondary or primary psychological injury is one for the Commission to determine and not one for the Panel to determine. Sufficiency of reasons of AMS.

["Kaur" Summary]

Trustees of the Roman Catholic Church for the Diocese of Bathurst v Dickinson [2016] NSWSC 101

DOJ: 24 February 2016

A re-assessment (re-examination) by a Panel can only be made once the Panel determines that the medical assessment certificate contains a demonstrable error. The need for particularity in the "grounds of appeal" referred to in s 328(2) of the 1998 Act. The Panel erred in finding that the AMS had been the worker's treating physician.

["Dickinson" Summary]

2015 (Number of decisions: 12) [Return to Index]

Western Sydney Local Health District v Chan [2015] NSWSC 1968
DOJ: 22 December 2015
It was open to the Panel to infer that the AMS did not feel the need to mention or discuss a supplementary report, particularly when the AMS's task was to assess the worker's condition based on his own clinical assessment of the material. It was not illogical or irrational for the Panel to infer that the AMS considered the supplementary report. The parties knew that the material was before the AMS.
["Chan" Summary]

Cook v City of Sydney [2015] NSWSC 1904
DOJ: 18 December 2015
Section 378 of the 1998 Act does not confer any right or entitlement. Rather, it confers a discretion upon the Panel to correct error, noting that there is no guarantee that an application under s 378 would be granted. The Panel erred in failing to take into account a relevant consideration, namely the adjustment to be made to the level of impairment having regard to the effect of the plaintiff's treatment.
["Cook" Summary]

Woolworths Limited v Howarth [2015] NSWSC 1624
DOJ: 11 November 2015
The fact that the AMS considered the treating doctor's report and came to a different conclusion does not mean that he made a jurisdictional error or exceeded the terms of the referral. It is not appropriate to parse the language of the MAC or to examine the AMS's reasons with a critical eye attuned to error. Like the Panel, an AMS is required to provide the parties procedural fairness
["Howarth" Summary]

Ali v Rockdale City Council [2015] NSWSC 1481
DOJ: 9 October 2015
No reason why the Court should intervene to quash earlier consent orders, particularly when the 1998 Act provided a number of mechanisms whereby such orders could be challenged. One of these mechanisms was an application under s 350(3) for reconsideration. No jurisdictional error was apparent in the consent orders made after the Panel's decision.
["Ali" Summary]

Cullen v Woodbrae Holdings Pty Ltd [2015] NSWSC 1416
DOJ: 28 September 2015
Panel's obligation, or at least power, to "conduct the assessment anew". This obligation arose once the Panel concluded that there was a mathematical error in the assessment. Panel should have addressed the meaning of "condition" in s 323 of the 1998 Act. Panel could not assume that degenerative changes could be addressed under s 323 without identifying whether there was a "condition" that predated any particular point in time.
["Cullen" Summary]

Pereira v Siemens Ltd [2015] NSWSC 1133
DOJ: 21 August 2015
It cannot be assumed that the mere existence of a pre-existing injury means that it has contributed to the current impairment. Accordingly the facts upon which a pre-existing injury is found must be clearly identified. Panel must have determined whether the pre-existing injury made a difference in the degree of the whole person impairment. In making a s 327 deduction there was no evidence before the Panel that deafness occurs in equal proportions over time.
["Pereira" Summary]

Moy v Emoleum Services Pty Ltd [2015] NSWSC 1062

DOJ: 7 August 2015

Panel's deduction was based on an assumption or hypothesis. Panel did not elaborate on the extent of the pre-existing condition that supported a four-fifths deduction, nor did the Panel indicate how the 10 per cent assumption was at odds with the available evidence. Even if intuition from experience forms some part of the process, reasons must be provided for the conclusion reached. Panel failed to refer to the words of s 323 of the 1998 Act in performing its task.

["Moy" Summary]

Jenkins v Ambulance Service of New South Wales [2015] NSWSC 633

DOJ: 26 June 2015

A mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review. In assigning a class of impairment to each scale under PIRS, the AMS is not restricted to the examples of activities listed in the tables.

["Jenkins" Summary]

Ryder v Sundance Bakehouse [2015] NSWSC 526

DOJ: 7 May 2015

It is not necessary that a pre-existing condition give rise to rateable percentage impairment for a deduction under s 323. A proportion of the impairment would be due to the pre-existing condition only if it can be said that the condition made a difference to the resulting WPI. The Panel must be satisfied that but for the pre-existing abnormality, the degree of impairment resulting from the work injury would not have been as great. Further, the jurisdiction of the Court does not extend to reviewing the legality of a MAC.

["Ryder" Summary]

Wilkinson v C & M Leussink Pty Ltd [2015] NSWSC 69

DOJ: 17 February 2015

There had been a number of jurisdictional errors in the Panel's decision. These errors were not cured by reconsideration and therefore both decisions were quashed. Errors include the Panel's failure to make a deduction for the pre-existing condition of "arthritis" under s 323(1) and the Panel's failure to put the parties on notice when it intended to consider the role of "arthritis", a new issue, as an explanation for the restriction of movement in the applicant's hip.

["Wilkinson" Summary]

Sydney Night Patrol & Inc Co v Absolom [2015] NSWSC 60

DOJ: 12 February 2015

When a party requests to make oral submissions at a hearing it is a mandatory consideration and one that the Panel is bound to take into account. Failure to take into consideration the request of a party to make oral submissions at a hearing constitutes a jurisdictional error.

["Absolom" Summary]

Kuzet v The Registrar of the Workers Compensation Commission [2015] NSWSC 4

DOJ: 30 January 2015

The question of whether the degree of permanent impairment is fully ascertainable is quintessentially a matter of clinical judgment, and not legal analysis. Further, the question of whether a feature, such as "abnormal illness behaviour", is a significant feature of the degree of impairment is properly within the realm of the AMS's clinical judgment, and not a matter for legal analysis.

["Kuzet" Summary]

2014 (Number of decisions: 9)

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Kolundzic v Quickflex Constructions Pty Ltd [2014] NSWSC 1523
DOJ: 7 November 2014
The terms of the WorkCover Guides provide some scope for the exercise by medical specialists of clinical judgment. However, when it comes to the determination of the "degree of permanent impairment that results from the injury" the tables, graphs and methodology given in the WorkCover Guides and AMA 5 must be complied with to the exclusion of the exercise of individual clinical judgment. Nothing in the 1998 Act suggests that a party having availed him, her or itself of an application for reconsideration may not, if unsuccessful, exercise the statutory right of appeal under s 327 of the 1998 Act.
["Kolundzic" Summary]

Inghams Enterprises Pty Limited v Vojnikovich [2014] NSWSC 1519
DOJ: 4 November 2014
The exercise of the Supreme Court's supervisory jurisdiction over the Commission depends on relevant error being established. Despite the terms of the parties' agreement to resolve the dispute, no error was established either by consent or by argument between the parties.
["Vojnikovich" Summary]

El Masri v Woolworths Ltd [2014] NSWSC 1344
DOJ: 29 September 2014
The Panel's decision adequately demonstrated its consideration of the submission addressed to it on appeal. The Panel did not make an error of law when it used the expression "clinical grounds" as the basis of its assessment of the contribution of the pre-existing condition to the worker's impairment. The Panel was required to draw upon its expertise and exercise its clinical judgment in making its decision.
["El Masri" Summary]

Dening v Oltoy Pty Ltd trading as Noble Toyota [2014] NSWSC 1224
DOJ: 5 September 2014
The Panel misconstrued its jurisdiction in failing to take in account additional evidence.The AMS acted beyond jurisdiction in assessing permanent impairment where it was not in dispute in the proceedings, nor was it referred to the AMS for assessment. The Panel's consideration of s 323 of the 1998 Act and the resulting deduction fell outside the ambit of referral by the Registrar.
["Dening" Summary]

Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd [2014] NSWCA 264
(Appeal dismissed)
DOJ: 14 August 2014
The Panel's decision was valid and whether loss of vision was "as a result of" the work injury was a "medical dispute" within s 319 of the 1998 Act to be determined by the Panel. The primary judge did not err in holding that there was no jurisdictional error on of law on the face of the record of the panel's reasons. Because the AMS and the Panel found that no permanent impairment resulted from the injury, the Panel did not fail to apply the test referred to in s 323 of the 1998 Act.
["Bindah" Summary]

Workers Compensation Nominal Insurer v Bui [2014] NSWSC 832
DOJ: 20 June 2014
The law does not require the Panel to make a formal determination to "admit" material into evidence before taking it into account. Having determined to allow "fresh evidence" under s 328(3) of the 1998 Act, the Panel was plainly obliged to offer the other party an opportunity to respond to it as an aspect of procedural fairness, whether or not the response was "fresh evidence" able to be given under s 328(3). A "hearing de novo" under s 328(2) is not a fixed procedure within the power of the Panel, where the failure to adopt such procedure might amount to error in law.
["Bui" Summary]

Inghams Enterprises Pty Ltd v Lakovska [2014] NSWCA 194

DOJ: 18 June 2014

The Panel did not err in law by declining to convene an oral hearing in the matter. Although the Panel must take into account a party's expressed desire for an oral hearing, such a decision is clearly open to the Panel in the absence of a special reason.

["Lakovska (NSWCA)" Summary]

RailCorp NSW v Registrar of the Workers Compensation Commission of NSW [2014] NSWCA 108

(Appeal dismissed)

DOJ: 8 April 2014

The delegate's decision was not a refusal to exercise jurisdiction or a denial of the existence of jurisdiction. Rather, the Registrar's delegate was exercising his jurisdiction by making a decision not to alter the original decision. No reason why there would be any constraint on the Registrar's power to reconsider a referral to a different specialist, at least at any time prior to the completion of an examination by the AMS.

["RailCorp" Summary]

Greater Western Area Health Service v Austin [2014] NSWSC 604

DOJ: 8 May 2014

The Panel erred by confining the referral order and inturn its jurisdiction, as well as the jurisdiction of the AMS, in a wholly unjustified way. The implicit finding that liability and causation matters are within the powers of arbitrators in the bifurcated system, and not of approved medical specialists is clearly contrary to the decision of the Court of Appeal in *Haroun* and the considered dictum of Leeming JA in *Tolevski.*

["Austin" Summary]

2013 (Number of decisions: 9)

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Railcorp NSW v Registrar of the WCC of NSW [2013] NSWSC 321
DOJ: 26 March 2013
Sections 350(3) and 378(1) of the 1998 Act give the Registrar the power to reconsider. The reconsideration of a decision of which AMS to appoint was a valid exercise of the reconsideration power by the Registrar and should stand. No issue estoppel arose in respect of a claim for further lump sum compensation because the degree of whole person impairment is a circumstance capable of change. The role of an AMS is to give an opinion as to the degree of permanent impairment at the time of the examination.
["Railcorp" Summary]

Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liquidation) [2013] NSWSC 365
DOJ: 18 April 2013
The Panel erred by merely adopting the reasons and conclusions of the AMS. The Panel did not correctly consider and apply section 323 of the 1998 Act. As there was a dispute on the evidence as to the appropriate deduction to be made the AMS was required to explain what evidence was preferred.
["Elcheikh" Summary]

Galluzzo v Little [2013] NSWCA 116
DOJ: 14 May 2013
It is permissible for a medical assessment to be undertaken before all impairments suffered as a result of the injury are fully ascertainable. Section 328(1) does not compel the Panel to conduct a hearing, they have discretion to decide how the case should proceed. There was no denial of procedural fairness by the failure of the Panel to conduct an oral hearing or call for further submissions.
["Little" Summary]

Fire & Rescue NSW v Clinen [2013] NSWSC 629
DOJ: 28 May 2013
The Panel made the basis of its decision legally and factually clear. Those reasons were adequate to discharge their legal duty to give reasons.
["Clinen" Summary]

Gardner v Rail Corporation New South Wales [2013] NSWSC 649
DOJ: 30 May 2013
The Registrar was not required to give reasons for her decision to refer the matter to a Panel. While the Arbitrator found there was no evidence to establish injury had not resolved, it was open to the Panel to come to a different conclusion. There was no denial of procedural fairness.
["Gardner" Summary]

Trustees of the Maronite Sisters of the Holy Family t/as Our Lady of Lebanon School v Carpenter [2013] NSWSC 1149
DOJ: 22 August 2013
The Panel raised an issue that did not form part of the basis for the appeal. Although the Panel was entitled to refer to the contents of the Application, the Panel acted beyond its powers by pointing out an omission in the AMS assessment. In accordance with section 328(2) of the 1998 Act and *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116, the parties should have been given an opportunity to be heard on the issue.
["Carpenter" Summary]

Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd [2013] NSWSC 1290
Confirmed on appeal; see Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd [2014] NSWCA 264
DOJ: 11 September 2013
The Panel did not make an incorrect assumption or non-jurisdiction error in relation to interpretation of arbitrator's consent orders concerning the nature of plaintiff's injury. There was no misapplication of the test of causation by the Panel.
["Bindah" Summary]

Inghams Enterprises Pty Limited v Valentina Lakovska [2013] NSWSC 1489

DOJ: 11 October 2013

The Panel did not travel beyond the boundaries of the grounds of appeal referred to it. Conducting a review of the material before it, with the purpose of detecting error and correcting it, did not point to a hearing *de novo* conducted by the Panel. Guided by the question of whether a matter is capable of determination on the papers, the decision to hold an assessment hearing is a matter within the discretion of the Panel.
["Lakovska" Summary]

NSW Police Force v Registrar of the Workers Compensation Commission of NSW [2013] NSWSC 1792

DOJ: 11 December 2013

The Panel had erred in conducting a re-examination of the worker before reaching the conclusion that the AMS had made a demonstrable error. If an assessment can be carried out in the course of an appeal, that assessment cannot take place before the Panel has determined that there is an error in the certificate. The words in section 328(2) are directed to greater particularity than simply categorising the appeal as being within one or more of the grounds in section 327(3).
["NSW Police Force" Summary]

2012 (Number of decisions: 1)

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TJ Galluzzo and SJ Galluzzo t/as Riverwood Chemworld Chemist v Dianne Little (No 2) [2012] NSWSC 324 **Appeal dismissed / cross appeal upheld**
DOJ: 5 April 2012
Formal orders made that the Appeal Panel approached the consideration of the medical appeal on the basis which accords with the proper construction of the legislation; the Appeal Panel's errors were errors within jurisdiction, but it failed to provide adequate reasons; order that declaration be made that the Appeal Panel's decision involved error on the face of the record, but the summons should otherwise be dismissed; plaintiff ordered to pay 70% of respondent's costs because the plaintiff failed in the main basis of the medical appeal and the judicial review, that matter being the construction of the provisions of the legislation.
["Little (No 2)" Summary]

2011 **(Number of decisions: 7)** **[Return to Index]**

TJ Galluzzo and SJ Galluzzo t/as Riverwood Chemworld Chemist v Dianne Little [2011] NSWSC 1581
DOJ: 19 December 2011
Denial of procedural fairness: Appeal Panel ought to have provided parties with opportunity for further submissions if no oral hearing is conducted, but parties not entitled to oral hearing just because they demand one; Appeal Panel's reasons inadequate; method of assessment for multiple impairments where one (or more) condition(s)/body part(s) had not reached MMI (construction of section 322 of the 1998 Act and paragraph 1.21 of the WorkCover Guides); implications of Registrar's role and function as gatekeeper on Appeal Panel's obligations; discretion of Appeal Panel to conduct assessment hearing; in circumstances where submissions inadequate, open to Appeal Panel to conduct assessment afresh
["Little" Summary]

Cortese v Cumberland Ford Pty Ltd & Ors [2011] NSWSC 1260
DOJ: 21 October 2011
Evidence does not fall under section 327(3)(b) if it merely restates evidence already given on the basis that if it had been put in a different way it may have been accepted.
["Cortese" Summary]

Vitaz v Westform (NSW) Pty Ltd [2011] NSWCA 254
(Appeal dismissed)
DOJ: 29 August 2011
No revieweable error in the decision of Appeal Panel; AMS's duty to provide reasons properly discharged; AMS's reasons need not be comprehensible to a person with no medical expertise
["Vitaz NSWCA" Summary]

Lukacevic v Coates Hire Operations Pty Limited [2011] NSWCA 112
(Appeal dismissed) **(Special Leave to Appeal to the High Court of Australia refused)**
DOJ: 6 May 2011
No procedural unfairness; no *Wednesbury* unreasonableness; WorkCover Guideline 43 and section 328 of the 1998 Act; discretion exercised in preliminary review; Statement of worker is additional information, not fresh evidence under section 328(3) of the 1998 Act
["Lukacevic NSWCA" Summary]

Ojinnaka v ITW Australia Pty Ltd [2011] NSWSC 208
DOJ: 17 March 2011
Assessment not to be undertaken until the degree of permanent impairment is fully ascertainable; AMS's MAC issued beyond power to this extent
["Ojinnaka" Summary]

Maricic v The Registrar, Workers Compensation Commission & Ors [2011] NSWCA 42
(Appeal dismissed)
DOJ: 11 March 2011
Report of examination adverse to worker; report not shown to worker prior to being acted on by Medical Appeal Panel; no breach of obligation of Medical Appeal Panel to afford procedural fairness
["Maricic NSWCA" Summary]

2011 (Continued)

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CSR Limited v Jamie Leonard Smith [2011] NSWSC 68
DOJ: 23 February 2011
Medical Appeal Panel provided opportunity to parties to substantiate the need for assessment hearing; no denial of procedural fairness
["CSR Limited v Smith" Summary]

2010 (Number of decisions: 13) [Return to Index]

George v Wombo Lane Pty Limited [2010] NSWSC 660
DOJ: 24 June 2010
Demonstrable error strictly read: "error that is readily apparent from an examination of the MAC"; role and function of the Registrar
["George" Summary]

Vitaz v Westform (NSW) Pty Limited and Ors [2010] NSWSC 667
Confirmed on appeal; see Vitaz v Westform (NSW) Pty Ltd [2011] NSWCA 254)
DOJ: 22 June 2010
Confirms *Cole*; standard of reasons; procedural fairness; re-examination of worker
["Vitaz" Summary]

Strbac v QBE Insurance (Australia) Limited [2010] NSWSC 602
DOJ: 8 June 2010
Standard of reasons; hyper-critical approach "with eyes keenly attuned to perception of error"
["Strbac" Summary]

Lukacevic v Coates Hire Operations [2010] NSWSC 551
(Confirmed on appeal; s**ee Lukacevic v Coates Hire Operations Pty Limited [2011] NSWCA 112)**
DOJ: 4 June 2010
WorkCover Guideline 43; confirms *Summerfield*; procedural fairness
["Lukacevic SC" Summary]

Jones v The Registrar WCC [2010] NSWSC 481
DOJ: 27 May 2010
Standard of reasons; role of AMS not as medical expert that decides on conflicting evidence; confirms *Bojko*
["Jones" Summary]

Bukorovic v The Registrar of the WCC [2010] NSWSC 507
DOJ: 25 May 2010
Compliance with *WorkCover Guides for Evaluation of Permanent Impairment*; Appeal Panel's duty to give reasons
["Bukorovic" Summary]

Energy Australia v Butler [2010] NSWSC 487
DOJ: 20 May 2010
Denial of procedural fairness; written or oral submissions – depends on circumstances of case
["Butler" Summary]

Fairfield City Council v Janet Brear & Ors [2010] NSWSC 480
DOJ: 20 May 2010
Denial of procedural fairness; *de novo* hearing vs re-hearing
["Brear" Summary]

2010 (Continued)

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Prasad v Workers Compensation Commission [2010] NSWSC 418
DOJ: 7 May 2010
Conduct of Appeal Panel's decision-making process; matters to be taken into consideration by Appeal Panel
["Prasad" Summary]

Symbion Health Limited v Hrouda & Anor [2010] NSWSC 295
DOJ: 21 April 2010
WorkCover Guideline 45; assessment hearing; procedural fairness
["Hrouda" Summary]

NSW Police Force v Derek Fleming [2010] NSWSC 216
DOJ: 25 March 2010
A demonstrable error is not fresh evidence; section 327(3)(d) of the 1998 Act requires a party "to demonstrate an arguable case of error appearing on the face of the MAC"; error may be of fact or law but must be more than one that depends upon evidence that is outside sections 327(3)(a) and/or 327(3)(b)
["Fleming" Summary]

Cole v Wenaline Pty Limited [2010] NSWSC 78
DOJ: 23 February 2010
Application of section 323 of the 1998 Act cannot be based on "assumption"
["Cole" Summary]

Hatch v Peel Valley Exporters Pty Ltd [2010] NSWSC 23
DOJ: 22 February 2010
Procedural fairness
["Hatch" Summary]

2009 (Number of decisions: 6)

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Borg v The Registrar Workers Compensation Commission [2009] NSWSC 1389
DOJ: 16 December 2009
AMS's reasons for reconsideration
["Borg" Summary]

Maricic v Registrar, NSW Workers Compensation Commission [2009] NSWSC 925
(Confirmed on appeal, see Maricic v The Registrar, Workers Compensation Commission & Ors [2011] NSWCA 42)
DOJ: 8 September 2009
Role and function of Appeal Panel
["Maricic SC" Summary]

Zeineddine v Matar [2009] NSWSC 646
DOJ: 10 July 2009
100% deduction under s 323 of the 1998 Act
["Zeineddine" Summary]

Markovic v Rydges Hotels Limited and Anor [2009] NSWCA 181 **(Appeal upheld)**
DOJ: 7 July 2009
Appeal Panel may depart from grounds of appeal, but must provide parties procedural fairness; Procedure on medical appeals; WorkCover Guidelines 45 and 46
["Markovic NSWCA" Summary]

Bojko v ICM Property Service Pty Ltd & Ors [2009] NSWCA 175 **(Appeal dismissed)**
DOJ: 2 July 2009
Procedure on medical appeal; WorkCover Guideline 45
["Bojko NSWCA" Summary]

Vekic v Registrar of Workers Compensation Commission and Ors [2009] NSWSC 552
DOJ: 18 June 2009
AMS failed to provide reasons
["Vekic" Summary]

2008 (Number of decisions: 11)

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Bojko v ICM Property Service Pty Ltd [2008] NSWSC 907 **(Confirmed on appeal; see Bojko v ICM Property Service Pty Ltd & Ors [2009] NSWCA 175)**
DOJ: 11 September 2008
Procedure on medical appeal; WorkCover Guideline 45
["Bojko SC" Summary]

Bunnings Group Limited v Peter Howard Hicks & Ors [2008] NSWSC 874
DOJ: 5 September 2008
Role and function of Registrar as gatekeeper; Registrar's reasons; Demonstrable means "capable of being demonstrated"
["Hicks" Summary]

Robertson v Registrar of the Workers Compensation Commission & Beny's Joinery Pty Ltd [2008] NSWSC 918
DOJ: 5 September 2008
Consideration of "special circumstances"; departure from *Aguiar*
["Robertson" Summary]

Haroun v Rail Corporation New South Wales & Ors [2008] NSWCA 192 **(Appeal dismissed)**
DOJ: 18 August 2008
Role and function of Arbitrator
["Haroun NSWCA" Summary]

Cameron v The Registrar of the Workers Compensation Commission of New South Wales [2008] NSWSC 704
DOJ: 14 July 2008
Registrar's role as gatekeeper; reconsideration by delegates of the Registrar
["Cameron" Summary]

Treverrow v Registrar, WCCC [2008] NSWSC 632
DOJ: 25 June 2008
Incorrect criteria: referable to criteria in the WorkCover Guidelines; Demonstrable error: error readily apparent from an examination of the MAC
["Treverrow" Summary]

Siddik v WorkCover Authority of NSW [2008] NSWCA 116 **(Appeal upheld)**
DOJ: 30 May 2008
Appeal Panel's powers under section 328: not limited to correcting errors identified by appellant; Procedural fairness
["Siddik NSWCA" Summary]

2008 (Continued)

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Mahenthirarasa v State Rail Authority of New South Wales [2008] NSWCA 101 **(Appeal upheld)**
DOJ: 21 May 2008
Registrar's test under section 327(4): "exists" or "made out"
["Mahenthirarasa NSWCA" Summary]

Marina Pitsonis V Registrar of the Workers Compensation Commission & Anor [2008] NSWCA 88 **(Appeal dismissed)**
DOJ: 9 May 2008
Incorrect criteria; Demonstrable error: implicit to be a material error; means error capable of being demonstrated
["Pitsonis NSWCA" Summary]

Haroun v Rail Corporation NSW [2008] NSWSC 160 **(Confirmed on appeal; see Haroun v Rail Corporation New South Wales & Ors [2008] NSWCA 192)**
DOJ: 4 March 2008
AMS's function to determine impairment; Arbitrator's function to determine injury/causation
["Haroun SC" Summary]

Altos v Registrar of the Workers Compensation Commission of NSW [2008] NSWSC 148
DOJ: 29 February 2008
Obiter: reconsideration under section 378 of the 1998 Act
["Altos" Summary]

2007 (Number of decisions: 26)

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Velickovich v Registrar of the Workers Compensation Commission & Anor [2007] NSWSC 1208
DOJ: 1 November 2007
Demonstrable error: Failure to give reasons
["Velickovich" Summary]

Petrovic v BC Serv No 14 Pty Limited & Ors [2007] NSWSC 1156
DOJ: 18 October 2007
Additional relevant information under section 327(3)(b): information of a medical kind or which is directly related to the decision required to be made
["Petrovic" Summary]

Rarasea v The Danks Family Trust trading as Caroline Chisholm Nursing Home & Ors [2007] NSWSC 1072
DOJ: 4 October 2007
Adequacy of Appeal Panel's reasons
["Rarasea" Summary]

Crean v Burrangong Pet Food Pty Limited [2007] NSWSC 839
DOJ: 3 August 2007
Procedural fairness
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Smith v Liquip Services Pty Limited and Ors [2007] NSWSC 687
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The following judicial review actions:

- Do not all deal with medical assessments and medical appeals, but are recorded for completeness by the Legal & Medical Services Branch as filed;
- May not contain any direct links to judgments or case summaries due to the actions being unreported, discontinued, settled or struck out by the courts; and
- May deal with delegated functions of the Registrar other than those pursuant to section 327 of the 1998 Act.

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State of NSW (Department of Education & Training) v Catherine Collopy, Registrar WCC

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Case Summaries

On Review

Supreme Court of NSW and NSW Court of Appeal
Judicial Review Decisions

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Judgment summary

State of New South Wales v Ali **[2018] NSWSC 1783**
(Harrison J, 21 November 2018)

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Facts

The worker sustained a psychological injury arising from bullying and harassment in the workplace. The worker applied to the Commission for an assessment of whole person impairment for threshold purposes to determine whether he met the definition of "worker with high needs." The employer's response to the application included several surveillance reports showing the worker attending his daughter's tiling business and apparently performing "work related activities."

The AMS assessed the worker to have 22% whole person impairment, and issued a Medical Assessment Certificate on 21 December 2017. The employer made an application to appeal against the decision of the AMS, on the grounds that additional relevant information was available, that the assessment was made on the basis of incorrect criteria and that the MAC contained a demonstrable error.

The "additional relevant information" referred to an investigation report and associated surveillance footage dated 16 January 2018, which the employer sought to have considered by an appeal panel. The Delegate of the Registrar refused the employer's application to appeal on the basis that the material sought to be introduced was essentially the same as the previous investigation reports, which were before the AMS.

Issues

The employer then sought judicial review of the Delegate's decision in the Supreme Court of NSW. The plaintiff employer submitted that the delegate did not determine whether the January 2018 investigation report was not available and could not reasonably have been obtained by the plaintiff before the AMS assessment. The employer submitted that the delegate had made an error of law by characterising the new report as "essentially the same" as the previous reports. The employer submitted that the January 2018 report contained observations of work activities which had not previously been recorded by investigators, and as such amounted to additional relevant information in relation to the assessment of the PIRS categories for "employability" and "social and recreational activities." The employer alleged that the delegate had failed to consider the substance of the earlier reports compared to the January 2018 report, as the earlier reports did not reveal specific observations of "work activities" as the later had done. In doing so, the employer submitted that the delegate did not properly consider the questions required of him.

Decision

Harrison J dismissed the employer's summons on the following grounds:

i) "additional relevant information" contemplates a qualitative, not merely quantitative, addition to the information previously available;
ii) the plaintiff's approach did not accord with that emphasised by Hoeben J in *Petrovic v BC Serv No 14 Pty Ltd & Ors* [2007] NSWSC 1156 insofar as the employer's opinions on the worker's employability or socialising are unrelated to the medical exercise in which the AMS is required to engage;
iii) Harrison J was not satisfied that the information could not reasonably have been obtained before the assessment;

iv) the information was not additional in the sense required simply because the reports could potentially provide some support for the appellant's arguments;

v) Section 327(3)(b) is not concerned with offering an aggrieved party the chance to run an assessment again because circumstances have since changed. This can be contrasted with s327(3)(a), which contemplates an appeal where circumstances have actually changed.

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Ali Ali v Rockdale City Council **[2015] NSWSC 1481**
(Stevenson J, 9 October 2015) **[Return to List]**

Facts

Mr Ali suffered injury whilst employed by Rockdale City Council in 2011. As a result of his injury, he took medication which affected his gastrointestinal tracts. On 10 January 2013 Mr Ali commenced proceedings in the Commission and a MAC was issued on 7 November 2013. In the MAC the AMS opined that Mr Ali did suffer from gastrointestinal tract symptoms however he concluded that Mr Ali had not sustained any WPI as a result of injury.

On 14 April 2014, the Panel confirmed the MAC. On 24 June 2014, the Commission (constituted by an Arbitrator) made consent orders which provided that Mr Ali had no entitlement to lump sum compensation in accordance with the decision in *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18. The consent orders were made following a teleconference between the Arbitrator and the parties' legal representatives.

On 19 August 2014, Mr Ali filed a summons in the Supreme Court of NSW seeking declarations that the Panel's decision and the MAC were void. The matter was adjourned following an application by Mr Ali's legal representatives to deal with the consent orders. Mr Ali then filed an application with the Commission on 26 February 2015 for reconsideration of the consent orders. The Arbitrator refused the reconsideration application.

Decision

His Honour, Stevenson J, did not see why the Court should intervene to quash the consent orders, particularly when the 1998 Act provided a number of mechanisms whereby such orders could be challenged. One of these mechanisms was an application under s 350(3) for reconsideration. In this regard, his Honour noted that the Commission could set aside a consent order on the basis that consent was not in fact given.

His Honour also pointed out to the right of appeal to a Presidential member under s 352 of the 1998 Act. Accordingly, his Honour found this matter to be a quintessential example of a case where a "more convenient and satisfactory remedy exists" to refuse prerogative relief: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33.

In conclusion, his Honour determined that it was not appropriate, as a matter of discretion, to interfere with orders made by the Commission when such orders can be corrected by the Commission itself. His Honour was also dissuaded from granting prerogative relief, given Mr Ali's delay in bringing his application to quash the consent orders.

With respect to the remaining grounds of appeal concerned with the reconsideration decision, his Honour was not satisfied that an error was committed by the Arbitrator. The Arbitrator did not misconceive her jurisdiction when she limited her consideration to the correction of any error apparent in the consent orders, particularly when that was the question to which the reconsideration application was directed. In this regard, his Honour did not find jurisdictional error. His Honour also held that there was no denial of procedural fairness by the Arbitrator.

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Judgment summary

Aguiar v Registrar of the Workers Compensation Commission of NSW & ors **[2005] NSWSC 1017**
(Malpass AsJ, 14 October 2005) **[Return to List]**

The plaintiff sought to quash the Registrar's decision to not allow the appeal to proceed.

Facts

An AMS conducted an assessment in February 2005 and certified that the worker had 0% WPI as a result of the aggravation, acceleration, exacerbation or deterioration of the "disease" as found to exist by the Arbitrator (section 4(b)(ii) of the 1987 Act).The worker appealed to the Registrar (outside the 28-day appeal period) on the basis that the MAC contained a demonstrable error and the AMS applied incorrect criteria. The worker relied upon a report of Dr Patrick which was sought in March 2005 but was not produced until April 2005.The Registrar rejected the appeal as she was not satisfied that special circumstances had been made out justifying an extension of time or that the submissions "added anything further to the appeal".

On judicial review, the plaintiff submitted that the Registrar erred in her construction of the meaning intended to be given to the words "special circumstances" necessary to justify the granting of an extension of time, and, in making her decision, the Registrar took into account an irrelevant consideration, being that the "appellant appears to be seeking to adduce fresh evidence without relying on s.327 (3) (b)."

Held

Malpass AsJ held that the circumstances relied upon could not be viewed as "special".
The plaintiff did not establish error on the part of the Registrar's delegate. Appeal dismissed.

Implications

The policy behind section 327(5) is to bring about expeditious finality.

The Registrar must be satisfied that there must be something "over and above that which is usual or ordinary" and matters such as "the length of the period of default, the explanation for the default, prejudice and the merits of what is sought to be litigated are taken into account". This is not the exercise of a discretionary power but the removal of the prohibition or the satisfaction of a threshold requirement.

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Judgment summary

Aircons Pty Ltd v- Registrar of the Workers Compensation Commission of NSW & Anor
[2006] NSWSC 322
(Malpass AsJ, 28 April 2006) **[Return to List]**

This was an appeal from a decision of the Registrar that it did not appear to her that at least one of the grounds of appeal existed. Relief was sought for judicial review of the decision, that is, to have the Registrar's decision set aside.

Facts

On 2 October 2002, the worker suffered injury to both hands in his employment. A medical dispute arose between the worker and employer and the matter was referred to two approved medical specialists. A referral was made to a plastic surgeon for assessment of scarring and skin discolouration only, and another referral was made to an orthopaedic surgeon for assessment of restriction of movement only. Two MACs were issued. The plastic surgeon made a diagnosis of "RSD/causalgia" and gave an assessment, which included "inability to work and loss of function of the hand".

Held

The Court held that the Registrar was in error and the decision of the Registrar was set aside. The plastic surgeon addressed matters other than those referred to him for assessment and he did not therefore give a certificate as to the matters referred for assessment. As a result there was an overlapping with the assessment given by the orthopaedic surgeon.

Implications

The statutory function of the AMS is to give a certificate as to the matters referred for assessment.

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Judgment summary

Altos v Registrar of the Workers Compensation Commission of NSW **[2008] NSWSC 148**
(Malpass, AsJ, 29 February 2008)

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Facts

The plaintiff suffered injury to his lumbar spine. He was referred for assessment by an AMS, who issued a MAC assessing 5% for a frank injury, 6% for nature and conditions, and making a deduction pursuant to section 323. The worker lodged an appeal against the MAC on the grounds of incorrect criteria and demonstrable error. A delegate of the Registrar issued a decision on 26 March 2007 that she was not satisfied that a ground of appeal had been made out and the appeal was not to proceed. A COD was then issued on 11 April 2007.

Pursuant to section 378, the Plaintiff sought reconsideration of the delegate's decision. The reconsideration application raised a fresh matter regarding the interpreter at the AMS examination. The delegate issued a further decision by way of letter dated 29 August 2007, that the earlier decision should not be altered, amended or rescinded. The Plaintiff filed a Summons in the Supreme Court seeking relief under section 69 of the *Supreme Court Act* 1970 (by way of judicial review). The Plaintiff appeared before the Court without legal representation.

Held

The Summons is dismissed.

- The Plaintiff's "appeal grounds" in the Summons are not helpful in identifying the case sought to be agitated [7]; it was difficult to identify the case the Plaintiff wished to put [14]. Counsel for the Defendant identified four areas:
  i. *The plaintiff contended a report of Dr Emil Guirguis had not been forwarded to the AMS* – this is erroneous: the certificate refers to the report, and the delegate searched the brief and satisfied herself that the report was contained therein. I am satisfied the AMS had the report [15-19]
  ii. *The certificate erroneously records the date of examination* – assuming that there be such error, it is of no significance whatsoever [20]
  iii. *The Plaintiff's subsequent complaint to the Healthcare Complaints Commission revealed the Plaintiff was unhappy with the AMS's attitude and the conduct of the examination* – these matters do not assist in judicial review [21]
  iv. *There was a complaint about deduction of 10% for pre-existing condition (degenerative disease)* – there was evidentiary support for the deduction and it was open to the AMS [22].

- The Plaintiff's submissions largely disregard the restrictions imposed by the prescribed appeal grounds (incorrect criteria and demonstrable error) (at [23]); the Plaintiff has not demonstrated that either appeal ground was made out and/or that there is any basis for setting aside the delegate's decision (at [24]).

- The reconsideration provision in section 378 has not been the subject of judicial consideration and was not argued before the court, but the following comments were made: what may be reconsidered is any matter that has been dealt with by the decision-maker in the process of making the decision (at [29]); reconsideration was not intended to cover the same territory as the appeal process; it seems that it involves the decision-maker having a further look at a matter that was dealt with in making the earlier decision and does not contemplate looking at fresh matters (at [30]); one clear function is to enable correction of obvious error (at [31]) ; the legislature did not intend that the section would become an instrument for abuse (by way of repeated application for reconsideration) (at [33]).

Implications

There are few if any implications from the substantive grounds argued, as it appears the Court found them deficient. The decision provides *obiter dicta* regarding the application of section 378 of the 1998 Act.

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Judgment summary

Amirilayeghi v Registrar of WCC & 2 Ors **[2007] NSWSC 669**
(Harrison AsJ, 29 June 2007)

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Facts

The Plaintiff alleged an injury to his back. An application was made to the Commission by the Plaintiff against his employer and an Approved Medical Specialist (AMS) was appointed to examine the Plaintiff. The AMS determined that the Plaintiff suffered 0% whole person impairment ("WPI") and as part of his examination the AMS gave consideration to the 8 Waddell's signs, which were indicative of non-organic problems. Of these 8 signs, 6 were positive.

The Plaintiff appealed against the AMS's determination pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 ("the 1998 Act"). The Delegate of the Registrar did not permit the appeal to go to an Appeal Panel.

Before the Supreme Court the Plaintiff submitted that the Registrar erred by asking whether or not the grounds of appeal were "made out" instead of properly construing the word "exists" in subsection 327(4) of the 1998 Act to mean whether or not an appeal was other than patently untenable or colourful. The Plaintiff's Counsel submitted that the Delegate applied a higher test, namely the merits of the appeal and that the Delegate should have applied the test in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284 (*Vegan*). It was also argued that the Delegate failed to ask the correct question in considering the WorkCover Guidelines or whether there was a demonstrable error. Further, it was submitted that the AMS made a jurisdictional error in not affording the Plaintiff procedural fairness by failing to warn the Plaintiff of his intention to base his decision on his interpretation of "Waddell signs".

Held

Summons dismissed. The decision of the Delegate of the Registrar affirmed.

- The Delegate of the Registrar applied the correct test, that is, the appeal is not to proceed unless it appears that at least one of the grounds of appeal specified in section 327(3) exists [27]. According to Handley JA's judgment in *Vegan*, "exists" means on its face, valid and apparently credible. Basten JA used different words and described "exists" as meaning "not patently untenable or colourable". But these statements from the Court of Appeal are *obiter dicta* [26].

- The Delegate of the Registrar stated "it appears that the MAC clearly reveals in paragraph 9(b) that the AMS made his assessment on the basis of correct criteria in accordance with AMA5 and WorkCover guides". The Delegate considered whether or not the AMS has properly applied the WorkCover guidelines, and came to the conclusion that there was no demonstrable error nor application of incorrect criteria. The Delegate's reasons do not reveal an error ([30] and [31]).

- Section 69(3) of the *Supreme Court Act* 1970 (NSW) is incapable of applying to the decision of an AMS, as this provision can only apply to quash decisions of a "court" or "tribunal". The assessment of an AMS is not an assessment made by a Tribunal and the Court does not have jurisdiction to hear a challenge to the decision of the AMS [33].

- Even if the Court had jurisdiction, the AMS did not deny the Plaintiff procedural fairness. The assessment of the Plaintiff's Waddell signs was founded on the AMS's own examination of the Plaintiff, and was not solely based on the reports of other doctors. The notion of procedural fairness does not extend to require an AMS to explain that a clinical

test he or she is about to conduct may lead to an adverse finding being made ([36] and [37]).

Implications

The Court's judgment is confined to the circumstances of the matter before the Court. The Court considered that the Delegate's reasons did not reveal any error and that the Delegate applied the correct test in not allowing the appeal to proceed to an Appeal Panel.

The Court confirmed that it does not have jurisdiction to hear challenges to a decision of an AMS, as an AMS's decision is not that of a Court or a Tribunal. However, the Court did indicate that in this matter the AMS did not deny the Plaintiff procedural fairness. An AMS is not required by virtue of rules of procedural fairness to explain to a worker that a clinical test he or she is about to conduct may lead to adverse finding being made.

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Judgment summary

Workers Compensation Nominal Insurer v Arcaba **[2016] NSWSC 1647**
(Davies J, 24 November 2016)

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Facts

The worker suffered injury when he fell awkwardly on a construction site. He claimed lump sum compensation for injuries to his lumbar spine, cervical spine and right upper extremity. That claim was determined by the Commission following the issue of a MAC by Dr Beer, which was revoked on appeal by the First Appeal Panel. Dr Beer's MAC and the First Appeal Panel decision was not the subject of appeal in the present matter.

The worker later commenced proceedings claiming additional lump sum compensation in respect of the cervical spine and right upper extremity, which was referred to Dr Pillemer, AMS, for assessment of WPI. Dr Pillemer's MAC was appealed and his decision was confirmed by a Second Appeal Panel. Dr Pillemer's MAC and the Second Appeal Panel's decision are the subject of appeal in the present matter.

The first MAC and First Appeal Panel's decision

Dr Beer (an AMS) assessed a combined 25 per cent WPI (11 per cent for the lumbar spine, 14 per cent WPI for the cervical spine and 3 per cent for the right upper extremity).

The Nominal Insurer appealed to the First Appeal Panel. The First Appeal Panel revoked Dr Beer's MAC, instead assessing 14 per cent WPI (11 per cent for the lumbar spine (the same amount as originally assessed), 0 per cent for the cervical spine (reducing it from 14 per cent), and 3 per cent for the right upper extremity (the same as originally assessed)).

The second MAC and Second Appeal Panel's decision

The worker subsequently made a claim for additional lump sum compensation seeking compensation in respect of 7 per cent for the cervical spine (up from 0 per cent from the First Appeal Panel) and 5 per cent for the right upper extremity (up from 3 per cent from the First Appeal Panel).

Dr Pillemer (an AMS) assessed the worker to have a combined 28 per cent WPI (consisting of 11 per cent for the lumbar spine, 15 per cent for the cervical spine and 5 per cent for the right upper extremity).

The Nominal Insurer appealed against Dr Pillemer's MAC to the Second Appeal Panel, who confirmed Dr Pillemer's MAC. The Nominal Insurer sought judicial review of the Second Appeal Panel's decision.

Issues

1. Whether the Second Appeal Panel erred in understanding its jurisdiction and failed to properly exercise its jurisdiction.
2. Whether there were three errors on the face of the record of the Second Appeal Panel's decision.
3. Whether the Second Appeal Panel failed to give any or any adequate, reasons for its decision.

4. Whether the Second Appeal Panel's decision was so wrong as to be perverse.

Decision

The Second Appeal Panel referred to the lumbar spine in respect of the Registrar's decision, as gatekeeper, to allow the appeal to proceed to the Second Appeal Panel. The Nominal Insurer contended that the injury to the lumbar spine was never put in issue. Justice Davies held that even a casual reading of the Second Appeal Panel's decision demonstrated beyond serious argument that the Second Appeal Panel understood that it was reviewing Dr Pillemer's assessment. The only reference to the lumbar spine by Dr Pillemer was that he accepted Dr Beer's 11 per cent assessment of the lumbar spine. His Honour was of the view that the first ground was without merit.

With respect to the second ground of appeal concerning the alleged errors on the face of the record, firstly, the Nominal Insurer claimed that the Second Appeal Panel referred to the thoracic spine and lumbar spine in error. Justice Davies held that it was perfectly clear from a reading of the remainder of the reasons that the Second Appeal Panel understood that, in fact, Dr Pillemer had been asked to assess the cervical spine and the right upper extremity.

Secondly, the Nominal Insurer took issue with the fact that 11 per cent for the lumbar spine had been included in the Second MAC. Justice Davies held that nothing flowed from it. His Honour stated that it did not reflect well on the Nominal Insurer to identify the above two errors which led nowhere and could not result in a different outcome.

Justice Davies dealt with the third alleged error on the face of the record, together with the third and fourth grounds of appeal, as they all related to the asserted incorrect reference to Dr Beer assessing 11 per cent for the cervical spine, when it was 0 per cent. His Honour held that the task of the Second Appeal Panel was to review the medical assessment by Dr Pillemer with the review being limited to the grounds of appeal on which the appeal was made under s 328(2) of the 1998 Act.

After acknowledging there is a tension between *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480 at [47] and *Campbelltown City Council v Vegan* [2006] NSWCA 284; 67 NSWLR 372 (*Vegan*) at [121]–[122], his Honour did not consider that there was inconsistency at least as far as this matter was concerned. Justice Davies found that the Second Appeal Panel examined whether Dr Pillemer had correctly dealt with the criteria in relation to radiculopathy following the WorkCover Guidelines at cl 4.23.

His Honour held that Dr Pillemer had complied with the requirements of *Vegan*. Justice Davies added that it was not part of Dr Pillemer's function to compare and contrast his findings with those of the First Appeal Panel. Dr Pillemer was not required to assess deterioration that resulted in an increase in the degree of permanent impairment. He was entitled to come to a different opinion from the First Appeal Panel. The fact that its certificate was binding until Dr Pillemer assessed the worker afresh did not impose upon him the obligation to make reference to the First Appeal Panel's competing views and assessment. His Honour further held that Dr Pillemer was not obliged to explain why he reached a different view on the radiological evidence and that was essentially a matter for clinical judgment.

Justice Davies was of the view that there was no failure to give adequate reasons by either Dr Pillemer or the Second Appeal Panel because there was no obligation to provide the explanation that the Nominal Insurer said should have been given. His Honour concluded that no

error of the kind alleged in the grounds of appeal had been shown and, accordingly, dismissed the summons.

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Judgment summary

Armstrong v Bowport All Roads & 2 Ors **[2007] NSWSC 491**
(Harrison AsJ, 18 May 2007)

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Facts

The Commission directed Mr Armstrong to submit to a medical examination by an Approved Medical Specialist ("AMS") for the purposes of assessment of permanent impairment as a result of an injury sustained by the Worker. The AMS issued a Medical Assessment Certificate ("MAC") assessing Mr Armstrong as having sustained a 40% permanent loss of efficient use of the right leg at or above the knee.

Bowport All Roads lodged an appeal against the AMS's determination pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 ("the 1998 Act"). The Appellant's submissions addressed the failure of the AMS to list or refer to the medical reports of Dr Preston dated 22 March 2005.

Before the Supreme Court, the Appellant contended that the Delegate of the Registrar made an error of law in finding that grounds of appeal existed pursuant to sections 327(3)(c) and 327(3)(d) of the 19098 Act and that the Medical Appeal Panel ("MAP") erred in assessing a proportion as 10/10 and in considering the reports of Dr Preston.

Registrar's determination: The Registrar's Delegate in granting the appeal determined that "it appears that the Approved Medical Specialist failed to consider or ignored relevant material and information in assessing the Appellant's whole person impairment" and that "as the AMS does not refer to these reports in the Medical Assessment Certificate, explicitly or implicitly, it appears that the Approved Medical Specialist has not considered these reports".

Medical Appeal Panel's determination: The MAP in revoking the AMS's MAC provided the following reasons:

> "The Panel concludes that there is no evidence of a trauma to the bone or joint of sufficient severity as to cause the development of osteoarthritis in the right hip, and that the history of the case suggests that the osteoarthritis is of a constitutional nature… The Panel finds that there is a 40% loss of use of the right leg at or above the knee due to osteoarthritis but that 10/10 of this arises from pre existing or constitutional condition and is not related to the injury on the 26 March 1999."

Held

The decisions of the Delegate of the Registrar and the Medical Appeal Panel are quashed. The medical appeal is remitted to the Registrar to be dealt with according to law.

- The facts here are similar to the facts outlined in *Massie v Southern NSW Timber & Hardware Pty Limited* [2006] NSWSC 1045 (*Massie*). In *Massie*, the AMS failed to refer to a report. The Registrar found that the report was not provided to the AMS and stated that as the AMS had not considered this report the assessment was made on the basis of either incorrect criteria or it contained a demonstrable error. Sully J found at [42] that the Registrar had confused the notions of a demonstrable error in the AMS's certificate with the demonstrable need for a section 329 reassessment to cure the administrative error that had caused the report not to be placed before the medical specialist (at [29]).As this case is factually similar to *Massie* the decision of Sully J in *Massie* is to be followed (at [35]).

- In *Massie* Sully J decided not to grant prerogative relief as the Appellant in that matter did not lodge his application to the court promptly and elected to fully participate in his appeal

before the MAP. However, in this matter the exercise of discretion to set aside the Registrar's decision is exercised differently. The Delegate's decision is to be set aside because at the time of making the decision, the Registrar did not have the option to refer the matter back to the AMS for reassessment to cure the administrative error (at [36]).

- Sully J in *Massie* clarified that the approach to be taken to section 328(3) of the 1998 Act is a strict one, and requires the MAP limit itself to assessing whether it can receive the report as fresh evidence (or evidence in addition to or in substitution of evidence received in relation to the medical assessment appealed against) in either of the "specific senses" prescribed by the 1998 Act, namely whether the evidence was not available to the appellant before the medical assessment, or whether it could not reasonably have been obtained by the appellant before the medical assessment (at [43]). Sully J came to the conclusion on the facts in *Massie* that the MAP erred in the application of the test in section 328(3) (at [44]). Adopting the approach in *Massie* Dr Preston's report could not be admitted as fresh evidence under section 328(3) of the 1998 Act. This constitutes a demonstrable error on the face of the record; the MAP's decision should be quashed (at [45]).

- The Macquarie Dictionary defines proportion as "a portion or part in relation to the whole" and the Oxford English Dictionary defines proportion as "a portion or part in its relation to the whole; sometimes simply a portion, division, part" (at [48]-[49]. The meaning of "proportion" in section 323(1) of the 1989 Act could have been made clearer to determine whether "deduction for any proportion" allows the Appeal Panel to find that the whole permanent impairment (10/10) was a result of pre-existing condition or abnormality. However, it is unnecessary to decide whether or not the Appeal Panel 's approach to the word "proportion" constituted a further error on the face of the record [48 and 51].

Implications

The Court considered this case to be factually similar to that of *Massie* and in applying the judgment in *Massie* found that the Delegate of the Registrar erred in allowing the appeal.

In quashing the MAP's decision the Court once again adopted the approach in *Massie* and found that the MAP in considering the reports of Dr Preston as "fresh evidence" under section 328(3) of the 1998 Act made an error on the face of the record.

Overall the Judgment appears to be uncontroversial, in that in coming to her decision, Harrison AsJ followed the judgment in *Massie*. Although, in reading the MAP's decision it may be questionable as to whether the MAP allowed the reports of Dr Preston as fresh evidence, the judgment confirms that in matters where a MAP allows evidence that does not meet the requirements under section 328(3) of the 1998 Act as "fresh evidence" in determining the appeal, such an approach will be considered an error on the face of the record.

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The UGL Rail Services Pty Ltd v Attard **[2016] NSWSC 911**
(Davies J, 1 July 2016)

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Facts

The worker was a boilermaker and welder. He developed hand dermatitis after being exposed to a solvent. The Registrar referred the matter to an AMS, Dr Sippe, for assessment of whole person impairment. Two expert doctors had assessed the worker as having 16 per cent and 17 per cent whole person impairment respectively.

The MAC and the Panel's decision

The AMS assessed the worker to have 13 per cent whole person impairment. The worker appealed this assessment. Before the Registrar, the appellant asserted there was a demonstrable error on the basis that the symptoms and impact of the skin disorder and the complexity of treatment required would be more in line with a higher level of impairment in accordance with the opinions of the expert doctors. The Registrar's delegate determined that a ground of appeal specified in s 327(3)(d) was made out in that the MAC contained a demonstrable error.
The Panel found a demonstrable error in relation to what the AMS said about the worker's employment and an error in not giving adequate reasons for explaining why the AMS differed from the "unanimous opinion" of the expert doctors.

Issues

5. Whether the Registrar erred in finding that there was a demonstrable error.

6. Whether the Registrar failed to determine that none of the grounds for appeal had been made out that the MAC contained a demonstrable error.

7. Whether the Registrar erred in allowing the worker to cavil at matters of the clinical judgment formed by the AMS.

8. Whether the Panel erred when it determined that there was demonstrable error in the MAC because the AMS had failed to adequately explain why his reasons differed from the expert doctors.

9. Whether the Panel erred in permitting the worker to cavil at the AMS's clinical judgment.

Decision

Justice Davies stated that an error suggesting that symptoms should be characterised in a particular way, whether being regarded as falling within a particular specified class or assessed at some particular percentage or range of percentages, does not without more amount to a demonstrable error and that those types of assessments amount to clinical judgments that ought not to be cavilled with. His Honour held that it is not part of the Registrar's functions to allow an appeal to proceed simply because the Registrar thinks the AMS ought to have found a higher percentage. (*Merza v Registrar of the Workers Compensation Commission* [2006] NSWSC 939 at [39] and *Pitsonis v Registrar of the Workers Compensation Commission* [2008] NSWCA 88; 73 NSWLR 366 referred to.)

Accordingly, there was no basis for the decision of the Registrar that the MAC contained a demonstrable error. His Honour was of the view that the matter should not have been referred to the Panel and that the Registrar acted beyond jurisdiction.

Should his Honour be wrong regarding the Registrar's decision, Davies J stated that the role of the Panel was to deal with the demonstrable error identified as having provided the bases for the appeal: *New South Wales Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792 at [52] and *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Dickinson* [2016] NSWSC 101 at [38]–[39].

Justice Davies held that the Panel did not confine itself to the ground of appeal in respect of which leave had been given to appeal. His Honour stated that in purporting to find the two errors, the Panel acted beyond jurisdiction in giving consideration to them when neither was the error identified in the application to appeal.

The decisions of the Panel and the Registrar were quashed and the matter was remitted to the Registrar to be determined according to law

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Judgment summary

Azzopardi v Liquorland Australia Pty Limited **(unreported)**
(Fagan J, 17 June 2016)

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Facts

The worker experienced pain in her lumbar spine and made complaints about this to her employer. She undertook a number of medical consultations and the radiological scans revealed extensive degenerative change in the facet joints at L5/S1. As a result of her continuing symptoms the worker ceased work on 23 August 2013 and sought compensation.

The matter was referred to an AMS who assessed the worker's WPI at 23 per cent, consisting of 22 per cent for the lumbar spinal disorder and 1 per cent for scarring. However, the AMS concluded that half of the degree lumbar spinal damage was caused by the pre-existing degenerative condition in the worker's lower spine. As a result, the AMS deducted half of 22 per cent for the lumbar spine and a total WPI of 12 per cent was assessed by the AMS.

An appeal was lodged against the AMS's assessment and the Panel confirmed the MAC. The Panel concluded that the AMS clearly stated the facts upon which the pre-existing injury (spondylolisthesis) was found. The medical specialists on the Panel confirmed that such a pre-existing condition would have been present at the outset of the worker's employment.

Ex-Tempore Judgment

His Honour Fagan J referred to the authority in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284 and held that the Panel's reasons were entirely inadequate. They provided no scientific reasoning as to how the pre-existing condition would have contributed to the worker's back symptoms in the degree of 50 per cent or in any other degree. They lacked any analysis of the mechanisms of cause and effect from, on the one hand, the degenerative disorder and, on the other hand, the exposure to work conditions.

According to his Honour, the Panel's reasons were "entirely unspeaking" as to what is the scientific and empirical analysis which would enable a deduction of 50 per cent to be arrived at. His Honour then set out two possibilities in which the pre-existing condition could have contributed to the worker's impairment. However his Honour noted that the medical specialists on the Panel "give no clue" as to whether this was the way in which contributions of causation might be analysed or examined.

His Honour also considered whether the Panel's decision might warrant reconsideration. Held that reconsideration was not possible based on the Panel's inadequate reasons and the Panel's decision was set aside.

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Judgment summary

Ballas v Department of Education (State of NSW) **[2019] NSWSC 234**
(Wright J, 8 March 2019)

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Facts

The plaintiff was exposed to a number of events between 2011 and 2016 which resulted in significant psychological injury. In 2016 the plaintiff pursued a claim for permanent impairment compensation and was referred to an AMS for assessment. The AMS assessed the plaintiff at 8% whole person impairment. On 8 June 2018, the plaintiff lodged an application to appeal on the following grounds: the assessment was made on the basis of incorrect criteria (section 327(3)(c)); the MAC contains a demonstrable error (section 327(3)(d)). The delegate of the Registrar dismissed the application to appeal on the basis that none of the grounds in section 327(3) of the 1987 Act were satisfied.

The worker filed a summons in the Supreme Court seeking a declaration that the certificate of determination and the decision of the Delegate are void and of no effect or an order setting aside the decision of the Delegate. The plaintiff submitted that there was an error of law on the face of the record or a jurisdictional error because the Delegate failed to consider the submission that the MAC contained a demonstrable error because the AMS took into account irrelevant considerations, such as attending the RSL Club by herself to play poker machines, when those matters could not properly be taken into account when assessing the plaintiff against the Social and Recreational Activities scale.

Held: The Appeal Panel's MAC quashed.

Discussion and Findings

1. Wright J at [41] accepted that the appeal submissions expressly raised the argument that when assessing "social and recreational activities", the AMS took into account irrelevant considerations and failed to take into account relevant considerations, in that: (1) the distinction between the categories of "social and recreational activities", "travel", and "social functioning"; (2) Table 11.2 indicates that the "social and recreational activities" category is directed to the kind of activities that involve interactions with other people, and not solitary activities, such as gambling on poker machines at an RSL club; (3) the fact that Ms Ballas is able to travel to the RSL club is not relevant to "social and recreational activities" but is relevant to "travel"; (4) the fact that Ms Ballas sees one friend regularly is relevant to "social functioning" not "social and recreational activities"; (5) seeing one friend regularly, to the extent that it is relevant to "social and recreational activities", is consistent with a rating in class 4 rather than class 2 as assessed by the AMS.

2. Wright J noted that when considering the submissions concerning the delegate's reasoning, the reasons under challenge must be read as a whole and be considered fairly. They are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291; [1996] HCA 6 and *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 286-7; [1993] FCA 456.

3. The plaintiff submitted that the Delegate treated the application as being about classes within the relevant scale or category and not about what should have been considered within the "social and recreational activities" category. The plaintiff further submitted that the Delegate cited *Jenkins v Ambulance Service of New South Wales [2015] NSWSC 633* which demonstrated that she misapprehended what she was meant to consider. The paragraphs in *Jenkins* relied upon classes within a category or scale, and not to what are the proper matters to take into account in respect of the scale or category.

4. Wright J held that the delegate's reliance on *Jenkins* did not establish that she did not consider the plaintiff's argument. His honour noted that *Jenkins* at [62] concerned examples given in relation to classes within a particular category or functional area and not whether particular activities fell to be assessed within one or more categories or functional areas. His honour further noted the decision in *Jenkins* establishes that the process of rating psychiatric impairment is not to be approached on an overly rigid reading of the relevant provisions of chapter 11 of the Guidelines. His honour at [54] stated that the Delegate may have misapprehended precisely what was held in Jenkins, however she expressly addressed the argument that the plaintiff contends was not addressed.

5. In dealing with discretion to category ground, Wright J accepted the Delegate's comments that the PIRS categories are general in description and occasionally the wording used to describe the categories may overlap. His honour provided an example in which the ability to relate socially may be reflected in both "social and recreational activities" and "social functioning". His honour confirmed that there was nothing erroneous in the Delegate's observations.

Orders

Wright J issued:

1. The summons filed on 14 September 2018 is dismissed.

2. The plaintiff is to pay the first defendant's costs as agreed or assessed.

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Judgment summary

Ballas v Department of Education (State of NSW) [2020] NSWCA 86

(Bell P, Payne JA, Emmett AJA, 6 May 2020)

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Facts

The applicant suffered psychological injury in the course of her employment with the Department of Education when she was exposed to a series of events from 2011 to 2016. In 2016, she brought a claim for permanent impairment compensation and liability was not disputed. The Approved Medical Specialist (**AMS**) issued a Medical Assessment Certificate (**MAC**) according to the Workers Compensation Guidelines (**the Guidelines**), assessing 8% whole person impairment (**WPI**).

The applicant lodged an application to appeal against the MAC on the basis that the AMS had applied incorrect criteria and made a demonstrable error when making an assessment of the applicant's "social and recreational activities" under the psychiatric impairment rating scale (**PIRS**). The applicant submitted that the AMS's consideration of the applicant's attendance at the RSL club monthly to gamble on poker machines for one hour was not relevant to the assessment of social and recreational activities because social and recreation activities were "not directed to solitary activities that do not involve interactions with other people". The Delegate of the Registrar refused the application and a Certificate of Determination was issued by an Arbitrator of the Workers Compensation Commission (**WCC**). The applicant then made an application to the WCC to reconsider its decision to issue the Certificate of Determination, which was refused.

The applicant commenced proceedings in the Supreme Court for judicial review of the decision of the Delegate, which was refused by the primary judge. The applicant appealed the decision.

Grounds of Appeal

1. Whether the primary judge erred in misconstruing s 327(4) of the 1998 Act;
2. Whether the primary judge erred in holding that the Delegate did not err in her application of s 327(3) of the 1998 Act, in respect of the assessment of WPI by the application of the PIRS categories, and
3. Whether the Court had power to set aside the Certificate of Determination.

Held: Appeal allowed

Discussion and Findings

1. The Court accepted that under s 327(4) of the 1998 Act, the Registrar plays a "gatekeeper" role. The Court considered historical interpretations of the role of the gatekeeper and agreed with the formulation of Simpson J in *Bunnings Group Limited v Hicks* [2008] NSWSC 874 that the Registrar's satisfaction as gatekeeper looks to the capacity of the appeal ground being made out, that is, an arguable case of error. The Court found that rather than looking to whether the grounds of appeal were capable of being made out, the Delegate erred in proceeding to determine the appeal. In doing so, the Delegate misconstrued the nature of the error that the applicant had identified as a "demonstrable error" within the meaning of s 327(3)(d). The primary judge should have found that the decision of the Delegate was affected by jurisdictional error.

2. The Court held that the Delegate conflated “scales” and “classes” in the Guidelines when assessing PIRS categories and misunderstood the process that an AMS was required to go through in making his or her assessment of WPI. The consequence of this was that the Delegate did not give proper consideration to the applicant’s argument. The Court found that the “scales” are fixed and are treated by the Guidelines as distinct from each other. While an AMS is required to exercise a degree of clinical judgment in assigning a class of seriousness to each area, the characterisation of conduct as going to “social and recreational activities” is not a matter of discretion. The “social and recreational activities” scale looks to the injured worker’s degree of participation in such activities. This scale should have been directed towards an assessment of the applicant’s interaction with other people and not a solitary activity such as gambling on poker machines. The Delegate and the primary judge erred in finding this ground of appeal was not capable of being made out.

3. The Court held that the Certificate of Determination and the reconsideration determination did not have the effect of superseding the Delegate’s decision to place it beyond the Court’s supervisory jurisdiction under s 69(3) of the *Supreme Court Act*. First, setting aside the Certificate of Determination and the reconsideration determination is necessary consequential relief having regard to the statutory process of the WCC making a determination. Secondly, the original Certificate of Determination and the reconsideration determination were themselves affected by jurisdictional error. By reason of the Delegate’s decision, which was affected by jurisdictional error, the issuing of the Certificate of Determination and the reconsideration determination were themselves jurisdictional error. The Court has the power to set aside the Certificate of Determination and the reconsideration determination.

Orders

Bell P, Payne JA, Emmett AJA ordered:

1. Appeal allowed with costs.

2. Leave to rely on ground 4 of the Notice of Contention refused.

3. Set aside the decision of the primary judge and, in lieu thereof:

    (i) declare pursuant to s 69 of the Supreme Court Act 1970 (NSW) that the certificate and decision of the Third Defendant dated 17 July 2018 is void and of no effect;
    (ii) order the decision issued by the Second Defendant, constituted by the Third Defendant on 17 July 2018 be set aside;
    (iii) remit the matter back to the Second Defendant for referral to a different Delegate to determine the dispute according to law;
    (iv) order the Certificate of Determination issued by the Fourth Defendant on 22 August 2018 be set aside;
    (v) order the reconsideration determination made by the Fourth Defendant on 8 April 2020 be set aside; and
    (vi) order that the First Respondent to pay the Appellant’s costs of the proceedings before the primary judge.

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Judgment Summary

Ingham Enterprises Pty Ltd v Belokoski [2018] NSWSC 1233
(Davies, J 10 August 2018)

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Facts

The worker suffered an injury at work in 2009 while carrying a 25kg bag on his left shoulder. After carrying it for about a minute he noticed pain in the left side of his neck radiating to the left arm. The worker eventually underwent a spinal fusion at C4/5 and C5/6 levels.

The AMS assessed the worker as having 28% WPI. The employer appealed the MAC and requested an oral hearing and re-examination of the worker. The employer submitted that a greater deduction ought to have been made for the worker's pre-existing condition, which had given rise to the spinal fusion surgery. The Panel conducted the review "on the papers." The Panel also commented that the appellant employer did not request a re-examination.

The Appeal Panel held that the AMS had failed to engage with the evidence or to explain why the deduction of one tenth was made, and that failure was a demonstrable error. The Panel said that the AMS failed to consider the evidence upon which the employer based its submissions and, although he made a deduction of one tenth, the AMS did not indicate his reasoning. The Panel held, nevertheless, on consideration of the evidence, that they were not satisfied that the AMS's assessment should be altered. They held that the plaintiff had not been able to point to any specific opinion that would justify a higher deduction pursuant to s 323.

Decision

Davies J found that the Panel committed an error of law in failing to have regard to the request for re-examination. His Honour noted at [34]:

> "(The Panel) were obliged to take into account the request for re-examination and the request for an oral hearing. No reasons were given by them for rejecting either of those matters. Together they were a relevant consideration that needed to be taken into account. That was an error of law as identified in *Craig v South Australia* (1995) 184 CLR 163 at 179."

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Judgment summary

Favetti Bricklaying Pty Limited v Benedek and Anor **[2017] NSWSC 417**
(Bellew J, 24 April 2017)

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The Supreme Court has delivered its decision in the matter of *Favetti Bricklaying Pty Limited v Benedek* [2017] NSWSC 417. The decision has procedural and policy implications for the Commission.

Background

Mr Benedek was injured on 5 October 2005 whilst employed by Favetti as a bricklayer. In 2008, he entered into a complying agreement with the plaintiff for 14% whole person impairment in relation to his lumbar spine.

In 2015, Mr Benedek brought a further claim for compensation for 21% whole person impairment, made up of 16% for the lumbar spine, 5% for the thoracic spine, and 1% for scarring. Mr Benedek also brought a claim for work injury damages at the same time. QBE denied liability on the basis that Mr Benedek had not suffered injury to the thoracic spine and that he did not have an increase in permanent impairment in the lumbar spine.

Mr Benedek commenced proceedings in the Commission as a **threshold dispute only**. In its Response, the respondent pressed for the matter to be referred to teleconference, asserting that the Registrar had no power to refer the matter to an AMS until the issue of injury to the thoracic spine was determined. In reply, the Director Operations, acting as delegate, declined to set the matter down for teleconference as she was of the view that the Commission did not have jurisdiction to determine injury in respect of a claim for work injury damages. The matter was referred to an AMS.

Judicial review proceedings

The plaintiff then commenced judicial review proceedings in the Supreme Court, claiming relief in the nature of certiorari and prohibition and/or injunction, seeking to quash the delegate's decision and prevent the Commission from taking any further step in determining the medical dispute until the dispute as to injury had been determined.

In the Supreme Court, SIRA sought leave, and was granted, permission to appear as amicus curiae.

His Honour Justice Bellew tackled the question of the competing positions of the parties as one of statutory construction, outlining the general principles at [74]. His Honour focussed on the construction of section 321 within the context of the 1987 and 1998 Acts as a whole.

His Honour held that the word "concerning" in section 321 means "about", connoting a broad class of dispute (at [77]). In that context, the section 74 notice issued by QBE took the position that the plaintiff was not entitled to any compensation over and above what he had already received. This put in issue liability to pay compensation, which had not been determined by the Commission. The plain text of s 321(4) did not allow the Commission to refer the matter to an AMS (at [80]). His Honour also distinguished *Junsay v Uncle Toby's Company Limited* [2009] NSWWCCPD 71 (*Junsay*), relied on by the delegate. In *Junsay,* the insurer accepted liability, whereas here there was a dispute. He concluded that the Commission has jurisdiction to determine injury related to a claim for work injury damages (at [85]).

His Honour was of the view that the Commission's broad power in section 105(2) of the 1998 Act to "examine, hear and determine" matters for the purposes of, and in connection with the operation

of Part 6 of Chapter 7 of the 1998 Act, included determining liability in a threshold dispute prior to the matter being referred to an AMS (at [89]-[90]).

Ultimately, his Honour accepted the proposition that the referral was beyond power and inconsistent with the provisions of section 151H(4) of the 1987 Act (at [92]).

The decision of the delegate was quashed and the Commission was restrained from acting upon or taking any further step in relation to an assessment of whole person impairment until liability in respect of injury to the thoracic spine had been determined by the Commission.

Implications

The decision reverses standing Commission policy concerning threshold disputes where liability has been disputed.

The Commission has always referred matters as pleaded (so long as supported by evidence) to an AMS, even in the face of a denial of liability, on the basis that injury at common law was a matter for a court of competent jurisdiction. It is now clear that the Commission must refer threshold disputes where liability is in issue to an arbitrator before an AMS can make an assessment.

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Judgment summary

Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd **[2013] NSWSC 1290**
(Harrison AsJ, 11 September 2013) (On appeal to the Court of Appeal)

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Facts

On 28 January 2009, Mr Bindah suffered an injury to his right eye at work from the door of a waste recycling bin. The door of the bin hit Mr Bindah on the right side of the face, causing lacerations to his cheek and shattering the safety goggles he was wearing. Mr Bindah was treated by his general practitioner and referred to an ophthalmologist for follow up treatment.

On 29 June 2009, Mr Bindah had surgery on the injured right eye due to poor vision that had been progressing for a number of months. The following day, further emergency surgery was performed, due to complications from the previous surgery. His vision steadily improved until April 2010, when he suffered a giant retinal tear and detachment of the retina in the right eye. Surgery was performed to successfully re-attach the retina. Further surgeries were performed in May and June of 2010, and a 'recurrence of eye injury' claim was lodged complaining of complete loss of vision in his right eye.

Liability was declined by the respondent on the basis that recurrence of injury, involving the giant retinal tear and detachment, was not a workplace injury pursuant to section 4 and that employment was not a substantial contributing factor pursuant to section 9A of the 1987 Act. The matter came to teleconference at the Commission and consent orders were issued, relevantly: "the applicant suffered injury on 28 January 2009 to his right eye and the Respondent has liability in respect of the injury". The matter was remitted to the Registrar for referral to an AMS.

The AMS concluded that Mr Bindah suffered from 22 per cent whole person impairment, making comments that he agreed with the respondent's doctor that the whole person impairment was more likely associated with trauma from the dislocated lens than the work injury. The matter was then referred for Reconsideration, with the AMS concluding that Mr Bindah had zero per cent whole person impairment, attributing impairment to "trauma from original cataract operation". Mr Bindah appealed against that decision. The Panel confirmed the MAC and the whole person impairment assessment of zero per cent.

Mr Bindah appeal to the Supreme Court, submitting that:

- The Panel's decision was invalid for jurisdictional error because the Panel had asked itself the wrong question and misconceived its function by attempting to determine whether Mr Bindah's permanent impairment had been caused by the work injury. That issue had been determined by an Arbitrator.
- The Panel made a jurisdictional error in solely attributing Mr Bindah's impairment to a pre-existing condition rather than a work injury. The Panel failed to address section 323(1) – whether there was to be a deduction, and 323(2) whether the assumption that a deduction of 10% was met.

Mr Bindah submitted in the alternative that even if the Panel did act within jurisdiction, it made a non-jurisdictional error of law on the face of the record by:

- Incorrectly assuming that the blow to the right eye on 28 January 2009 was the work injury when as a matter of law the work injury for the purposes of sections 4, 9A and 16 of the 1987 Act was the exacerbation or aggravation of a pre-existing cataract condition.
- Misapplying the test of causation in asking whether the permanent impairment was caused directly by the frank injury to the right eye from the blow on 28 January 2009, instead of

asking whether the permanent impairment was caused by the exacerbation or aggravation of the pre-existing cataract condition.

Held

Mr Bindah submitted that the injury found by the arbitrator was in the nature of an aggravation of a disease, pursuant to section 4(b)(ii). Her Honour, referring to and distinguishing *Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liq)* [2013] NSWSC 365 (*Elcheikh*), held that the consent orders confirmed a frank injury on 28 January 2009 within the meaning of section 4(a) of the 1987 Act. There could be no inconsistency between the orders made by the Arbitrator and the finding that the work injury did not result in any permanent impairment.

It was common ground between the parties that the retinal detachment, which was the cause of Mr Bindah's impairment, was the result of complications from cataract surgery in June 2009. The medical evidence indicated that it was possible that a significant blow to the eye could accelerate the progress of a cataract. The Panel concluded that the blow to the eye was not substantial and the need for cataract surgery was not caused or exacerbated by the work injury. The Panel correctly considered the question to determine the extent of permanent impairment resulting from the work injury of 28 January 2009. As the Panel found that no permanent impairment resulted from the work injury, there was no need to consider deduction pursuant to section 323.

In relation to the alternative arguments, her Honour held that the Arbitrator did not make a finding of a disease injury. The words of the consent order were clear and reflected a frank injury on 28 January 2009. It was also common ground that the retinal detachment and tear were caused by complications from the cataract surgery. The Panel did not misapply the test of causation and did not make a non-jurisdiction error of law on the face of the record.

Implications

Follows *Haroun v Rail Corporation of NSW* [2008] NSWCA 192.

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Judgment summary

Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd **[2014] NSWCA 264**
(Meagher, Ward and Emmett JJA, 14 August 2014)

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Facts

The facts are briefly summarised here and are comprehensively set out in the summary of *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2013] NSWSC 1290 as it appears in *On Review*.

On 28 January 2009, Mr Bindah suffered an injury to his right eye at work. He underwent cataract surgery to his right eye on two occasions in June 2009 and suffered complications as a result of surgery. On 10 June 2010 Mr Bindah made a compensation claim for a 'recurrence of eye injury' after suffering a complete loss of vision in his right eye. This came as a result of a giant retinal tear and retinal detachment in the same eye followed by unsuccessful surgical attempts to repair that detachment.

The insurer accepted that the applicant suffered an injury for which the respondent was liable within s 9 of the 1987 Act but disputed that the injury included or involved a material exacerbation or aggravation of the cataract requiring surgery under s 4 of the 1987 Act.

On 24 August 2011 the applicant referred the dispute to the Commission and consent orders were issued on 21 November 2011, relevantly providing under order 3:

> "3. The applicant suffered injury on 28 January 2009 to his right eye and the Respondent has liability in respect to injury."

The matter was then referred to an AMS for the assessment of the "degree of permanent impairment that results from injury". The assessment was the subject of a successful reconsideration application and on 8 June 2012 the AMS concluded that Mr Bindah had zero per cent WPI, attributing impairment to "trauma from original cataract operation".

Mr Bindah appealed against that decision. The Panel confirmed the MAC and the WPI assessment of zero per cent. It addressed whether, as the applicant contended, the injury exacerbated or aggravated his pre-existing cataract condition. Mr Bindah appealed to the Supreme Court, filing a summons which claimed:

- an order in the nature of certiorari quashing the decision made by the Panel and the MAC reconsidered and issued by the AMS;
- a declaration that the decision of the Panel and the MAC are void;
- an order remitting the matter to the Registrar to constitute Panel to determine the matter according to law.

Decision of the primary judge

On 11 September 2013, the primary judge ordered that the summons be dismissed. Mr Bindah appealed this decision on the grounds that the primary judge erred in failing to make the following findings:

- The Panel's decision was invalid for jurisdictional error because the Panel had asked itself the wrong question and misconceived its function by attempting to determine whether Mr

Bindah's permanent impairment had been caused by the work injury, when the issue of liability was properly the function of an arbitrator.

- Order 3 made in the consent orders should be construed as referring to an injury consisting of exacerbation or aggravation of a pre-existing cataract condition necessitating surgery in the right eye rather than as referring to the frank injury to the eye from the blow on 28 January 2009;
- The Appeal Panel made a jurisdictional error in failing to apply the test referred to in s 323 of the 1998 Act, as to whether there should be a deduction for the impairment of Mr Bindah 's vision that was due to his pre-existing cataract condition;
- In the alternative, there was a non-jurisdictional error of law on the face of the record by reason of the misapplication by the Panel of the test of causation.

Held

Meagher JA

Ground 2

With respect to the findings of the primary judge on order 3, his Honour stated that the question was whether the "injury" (in order 3) referred only to an exacerbation of the pre-existing condition or, more generally, to the trauma injury received as a result of the direct blow to the right eye. The dispute was as to the pathology of the injury which the applicant had sustained. His Honour said the expression "frank injury" is not to be found in legislation and reviewing the authorities suggests an understanding that the term refers to a "personal injury" that is sustained in a specific incident (this would make "frank injury" a subset of "personal injury", so that it does not refer to a personal injury where the injurious circumstances are the nature and conditions of employment).

After taking into account the circumstances in which the consent orders were made, his Honour held that the "injury" being referred to was the trauma injury and its pathology pursuant to s 4(a) of the 1987 Act. His Honour determined that if the position was otherwise, there would have been nothing of substance left for assessment, particularly in circumstances when it was not in issue that the injury accelerated the need for cataract surgery.

His Honour found that order 3 was a determination that the applicant "suffered injury on 28 January 2009" where that injury was a trauma injury to which aspects of its pathology remained to be assessed. Accordingly, his Honour determined that the respondent was liable for the trauma injury (injury to the right eye) and its consequences.

For these reasons, his Honour held that this ground should be rejected

Grounds 1 and 3

His Honour held that grounds 1 and 3 should be rejected.

Having determined that the respondent was liable for the trauma injury, his Honour held that liability had been determined by the Commission. Accordingly, a dispute as to whether Mr Bindah's loss of vision was "as a result of" that injury was a "medical dispute" within s 319(c) and (d) of the 1998 Act to be determined by the Panel. Because the Panel was not satisfied that the loss of vision was "as a result of" the trauma injury, his Honour found that it was not necessary for the Panel to address whether there should be a deduction for any proportion of the impairment that was due to the pre-existing condition.

Ground 4

Meagher JA also rejected ground 4 of the appeal. He held that the primary judge did not err in holding that there was no jurisdictional error of law on the face of the record of the Panel's reasons.

The Panel did not misapply the test of causation and it relied on evidence to support its conclusion. His Honour also pointed out that Panel was entitled to draw on its own knowledge, experience and expertise without the need for information or other expert opinions addressing the subjects before it.

Emmett JA **(Ward JA agreeing)**

Ground 1

Emmett JA held that the 1998 Act vests in an AMS or the Panel exclusive jurisdiction to determine factual issues, issues of causation or otherwise that are within the definition of “medical dispute” under s 319 of the Act. His Honour pointed out that questions of causation are not foreign to medical disputes and that the language of causal connection is squarely within the definition of "medical dispute".

His Honour held that ground 1 could not be established and that a determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the AMS or, on appeal, the Panel.

Ground 2

His Honour also found that ground 2 could not be established. His Honour said that the consent orders must be construed in light of the circumstances surrounding the making of the orders (similar to Meagher JA), including the legal framework within which the dispute arose that led to the making of the orders. Although orders should be construed in conformity with the reasons, because the Determination was made by consent, there were no reasons for the making of the orders.

His Honour found that the consent orders simply recorded “an” injury according to the definition in s 4 of the 1987 Act. This was based on the Arbitrator’s finding that Mr Bindah’s employment was a substantial contributing factor to his right eye injury. His Honour held that the Arbitrator was not required to specify the injury because the matter “fell within the province of a medical dispute” to be determined by an AMS, or the Panel. His Honour placed particular emphasis on the words degree of permanent impairment that **resulted from** the injury to indicate that a determination by the AMS, or the Panel, involved a conclusion on a matter of causation.

Ground 3

With respect to ground 3, his Honour held that there was no constructive jurisdictional error on the part of AMS or on the part of the Panel. Because the AMS and the Panel found that no permanent impairment resulted from the injury, the Panel did not fail to apply the test referred to in s 323 of the 1998 Act. Accordingly, his Honour found that it would be otiose for an assessment to be carried out for the purposes of determining a deduction to be made from nil.

Ground 4

His Honour held there was no error on the part of the Panel in drawing the conclusion that it drew from Dr Saks's report that the work injury suffered by Mr Bindah was not substantial. His Honour noted the Panel’s consideration of the passage of time between Mr Bindah’s surgery in June 2009 and the retinal detachment in May 2010, indicating that the right eye injury was not implicated as being directly responsible for the detachment.

Following his Honour’s consideration of the Panel’s reasoning and reference to the minor injury to the right eye, he determined that the reasoning by the Panel was not erroneous.

Implications

See *Connor v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2006] NSWWCCPD 124 at [43] – [54].

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Judgment summary

Bojko v ICM Property Service Pty Ltd & Ors **[2009] NSWCA 175**
(Allsop P, Handley AJA and Giles JA, 2 July 2009)

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Facts

The Worker lodged an appeal against the decision of an Approved Medical Specialist ("AMS"). In the appeal application a request was made for a re-examination by a member of the Appeal Panel.

In its reasons for decision, the Appeal Panel stated that it had determined it was not necessary for the worker to undergo a further medical examination because there was sufficient information on the papers.

The Worker challenged the Appeal Panel's decision by way of judicial review in the Supreme Court (Malpass AsJ), which was unsuccessful. The Worker then sought leave to appeal to the Court of Appeal.

Grounds of appeal

Before the Court of Appeal, the Worker argued two grounds. The first was that the Appeal Panel failed to accord procedural fairness, failed to take into account a relevant consideration or failed to give reasons for an aspect of its decision, thus erring as to jurisdiction. This was based on the argument that there was an absence of any reference in the Appeal Panel's reasons regarding the Worker's request for a further medical examination.

The second was that the Appeal Panel erred in law in exercising its discretion not to conduct a further medical examination. The Worker argued that the request for re-examination was treated as an irrelevant consideration, as one of no weight, and was simply ignored.

Held

Appeal dismissed.

- The power of an Appeal Panel to examine a Worker arises from the powers an AMS has at first instance and brings it to an Appeal Panel under section 324(3) of the 1998 Act. When exercising that power, an AMS is not bound to consider whether such an examination would be necessary or desirable. The power to examine is not conditioned in this way. Therefore a failure to consider whether a medical examination is desirable or necessary does not mean that an AMS (and therefore an Appeal Panel) has failed to discharge its statutory function (at [22]).

- The grounds of appeal argued by the Worker involved a "hyper critical" approach to the reasons of the Appeal Panel which is contrary to authority, and ignores the presumption of regularity which attends administrative action (at [36]).

- In *obiter*, the Court commented that it would be helpful if Appeal Panels would, in future, make it quite clear in their reasons that they had considered and dealt with the whole case before them, including applications for a further medical examination, to receive further evidence, or to have an assessment hearing. This should reduce the challenges on judicial review and remove any perception by the unsuccessful party that the case has not been properly considered by the panel (at [37]).

Implications

Appeal Panels are not bound to consider whether an examination is necessary or desirable, but should make it clear in their reasons that a request for examination has been made and taken into consideration.

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Judgment summary

***Bojko v ICM Property Service Pty Ltd & 2 Ors* [2008] NSWSC 907**
(Malpass AsJ, 11 September 2008)

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Facts

The Plaintiff worker sustained injury to his hands, forearms, shoulder and neck. At a later date, she sustained further injuries to other body parts including the left arm and thoracic spine. The matter was referred to an AMS who assessed the impairments at 7% WPI. The Plaintiff appealed on the grounds that the AMS used incorrect criteria and that there were errors in the assessment. The Plaintiff also relied upon additional relevant information in the form of a statutory declaration asserting the requirement for a further examination by an appeal panel and a report showing that the Plaintiff's condition deteriorated. The Medical Appeal Panel ("MAP") conducted a review without requiring the Plaintiff to undergo a further medical examination, confirming the AMS's assessment but increasing the impairment of the scarring to 2% WPI.

The Plaintiff sought review of the MAP's decision in the Supreme Court. Two grounds were raised:

1) That the MAP failed to accord procedural fairness by ignoring relevant material or failing to give reasons in increasing the impairment; and
2) That the MAP erred in law by not conducting a further medical examination and failing to give sufficient reasons for not doing so.

Held

Summons dismissed.
The absence in the MAP's Reasons of an express reference to the Plaintiff's request for a further medical examination is not significant (at [19]). Referring to WorkCover Guideline 45, Malpass AsJ stated that the provision enables the MAP to adopt the procedure appropriate to the case. In so doing, the MAP had provided the Plaintiff the requisite procedural fairness in the application and considered that an assessment hearing was not required following the Plaintiff's previous concurrence on this issue (at [21]). His Honour also acknowledged that, in setting out the reasoning process by which it arrived at its determination, "*the Appeal Panel was informing the parties that the needs of this particular case did not require a further medical examination because the Panel had before it all the material that was required to resolve such issues*" (at [22]).

The power conferred by WorkCover Guideline 45 on the MAP enables it to exercise discretion in adopting any of the listed procedures in that guideline (at [25]). His Honour remarked that the MAP would have considered all the necessary issues before it in adopting the procedure "*which best served a just and fair determination of the matters in issue in the particular review*" (at [26]). His Honour found that the MAP did not address the wrong question and did not fall into jurisdictional error. The summons was dismissed.

Implications

- It is open to the MAP to adopt the approach it considers appropriate and as is necessary to the needs of the individual case before it, according to the relevant WorkCover Guidelines.

- Sufficient reasons greatly assist in demonstrating the process by which a decision has been arrived at.

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Judgment summary

Borg v The Registrar Workers Compensation Commission **[2009] NSWSC 1389**
(Hulme J, 16 December 2009)

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Facts

The worker lodged an application to resolve a dispute in the Workers Compensation Commission seeking lump sum compensation for permanent impairment. The Registrar referred the matter to an approved medical specialist ("AMS") for assessment of the worker's degree of permanent impairment. The AMS assessed the worker as suffering 0% whole person impairment ("WPI") and a medical assessment certificate ("MAC") was issued to that effect.

The worker applied for reconsideration of the medical assessment pursuant to section 378 of the *Workplace Injury Management and Workers Compensation Act* 1998. The AMS declined to amend the medical assessment and wrote:

> "I am in receipt of a request for reconsideration of a MAC issued on 7 May 2008. I do not consider it appropriate to make any amendments."

The AMS did not provide any reasons for the decision not to reconsider the assessment.

The Commission issued a Certificate of Determination ("COD") determining that the worker suffered 0% WPI resulting from the injury.

The worker applied to the Supreme Court to quash the decision of the AMS not to amend the MAC.

Issues

The worker alleged that the AMS did not give adequate reasons for his decision not to make any amendments to the assessment on reconsideration, and thereby alleged that she was denied procedural fairness.

The worker also alleged that the AMS failed to comply with the requirement in the *Registrar's Guideline – Requests for Reconsiderations under ss 329(1A), 350(3) and 378 of the Workplace Injury Management and Workers Compensation Act 1998* to give brief reasons as to why the application to reconsider was declined. The Supreme Court did not consider this argument.

Held

Hulme J in the Supreme Court determined that the AMS failed to give adequate reasons in relation to the reconsideration decision and his Honour set aside the AMS's reconsideration decision. As the reconsideration decision was set aside, it followed that the COD issued was also set aside.

Hulme J ordered that the AMS reconsider the assessment in accordance with law and with the reasons given in his Honour's judgment.

Reasons for Decision

- Section 378(1) empowers an AMS (or one of the other official persons or bodies named in the section) to reconsider and vary an earlier decision. Section 378 imposes no limits on the basis of which reconsideration may occur or at the time when a request for reconsideration may be made.

- Section 378 does not give a right to a party; it merely empowers an AMS to reconsider an earlier assessment. An AMS cannot therefore be compelled to reconsider an assessment.

- Once a matter is "referred" to an AMS for reconsideration, the AMS must reconsider the matter. That referral is not by a party but rather by the Registrar, an Arbitrator or by a court.

- In circumstances where reconsideration must occur of necessity, parties' rights are liable to be affected. Any reconsideration is liable to affect the rights of a party just as much as the original assessment; and therefore the basic criteria by which the assessment is made are the same. The requirements of the original assessment, including the requirement under section 325(2) to provide a statement of reasons, are therefore equally required when reconsidering a decision. The fair operation of the reconsideration provisions would be hampered if no reasons were given.

- It would be illogical in the extreme to require reasons in the case of an original assessment, and by a Medical Appeal Panel, but not in the case of reconsideration.

- As a matter of procedural fairness, the other party should be served with the application for reconsideration and given the opportunity to be heard by way of submissions in reply to that application.

- The worker should have the opportunity to have her reconsideration application dealt with so as to enable her to determine if the AMS has erred.

Implications

Procedure for Reconsideration

Section 378 provides a general power of reconsideration. The legal authority is clear that a party does not have an unlimited right to force reconsideration. However, once a matter is referred to an AMS for reconsideration, section 378(3) makes reconsideration of the original assessment a mandatory process.

It is the act of the Registrar, or the Registrar's delegate (a member of staff) referring a party's request for reconsideration to an AMS, that makes reconsideration of the original assessment mandatory.

That does not mean that an AMS must rescind, alter or amend the original assessment. An AMS may confirm the original assessment. Either way, the AMS must explain why (s)he has or has not altered the original assessment.

The other party should be served with the application for reconsideration and given the opportunity to be heard by way of submissions in reply to the reconsideration application. The Registrar or delegate must ensure that this is done prior to the matter being referred to the AMS.

The procedure for reconsideration is different from an appeal to a Medical Appeal Panel. A medical appeal is a review or re-examination of the entire original file and original medical assessment. The focus is on the correctness of the original assessment.

The process of reconsideration is a re-thinking or working-through of the original assessment in light of further material or new developments. The focus is the later material or the new development. In considering further material or developments, the criteria to be used are the same as with the original assessment.

Accordingly, the same power conferred on an AMS under sections 325 and 326 applies in the process of reconsideration. For instance, an AMS may have the discretion to call for further

examination or medical evidence in the process of reconsideration just as in an original assessment, although with a different focus.

Requirement to Give Reasons on Reconsideration

As any reconsideration is liable to affect parties' rights as much as an original assessment, whether an AMS confirms an original assessment or changes an original assessment, reasons must be given.

Unlike an Arbitrator or a Medical Appeal Panel, whose task is to arbitrate or decide correct opinions from incorrect ones, an AMS is an original decision maker. An AMS must make a decision in light of his or her own opinion on the fundamental basis of the basic criteria set out in the AMA5 Guides and the WorkCover Guides. In giving reasons, the focus should be on the basis of the AMS's own opinion and why (s)he has come to that opinion.

As a decision to decline reconsideration affects the parties' rights, the general requirement to be applied is that reasons must satisfy the principle that justice must be seen to have been done; that is, the reasons must enable the losing party to understand why they have lost. Provided the reasons are adequate, the decision may leave the losing party disappointed, but not "disturbed" or aggrieved (*Mifsud v Campbell* (1991) 21 NSWLR 725 per Samuels JA, quoting the words in *Connell v Auckland City Council* [1977] 1 NZLR 630 at 634).

Standard of Reasons

Borg does not set out the standard of reasons required in a reconsideration decision. It refers to *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284; (2006) 67 NSWLR 374, which sets out the standard of reasons for a Medical Appeal Panel decision. Paragraphs [121]-[122] of *Vegan* state:

> "Where it is necessary for the Panel to make findings of primary fact, in order to reach a particular conclusion as to the existence, nature and extent of any physical impairment, it may be expected that the findings of material facts will be set out in its reasons. Where facts are in dispute, it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. More importantly, where more than one conclusion is open, it will be necessary for the Panel to give some explanation of its preference for one conclusion over another. That aspect may have particular significance in circumstances where the medical members of a Panel have made their own assessment of the applicant's condition and have come to a different conclusion from that reached by other medical practitioners, as set out in reports provided to the Panel.
>
> On the other hand, to fulfil a minimum legal standard, the reasons need not be extensive or provide detailed explanation of the criteria applied by medical specialists in reaching a professional judgment: see *Soulemezis* at 273-274 (Mahoney JA) and 281-282 (McHugh JA). At least, that will be so where the medical science is not controversial: if it is, a more expansive explanation may be required."

Presidential decisions on the standard of reasons for Arbitrator decisions may provide guidance for an AMS in determining the extent of reasons to be given. *North Coast Area Health Service v McDonald (No.2)* [2009] NSWWCCPD 156 provides a helpful summary on adequacy of reasons for Arbitrator decisions (at [113]-[115]):

- The standard by which the adequacy of reasons must be determined is relative to the nature of the decision itself and the decision maker. It is not necessary for an Arbitrator to refer to every piece of evidence.

- When considering the adequacy of the reasons the decision must be read as a whole.

- If an obligation to give reasons for a decision exists its discharge does not require lengthy or elaborate reasons.

In *BHP Billiton Limited & Anor v Bourke & Ors* [2009] NSWWCCPD 117 at [37]-[43], it was held that where one set of evidence is accepted over a conflicting set of significant evidence, a trial judge should set out his or her findings, not only the evidence, as to how he or she came to accept the one over the other. How much reasoning is adequate, or the extent of adequate reasoning, depends on the circumstances of an individual case.

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Judgment summary

Kitanoski v JB Metropolitan Distributors Pty Limited [2019] NSWSC 1802
(Adamson J, 16 December 2019)

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Facts

The Plaintiff worker, in the course of his employment with the Defendant, suffered an injury when a box fell from a shelf.

The worker initially claimed WPI and was assessed at having a WPI of 0%. The MAC to that effect was confirmed on appeal by a Panel.

The worker made a further claim against the Defendant for WPI. This WPI was as follows:

(1) 15% WPI for the cervical spine;
(2) 10% WPI for the lumbar spine;
(3) 8% WPI for vestibular injury;
(4) 7% WPI for hypertension;
(5) 4% WPI for lower digestive system; and
(6) 4% WPI for upper digestive system.

The Employer denied the claim and requested that the Registrar refer the claim for assessment. A MAC was issued which certified a WPI of 7% and was referable to the WPI found by Dr Ackroyd. Dr Truskett found 0% WPI when assessing the worker's lumbar spine, cervical spine and upper and lower digestive tracts. Dr Williams also found 0% WPI when assessing the worker's vertigo for the purposes of assessing any vestibular impairment.

The worker applied to the Registrar for leave to appeal against this medical assessment on the following grounds: Section 327(3)(a) (deterioration of the plaintiff's condition), (c) (incorrect criteria) and (d) (demonstrable error). The Registrar was satisfied, on the face of the application, that the section 327(3)(d) demonstrable error ground was made out and referred the matter to the Panel. Whilst the Registrar identified effort, he did not identify the specific error in his decision.

The Panel dismissed the appeal and gave reasons for its decision. The Panel considered and refused the worker's request that he be re-examined. Regarding the worker's application to adduce fresh evidence before the Panel, the Panel reasoned that the worker did not address why the evidence could not have been obtained before the referral. The Panel rejected the worker's submission that Dr Truskett had not complied with the Guidelines and rejected the challenge to Dr Williams' MAC.

Grounds of appeal

The worker filed a summons in the Supreme Court seeking a declaration that the decision and reasons of the Appeal Panel were of no effect. The plaintiff relied on the following three grounds:

1. The Panel failed to accord procedural fairness by refusing to re-examine the worker and by failing to give sufficient reasons for its refusal. Further, it was not open to the Panel to refuse to re-examine the worker in circumstances where the worker's credit was in issue.

2. It was not open to the Panel to refuse to receive the Additional Reports since they could not have been obtained before the MAC. Further, the Additional Reports

constituted additional relevant information and the Panel's refusal to consider the Additional Reports amount to procedural unfairness.

3. It was not open to the Panel to refuse to consider the worker's statutory declaration and that such a refusal amounted to procedural unfairness.

Held

Adamson J dismissed the summons and ordered the worker to pay the first Defendant's costs of the proceedings.

Ground 1

Adamson J, when considering the Panel's decision not to examine the worker, affirmed that a worker is not entitled to be re-examined by the Panel. Her Honour addressed *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123 where the High Court found that further inquiry would not have yielded a useful result and that no denial of procedural fairness had occurred. Her Honour then considered the three matters raised by the worker's Counsel:

Firstly, regarding the assessment of credibility of the worker, Adamson J rejected the submission that the AMS formed an adverse view of the worker's credit and that the Panel was obliged to examine him.

Secondly, regarding whether an examination was required for the Panel to form a view about the percentage WPI of the plaintiff's lumbar spine, the worker's Counsel relied on what Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37] that the law should "avoid practical injustice" in the context of procedural unfairness as per Adamson J found that it was open to the Panel to refuse to examine the worker and that such a refusal did not amount to a denial of procedural fairness. Her Honour found that the Panel's reasons were ample to explain why it refused to examine the worker.

Adamson J held that it is open to the Panel to refuse the worker and that such a refusal did not constitute a denial of procedural fairness.

Ground 2

The worker's Counsel submitted that the Additional Report were important and indicated that a further examination was mandated. Her Honour did not consider the Panel's refusal to admit the Additional Reports as amounting to an error law and did not find a denial of procedural fairness.

The worker's Counsel had not pressed the allegation per the worker's statutory declaration that the worker's lumbar spine had deteriorated. Accordingly, Her Honour did not address this matter further.

Ground 3

Her Honour discerned no error in the Panel's finding that Dr Truskett's examination of the worker had complied with the Guidelines. Her Honour found that no legal error was established and Dr Williams competently carried out the Hallpike test.

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Judgment summary

Bosch v McCain Foods (Australia) Pty Ltd [2019] NSWSC 1390
(Simpson AJ, 15 October 2019)

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Facts

The plaintiff, in the course of her employment, lifted a heavy box and experienced sudden severe pain as well as painful symptoms in her pelvic region. The plaintiff later attended upon Dr Manning, a urogynecologist who recommended prolapse surgery. The surgery involved anterior repair, posterior repair, vaginal hysterectomy, sacrospinous colpopexy and cystoscopy.

The plaintiff accepted the urogynecologist's advice and proceeded with the surgery. The plaintiff later made a claim for compensation for the cost of medical and hospital treatment and also compensation for permanent impairment.

The Plaintiff claimed she was entitled to lump sum compensation for loss of fertility occasioned by the hysterectomy. The plaintiff was later referred to an Approved Medical Specialist (AMS) for assessment of the degree of permanent impairment. The AMS concluded that the hysterectomy did not result from the work injury and that the procedure itself was "elective".

The plaintiff applied to the Registrar to appeal against the AMS's determination. EML submitted that it was reasonable for the AMS to attribute the applicant's loss of fertility to non-work related factors. The Appeal Panel agreed with the conclusion reached by the AMS in that the loss of fertility as a result of the hysterectomy was not one for assessment of permanent impairment resulting from the injury was based upon his medical knowledge and judgment.

The worker filed a summons in the Supreme Court to seeking a declaration that the decision and reasons of the Appeal Panel were of no effect. The plaintiff relied on the following two grounds:

1. The Appeal Panel erred in law in finding that the permanent impairment to the plaintiff's urinary and reproductive system was not a result of the work injury.
2. The Appeal Panel erred in law on the face of the record in failing to give adequate reasons for its decision, in that it failed to articulate the test of causation in determining whether the plaintiff's impairment caused by the hysterectomy and failed to give adequate consideration to the causal connection between the hysterocomy surgery and injury.

Held: The Appeal Panel's MAC quashed.

Discussion and Findings

1. Simpson AJ referred to the decision in *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264 at [109] noting that the Arbitrator is to determine a causal connection between the work injury and the medical treatment provided. In the present case, her honour confirmed that it was clear that the Arbitrator found that both the prolapse surgery and the hysterectomy was were 'reasonably necessary' as a result of the plaintiff's work injury.

2. Simpson AJ stated that the question of causation remained a live issue for the AMS and Appeal Panel. Her Honour confirmed that the determination of medical disputes also

includes issues of causation. Simpson AJ was satisfied that both the AMS and Appeal Panel were required to grapple with the arguments of the parties on the question of causation. At [86] her Honour stated that the Plaintiff's decision to undergo the hysteroctomy gained its necessary causal connection from the advice given by Dr Manning of the potential benefits to the outcome of the prolapse surgery of including the hysteroctomy.

3. Simpson AJ, however was unsatisfied with the reasons provided by the Appeal Panel. Simpson AJ noted that there was no discussion that the hysterectomy and consequent permanent impairment "resulted from" the work injury. Her honour further noted that the Appeal Panel gave no explanation for agreeing with the conclusion of the AMS that the hysterectomy was an elective procedure and that the hysterectomy was not the result of the work injury. Her honour was satisfied that the reasons of the Appeal Panel were inadequate, constituting error on the face of the record.

Orders

Simpson AJ ordered and declared:

1. that the Medical Assessment Certificate issued on 26 July 2018 is vitiated by jurisdictional error.
2. that the decision of the Appeal Panel of 23 November 2018 is vitiated by jurisdictional error and error of law on the face of the record.
3. quash the determination of the Appeal Panel of 23 November 2018;
4. order that the plaintiff's appeal from the determination of the approved medical assessor of 26 July 2018 be remitted to the Workers Compensation Commission for determination according to law;
5. order the first defendant to pay the plaintiff's costs of these proceedings..

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Judgment summary

Sandra Joan Boulding v Warrigal Care Limited & Ors **[2006] NSWSC 904**
(Malpass AsJ, 11 September 2006)

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The Plaintiff sought review of the decision of the Medical Appeal Panel.

Facts

The AMS issued a MAC and certified that the worker had 17% WPI. The Medical Appeal Panel ("MAP") found demonstrable error in the application of Table 4.4 of the WorkCover Guidelines (Modifiers for DRE categories), revoked the MAC and issued a certificate in which it provided an impairment assessment of 14% WPI.

The Plaintiff submitted that the MAP erred in applying Table 4.4, erred in not making an allowance of 2% for a further operation, and, in the alternative, erred in not allowing 1% for each of the two levels operated on in addition to the 3% for discectomy or single-level decompression.

Held

Malpass AsJ rejected the submissions that the MAP erred. The function of Table 4.4 is expressed to indicate the additional ratings which should be combined with the rating determined using the DRE method, and the threshold is "where an operation for intervertebral disc prolapse or spinal stenosis has been performed and where there is a residual radiculopathy following surgery". There was only one operation performed involving two spinal levels and the excision of two discs. In those circumstances the Plaintiff is entitled to the additional 3% together with a further 1% because surgery encompassed an additional level.

Implications

The addition of a further 1% for each level occurs after the threshold is met - the first operative procedure.

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Judgment summary

Fairfield City Council v Janet Brear & Ors **[2010] NSWSC 480**
(Barr AJ, 20 May 2010)

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Facts

The first defendant, Ms Brear sustained an injury to her left ankle on 1 May 2006 in the course of her employment with the plaintiff, Fairfield City Council ("Fairfield Council"). Ms Brear made a claim for lump sum compensation and pain and suffering which resulted in proceedings being commenced in the Commission on 18 September 2008.

Ms Brear was referred by the Registrar to Dr Rowe, AMS, for assessment of her permanent impairment resulting from the injury to her left lower extremity. Dr Rowe issued a MAC on 1 December 2008 assessing Ms Brear with 11% whole person impairment as a result of the injury to her left lower extremity, after deducting 10% pursuant to section 323 of the 1998 Act for pre-existing injury.

Fairfield Council appealed against the medical assessment, relying on grounds of appeal under sections 327(3)(c) & 327(3)(d). A delegate of the Registrar determined that it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel.

Fairfield Council submitted on appeal that the allowance for pre-existing abnormality of 1/10th was demonstrably erroneous in view of the medical evidence that there was at the time substantial pre-existing osteoarthritic change, against the background of an earlier fracture. It was submitted that the deductible proportion should have been at least 90%. In its appeal application Fairfield Council also sought an assessment hearing before the Appeal Panel.

On 27 January 2009 Ms Brear also appealed against the medical assessment, with regard to a question of impairment as a result of scarring, relying on grounds of appeal under sections 327(3)(c) & 327(3)(d). In that application Ms Brear requested a re-examination. Leave was not granted as Ms Brear's appeal application was lodged outside the 28-day timeframe prescribed by section 327(5) and the delegate of the Registrar was not satisfied that there were special circumstances justifying an increase in the period for an appeal.

The version of the *WorkCover Guides for the Evaluation of Permanent Impairment* ("WorkCover Guides") in force at the time of Dr Rowe's assessment was the second edition. However, at the time of Fairfield Council's appeal, the third edition of the WorkCover Guides was promulgated. The Government Gazette of 5 February 2009 provided that it should apply to all assessments of a degree of permanent impairment that occurred on or after
6 February 2009. Relevantly the third edition of the WorkCover Guides allowed for a more generous assessment of Ms Brear's permanent impairment.

The Appeal Panel determined that Ms Brear should undergo a re-examination by an AMS panel member and invited the parties to provide written submissions as to whether the second or third edition of the WorkCover Guides should be applied to the Appeal Panel's assessment and re-examination of Ms Brear. Fairfield Council was also invited to make submissions in relation to Ms Brear's request for the Appeal Panel to consider and assess the degree of permanent impairment of the scarring as a result of the injury to the left lower extremity.

Fairfield Council submitted that there should be no further medical examination of Ms Brear and that the second edition of the WorkCover Guides should apply to the Appeal Panel's assessment. Ms Brear submitted that the relevant edition of the WorkCover Guides was the second edition and that she was amenable to the Appeal Panel medically examining her. It appears however that Ms

Brear's submission in respect to the Appeal Panel medically examining her was made to preserve her position should she be permitted to re-agitate the question of impairment resulting from scarring. The Appeal Panel did not consider the issue of scarring.

The Appeal Panel decided that Dr Crocker, an AMS panel member, should conduct the re-examination of Ms Brear. The parties were advised of the re-examination however Ms Brear was unable to attend the appointment and another appointment was made. In a letter dated 22 January 2009 Fairfield Council's solicitor informed the Registrar that it wished to be represented at any examination of Ms Brear and by implication asked to be informed of any date fixed. Ms Brear was examined by Dr Crocker on 7 August 2009 but no notice was given to Fairfield Council and it was not represented at the examination.

Following the examination by Dr Crocker the Appeal Panel considered the appeal on the basis of the written submissions. It determined relevantly that the appropriate edition of the WorkCover Guides was the third edition. It accepted and acted on the findings of Dr Crocker without giving the parties an opportunity to make oral submissions about them. The Appeal Panel revoked the MAC of Dr Rowe and issued a new MAC assessing Ms Brear with a 25% WPI after deducting 1/5 pursuant to section 323 of the 1998 Act.

Issues

Fairfield Council sought to challenge the decision of the Appeal Panel and lodged a summons in the Supreme Court. The grounds of relief pleaded were that the Appeal Panel erred:

1. In denying the request for an oral hearing, without any adequate reasons;
2. In failing to give the parties an opportunity to consider or make submissions on Dr Crocker's findings on examination;
3. In accepting in full and acting upon the findings of Dr Crocker without reference to the evidence which was the subject of review;
4. In relying on the incorrect edition of the WorkCover Guides, and
5. In conducting a hearing *de novo*, rather than a review as required by legislation.

Held

In the Supreme Court Barr AJ set aside the decision of the Appeal Panel and remitted the matter to the Appeal Panel to be dealt with according to law. The reasons for his Honour's decision are summarised below.

Representation

- Fairfield Council was represented by Mr Williams, SC leading Mr Saul.

- Ms Brear filed a defence in which she submitted to the orders of the Court save as to costs. Counsel represented Ms Brear on the hearing of the summons, but only in relation to the issue of costs of the Supreme Court proceedings.

- Submitting appearances save as to costs were also filed on behalf of the Registrar and the Appeal Panel.

- WorkCover sought and was granted leave to appear as *amicus curiae* ("a friend of the court"). However Counsel was not permitted to make submissions on the facts or on the merits of Fairfield Council's claim, since they were matters which could have been taken up by Ms Brear and no reasons were offered as to why Counsel appeared throughout the proceedings but did not participate in the proceedings except to be heard on the issue of costs of the proceedings.

The procedural fairness issue

- The Appeal Panel's decision to re-examine Ms Brear without giving Fairfield Council the opportunity it had requested to be present at the re-examination or to have the results of that examination provided to it for consideration gave rise to a need for the Appeal Panel to consider or to reconsider Fairfield Council's submission that it should be permitted to make oral submissions.

- The Appeal Panel in its reasons stated, "Having considered the evidence, the Panel is satisfied that the matter can be properly determined without an assessment hearing". His Honour considered in the circumstances that these reasons were inadequate.

- A party has a right to know the evidence that is being presented and on which a determination may possibly be made against its interests. A party is entitled to make oral submissions about such matters (see *Ah-Dar v State Transit Authority of NSW* (2007) 69 NSWLR 468).

- Concerning the right of parties to be heard, there is a long line of authority dealt with in the judgments of each of the members of the Court of Appeal (see *Seltham Pty Ltd v Ghaleb* [2005] NSWCA 208 per Mason P at [7] and per Ipp JA at [69] – [79])).

- The question of whether the second or third edition of the WorkCover Guides should apply depended upon answers to two antecedent questions. The first was whether the Appeal Panel's determination of the appeal amounted to an "assessment". In its decision the Appeal Panel acknowledged that. That was a matter on which like minds might have differed. The Court was not concerned with whether the Appeal Panel came to the right or wrong conclusion but with its denial of Fairfield Council's right to make submissions on the question.

- The second question was whether the appeal was properly to be regarded as a hearing *de novo* or as a re-hearing and, depending on the answer to that question, whether the WorkCover Guides applicable at the time of Dr Rowe's assessment should apply or whether it should be the edition current at the time of the determination of the appeal. The Appeal Panel as soon as it contemplated the possibility that the third and not the second edition of the WorkCover Guides was that which applied ought to have informed the parties and afforded them an opportunity to make submissions. The failure to do so also amounted to a denial of procedural fairness.

Other grounds

- It was not necessary to deal with the remaining grounds of appeal.

Costs

- Fairfield Council sought costs against Ms Brear. The submission was that if consent had been forthcoming orders could have been made without a hearing. That submission was not accepted based on the fact that the Court would not have been justified making the orders sought by Fairfield Council without a proper examination of the evidence and the law. In view of the fact Counsel for Ms Brear took no part in the debate on the merits, the hearing took no longer than it would otherwise have taken. Fairfield Council was not awarded costs and was ordered to pay the costs of Ms Brear.

Implications

- The decision confirms that the determination of the appeal by an Appeal Panel on a basis not raised by the parties in their submissions in circumstances where the parties are not provided with an opportunity to make submissions constitutes a denial of procedural fairness.

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Judgment summary

Broadspectrum (Australia) Pty Ltd v Wills [2019] NSWSC 1797
(Meagher J, 17 December 2019)

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Facts

The defendant worker was sexually assaulted in the course of her employment as case manager at the Regional Processing Centre on Manus Island. The defendant worker was assessed by an AMS as suffering from a 20% WPI following a 10% deduction under section 323(2) of the 1998 Act. The plaintiff employer later appealed the MAC on the basis that the AMS erred in determining the percentage under section 321(1). Allowing the appeal the Appeal Panel assessed the worker's current impairment due to her pre-existing conditions to be 20% resulting in an 18% WPI.

The plaintiff employer filed for judicial review on the basis that the Panel erred in failing to consider the history that the worker's pre-existing condition was being effectively managed through medication and treatment. The plaintiff further submitted that the Panel failed to provide adequate reasons when assessing whether this condition contributed to her current impairment.

Held: Summons dismissed.

Discussion and Findings

1. The plaintiff employer submitted that when addressing the question of causation, the pre-existing condition was not viewed as being asymptomatic, but was being managed by appropriate medication. The plaintiff employer submitted that any absence of symptoms before the injury had to be considered in the context that the pre-existing conditions were being managed effectively by treatment.
2. Meagher J noted that the Panel did not have regard to any differences in the worker's medical treatment over the years. His honour however was satisfied that the Panel was correct in implicitly acknowledging that the worker's pre-existing conditions had (over time and despite of treatment) resulted in impairment. His honour was not satisfied that this ground had been made out.
3. Meagher J referred to *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 in which the function of the Panel is to form and give its own opinion on the medical question referred to it by applying its own medical experience and expertise.
4. Meagher J confirmed that the Panel's assessment involved the weighing of competing considerations and the exercise of clinical judgment. His honour was satisfied that the Panel identified competing considerations and that it was evident that the Panel did not disregard the fact that the worker's pre-existing condition was managed by medication and asymptomatic at the time of the work injury. Meagher J was satisfied that the reasons of the Panel were not inadequate.

Orders

Meagher J issued:

1. Dismiss the amended summons.
2. Plaintiff to pay the first defendant's costs of the proceedings.

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Judgment summary

***Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* [2006] NSWSC 235**
(Studdert J, 7 April 2006)

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Facts

The Worker brought proceedings seeking to review the decision of the Registrar to refer an appeal to an Appeal Panel, and the decision of the Appeal Panel.

An AMS issued a MAC certifying permanent loss of efficient use of sexual organs at 100%. The Employer appealed and the Registrar allowed the appeal to proceed, without providing reasons. An AMS panel member examined the worker. The examining AMS panel member concluded that the Worker's back pain was not a limiting factor in preventing him from having intercourse. The Appeal Panel adopted the findings of the examining AMS panel member and assessed loss of use at 0%. The report of the examining AMS panel member was not distributed to the parties.

The Employer argued that the Registrar erred in referring the matter to the Appeal Panel, as no ground of appeal had been established on the material before the Registrar. The Employer also argued that the Appeal Panel was required to conduct a hearing and provide the AMS panel member's report to the Worker.

Held

The language of section 327(4) (gateway provision) is intended to discourage appellate review where appeals are allowed to proceed by the Registrar. The Registrar may be wrong in concluding that there is an available ground of appeal, but this does not invalidate the appeal. Even if the Registrar's decision is reviewable, it was open to the Registrar to be satisfied that a ground of appeal has been established.

Section 328 of the 1998 Act does not compel the Appeal Panel to conduct a hearing. An AMS panel member of an Appeal Panel is not obliged to provide a copy of his or her report of examination to the parties. The Registrar was not obliged to give reasons for a decision to refer a matter to an Appeal Panel.

Implications

There is no general rule of common law or a principle of natural justice that requires reasons to be given for administrative decisions, absent a statutory obligation to do so, and there was no such obligation on the Appeal Panel to do so (*Vegan*).

The Appeal Panel was not required to give reasons as to how it reached the figure of impairment it adopted or to provide a detailed review of all of the medical evidence. The Appeal Panel properly exercised its discretion not to conduct a further medical examination.

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Judgment summary

Workers Compensation Nominal Insurer v Bui **[2014] NSWSC 832**
(McCallum J, 20 June 2014)

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Facts

On 31 October 2003, Thi Bien Bui was the victim of a robbery whilst at work. She was threatened by a man wielding a screwdriver who held it against her throat and demanded the contents of the cash register. As a result of that event, Ms Bui suffered a psychological injury.

A dispute arose as to the degree of permanent impairment between the parties and the issue was referred to an AMS. The AMS assessed Ms Bui as having 26 per cent WPI. However within a month after the assessment, Ms Bui was observed as behaving inconsistently with her previous presentation before the AMS. The observations were made by an investigator, retained by the insurer, and formed the basis of one of the grounds of appeal to an Appeal Panel.

After considering the investigator's report and Ms Bui's response, the Panel issued a new MAC reducing the assessment of Ms Bui's whole person impairment from 26 per cent to 24 per cent.

In reaching its decision the Panel determined that:

- The investigator's report was consistent with the findings of the AMS on three of the psychiatric impairment rating scale (PIRS) scores (social functioning, concentration and employability);
- Based on the investigator's observations on 14 and 15 June 2013, the finding of the AMS on the fourth PIRS score (travel) should be reduced from Class 3 to Class 2, and
- The median score remained the same, giving a whole person impairment of 24 per cent rather than 26 per cent for Ms Bui.

The insurer sought judicial review of the decision of the Panel on the following grounds of appeal:

- Ground 1 – the Panel erred in law in taking into account Ms Bui's statement dated 8 July 2013 when it had not admitted it into evidence;
- Ground 3 – the Panel erred in law in failing to carry out a hearing de novo (afresh);
- Ground 5 - failed to give any or any sufficient reasons for its decision, and
- Grounds 2, 4 and 6 – the Panel erred in law in its consideration of the fresh evidence.

Held

The decision of the Panel dated 17 October 2013 was set aside and the proceedings remitted to the Registrar.

Ground 1

The critical question before McCallum J was whether there is any legal requirement for the Panel to "admit" material (Ms Bui's response) into evidence before taking it into account. Her Honour held that while s 328(3) of the 1998 Act did qualify the investigator's report for admission, the provisions that govern the procedure on appeal to the Panel do not require it to make a formal determination to "admit" material into evidence before taking it into account.

Her Honour held that having determined to allow the investigator's report to be given as "fresh evidence" under s 328(3), the Panel was plainly obliged to afford Ms Bui an opportunity to respond

to it as an aspect of procedural fairness. Whether or not that response was “fresh evidence” able to be given under s 328(3) did not matter.

Ground 3

McCallum J held that the Panel’s failure to conduct an assessment by way of a “hearing de novo” did not amount to an error in law. Her Honour held that the insurer could not rely on Basten JA’s reference in *Campbelltown City Council v Vegan* [2006] NSWCA 284 at [85] (cited by McColl JA in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116), to an assessment by way of a hearing de novo, as a “rule that qualifies the terms of the statute”.

McCallum J held that it would be wrong to elevate his Honour's recognition of a "hearing de novo" under s 328(2) to a kind of fixed procedure within the power of the Panel, where the failure to adopt such procedure might amount to error in law. Her Honour pointed out that Basten JA’s reference in *Vegan* to a “hearing de novo” recognises the flexible range of procedures that might be adopted by the Panel in the circumstances.

Thus, it was held that that the Panel’s determination not to undertake a further medical examination of Ms Bui was within the Panel’s power and did not entail legal error.

Ground 5

Following her acknowledgement of the principles in *Vegan*, namely the requirement for the Panel to explain its findings when more than one conclusion is open and that the reasons need not be extensive, her Honour was not satisfied that the Panel met the minimum requirement of explaining its conclusion in its statement of reasons.

Her Honour determined that it was simply not possible to know what process of thinking led the Panel to the conclusion it reached, particularly when:

- The Panel considered the fresh evidence and Ms Bui's response;
- The Panel had determined to make its own assessment of the impact of her psychiatric disorder on her ability to travel (reaching a different finding made by the AMS);
- The Panel left other areas of the assessment by the AMS undisturbed, and
- The appellant requested a further medical examination of Ms Bui.

Accordingly, her Honour determined that the Panel's statement of reasons failed to comply with the implied statutory obligations recognised in the decision of *Vegan*.

Having reached the above conclusion, her Honour did not consider it appropriate to determine grounds 2, 4 and 6.

Implications

Applies *Campbelltown City Council v Vegan* [2006] NSWCA 284.

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Judgment summary

Bukorovic v The Registrar of the WCC **[2010] NSWSC 507**
(Harrison AsJ, 25 May 2010)

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Facts

The plaintiff, Mr Bukorovic sustained injuries to his neck, lower back, left and right upper extremities and right leg on 6 August 2007 in the course of his employment with the fourth defendant, Formtec Group (NSW) Pty Ltd ("Formtec"). Mr Bukorovic made a claim for lump sum compensation and pain and suffering which resulted in proceedings being commenced in the Commission on 17 February 2009.

The matter came before an Arbitrator. In an ex tempore decision, the Arbitrator determined that, among other things, the medical dispute be remitted to the Registrar for referral to an AMS for assessment of the permanent impairment of Mr Bukorovic's lumbar spine, cervical spine and right upper extremity (shoulder).

Upon assessment, Dr Giblin, AMS, issued a MAC on 1 June 2009, assessing Mr Bukorovic with 6% whole person impairment ("WPI") as a result of the injury to his lumbar spine and 0% WPI as a result of the injury to his cervical spine. In relation to his right shoulder, Dr Giblin stated that he was unable to arrive at an assessment owing to the inconsistency of the examination. He therefore declined to provide a WPI percentage in respect to the assessment of the right upper extremity.

Mr Bukorovic appealed against the medical assessment, relying on the grounds of appeal under sections 327(3)(c) & 327(3)(d). A delegate of the Registrar determined that it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel.

The Appeal Panel revoked Dr Giblin's MAC and issued its own certificate, assessing Mr Bukorovic with 7% WPI of the lumbar spine after allowing 2% for activities of daily living ("ADL") and 0% WPI of the right upper extremity. The Appeal Panel otherwise confirmed Dr Giblin's assessment of the cervical spine.

The Registrar issued a Certificate of Determination ("COD") on 28 September 2009 with an order that Formtec pay Mr Bukorovic lump sum compensation under section 66 in the amount of $10,106.25 in respect of 7% WPI resulting from the injury on 6 August 2007.

Issues

Mr Bukorovic sought to challenge the decision of the Appeal Panel and lodged a summons in the Supreme Court. The grounds of review pleaded were as follows:

1. That the Registrar's decision in the COD was based on conclusions on assessment of the Appeal Panel which was no decision at all, and that the determination of the Registrar was thereby itself no decision at all;
2. That the AMS failed to comply with the statutory task incumbent upon him pursuant to sections 325(2)(c) and 327(3)(d) or at common law to give adequate reasons for assessment with regard to the cervical spine;
3. The AMS failed to make findings with regard to the right shoulder;
4. The Appeal Panel, by failing to conduct its own examination of Mr Bukorovic and relying on the facts found and reasoning by the AMS, and failing to cure the errors identified in the decision of the AMS with regard to the cervical spine, the Appeal Panel affirmed the AMS's decision that was no decision at all, and

5. The Appeal Panel constructively failed to exercise its jurisdictional task on appeal by failing to make findings with regard to the right shoulder in accordance with the Act, in particular by misleading itself as to the operation of clause 1.60 of the WorkCover Guides with regard to consistency of presentation. In so doing, the Appeal Panel purported to correct the error made by the AMS with regard to the right shoulder, however, it failed to do so, and therefore the decision of the Appeal Panel was no decision at all.

Held

Harrison AsJ dismissed the summons. The Plaintiff was ordered to pay the fourth defendant's costs. The reasons for her Honour's decision are summarised below.

Duty to give reasons

- The duty to give reasons arises by implication from the statute not from the common law (see *Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372). Her Honour confirmed this decision where Basten JA at [122] stated, "to fulfill a minimum legal standard, the reasons need not be extensive or provide a detailed explanation of the criteria applied by a medical specialist in reaching a professional judgment".

- Section 325 of the 1998 Act sets out what is to be contained in a MAC and section 328 of the 1998 Act sets out the procedure on appeal.

The role of the WorkCover Guides and the AMA 5 Guides

- The purpose of the Guides is that they are meant to assist the medical specialist to assess the level of impairment. They are not to provide a recipe approach.

- The AMS is to direct his or her mind to the matters laid down in the WorkCover Guides but he or she is not bound, in the strict legal sense, to every word contained in them.

Reasons of the AMS in relation to the cervical spine

- Her Honour accepted that under the heading "Findings on Physical Examination" the AMS did not specifically comment on muscle guarding as far as the cervical spine was concerned. Later in his reasons the AMS stated that, "based on the physical examination today there was no reproducible significant findings in terms of muscle guarding". Her Honour found this to be sufficient, stating, "Just because this finding on muscle guarding appears under another heading does not amount to an error of law or jurisdictional error" (at [36]).

- The AMS addressed the criteria specified in AMA 5 under DRE I. He stated that there was no muscle guarding, no documentable neurological impairment, no significant loss of motion segment integrity and no other indication of impairment related to injury or illness; and no fractures.

The decision of the Appeal Panel in relation to the cervical spine

- The Appeal Panel's decision not to re-examine Mr Bukorovic was a clinical decision by the Appeal Panel. The Appeal Panel was entitled to take this approach.

- In relation to the cervical spine the AMS did not make a jurisdictional error. Nor did the Appeal Panel.

The findings of the AMS in relation to the right shoulder

- The AMS did not provide a percentage of WPI because he perceived a conceptual difficulty.

- Her Honour found that there was an error in the AMS's approach in relation to the assessment of permanent impairment to the right shoulder. Having determined that maximum improvement to the shoulder had been reached, the AMS had to make a WPI assessment as a percentage.

The decision of the Appeal Panel in relation to the right shoulder

- The AMS assessed the range of motion of both Mr Bukorovic's shoulders and recorded them. The Appeal Panel considered the AMS's other observations and findings in relation to Mr Bukorovic's right shoulder. It was a matter for the Appeal Panel's clinical judgment as to whether Mr Bukorovic should have been further examined, and it did not err in the exercise of that discretion.

- The Appeal Panel identified that the AMS erred in not making an assessment in relation to the right shoulder.

- The Appeal Panel took into account the AMS's findings and determined that there was nil probable limitation of active range of motion to the right shoulder and determined that 0% WPI was appropriate. The Appeal Panel did not err in this approach.

Implications

The decision is uncontroversial and merely confirms the following:

- An AMS is to direct his or her mind to the matters laid down in the WorkCover Guides but he or she is not bound, in the strict legal sense, to every word contained in them.

- Having determined that maximum improvement has been reached, an AMS is obliged to provide a WPI assessment as a percentage.

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Judgment summary

Energy Australia v Butler **[2010] NSWSC 487**
(Barr AJ, 20 May 2010)

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Facts

The first defendant, Mr Butler, suffered injuries to his left leg on 13 July 1981 and in October 1992. Mr Butler also suffered injury to his right wrist on 24 July 1977. All injuries were suffered in the course of his employment with the plaintiff, Energy Australia.

In 1995 he received lump sum compensation in respect of 15% loss of efficient use of his left leg at or above the knee as well as pain and suffering. Lump sum compensation was also paid in respect of 10% loss of efficient use of the right hand. In 2009 Mr Butler made a claim for compensation for permanent impairment in respect of further loss of use of the left leg and right hand, which resulted in proceedings being commenced in the Commission.

In the Application to Resolve a Dispute ("ARD") the worker alleged injuries as follows:

1. "Date of Injury":
   24 July 1977, 30 June 1995 (deemed date) or alternatively 1 October 2008 (deemed date)
2. "Date of notice of injury":
   On or shortly after 24 July 1977 and various dates including on or shortly after 13 July 1981, on or shortly after 19 October 1992 and 1 October 2008
3. "Date of Compensation Claim":
   On or shortly after 24 July 1977 and various dates including on or shortly after 13 July 1981, on or shortly after 19 October 1992 and 1 October 2008
4. "Injury Description":
   Right hand/wrist and left leg
5. "Describe how the injury occurred":
   The Applicant sustained injury to his left knee from performance of heavy and repetitive duties in the course of his employment including specific incidents on 13 July 1981 and 19 October 1992. In earlier proceedings, the Applicant's injury deemed to have a date of injury of 30 June 1995. In the alternative, the Applicant argues a deemed date of injury as the date of lodgement of the permanent impairment claim form. The Applicant sustained injury to his right hand/wrist on 24 July 1977 when he tripped and fell in the course of his employment.

The matter proceeded to teleconference on 21 May 2009 following which a Certificate of Determination – Consent Orders ("Consent Orders") was issued on 12 June 2009. The Consent Orders noted, among other things, that by reason of their agreement, and in accordance with Rule 15.9(1) of the *Workers Compensation Commission Rules* 2006 the determination of the Commission in this matter is:

> *"1. Application amended to delete claim in respect of deemed date of injury of 1 October 2008".*

The Consent Orders also contained the following notation:

> *"The following is not a determination of the Commission, however, I note that the parties have agreed to the following:*

The Respondent has not disputed injury as set out in the Application to Resolve a Dispute."

The medical dispute was remitted to the Registrar for referral to an AMS. Mr Butler was referred by the Registrar to Dr Bye, AMS, for assessment of his permanent loss of use of left leg and right hand. In the referral to the AMS the date of injury in relation to the left leg was described as 30 June 1995.

Dr Bye issued a MAC on 16 July 2009 assessing Mr Butler as suffering 20% permanent loss of efficient use of the right hand as a result of injury on 24 July 1977 and 30% permanent loss of efficient use of the right leg at or above the knee as a result of the "deemed" injury on 30 June 1995. No deduction was made for any proportion of the impairment that was due to previous or pre-existing condition or abnormality.

Dr Bye made the following observation in the MAC in relation to the knee injury:

> *"I presume that the date of injuries for the left leg at or above the knee is a Deemed Date, 30/6/1995 as his original injuries were in 1981."*

Under the heading "Deduction (if any) for the Proportion of the Impairment that is due to Previous Injury or Pre-existing Condition or Abnormality", Dr Bye said:

> *"This does not exist."*

Energy Australia appealed against the medical assessment, relying on grounds of appeal under sections 327(3)(c) & 327(3)(d). A delegate of the Registrar determined that it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel.

Energy Australia argued that the AMS was in error in assessing all of Mr Butler's loss of use of his left knee as attributable to "injury" on 30 June 1995, without deduction for pre-existing abnormality, particularly as the AMS had attributed Mr Butler's left leg injury to the injury sustained in 1981. Energy Australia further argued that the failure by the AMS to make a deduction for pre-existing abnormality to take account of the injury in 1981 was specifically inconsistent with all of the evidence. In its appeal application Energy Australia sought an assessment hearing before the Appeal Panel.

The Appeal Panel considered Energy Australia's request to have an opportunity to present oral submissions but decided that it was appropriate to determine the appeal on the papers. In giving its reasons it observed that Energy Australia had not explained why the matter could not be dealt with by its written submissions. The Appeal Panel, apart from a minor and uncontentious amendment, determined the appeal in accordance with Dr Bye's assessment.

Issues

Energy Australia sought to challenge the decision of the Appeal Panel and lodged a summons in the Supreme Court. The grounds of relief pleaded were that the Appeal Panel erred:

1. By failing to provide Energy Australia with a hearing which it sought;
2. By not properly exercising the discretion in deciding whether or not to hold an assessment hearing;
3. By not properly considering the grounds relied on by Energy Australia on appeal to the Appeal Panel in circumstances where the Registrar was satisfied that at least one of the grounds of appeal was made out;
4. By failing to revoke the MAC consistent with the finding of the Registrar and the grounds relied on by Energy Australia, and

5. By including injuries prior to 1 July 1997 (and in particular 13 July 1991) in its assessment of loss of use under the Table of Disabilities.

Held

In the Supreme Court Barr AJ set aside the decision of the Appeal Panel and remitted the matter to the Appeal Panel to be dealt with according to law. The reasons for his Honour's decision are summarised below.

Representation

- Energy Australia was represented by Mr Williams SC, leading Mr Saul.

- Mr Butler filed a notice of appearance in which he submitted to the orders of the Court save as to costs. Counsel represented Mr Butler on the hearing of the summons, but only in relation to the issue of costs of the Supreme Court proceedings.
  Mr Butler's Counsel made no submissions on the merits of the case.

- Submitting appearances, save as to costs, were also filed on behalf of the Registrar and the Appeal Panel.

- WorkCover sought and was granted leave to appear as *amicus curiae* ("a friend of the court"). However Counsel was not permitted to make submissions on the facts or on the merits of Energy Australia's claim, since they were matters which could have been taken up by Mr Butler and no reasons were offered as to why Counsel appeared throughout the proceedings but did not participate as a contradictor in the proceedings except to be heard on the issue of costs of the proceedings.

The procedural fairness issue

- A party has the right to decline to consent to a hearing on the papers and to make oral submissions to a tribunal (see *Ah Dar v State Transit Authority of NSW* (2007) 69 NSWLR 468 per Bell J at [63] – [69]).

- In a proper case a tribunal, subject to the requirements of its statute, may determine to deal with a matter without a requested oral hearing. But when there is a request to give an opportunity to a party to make oral submissions, it needs to be confident that questions are unlikely to arise that call for oral submissions.

- The issue before the Appeal Panel was whether the assessment should have incorporated a deduction to allow for the degree of impairment for which Mr Butler had been compensated in 1995. Without notice to the parties the Appeal Panel dealt with the matter on a basis not raised in the written submissions of either side, namely, the Appeal Panel had no power to deal with what it was being asked to do.

- There were substantial arguments that could have been put before the Appeal Panel which, if correct, were capable of showing that it would be wrong for the Appeal Panel to come to the decision it ultimately did.

- It was unnecessary in the present case to decide whether such arguments would ultimately be persuasive. It is sufficient to say that they were available but could not be put because an oral hearing had been denied.

- The Appeal Panel ought to have realised that when it decided to deal with the appeal on a basis contemplated by neither of the parties, the parties ought to have been given an opportunity to attend a hearing to make submissions. The circumstances required the

Appeal Panel to give Energy Australia the opportunity it requested to attend and make oral submissions. In denying Energy Australia that opportunity the Appeal Panel failed to afford it procedural fairness.

Other grounds

- It was not necessary to deal with the remaining grounds of appeal. His Honour did not think it desirable to deal with the arguments because it seemed possible that there were matters which could be put the other way but were not put to the Court because Counsel for Mr Butler had taken no part in the debate on the merits.

Costs

- Energy Australia sought costs against Mr Butler. The submission was that if consent had been forthcoming orders could have been made without a hearing. That submission was not accepted based on the fact that the Court would not have been justified making the orders sought by Energy Australia without a proper examination of the evidence and the law. In view of the fact Counsel for Mr Butler took no part in the debate on the merits, the hearing was no longer than it would otherwise have been. Energy Australia was not awarded its costs and was ordered to pay Mr Butler's costs.

Implications

- The determination of an appeal by an Appeal Panel on a basis not raised by the parties in their submissions in circumstances where the parties are not provided with an opportunity to make submissions constitutes a denial of procedural fairness.

- The hearing rule requires a decision-maker to give an opportunity to be heard to a person whose interest will be adversely affected by the decision.

- Whether the opportunity to be heard is by way of written or oral submissions is a matter to be determined having regard to the circumstances of each case.

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Judgment summary

Cameron v Registrar of the Workers Compensation Commission of NSW [2008] **NSWSC 704**
(Rothman J, 14 July 2008)

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Facts

An AMS issued a MAC which determined that the Worker had 24% WPI of the lumbar spine due to an injury on 14 April 2004. The assessment was based upon categorisation of the Worker in DRE Lumbar Category IV. The assessment included an adjustment to take into account activities of daily living, and an additional 2% WPI on the basis of a spinal fusion that the Worker underwent due to a non work-related prior injury. It assessed a pre-existing condition at 8% WPI including the surgery. The result was an assessment at 16% WPI.

The Respondent appealed against the assessment of the AMS on the grounds specified in subsections 327(3)(c) and 327(3)(d) of the 1998 Act. It contended that the deduction made for pre-existing injury was inadequate and that the Worker should have been categorised as a DRE Class IV prior to the work injury occurring. It further contended that the adjustment for 2% on account of surgery and adjustment for the impact on daily living was in error as each pre-dated the workplace injury.

A delegate of the Registrar determined that it did not appear that grounds for appeal existed and the appeal did not proceed. The Respondent then challenged this decision in the Supreme Court. On 1 November 2006, amendments to the 1998 Act became operative. Section 327 was amended and section 378 was inserted. As a consequence, the Respondent notified that it would discontinue the Supreme Court proceedings and apply for reconsideration of the delegate's decision.

Subsequently a different delegate (the delegate who made the original determination had resigned) considered the application for reconsideration, granted the application, rescinded the decision and referred the appeal against the original assessment to an Appeal Panel. The delegate did so on the basis that the 2% adjustment on account of surgery pre-dated the relevant workplace injury, and determined that it was an error to include that adjustment because of the relevant date of surgery.

The appeal proceeded to an Appeal Panel who revoked the original MAC and replaced with an assessment of 26% WPI, but deducted 20% WPI as a result of pre-existing injury, leaving an effective 6% WPI attributable to the workplace injury.

Held

The reconsideration of matters arising under section 327(4) of the 1998 Act by the delegate of the Registrar is quashed. The assessment of the Appeal Panel is also quashed. The application for reconsideration of the refusal of the Registrar to allow the appeal to proceed is remitted to the Registrar to be dealt with in accordance with the law.

- It was both appropriate and legally correct to include the 2% adjustment on account of the pre-workplace injury surgery in the assessment of the WPI for the period after the workplace injury. The deduction to allow for the pre-existing injury would necessarily include the same 2% adjustment. As a matter of both principle and logic, if the effective WPI arising from any particular injury were required to be assessed by a calculation of current WPI for the period immediately prior to the injury, then the surgery must be included in the post-injury WPI assessment (at [16]).

- The use of the definite article ("the") in subsection 378(1) requires a reconsideration by the same AMS or Appeal Panel as made the original decision. However, as there is only one

Registrar, that it is the same person that is required to reconsider it as made the original decision is supported by the ordinary meaning of the term "reconsider" (at [45]). Although the Court considered it unnecessary to determine this issue to finality, it is at least strongly arguable that another delegate of the Registrar does not have the authority to reconsider the earlier-made decision of the Registrar or an earlier delegate (at [51]).

- The delegate's reconsideration determination was predicated on the basis that the delegate applied a test which was whether a ground of appeal exists for the purpose of section 327(4). The provisions that applied at the time the determination was required were the provisions of section 327(4), as amended in 2006 (at [54]). The delegate did not address the question as to whether or not he was satisfied that on the face of the application and any submissions made, at least one of the grounds had been made out. In doing so, the delegate addressed and answered a wrong question (at [58]).

- The provisions of section 327(4) do not require the actual existence of a state of facts, namely the making out of a ground of appeal, but require only the satisfaction of the Registrar of that fact (at [59]). Section 327(4) does not make the arguability, existence or success of the ground of appeal, objectively determined, the criterion for the appeal to proceed. It makes the satisfaction of the Registrar the criterion- the satisfaction of the Registrar that at least one of the grounds of appeal has been made out (at [60]). The Registrar determines whether an appeal should proceed (at [62]). As a consequence, the "satisfaction" under section 327(4) of the 1998 Act was only a purported satisfaction and the jurisdiction required to be exercised by section 327(4) of the 1998 Act was only a purported satisfaction and the jurisdiction required to be exercised by section 327(4) remains constructively unexercised (at [65]).

- Further, the application of the wrong test and the satisfaction of the Registrar at a lower standard than that required by the provisions as they existed at the time of the exercise, necessarily involves the proposition that the wrong exercise of the jurisdiction conferred by section 327(4) of the 1998 Act has affected the task undertaken by the Registrar through her delegate (at [67]).

- The Registrar lacks the authority to determine questions of law authoritatively, or bindingly, or to make an order or decision otherwise than in accordance with the law. The determination that as a matter of law, the WPI could not include an adjustment for the surgery undertaken prior to the workplace injury, was an error. It was an error of principle and law in the proper construction of the Act and the function of the AMS under the Act (at [68]).

- In *obiter*, the Court was of the view that the approach to be undertaken by an Appeal Panel is to identify an error raised by the Appellant, determine whether the error existed, and if so, to assess, on all the material before it, the whole person impairment without the error it has found. On any analysis, it is not, as stated in the reasons for the Appeal Panel, to decline to consider whether an error exists. Further, it is required to make a positive finding as to the existence of the error.

- The Registrar is "gatekeeper" but does not finally determine, or objectively determine, the existence of error. The appeal is not a hearing *de novo* of the original assessment without regard to whether an error has occurred or without regard to the original assessment. The Appeal Panel misunderstood its task, asked itself the wrong question and misconstrued its power (at [78]).

- Approaching the assessment of pre-existing injury by having regard to interference with activities of daily living can give rise to unfairness, however assessing pre-existing injury without having regard to interference with activities of daily living can also cause unfairness. The method of calculating pre-injury WPI is a matter for expert assessment. Neither

approach is an error of law. In some circumstances, one or other approach may be an error of fact (at [86]).

Implications

The decision is highly persuasive authority to the effect that delegates of the Registrar do not have the authority to reconsider the earlier-made decision of the Registrar or an earlier delegate, where that delegate is not available to reconsider the matter referred for reconsideration. Where a determination is made by a delegate who is unable to reconsider a determination, the doctrine of necessity together with the Court's interpretation of section 378(1) requires that the Registrar herself reconsider such determinations. Further, the Registrar and only the Registrar herself can reconsider determinations that she has made.

The decision confirms with authority that the role of the Registrar, when considering appeals against medical assessment as the "gatekeeper" pursuant to section 327(4) of the 1998 Act, is not to determine whether an actual error exists in the certificate or that incorrect criteria have actually been applied by an AMS.

The role of the Registrar is to make a determination as to whether, on the face of the application and submissions made, a state of satisfaction has been reached, that a ground of appeal under one of the heads contained in section 327(3) is made out, such that would justify the appeal to proceed. This is a subjective function. This interpretation conforms with earlier authority to the effect that the Registrar adopts an administrative decision-making function when exercising powers as the "gatekeeper", and does not exercise powers of a judicial or quasi-judicial nature.

It is not the function of the Registrar to determine questions of law, such as the interpretation or application of the AMA5 or WorkCover Guides to the Evaluation of Permanent Impairment. Such matters are matters for an AMS to determine, and this necessarily extends to an AMS who brings the powers to an Appeal Panel.

Although the decision does not raise any issues of a novel nature as regards the function of the Registrar, the effect of the decision is that any determination made by a delegate which purports to determine the interpretation or application of the AMA5 or *WorkCover Guides to the Evaluation of Permanent Impairment* as a matter of law, amounts to jurisdictional error.

Accordingly, delegates of the Registrar must exercise care to ensure that determinations reflect an understanding of the jurisdiction and powers exercised by the Registrar, and do not contain statements that purport to interpret in an authoritative and binding way, the AMA5 or the *WorkCover Guides for the Evaluation of Permanent Impairment*.

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Judgment summary

Jennifer Yvonne Carter* v *GIO Workers Compensation (NSW) Ltd and Ors
(James J, unreported)

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Facts

In 2002 the Plaintiff brought proceedings in the District Court against her employer, claiming damages for injuries allegedly suffered in the course of her employment. The Court considered video surveillance of the Plaintiff and made findings that while the Plaintiff suffered soft tissue injury, she did not suffer continuing physical restrictions from her injuries. The Court found that the employer was not negligent and entered a verdict in favour of the employer.

In 2005 the Plaintiff filed in the Commission an Application to Resolve a Dispute about her claims for weekly benefits, medical expenses and lump sum compensation for permanent impairment and pain and suffering. The Commission referred the medical dispute to an Approved Medical Specialist (AMS) and ordered that the transcript of the proceedings in the District Court and Dodd DCJ's judgment were not admissible before the AMS.

Notwithstanding the Commission's order, the AMS had before him and considered Dodd DCJ's judgment in making his assessment of permanent impairment. However, neither the video nor any surveillance report were before the AMS. An application was filed for an appeal pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) against the decision of the AMS. In determining the Plaintiff's claim for weekly benefits, the Commission ordered that the Respondent make copies of the surveillance video and provide copies to the Plaintiff and the Commission. Following the Commission's orders, an amended application to appeal the decision of the AMS was filed relying on the video surveillance as additional relevant information (subsection 327(3)(b)). The Registrar referred the matter to an Appeal Panel, as it appeared to the Registrar that the surveillance video was additional relevant information.

The Appeal Panel, in relying on the video surveillance, revoked the Medical Assessment Certificate and issued a new certificate with 0% whole person impairment ("WPI"). The Appeal Panel determined that the video surveillance was fresh evidence pursuant to section 328(3) of the 1998 Act, as the Appellant did not have access to the video at the time of medical examination and the contents of the tape were such that it potentially leads to a different outcome.

The Plaintiff sought judicial review of the Appeal Panel's determination on the following grounds:

- Denial of procedural fairness – in taking into account some of the contents of the video without identifying to the Plaintiff the parts relied upon; not giving the Plaintiff an opportunity to address adverse findings about the Plaintiff's credit; and not giving the Plaintiff an opportunity to address any adverse matters in the video;

- Errors of law in failing to give reasons or sufficient reasons for the decision of the Appeal Panel, and

- Errors of law with respect to section 328(3) of the 1998 Act – applying an incorrect test, or alternatively, failing to apply any test for the application of this section; and making a finding that the video was admissible under this section.

Held

Final orders not made.

- The Plaintiff herself received a copy of the video and her solicitor was served with a copy of the video. It would have been transparently obvious that the parts of the video that could be relevant were the parts showing movements by the Plaintiff of the two parts of her body identified in the medical assessment certificate of the AMS. The Plaintiff's claim of denial of procedural fairness regarding the Appeal Panel's failure to identify to the Plaintiff the parts of the video it considered adverse can be disposed of (at [51]-[52]).

- The Appeal Panel's finding that "the Panel is of the view that the movements observed in the video are incompatible with the respondent worker having loss of use of her neck or right arm at the time" was not, primarily, a finding about the Plaintiff's credit. It was a finding that the video showed movements by the Plaintiff of her arm and neck, which were inconsistent with the Plaintiff having any loss of use of her arm or neck. Any adverse effect on the Plaintiff's credit was a consequence of this finding (at [53]-[54]).

- The Plaintiff and her solicitors had been served with a copy of the video. The video was the subject of a ground of appeal. It would have been obvious to the Plaintiff's legal advisers that there was a serious risk that the video might be admitted into evidence. It could be of critical importance, that there was a serious likelihood (having regard to the Guidelines) that, notwithstanding the submission made on behalf of the Plaintiff, the Appeal Panel might determine the matter "on the papers". The Plaintiff had an opportunity within that period to make submissions, or seek directions for making submissions, about what effect should be given to the video, if it was admitted into evidence. That opportunity was not availed of (at [65]-[67]).

- The reasons given by the Appeal Panel in its statement included that all the findings made by the AMS on his examination of the Plaintiff were subjective, in that they depended on the reliability of the Plaintiff as a witness, and the AMS had not reported any objective signs (at [73]). It can be inferred from the reasons expressly given by the Appeal Panel that it considered that the medical reports favourable to the Plaintiff were made by doctors who had not seen the video and, like the AMS, relied on subjective findings on examination. There was no failure by the Appeal Panel to give sufficient reasons for its decision to revoke the medical assessment certificate (at [75]-[76]).

- *Summerfield v Registrar of the Workers Compensation Commission* [2006] NSWSC 515 ("S*ummerfield"*) and *Massie v Southern NSW Timber & Hardware Pty Limited* [2006] NSWSC 1045 ("*Massie"*) applied: The word "or" in the expression commencing with the word "unless" in section 328(3) is to be interpreted disjunctively and, applying to the present case what Sully J said in *Massie*, the video was not to be admitted into evidence by the Appeal Panel, unless the Appeal Panel was satisfied that either (1) the video had not been available to the plaintiff before the medical assessment by the AMS or (2) the plaintiff had not in fact obtained the video before the AMS made his medical assessment and could not reasonably have obtained the video before the AMS made his assessment (at [83]-[85]).

- The meaning of "not available" in section 328(3) would include the senses of "not in existence", "not known by the party to be in existence" and "not capable of being obtained by a party by any means". The expression cannot be interpreted as meaning simply "not obtained by a party" before the medical assessment by the AMS, because to give such interpretation to "not available" would deprive the second alternative in section 328(3) of any effect (at [86]-[88]).

- The only reason given by the Appeal Panel for receiving the video used the expression "access", which is not a term used in section 328. The Appeal Panel did not address the

written submissions, which had been made by the parties and did not ask itself a question of the type propounded by Sully J in *Massie*. The Appeal Panel applied an incorrect test and failed to give sufficient reasons for its decision to admit the video. The Appeal Panel erred in law in making its finding that the video was admissible under section 328(3) (at [91]-[92]).

Implications

The Court refrained from making final orders in this matter, allowing the parties to make submissions about the appropriate form of relief.

In confirming Johnson J's judgment in *Summerfield* about the meaning of the word "or" in section 327(3)(b) of the 1998 Act and Sully J's judgment in *Massie* regarding the test to be applied in allowing fresh evidence under section 328(3) of the 1998 Act, the Court held that the Appeal Panel applied an incorrect test in admitting the video as fresh evidence. It is significant to note that the Court commented on the Appeal Panel's use of the word "access" in determining whether or not to admit the video as fresh evidence, in that the word is not a term used in section 328 of the 1998 Act. This highlights the importance of using the words of the legislature when applying a statutory test.

James J held that "not available" in section 328(3) would include the senses of "not in existence", "not known by the party to be in existence" and "not capable of being obtained by a party by any means" and that the expression cannot be interpreted as meaning simply "not obtained by a party" before the medical assessment by the AMS. The Court's interpretation of "not available" can equally be applied with respect to section 327(3)(b) of the 1998 Act.

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Judgment summary

***Chalkias v State of New South Wales* [2018] NSWSC 1561**
(Adamson J, 17 October 2018)

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Facts

The plaintiff made a claim for compensation for permanent impairment pursuant to s 66 of the 1987 (NSW) on the basis of a psychiatric injury that occurred on 27 November 2012. The AMS assessed the plaintiff at 15% whole person impairment. On 4 September 2018, the employer lodged an application to appeal on the following grounds: the assessment was made on the basis of incorrect criteria (section 327(3)(c)); the MAC contains a demonstrable error (section 327(3)(d)). On 2 February 2018, the Panel assessed the plaintiff's WPI at 7% on the basis that the descriptors provided in the Guidelines are examples only but the criteria described by the AMS did not fit within Class 3 but rather reflect a mild impairment.

The worker filed a summons in the Supreme Court seeking the decision of the Medical Appeal Panel be set aside on the basis of error of law on the face of the record or jurisdictional error. The plaintiff submitted that the Panel had not determined that there was a relevant error before proceeding to review the assessment. The Plaintiff submitted, in the alternative, that it was not open to the Panel, in the circumstances of the present case, to find a demonstrable error or incorrect criteria in the AMS's assessment. The Plaintiff also submitted that the present case was indistinguishable from the circumstances addressed by Harrison AsJ in *Parker v Select Civil Pty Ltd* [2018] NSWSC 140 in which her Honour found that a difference in opinion as to whether the plaintiff ought be categorised in Class 2 or Class 3 was insufficient to amount to a demonstrable error or incorrect criteria for the purposes of s 327(3) of the 1998 Act.

Held: The Appeal Panel's MAC confirmed.

Discussion and Findings

Adamson J rejected the plaintiff's submissions that the Panel's review is confined to cases where the Medical Assessment, or some aspect of it, is "glaringly improbable", holding that the submission found no support in the wording of the 1998 Act. Her Honour considered the Appeal Panel's reasons, which found that the AMS had "fallen into error" when one compared his "findings" with "the descriptors in the Evaluation Guidelines". In substance the Panel was satisfied, as is apparent from its reasons, that the AMS had made his assessment on the basis of incorrect criteria within the meaning of s 327(3)(c) of the 1998 Act, since the AMS had not applied the Guidelines correctly and that this amounted to a demonstrable error within the meaning of s 327(3)(d) of the 1998 Act.

Her Honour further stated that finding of error indicated that the Panel did not misapprehend its jurisdiction. A decision-maker in the position of the Panel is required to set out "the actual path of reasoning" by which it arrived at its assessment of WPI: *Wingfoot Australia Partners Pty Limited v Kocak* (2013) 252 CLR 480.

Adamson J noted that as the Appeal Panel was satisfied of the error relating to the grading with respect to self-care and personal hygiene, the Panel was entitled and obliged to review the assessment of the self-care and personal hygiene category.

Her honour was satisfied that the Appeal Panel correctly applied the criteria in the Guidelines and was entitled to review the AMS's grading of the plaintiff in the self-care and personal hygiene category. As a result, the Appeal Panel came to a different assessment and assessed the plaintiff as Grade 2 in respect of this category, a finding open to the Panel and authorised by the 1998 Act.

Orders

Adamson J made the following orders:

1. Summons dismissed
2. Order the plaintiff to pay the first defendant's costs.

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Judgment summary

Western Sydney Local Health District v Chan **[2015] NSWSC 1968**
(Adams J, 22 December 2015)

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Facts

The worker was employed as a dietician when she suffered injury to her lumbar spine on 27 July 2010, and a psychological injury which developed from 2003 to 2010. She had been receiving weekly benefits until 24 December 2012 when she was informed that the effect of her injuries had resolved and liability was disputed. In December 2012 she lodged an application with the Commission.

On 14 February 2014 a MAC was issued which assessed the worker's psychological injury at 7 per cent whole person impairment. The original AMS, Dr Baker, noted that he did not have access to the treating doctor's report, which had assessed the worker's impairment at 20 per cent.

In addition the original AMS did not have the first report prepared by Dr Snowden, one of the psychiatrists retained by the plaintiff. In that report, Dr Snowden assessed the worker's impairment at 17 per cent. However in a supplementary report, Dr Snowden revised down the scores he had originally assigned the worker and found a revised impairment of 6 per cent.

An appeal was lodged and the Registrar referred the matter to a new AMS, Dr Parmegiani, to conduct a fresh examination of the worker and issue a new MAC. The AMS conducted a further examination and assessed the worker's impairment at 15 per cent. He did not refer to Dr Snowden's supplementary report but did refer to the Application to Admit Late Documents attaching that report.

An appeal was lodged against the new MAC and the plaintiff submitted that the AMS failed to consider Dr Snowden's supplementary report. The Panel confirmed the new MAC, noting that the AMS is not required to refer to every piece of evidence or medical opinion.

Issues

Whether the AMS, Dr Parmegiani, overlooked the supplementary report issued by Dr Snowden. Given that Dr Parmegiani did not expressly refer to the supplementary report, but did refer to Dr Snowden's first report, meant that the only rational conclusion was that he had not considered the supplementary report.

Decision

His Honour, Adams J, held that it should be accepted that the AMS had the material before him. Moreover, the AMS expressly referred to the report of Dr Baker which set out the conclusions of Dr Snowden's supplementary report. His Honour was not persuaded that the AMS's silence with respect to the supplementary report demonstrates the he did not consider it.

His Honour acknowledged the role of the Panel's experience as to how the task of an AMS should be undertaken. The plaintiff contended that the only reasonable explanation of the AMS's failure to mention the supplementary report is that he had not considered it. According to his Honour, there is no bright line here. The parties knew that the material was before the AMS.
In conclusion, his Honour held that it was entirely reasonable for the Panel to conclude that the AMS was aware of the supplementary report. In that regard, it was open to the Panel to infer that the AMS did not feel the need to mention or discuss the supplementary report, particularly when the AMS's task was to assess the worker's condition based on his own clinical assessment of the material. Accordingly, it was not illogical or irrational for the Panel to infer that the AMS considered the supplementary report.

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Judgment summary

Cincotta v Police Citizens Youth Clubs NSW Ltd & Ors [2018] NSWSC 1588
(Hoeben CJ, 23 October 2018)

Facts

The matter involved a complex history, whereby the worker had previously been compensated for 24% WPI for permanent impairment to the lumbar spine in 2008. In 2015, the worker suffered a fall and underwent surgery, resulting in consequential left foot drop. The worker claimed lump sum compensation in respect of lumbar spine peripheral spinal nerve root impairment resulting from the 2015 injury.

The AMS issued a MAC assessing 14% WPI of the lumbar spine. The employer sought reconsideration of the MAC on the basis that this was not consistent with the referral. The AMS issued a further MAC assessing nil impairment of the peripheral nerve, attributing the worker's symptoms to diabetic peripheral neuropathy rather than injury. The appellant appealed the MAC stating that the AMS had wrongly used an analogous condition (peripheral neuropathy) in making his assessment, and failed to examine the worker's power and motor deficit.

The Appeal Panel upheld the MAC of 0%.

Issues

The worker brought judicial review proceedings in relation to both the reconsidered MAC and the Appeal Panel decision on the following grounds:

(a) The AMS acted beyond jurisdiction in making a negative finding as to causation, and the Panel acted beyond jurisdiction in accepting this approach;

(b) The AMS and Appeal Panel asked themselves the wrong question as to whether the peripheral neuropathy was work related, rather than whether the left foot drop was caused by damage to the peripheral nerve roots arising from the accepted injury; and

(c) The AMS had failed to carry out his statutory task of determining the degree of permanent impairment resulting from the work-related injury in circumstances where there was no dispute between the parties that there was a consequential work-related condition of left foot drop. The plaintiff also submitted that the Panel had erred in failing to make such a finding, thereby falling into jurisdictional error.

Held

His Honour declined to deal with the plaintiff's challenge to the reconsidered MAC on the basis that the 1998 Act provides a remedy via appeal to the Panel, and this was a right that the plaintiff had exercised.

His Honour noted at [39] that liability was not in issue in relation to the 2015 injury and anything consequential upon it. However, this did not mean that there was no dispute as to whether the left foot drop, being the condition said to cause permanent impairment, was caused by the injury for which liability had been accepted, as evinced by the insurer's Reply to the claim. As such, the referral to the AMS did challenge the medical consequences of the injury, that is the extent to which the degree of permanent impairment was due to any pre-existing condition.

His Honour discussed *Haroun v Rail Corporation New South Wales and Ors* [2008] NSWCA 192, *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264 and *Jaffarie v*

Quality Castings Pty Ltd [2018] NSWCA 88 at [44 -46] in reaching his conclusion, finding that the AMS and Panel were required to consider the degree of permanent impairment attributable to other causes, and to differentiate between these and the degree of impairment resulting from injury.

His Honour stated at [48] “it is apparent that the AMS and Appeal Panel were required to engage in such assessment of causation as was necessary to discharge their statutory task of determining the degree of permanent impairment resulting from the injury in question.” As such, His Honour found no jurisdictional error, and that the Panel had not misdirected itself to its statutory task.

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Judgment summary

Fire & Rescue NSW v Clinen **[2013] NSWSC 629**
(Campbell J, 28 May 2013)

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Facts

Mr Clinen was employed by Fire & Rescue NSW in work to the nature of which skin cancer may be due. Mr Clinen claimed lump sum compensation in respect of 6% whole person impairment (WPI) for facial and bodily disfigurement. The Registrar referred the matter to an Approved Medical Specialist (AMS) for assessment. The AMS assessed Mr Clinen with 5% WPI for bodily disfigurement and 5% WPI for facial disfigurement, a total of 10% WPI.

Fire & Rescue NSW appealed against the assessment of the AMS on the basis that the AMS failed to provide reasons for the conclusion that there was no deduction pursuant to section 323 of the 1998 Act. The matter proceeded to a Medical Appeal Panel (MAP).

The MAP confirmed the AMS's assessment. The MAP noted that whilst there may have been evidence of exposure to the sun in Mr Clinen's early years, there was no evidence of an earlier injury, pre-existing condition or abnormality. There was no evidence before the MAP, nor was there any evidence before the AMS, of any injury, condition or abnormality in respect of Mr Clinen's skin on his face or body that occurred prior to the commencement of his employment with Fire & Rescue NSW. There was no evidence before the MAP, nor was there any evidence before the AMS, that Mr Clinen received any treatment for skin cancer/disorder/disfigurement prior to his employment with Fire & Rescue NSW.

Issues

Fire & Rescue NSW sought judicial review in the Supreme Court of NSW on the grounds that:

(a) the MAP failed to make a deduction pursuant to section 323 of the 1998 Act, and

(b) the reasons given by the MAP were inadequate.

Held

Campbell J dismissed the summons with costs.

Reasons for decision

- As Schmidt J pointed out in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (*Cole*) and *Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liq)* [2013] NSWSC 365, it is necessary to find a pre-existing abnormality or condition, here the latter, actually contributing to the impairment before section 323 of the 1998 Act is engaged. This conclusion has to be support by evidence to that effect. Assumption will not suffice.

- This case was distinguished from *Cole*. In *Cole* Schmidt J was concerned with the causal connection connoted by the phrase "due to". Her Honour made the pertinent observation that it was necessary for the evidence acceptable to the MAP to actually support the connection between a previous injury (here, pre-existing abnormality of condition) and the overall degree of impairment in the instant case. This case is concerned with a logically anterior question: did the accepted evidence that there was exposure to the sun in the worker's early years

mandate a finding of pre-existing condition or abnormality within section 323 of the 1998 Act as the only legally sustainable conclusion? In the judgment of Campbell J it did not.

- The analysis of Giles JA in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [29] – [33] and [37] supports a legal distinction between a medical condition and the circumstance giving rise to it. The meaning of "condition" in ordinary language may extend to include a prerequisite to something else. The worker's exposure to sunlight in his youth, in that broad sense, is a pre-existing condition. But the word "condition" in the present statutory context has a more limited meaning. In the context of legal causation, as with the meaning of the phrase "due to", one may refer to any one of the necessary "conditions" giving rise to a consequence as a cause, or prerequisite, of it. As a matter of causation, the worker's skin cancer is due to his exposure to sunlight, including during his youth, before the commencement of his employment with the employer. But the causation is not presently relevant context.

- The context here is provided by section 323 and arises from the juxtaposition of words "previous injury", with "pre-existing condition or abnormality". The natural meaning in that restricted context of "condition" is "medical or like condition" in the sense of a diagnosable, or established, clinical entity c.f. *Simeon Wines Ltd v Bobos* [2004] NSWCA 342 at [17] per Sheller JA, Santow JA and Young CJ in Eq. (as he then was) agreeing. This, in effect, is what the MAP decided. The MAP's decision was not only legally open, but also legally correct.

- The legal duty of the MAP to give reasons is discussed by Basten JA in *Campbelltown City Council* v *Vegan* [2006] NSWCA 284; 67 NSWLR 372. In Campbell J's judgment the MAP made the basis of its decision legally and factually clear in the appropriately succinct reasons provided. Those reasons are more than adequate to discharge the legal duty.

Implications

The word "condition" in section 323 is restricted to mean "medical or like condition, in the sense of a diagnosable, or established, clinical entity" in its statutory context.

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***Cole v Wenaline Pty Limited* [2010] NSWSC 78**
(Schmidt J, 23 February 2010)

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Facts

In 1975 or 1976 Warwick James Cole ("the worker") suffered an injury ("the first injury"), which necessitated a discectomy.

The worker suffered a further back injury in October 2005 ("the second injury") in the course of his employment with Wenaline Pty Ltd ("the employer"). As a result of that injury the employer's insurer accepted liability and paid weekly compensation and medical expenses.

In February 2008 the worker underwent a lumbo-sacral discectomy. There was no dispute between the parties that the surgery was as a result of the second injury.

The worker made a claim for lump sum compensation due to permanent impairment as a result of the second injury.

In the Workers Compensation Commission the worker was assessed by an Approved Medical Specialist ("AMS"). The AMS assessed the worker as suffering 16% WPI, namely:

1. DRE Lumbar Category III (Table 15-3, AMAV)	10%
2. ADLs (Paragraphs 4.29-4.32, WorkCover Guidelines)	3%
3. Persisting radiculopathy (Table 4.2, WorkCover Guidelines)	3%
Total WPI:	16%

The AMS deducted the proportion of 50% of the total assessment (i.e. 8% WPI) as being due to the first injury. The AMS based the deduction on the following facts:
(a) The worker had previous disc surgery to the same level of the lumbar spine in 1976;
(b) The worker had ongoing "niggling pain and stiffness ever since"; and
(c) There were significant degenerative changes present in the lower lumbar spine at the time of the second injury.

The worker appealed against the AMS assessment. The issue for the Appeal Panel regarding section 323 of the 1998 Act was whether any proportion of the worker's permanent impairment was due to his previous injury.

The Appeal Panel issued two judgments – a majority judgment of the AMS panel member and a dissenting judgment by the Arbitrator panel member. Pursuant to section 328(6) of the 1998 Act the decision of a majority of the members of an Appeal Panel is the decision of the Appeal Panel. Therefore, the decision of the two AMS panel members was the decision on appeal.

The majority Appeal Panel agreed with the AMS's original assessment of deduction, "taking into account all the available evidence and information, and then applying medical judgment based on knowledge and expertise".

The majority Appeal Panel was of the view that the evidence clearly showed that there was "previous impairment". It said that *hypothetically* if the worker had been examined prior to the second injury, the fact of the first surgery, the history of ongoing symptoms (being "niggling pain

and stiffness ever since") and significant degenerative changes, the worker would have had a level of permanent impairment prior to the second injury.

The worker sought judicial review of the Appeal Panel's decision.

Issues

The worker raised the following grounds:
1. The majority Appeal Panel failed to give adequate reasons for its conclusions;
2. The majority Appeal Panel had misquoted and acted upon an incorrect understanding of the evidence; and
3. The majority Appeal Panel failed to correctly apply the requirements of section 323 of the 1998 Act.

Held

Schmidt J in the Supreme Court found that the majority Appeal Panel conducted its assessment on a basis inconsistent with what section 323 of the 1998 Act required.

Her Honour quashed the decision and remitted the matter to the Appeal Panel to be determined according to law.

Reasons for Decision

- The Appeal Panel proceeded on the basis of an assumption that, even though the treatment of the first injury had succeeded, the very fact of the existence of that prior injury "irrespective of outcome" resulted in an impairment which must have contributed to the impairment that arose after the second injury. That was an incorrect approach. Section 323 does not permit an assessment to be made on the basis of an assumption or hypothesis that once a particular injury has occurred (the first injury) it will always, "irrespective of outcome", contribute to the impairment flowing from any subsequent injury (the second injury).

- Section 323 of the 1998 Act requires establishing, on the available evidence:

    - What the level of impairment is after the second injury;
    - Whether a proportion of the impairment is due to the first injury;
    - What the proportion is.

    While the AMS panel members must utilise their medical judgement, knowledge and experience, this must be done having regard to the evidence and without making assumptions.

- The assessment must have regard to the evidence as to the actual consequences of the first injury (or pre-existing condition or abnormality) and the extent that the later impairment was due to the earlier injury (or pre-existing condition or abnormality) must be determined. In the present case the evidence established that:

    - The worker had a good result from the first surgery after the first injury;
    - He returned to full labouring work without continuing symptoms for over 20 years after the first injury and surgery;
    - He required no further treatment after the first surgery up to the second injury in 2005;
    - He had only occasional niggling back pain and stiffness since the first injury;
    - He only developed leg symptoms after the second injury;
    - There was no evidence of residual radiculopathy after the first surgery;
    - There was no evidence of any restriction in the worker's activities of daily living prior to the second injury, and

- There was no evidence that the first surgery contributes to the worker's current residual radiculopathy or current restriction in the activities of daily living.

- The evidence suggested that the degree of impairment before and after the second injury was quite different. Why the degree of impairment after the second injury was found to be due to the first injury was not explained, other than by the assumption made by the majority of the Appeal Panel.

- In relying on the "occasional niggling back pain and stiffness", the majority of the Appeal Panel did not address what the "niggling pain and stiffness" was due to.

Implications

- Section 323 of the 1998 Act requires a determination of whether or not any proportion of permanent impairment assessed is due to any previous injury or pre-existing condition or abnormality. The determination must be based on evidence of the actual consequences of the previous injury, pre-existing condition or abnormality and the later injury. This will require clinical assessment by an AMS and may (and will usually) include examination of a worker by an AMS.

- An AMS or Appeal Panel must explain why any proportion of impairment present after the second injury was found to be due to the previous injury.

- A previous injury, even to the same body part, does not automatically invoke a deduction under section 323. The test is whether the previous injury actually contributes to the current impairment. If the evidence does not establish that the previous injury contributes to the impairment then no deduction can be made. However, if the previous injury does contribute, even if it was asymptomatic at the time of the later injury, then there must be a deduction.

- Where the evidence lends itself to more than one conclusion, an AMS or Appeal Panel must provide reasons for preferring one conclusion to another. The more controversial, the more detailed the reasons should be. It is possible that a later injury will be of such significance that an earlier injury, pre-existing condition or abnormality would make no difference to the impairment that exists following the later injury. For example, if the worker suffered an earlier ruptured disc and a later injury where the spinal cord was severed.

- There is no formula for calculating the proportion of the impairment due to any previous injury or pre-existing condition or abnormality, save for limited exceptions under section 323(2). Section 323(2) of the 1998 Act allows for a deduction of 10% of the total current impairment if it would be "difficult or costly" to determine the extent of the deduction. However, the formula under section 323(2) cannot be applied if it is "at odds with the available evidence".

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***Cook v City of Sydney* [2015] NSWSC 1904**
(Bellew J, 18 December 2015)

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Facts

The worker was employed as a cleansing services officer between 20 November 2006 and 20 August 2008. He lodged a claim for compensation in respect of a psychological injury resulting from bullying and intimidation in the workplace.

The worker came before the AMS and was assessed as having a WPI of 16 per cent. The AMS first assessed the worker's WPI as 17 per cent and then added 1 per cent to that figure, representing an adjustment for the effect of treatment. The treatment consisted of taking the antidepressant medication Sertraline.

The defendant lodged an appeal against the MAC and the Panel concluded that the worker's WPI was 7 per cent. In reaching its conclusion, the Panel did not address the issue of the effect of treatment undertaken by the worker and the adjustment made by the AMS for that treatment.

Issues

1. Whether the Panel erred in failing to take into account a relevant consideration, namely the adjustment to be made to the level of impairment having regard to the effect of the plaintiff's treatment. Note that the defendant conceded that this was an error.
2. If the Panel did err in failing to take into account the relevant consideration, whether section 378 of the 1998 Act could empower the Panel to correct that error.

Decision

His Honour, Bellew J, held that s 378 does not confer any right or entitlement. Rather, it confers a discretion upon the Panel to correct error, noting that there is no guarantee that an application under s 378 would be granted. Further, s 378 does not incorporate any independent review and contemplates the matter being referred back to the original decision-maker.

In theses circumstances, it could hardly be said that the remedy afforded by s 378 is as convenient or satisfactory as the relief sought by the worker on judicial review.

Although his Honour was unable to determine the reason for the Panel's failure to take into account the effect(s) of the worker's treatment, he held that the Panel failed to properly carry out its assessment. This amounted to a fundamental failure on the part of the Panel and could not be categorised as 'minor'. Nor could it be "easily fixed" as suggested by the defendant.

The plaintiff had a long and complicated psychiatric history and taking into account the effect of his treatment for the purposes of assessing his level of impairment would have its complications. His Honour also had regard to the large number of medical and associated reports generated in the matter.

In light of the above reasons, and in in circumstances where error had been conceded, his Honour held that the MAC and MAP decisions should be quashed and remitted the matter to the Registrar to be further dealt with according to law.

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Cornett –v- Plateau View Aged Care Facility & Ors **[2006] NSWSC 244**
(Malpass AsJ, 7 April 2006)

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Facts

On 5 August 2004 the worker suffered injury to her back and hand. An Application to Resolve a Dispute was filed in the Commission, the reasons for which were set out as being that the insurer had not made a decision within one month of the degree of permanent impairment being fully ascertainable or within two months of being given all relevant particulars of the claim and whether the injury was stabilised. There was no denial of liability. The Reply indicated that an offer of settlement had been conveyed in line with an assessment of 1% WPI with respect to the right middle finger. The medical dispute was referred to an AMS re the lumbar spine and the right middle finger.

Held

Malpass AsJ held that the Registrar was in error and the decision of the Registrar was set aside. It was stated "at the time of the referral there was common ground between the parties. Although the degree of permanent impairment may not have been great, there was no dispute that there was some permanent impairment. The dispute concerned the degree of it. This was the matter for referral".

Malpass AsJ considered that the AMS asked himself the wrong question of whether or not the injury suffered by the worker resulted in impairment. What was referred to the AMS for assessment was the degree of permanent impairment.

Implications

The AMS is to give a certificate as to the matters referred for assessment.

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Judgment summary

***Cortese v Cumberland Ford Pty Ltd & Ors* [2011] NSWSC 1260**
(Adamson J, 21 October 2011)

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Facts

The plaintiff claimed lump sum compensation for injury to his cervical spine. In support of the claim the plaintiff relied on a report from Dr Bodel.

The matter was referred to an Approved Medical Specialist (AMS) who assessed the plaintiff as suffering from a DRE Cervical Category II impairment and 7% whole person impairment.

The plaintiff appealed against the Medical Assessment Certificate (MAC) and claimed that the AMS should have found the plaintiff was suffering from a DRE Cervical Category III impairment. The plaintiff sought to rely on a further report of Dr Bodel as additional relevant information pursuant to section 327(3)(b) of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act).

A Medical Appeal Panel (the Panel) rejected the further report of Dr Bodel on the basis that the observations made in the report were already covered in the plaintiff's submissions and that the report sought to cavil with the findings of the AMS.

In a majority decision, the Panel confirmed the MAC.

Issues

The plaintiff commenced a juridical review action in the Supreme Court, seeking an order that the decision of the Panel be quashed and other consequential orders. The plaintiff submitted that:

(a) The Panel erred in law by not admitting the further report of Dr Bodel and not taking it into account.

(b) Dr Bodel's further report was not available and could not reasonably have been obtained before the medical assessment because Dr Bodel could not have envisaged that his initial report would be misinterpreted by the AMS.

(c) The Panel applied the wrong test when it decided not to admit Dr Bodel's further report.

(d) The Panel's assessment of the plaintiff as DRE Cervical Category II was against the weight of evidence.

Held

- Adamson J found that there was nothing in the MAC to indicate that the AMS misunderstood Dr Bodel's initial report. Evidence does not fall within section 327(3)(b) of the 1998 Act if it merely restates evidence that has already been given on the basis that if it had been put in a different way it may have been accepted.

- On a fair reading of the reasons of the Panel it was evident that they did not reject the further report of Dr Bodel simply because they saw it as an attempt by Dr Bodel to cavil with the MAC.

- The plaintiff's grounds of appeal in relation to the Panel's rejection of Dr Bodel's further report did not disclose any error of law.

- The balance of the grounds of appeal concerned the classification and proper construction of the evidence that was before the AMS and the Panel and did not raise any error of law.

- The plaintiff's summons was dismissed.

Implications

The Court will not exercise jurisdiction under section 69 of the *Supreme Court Act* 1970 to decide whether a Medical Appeal Panel has made the correct and preferable decision. Matters concerning the weight of evidence and how documents, including experts' reports, should be read are matters of fact. "In circumstances where the administrative decision maker is comprised at least in part of experts, a court should be loath to go behind the expert opinion of such a panel, or too readily characterise any alleged errors as errors of law rather than errors of fact" at [21].

The decision confirms that "the reasons of an administrative decision-maker (especially one who is not a judge) are not to be 'construed minutely and finely with an eye keenly attuned to the perception of error'": *Minister for Immigration and Ethnic affairs v Wu* (1996) 185 CLR 259 at 271-2, applied in *Pitsonis v Registrar of the Workers Compensation Commission* [2008] NSWCA 88 at [31].

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Judgment summary

Crawford v The Registrar of the Workers Compensation Commission & ors **[2007] NSWSC 44**
(James J, 9 February 2007)

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Facts

The AMS was required to assess the level of permanent impairment to the Plaintiff's right upper extremity. The AMS issued a MAC in which he referred to the Plaintiff as having suffered an injury to his right shoulder on 25 February 2003 and having undergone a surgical repair of the rotator cuff of the right shoulder in August 2003. The AMS made no reference to the Plaintiff having suffered an injury to his right elbow or right arm. Based on his examination and findings of the restriction of movement in the Plaintiff's right shoulder the AMS provided an assessment of 7% WPI. The Plaintiff appealed the assessment.

The Panel confirmed the AMS's assessment of 7% WPI but issued a fresh MAC in which it confirmed that re-examination was not required as there was sufficient material filed and a proper review of this material confirmed that there was no indication of any impairment in the right elbow (upon which a lateral release had been performed). The Plaintiff sought a judicial review.

The Plaintiff submitted that the Panel failed to take into account relevant considerations by not conducting a further examination of the Plaintiff's right upper extremity including his right elbow and arm. Further the Panel failed to take into account the relevant consideration of the AMS's failure to take into account the Plaintiff's right elbow or arm.

Held

James J rejected the submissions and found that no further examination of the Plaintiff was required. The Panel expressly took into account the Plaintiff's grip strength as provided by AMA5 and the Panel was entitled to rely on the other reports that there was no diminution of grip strength. Sufficient reasons were given and there was no denial of procedural fairness.

Implications

There is no absolute requirement for the Panel to re-examine a worker in circumstances where the MAC does not refer to all of the separate injuries to the body part referred.

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Judgment summary

***Crean v Burrangong Pet Food Pty Limited* [2007] NSWSC 839**
(McClellan CJ at CL, 3 August 2007)

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Facts

The plaintiff sustained injuries to his back and leg at an abattoir where he handled large pig carcasses over the period 1998-2003. The plaintiff filed an Application to Resolve a Dispute in the Commission. He was referred for assessment to two Approved Medical Specialists (AMSs) – Dr Lahz for orthopaedic injuries and Dr Taylor for injuries to his sexual organs. As the injuries were pre- and post- 1 January 2002, both AMSs provided assessments under the Table of Disabilities (TOD) and Whole Person Impairment (WPI) as follows:

Dr Lahz:	TOD: right leg at or above the knee 5%, back 10%; WPI: right lower extremity 0%, lumbar spine 7% (8% minus 10% section 323 deduction).
Dr Taylor:	TOD: loss of sexual organs 0%; WPI: sexual organs 0%.

Dr Taylor qualified his assessment by stating "I am prepared to consider changing this opinion in light of the final orthopaedic opinion" (he had not yet seen Dr Lahz's MAC; he later issued a second MAC wherein he stated that he had seen Dr Lahz's report; the second MAC was otherwise identical to the first).

The worker appealed against both MACs, claiming that Dr Lahz's decision was "affected by legal, factual and discretionary error", and that Dr Taylor had failed to consider Dr Lahz's MAC. In the body of his MAC, Dr Taylor had also referred to his opinion that the worker was suffering from a 60% loss of sexual organs, which was alleged to be an internal inconsistency in the MAC. Both appeals came before a Medical Appeal Panel.

The Appeal Panel concluded that Dr Lahz erred in applying the nominal 10% deduction under section 323 of the 1998 Act. Having identified that as a demonstrable error, the Appeal Panel conducted its own assessment and found that the appropriate deduction was 50%. It concluded that the internal inconsistency in Dr Taylor's MAC was a demonstrable error, and conducted its own assessment of the worker's losses and impairments.

The Appeal Panel revoked both MACs, and issued new assessments as follows:

> TOD: right leg at or above the knee 5%, back 10%, loss of sexual organs 0%;
> WPI: right lower extremity 0% ('no ratable impairment'), lumbar spine 4% (8% minus 50% section 323 deduction), sexual organs 0%.

Issues

The worker sought review of the Appeal Panel's decision in the Supreme Court. The main grounds of review pressed were:

- The Appeal Panel erred in relying on the decision of Wood CJ at CL in *Campbelltown City Council v Vegan* [2004] NSWSC 1129. The Appeal Panel should have confined itself to submissions made by the plaintiff – the plaintiff had not raised section 323 as an issue, so it could not review that part of Dr Lahz's MAC.

- Procedural fairness required that before taking a course of action adverse to the plaintiff (making a 50% deduction under section 323, in lieu of the 10% deduction made by the

AMS at first instance), the Appeal Panel was required to give notice that it was considering this course and allow him the opportunity to make further submissions.

- The Appeal Panel erred in dealing with the challenge to the finding in relation to the plaintiff's sexual organs; it failed to give sufficient reasons for its decision in relation to Dr Taylor's MAC.

Held

Summons dismissed.

- Although the Appeal Panel's reasons refer to the judgement of Wood CJ at CL in *Campbelltown City Council v Vegan* [2004] NSWSC 1129, its process was consistent with Handley JA's judgment in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284 i.e. it considered the grounds of appeal, satisfied itself of error then conducted its own assessment (at [28]). This is also consistent with the tentative view expressed in that judgment by Basten JA, who did not consider that all forms of merit review were excluded by the Act – that would be inconsistent with section 328 subsections (2), (3) and (5) (at [29]-[30]). The plaintiff's submission that the Appeal Panel could not review the operation of section 323 must be rejected. The plaintiff had sought review of Dr Lahz's MAC on the basis that it was affected by "legal, factual and discretionary error", so it was open to the Appeal Panel in exercising its review power under section 328 to conclude that the section 323 deduction should have been 50% (at [32]).

- The decision of the Appeal Panel turned upon material known to the applicant. A decision-maker may be obliged to advise of a prospectively adverse conclusion "not obviously open on the known material" or which may not be apparent from "its nature of the terms of the statute under which it is made". However, a decision-maker "is generally not obliged to invite comment on the evaluation" of a person's case (at [37]). Procedural fairness does not require the Appeal Panel to disclose that it proposes to increase or decrease WPI because it has reached a different view from the AMS, nor does it require the Panel to disclose in advance for comment its evaluation of the appropriate section 323 deduction (at [40]).

- Having found error based on the internal inconsistency in Dr Taylor's MAC, the Appeal Panel considered all the available medical evidence. It was open to the Appeal Panel to find that the plaintiff's sexual difficulties were related to an injury on 10 October 2002, and not to any earlier injury. It was also open to the Appeal Panel to find that the post-1 January 2002 impairment to the sexual organs was not due to physical or neurological impairment of those organs and was accordingly not compensable under the Guidelines (at [43]-[45]). The Appeal Panel discharged its obligation of giving sufficient reasons for the reader to understand why it reached its conclusion (at [46]).

Implications

McClellan CJ at CL has followed the ratio of Handley JA (and also an interpretation of Basten JA) in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284, and followed by Malpass AsJ in *Skillen v MKT Removals Pty Ltd & Ors* [2007] NSWSC 608, that an Appeal Panel's function is confined to reviewing a medical assessment and correcting errors in relation to matters raised by the Appellant. The Court noted that the Act provides for merits review, but only of matters raised by the Appellant.

Further, the Court held that procedural fairness does not require the Appeal Panel to advise the parties of prospectively adverse conclusions, except possibly where such conclusions are not obviously open on the known material or may not be apparent from the nature or terms of the relevant statute.

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Judgment summary

CSR Limited v Jamie Leonard Smith **[2011] NSWSC 68**
(Harrison AsJ, 23 February 2011)

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Facts

The first defendant, Mr Smith sustained injury to his lumbar spine in the course of his employment with the plaintiff, CSR Limited ("CSR"). Mr Smith made a claim for lump sum compensation and pain and suffering as a result of the injury to his lumbar spine which resulted in proceedings being commenced in the Commission on 16 September 2009. The matter proceeded to arbitration hearing on 14 December 2009 following which the Arbitrator gave an extempore decision. Relevantly the Arbitrator ordered that the degree of permanent impairment in respect of the lumbar spine was to be referred by the Registrar to an Approved Medical Specialist ("AMS") for assessment as a result of the injury on 17 August 2006.

Mr Smith was referred by the Registrar to Dr McGroder, AMS, for assessment of the permanent impairment resulting from the injury to his lumbar spine on 17 August 2006. Dr McGroder issued a MAC on 18 February 2010, assessing Mr Smith with 6% whole person impairment ("WPI") as a result of the injury to his lumbar spine.

CSR appealed against the medical assessment, relying on the grounds of appeal under sections 327(3)(c) & (d). Relevantly, in its appeal application CSR requested the opportunity to present oral submissions to the Appeal Panel. A delegate of the Registrar determined that a ground of appeal under section 327(3)(d) had been be made out and referred the matter to an Appeal Panel. Having considered the request by CSR for an oral hearing the Appeal Panel determined that it had enough information to proceed on the papers and issued a decision on 18 June 2010 confirming the MAC issued by Dr McGroder.

Issues

CSR sought to challenge the decision of the Appeal Panel and lodged a summons in the Supreme Court. The grounds of review pleaded were as follows:

1. The Appeal Panel erred in failing to provide the plaintiff with a hearing;
2. The Appeal Panel erred in not properly exercising its discretion in deciding whether to hold an assessment hearing;
3. The Appeal Panel erred in not properly considering the grounds relied on by CSR on appeal in circumstances where the Registrar was satisfied that at least one of the grounds of appeal was made out;
4. The Appeal Panel erred in failing to revoke the MAC consistent with the finding of the Registrar and the grounds relied on by CSR;
5. The Appeal Panel erred in failing to identify the clear reference in the MAC to the AMS having been sent the documents excluded from the referral despite that being clear from paragraph 2 of the MAC;
6. The Appeal Panel erred in failing to make a deduction as required by section 323 of the 1998 Act, and
7. The Appeal Panel erred in considering that there had been no injury to Mr Smith's lower back after the injury which was the subject of the referral despite the reference to a subsequent injury in paragraph 2 on page 3 of the MAC (and elsewhere).

Submitting appearances were filed by all the defendants. In the circumstances the WorkCover Authority sought leave to intervene in the proceedings.

WorkCover's role in the proceedings

- The question of the appropriate role that WorkCover should play in proceedings of this nature was considered in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 286 at [54] – [64] ("*Vegan*"). The distinction between those proceedings and these proceedings is that in *Vegan* there was an active contradictor to deal with the merits of the case, whereas in these proceedings there is no active contradictor.

- *Fairfield City Council v Janet Brear & Ors* [2010] NSWSC 480 ("*Brear*") and *Energy Australia v Butler* [2010] NSWSC 487 ("*Butler*") are instructive. In these cases the other parties filed submitting appearances. WorkCover sought and was granted leave to appear as *amicus curiae*. WorkCover's role was confined to submissions on law no submissions were permitted going to the merits of the case.

- On 11 October 2010, Hislop J granted leave to WorkCover to appear as *amicus curiae* in the proceedings. Before Harrison AsJ CSR opposed leave being granted to WorkCover to make submissions on the merits but accepted that the Court had the power to grant leave to WorkCover make submissions on law.

- Harrison AsJ considered WorkCover's submissions in relation to law only.

Held

The matter was listed for judgment on 23 February 2011. Harrison AsJ dismissed the summons. The question of costs was reserved as there was no appearance on behalf of the plaintiff on the day the judgment was handed down. Liberty was granted to the parties to apply to the Court as to whether the plaintiff should pay the costs of any of the submitting defendants. The reasons for her Honour's decision are summarised below.

Failure to provide the plaintiff with the hearing which was sought

- There was no dispute that the Appeal Panel had a discretion as to whether or not it should agree to an oral hearing, the issue was whether the Appeal Panel had exercised its discretion in a proper manner.

- Counsel for CSR referred to *Ah Dar v State Transit Authority of New South Wales* (2007) 69 NSWLR 468 ("*Ah Dar*"), *Brear* and *Butler*

- Counsel for WorkCover referred to *Estate of Brockman v Brockman Metal Roofing Pty Limited* [2006] NSWSC 235 ("*Brockman*"); *Symbion Health Limited v Hrouda* [2010] NSWSC 295 at [86] – [92] ("*Hrouda*") and *Fletcher International Exports Pty Limited v Lott & Anor* [2010] NSWCA 63 at [40] – [51] ("*Lott*").

- *Ah Dar* was distinguished on the basis that the discretion was not exercised at all in that case because the Appeal Panel wrongly understood that each of the parties to that medical dispute wanted the appeal to be determined on the papers.

- *Brear* was distinguished on the basis that in that case the Appeal Panel without notice to the parties dealt with the matter on a basis that went outside the content of the written submissions and this amounted to a denial of procedural fairness. The Appeal Panel ought to have informed the parties and afforded them an opportunity to make submissions.

- *Butler* was distinguished on the basis that in that case there were substantial arguments that could have been put before the Appeal Panel which, if correct, were capable of showing that it would be wrong for the Appeal Panel to come to the decision it ultimately did.

- *Brockman* was considered. In that case it was found to be reasonable to conclude from the Appeal Panel's statement of reasons that the examination of Mr Brockman by an AMS member of the Appeal Panel influenced his decision and that his report influenced the other members of the Panel. The Appeal Panel was entitled to draw upon the expertise of one of its members, as it plainly did and was entitled to take into account that expertise and the conclusions reached by that expert without disclosing those conclusions to the parties before coming to a final conclusion. It was reasonable to assume that the parties were on notice that the Appeal Panel would rely on the expertise and experience of its medical specialist members in its deliberations. There was no denial of procedural fairness in these circumstances.

- *Hrouda* was considered. In that case the Appeal Panel wrote to the parties and informed them that it would be considering an issue that had not been raised by either party. Symbion Health in its original submissions and in its supplementary submissions had made requests for a hearing. The submissions did not elaborate in any detail what issues it wished to address. In the absence of any cogent reasons in support of the requested hearing the Appeal Panel determined that it would not hold an assessment hearing. At the judicial review Symbion Health argued that it was not for the Appeal Panel to speculate. It was argued that the Appeal Panel effectively judged in advance Symbion Health's capacity to persuade it. The issue was whether Symbion Health had a legitimate grievance or complaint in contenting, as it did, that it had been denied procedural fairness in the Appeal Panel failing to advise it before its final decision that it refused the request for a hearing. It was decided that there had been no denial of procedural fairness.

- Her Honour did not consider *Lott* as that authority concerned a failure to grant an oral hearing under section 354 of the 1998 Act as an error in point of law.

- The requirements of natural justice depend on the circumstances of the case, the nature of the inquiry and the rules under which the Tribunal is acting as well as the subject matter: *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118.

- Whether there has been a denial of procedural fairness is influenced by the particular circumstances, including the relevant statutory context. The appeal is to be by way of review (section 328(2) of the 1998 Act). At the preliminary review the Appeal Panel had before it the documents that were before the AMS and the submissions of the parties in relation to the appeal. The Appeal Panel can determine whether it will deal with a review "on the papers" or whether an assessment hearing is required (WorkCover Guideline 45).

- CSR was on notice that it should attach to the appeal application reasons why the presentation of oral submissions was necessary. CSR did not elucidate what matters it needed to address at the hearing and why those matters could not be properly articulated in written submissions.

- There was nothing in the submissions to suggest that the Appeal Panel would benefit from oral submissions being made at an assessment hearing. Nor was there anything that was likely to arise during the determination that would suggest to the Appeal Panel that oral submissions would be required. The Appeal Panel was not contemplating going outside the contents of the written submissions of the parties. In these circumstances her Honour was not satisfied that the Appeal Panel had wrongly exercised its discretion in not affording CSR an assessment hearing. CSR was not denied procedural fairness.

- Her Honour did not consider the other grounds of review pleaded by the plaintiff.

Implications

The decision is uncontroversial in confirming the following principles:

- The question of whether or not the Appeal Panel will grant a party an oral hearing is a discretionary matter for the Appeal Panel.

- The question of whether or not a failure to afford a party an oral hearing will amount to a denial of procedural fairness is influenced by the particular circumstances of the case and consideration of the relevant statutory context. It was relevant in this case that the plaintiff had not elucidated what matters it needed to address at the hearing and why those matters could not be properly articulated in written submissions.

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Judgment summary

***Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416**
(Beech-Jones J, 28 September 2015)

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Facts

The worker was employed by the respondent as a slaughterman from 1978. Some time around 2000 to 2002, he began to experience pain in both hips. He ceased work with the respondent in 2004 and in 2008 he had X-rays revealing severe bone-on-bone osteoarthritis. He eventually had both hips replaced in 2010. The worker lodged an application in the Commission relying on ss 15 and 16 of the 1987 Act. The Registrar referred the medical dispute to an AMS.

The AMS issued a MAC in 2014 and concluded that the worker developed osteoarthritis in both hips. He assessed the impairment of both hips at 34 per cent WPI and made a deduction of three-quarters under s 323 of the 1998 Act. However in making this deduction he made a mathematical error which resulted in a WPI of 14 per cent rather than 10 per cent.

The worker appealed to the Panel with the main ground being that there was no basis for the AMS to make a deduction. The Panel confirmed the AMS's findings and corrected the mathematical error in the MAC which resulted in the worker's WPI of 10 per cent.

The Panel noted that there was no evidence of symptoms prior to 2002. The Panel said that the evidence as to the nature of the work, the course of the condition, including the onset of symptoms in 2002 and the 2008 imaging were all relevant to assessing what was clearly a primarily degenerative condition. They noted that there was some aggravation from work but there was no severe trauma involved, and the bilateral progression of the condition at similar rates were factors indicating predominantly constitutional pathology.

As a result, the worker sought judicial review of the Panel's decision by the Supreme Court.

Decision

His Honour, Beech-Jones J, first set out to explain the functions of the Panel and nature of the review it was conducting. In this regard, his Honour found that the basis upon which the Panel interfered with the AMS's assessment was unclear. His Honour also relied on *Siddik v Work Cover Authority of New South Wales* [2008] NSWCA 116 in noting the Panel's obligation, or at least power, to "conduct the assessment anew". This obligation arose once the Panel concluded that there was a mathematical error in the assessment.

With respect to the s 323 deduction, his Honour found it necessary to address the meaning of "condition" in s 323. Although "condition" was not defined in legislation, his Honour relied on *Mosby's Dictionary of Medicine, Nursing & Health Professions* to define the term as a "state of being, specifically in reference to physical and mental health or wellbeing".

In the decision, the parties' submissions concentrated on the meaning of condition in the context of two decisions cited by Basten JA in *Vitaz v Westform* (NSW) Pty Ltd [2011] NSWCA 254. They are *D'Aleo v Ambulance Service of New South Wales* [1996] NSWCCR 139 and *Mathew Hall Pty Ltd v Smart* [2000] NSWCA 284 (*Hall*).

After summarising the parties' submission and pointing out that both decisions concerned an earlier version of s 323, his Honour applied the reasoning in *Hall.* In *Hall* her Honour, Giles JA, opined that "a genetic predisposition to keratoconus is not the same as the condition of keratoconus for the purposes of s 68A(1)" (at [37]). In applying her Honour's reasoning to s 323 of the 1998 Act, Beech Jones J concluded that:

> "Thus to establish a pre-existing condition for the purposes of s 323(1) there must, at the relevant date, be an actual condition although it may be asymptomatic. A mere predisposition or even a susceptibility is not sufficient to constitute a condition".

In considering whether the Panel erred in applying s 323 to degenerative changes (osteoarthritis) occurring contemporaneously, his Honour stated that he had considerable difficulty in ascertaining from the Panel's reasons what point of time, if any, the worker's osteoarthritis had to predate the injury in order to be a "pre-existing condition". Was the relevant time for determining whether a pre-existing condition existed prior to the deemed date of injury under ss 15(1) 16(1) of the 1987 Act, or was it prior to the commencement of worker's employment?

His Honour found that the Panel's approach was to assume that degenerative changes could be addressed under s 323 without the necessity of identifying whether there was a "condition" that predated any particular point in time. Instead, the Panel considered that it was sufficient if the condition arose independently of a person's employment even if contemporaneously. Further, in referring to his osteoarthritis as "constitutional", the Panel did not explain whether the worker always had that condition or whether he only had a susceptibility or predisposition.

Overall, what the Panel had done was to conclude that once it was established that the worker had osteoarthritis that had a "constitutional pathology" then it automatically followed that it was a pre-existing condition. His Honour held that this approach was erroneous in law and constituted an error on the face of the record.

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***Dar v State Transit Authority of NSW* [2007] NSWSC 260**
(Bell J, 29 March 2007)

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Facts

The worker was referred to an AMS for an assessment of permanent impairment. The Arbitrator admitted into proceedings various documents filed by the employer but none of these documents were sent to the AMS. The AMS had only the worker's evidence before him when preparing the MAC. The AMS issued a MAC assessing the worker's cervical spine as DRE III (15% WPI). The employer appealed against that assessment based on the non-provision of its evidence to the AMS.

The Registrar determined that it appeared to her that a ground of appeal existed on the basis of demonstrable error, and referred the matter to a Medical Appeal Panel ("MAP"). The MAP reviewed all documents (including those that were not sent to the AMS) and revoked the original MAC, issuing a new MAC with an assessment of DRE II (5% WPI).

The worker appealed to the Supreme Court. The Court first examined the Registrar's decision, considering the definitions of "demonstrable error" in previous cases (e.g. *Pitsonis*: "an error is demonstrable if it is capable of being shown or made evident", *Merza*: "demonstrable error may be made out in a case in which the error is readily apparent from an examination of the MAC and the referral document"). The Court considered that although the subjective test in the Registrar's gatekeeper function under section 327(4) of the 1998 Act was designed to discourage appellate review (as discussed in *Brockmann*) and although it only required the formation of an opinion by the Registrar (as per *Vegan*), if the Registrar had wrongly approached the task, the worker may be entitled to relief.

Held

The Court held, following the decision in *Massie*, which had similar facts to this case, that although the assessment process was procedurally flawed, the non-provision of documents to the AMS was not a "demonstrable error". Accordingly the Registrar erred in law in deciding that an appeal ground existed on this basis.

The Court then went on to consider the MAP's decision, which was relevant in determining whether or not it should exercise its discretion to quash the Registrar's decision. In *Massie*, the Court had refused to quash the Registrar's decision on the basis that the appellant should have challenged it immediately, and before the matter was decided by the MAP.

In the worker's Notice of Opposition to the appeal, he had requested an oral hearing if the matter should proceed to a MAP. The MAP proceeded to determine the matter on the papers and in their reasons stated: "The parties did not object to the determination of the matter without an assessment hearing and both parties supported an assessment on the papers".

The Court accepted that the MAP had a discretion as to whether or not to hold a hearing, and that the parties were on notice that the MAP may determine the matter on the papers without a hearing. However it appeared that the MAP did not properly exercise its discretion, or did not exercise it at all.

The Court considered that due to the functions of the MAP being judicial in nature and having significant consequences for the parties, it was bound to take this consideration into account. Its failure to do so meant that it fell into a jurisdictional error of law justifying the setting aside of its decision.

Accordingly the Court found that the discretionary consideration that led the Court in *Massie* to refuse to quash the Registrar's decision did not apply in this case.

Having set aside the Registrar's decision, the Court then considered how to proceed with the matter. The worker submitted that the decision of the AMS was of no legal effect because of the failure to consider the employer's evidence, and that the appropriate way to address that problem would be for the employer to approach the AMS and invite him to carry out a fresh assessment based on all the material (based on the principles in the High Court Decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597). The Court appears not to have accepted that submission on the basis that the Act and Guidelines do not allow the parties to have contact with the AMS.

The Court also noted that it was unclear whether the Registrar had the power to refer the matter for further assessment where an original assessment was flawed by lack of procedural fairness. In the end, the Court used its power under section 329(1)(b) of the 1998 Act to refer the matter directly for a further assessment.

Implications

The court largely followed the decision in *Massie*, which had similar facts to this case. Where an AMS fails to consider relevant materials on the basis that the documents were not provided, no ground of appeal exists and any appeal should be refused at the gatekeeper level. Unlike in *Massie,* where the court refused to quash the Registrar's decision based on discretionary grounds, the matter was referred back to the AMS by the court.

The correct avenue for correction of this kind of mistake is through reconsideration or further assessment. Appeals that proceed on this basis are infected with jurisdictional error and are void.

The Appeal Panel also erred in failing to consider the respondent's request for an oral hearing of the matter. An Appeal Panel exercises a judicial function and an assessment hearing offers the parties an opportunity to be heard; to have legal representations; and to be afforded procedural protections. An Appeal Panel is bound to take into account a wish that there be a hearing and any desire to make oral submissions. The Panel still has the discretion to not allow the parties to make oral submissions but it must exercise this discretion.

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Judgment summary

Darlington v Clarry Anderson Sheet Metal Pty Limited & Ors **[2007] NSWSC 179**
(Malpass AsJ, 13 March 2007)

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Facts

A sheet metal worker suffered an injury to his left hand involving amputation of fingers and scarring/disfigurement. The medical dispute regarding the worker's loss under the table of disabilities was referred to an AMS.

The AMS was required to decide whether the worker was entitled to compensation for both loss of use of his hand and severe bodily disfigurement under the table. The table provides for compensation for: "Severe bodily disfigurement (being an injury which is not or is not wholly any injury otherwise compensable under this table)".

The AMS answered this question in the negative, taking the view that to 'add in' an allowance for disfigurement would result in 'double dipping'. An appeal was lodged and the panel conducted a de novo review, following which they confirmed the AMS's MAC, stating "severe bodily disfigurement in this case where there is an amputation cannot be separately assessed as it is taken unto account in the assessment for loss of use of the arm". That decision was appealed to the Supreme Court.

A threshold dispute had also been referred to the AMS, who had provided a WPI assessment, but the Panel did not appear to address this part of the dispute. Accordingly, the Court mostly left this issue aside, focusing instead on the issue of compensability of disfigurement under the table of disabilities.

Held

The Court referred to previous judgments on this issue in the cases of *Australian Specialised Meat Products Pty Limited v Turner* (1995) 11 NSW CCR 614 and *Fobco Pty Ltd v Harvey* (1996) 14 NSW CCR 98. The Court acknowledged that these cases threw up differences of opinion between the judges, and that the law in this area is somewhat unclear. Some of the different opinions included:

- Disfigurement is not compensable where the loss of use of the injured body part is compensated
- Disfigurement is to be taken into account in the compensation for the loss of use of the body part
- Disfigurement is to be compensated separately from (and in addition to) the loss of use of the body part.

(These all presume that the disfigurement has not contributed to the loss of efficient use of the body part, which appeared to be the case on the evidence here).

The decision of the majority in *Fobco* appears to stand for the notion that disfigurement is to be compensated separately from and in addition to the loss of use of the body part (the third option above). The Court held that the panel had misdirected itself in failing to apply the decision in *Fobco*, and remitted the matter to the WCC for determination according to law.

There was also some discussion on the adequacy of reasons provided by the panel, and reference to the Court of Appeal decision in *Vegan*, but having already found an error due to the misdirection, the Court did not find it necessary to determine this question.

Implications

Maplass AsJ, preferring the decision of *Fobco* over *Turner*, clarified the position where a worker suffers disfigurement and loss of use of a body part. Where both elements exist, disfigurement is to be compensated separately from and in addition to the loss of use of the body part.

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Judgment summary

Deanne Michelle Dillon v Australasian Correctional Management Pty Ltd & 4 Ors **[2005] NSWSC 1284**
(Newman AJ, 12 December 2005)

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Facts

The plaintiff claimed compensation for permanent impairment of her sexual organs alleged to have resulted from psychological trauma suffered as a consequence of incidents occurring at the workplace of the defendant.

An Approved Medical Specialist (AMS) found sexual loss was psychiatrically induced and assessed loss at 0%.

The plaintiff appealed against the AMS's assessment. An Appeal Panel (the Panel) agreed with the reasoning of the AMS and confirmed the 0% assessment.

Issues

The plaintiff claimed:

1. The AMS erred by deciding that the claim could only succeed on the basis that the plaintiff suffered a physical injury.

2. The Panel erred by adopting the AMS's erroneous reasons.

3. The Panel failed to reconsider the matter with a fresh mind and merely adopted the reasoning of the AMS.

Held

The AMS erred by confining his assessment to disability flowing from physical injury because the definition of injury under the Workers Compensation legislation includes psychological injury as a basis for the receipt of compensation. The Panel repeated the error when it adopted the AMS's erroneous approach.

Newman AJ applied *Drake v The Minister for Immigration and Ethic Affairs* (1974) 24 ALR 577 and found that the Panel erred by merely agree with the reasoning of the AMS rather than considering the matter with a fresh mind.

Newman AJ found that the Panel's decision involved jurisdictional error and error of law, quashed the orders of the Panel and ordered that the matter be determined by a fresh Appeal Panel according to law.

Implications

This decision confirms the view expressed in *Campbelltown City Council v Vegan* [2004] NSWSC 1129 as to the role of the Registrar and an Appeal Panel in a medical appeal: the Registrar's role is as a gatekeeper who is to consider whether one of the grounds of appeal in section 327(3) is made out whereas the role of an Appeal Panel is to "conduct a review afresh" and it is not required to consider "whether any of the four grounds referred to in s 327(3) has been made good."

The decision also makes it clear that a claim for compensation can be established on the basis of impairment flowing from a psychological injury.

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Dening v Oltoy Pty Ltd trading as Noble Toyota **[2014] NSWSC 1224**
(Harrison AsJ, 5 September 2014)

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Facts

Frank Dening was employed as a car salesman from 20 June 2003 to 1 June 2006 with Noble Toyota. Noble Toyota was located on the corner of two busy streets. Mr Dening alleged that he had been regularly exposed throughout the course of his employment to the noise of the two streets and machinery noise from the workshop on the premises.

Mr Dening was examined by Dr Paul Fagan who assessed Mr Dening's hearing loss to be 42.6 per cent, resulting in a WPI of 22 per cent. Dr Fagan stated that Mr Dening was suffering from "industrial deafness" and that the last "noisy" employer was Noble Toyota. Based on Dr Fagan's findings, a notice of claim was sent to Noble Toyota on 1 March 2012. Noble Toyota denied liability.

On 22 June 2012, Mr Dening filed an application with the Commission claiming a lump sum payment of $32,500 for industrial deafness and $25,000 for pain and suffering.

On 5 June 2013, Noble Toyota sent an email to the commission (the concession email) conceding that it was the "last noisy employer" of Mr Dening and that two issues still had to be resolved; the nature and extent of loss of hearing suffered by Mr Dening, and if hearing aids were a reasonably necessary treatment.

The parties agreed that the matter be referred to an AMS. On 25 June 2013, the Registrar issued a referral for assessment setting out two grounds for assessment, consistent with the two issues in the concession email:

(1) The nature and extent of hearing loss suffered by a worker per s 319(e) of the 1998 Act.
(2) Whether hearing aids are reasonably necessary per section 319(a) of the 1998 Act.

The AMS was unaware Noble Toyota had conceded that it was the last noisy employer. Following the assessment of Mr Dening's injury, the AMS decided that the injury suffered was not related to Mr Dening's employment with Noble Toyota, as it was not "noisy employment". Accordingly, the AMS made make a deduction for a pre-existing injury, namely a non-related loss of 45 per cent.

On appeal, the Panel agreed with the decision of the AMS that the employment had not been noisy enough to cause Mr Dening's hearing loss. In making its decision, the Panel rejected taking into account the concession email on the basis that such evidence was not necessary in light of the terms of the referral by the Registrar.

On 4 April 2014, the Commission determined that Mr Dening suffered 0 per cent permanent impairment resulting from his injury and no entitlement to lump sum compensation.

Mr Dening sought judicial review of the decision of the Panel on two main grounds, first the noisy employment issue (Grounds 1, 3 and 4) and secondly, the s 323 deduction under the 1998 Act (Grounds 2 and 4).

Held

The Court declared that the decision of the Panel dated 20 February 2014 and the Certificate of Determination dated 4 April 2014 was vitiated by error of law. The Court ordered both decisions be quashed and the proceedings be remitted to the Registrar to determine according to law.

Noisy employment (Grounds 1, 3 and part of 4)

Harrison AsJ said this ground of judicial review was well founded. Her Honour held that the Panel misconstrued it jurisdiction in failing to take in account and consider the concession email. The Panel erred by not recognising that its task was to determine Mr Dening's claim on the basis that Noble Toyota was deemed the last noisy employer, pursuant to s 17(1)(c)(ii) of the 1987 Act. Accordingly, the Panel failed to appreciate the significance of the concession email and failed to take it into consideration for that purpose.

Her Honour held that Noble Toyota was liable for the hearing loss of Mr Dening.

Deduction under s 323 of the 1998 Act (Grounds 2 and part of 4)

It was held that the AMS acted beyond jurisdiction in assessing permanent impairment and the resulting deduction. Her Honour found that permanent impairment was not in dispute in the proceedings, nor was it referred to the AMS for assessment.

Her Honour came to the same conclusion with respect to the Panel's consideration of the s 323 deduction made by the AMS. The Panel was obliged to consider whether the AMS committed an error by going beyond the referral of the Registrar. Her Honour determined that the Panel's engagement with s 323 and the resulting deduction fell outside the ambit of referral by the Registrar.

Her Honour held that the Panel acted beyond jurisdiction.

Implications

Note that the determination of last noisy employment is a matter for an arbitrator.

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Judgment summary

Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liquidation) **[2013] NSWSC 365**
(Schmidt J, 18 April 2013)

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Facts

The applicant worked as a labourer for the respondent from 1997. In 2004 he started experiencing back pain. His pain became worse and he eventually ceased work in 2008 and underwent spinal fusion surgery in 2010. In 2012 he made a claim for lump sum compensation.

An Arbitrator determined that the applicant suffered injury to his thoracic spine as a result of the nature and conditions of his employment. The matter was referred to an Approved Medical Specialist (AMS) for assessment.

The AMS assessed 11% whole person impairment (WPI), after making a deduction of 50% for pre-existing condition pursuant to section 323 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act). He found that the applicant had an underlying condition (Scheuermann's disease) which had been aggravated and accelerated by the nature and condition of his work. In giving reasons for his assessment, the AMS noted that there was no history of any injury and that a "specific injury" was required for any DRE category above DRE II. However, he gave the applicant "the benefit of the doubt", noting that his work could be extremely heavy at times. He identified that spinal surgery was carried out for two purposes; to treat the pain that could be seen as a consequence of the work injury and to treat the effects of the pre-existing condition. He found that each contributed equally to the decision to carry out surgery and made the 50% deduction on that basis.

The applicant appealed the MAC on the basis of the 50% deduction and that the AMS failed to assess scarring. An Appeal Panel (the Panel) found that the AMS clearly explained how the pre-existing condition contributed to the currently assessable impairment and agreed with the reasons and conclusions of the AMS. However, the Panel found the AMS failed to address the issue of scarring. The Panel assessed scarring at 1% WPI and issued a new MAC certifying 12% WPI.

The applicant sought orders quashing the decision of the Panel and declaring the decision and the MAC issued by the Panel void.

Issues

The applicant argued:

(a) The Panel's reasons were inadequate. The Panel did not adequately explain why the applicant's appeal failed or reveal how it resolved the matters in issue on the appeal.

(b) The Panel failed to consider what the degree of permanent impairment resulting from the injury was.

(c) The Panel failed to determine the degree of impairment due to the pre-existing condition.

(d) The Panel erred by agreeing with the AMS's conclusion that a "specific injury" was required for any diagnosis related estimate category above DRE category II.

(e) The Panel erred by determining causation of permanent impairment.

(f) The Panel failed to address the requirements of section 323(2) of the 1998 Act.

Held

- Schmidt J noted that the reasons given by a Medical Appeal Panel "are not to be construed minutely and finely with an eye keenly attuned to the perception of error" (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259). However, she found that by merely adopting the conclusions and reasons of the AMS, without further explanation, the Panel failed to comply with their obligation to supply reasons for refusing the appeal to the minimum standard as stated in *Campbelltown City Council v Vegan* [2006] NSWCA 284; 67 NSWLR 372 (*Vegan*). Some explanation of why the Panel considered that the AMS's conclusions were correct, by reference to the factual contest between the parties, had to be provided.

- The Panel failed to consider the degree of impairment resulting from the injury, as required by section 323(1) of the 1998 Act. On appeal to the Panel the applicant advanced various arguments in relation to the 50% deduction made by the AMS. The Panel was obliged to consider and determine those arguments.

- The approach of focusing on the purpose of the surgery in order to determine the section 323 deduction, taken by the AMS and adopted by the Panel, was fundamentally flawed. The surgery was part of the treatment received for the injury which the Arbitrator determined the applicant suffered as a result of the nature and conditions of his work. The AMS was bound by that decision and had to consider whether the pre-existing condition contributed to the assessed impairment.

- Schmidt J found the Panel failed to consider whether the applicant's pre-existing condition contributed to his level of post work injury impairment (citing *Cole v Wenaline Pty Limited* [2010] NSWSC 78 (*Cole v Wenaline*). The Panel considered that the AMS had clearly explained how the pre-existing condition contributed to the assessable impairment but did not explain why it agreed with the AMS.

- The AMS's view that a "specific injury" was required in order for a worker to fall within a category above DRE II was wrong. DRE IV only requires a spinal fusion, which the applicant had, there was no need for the AMS to give the applicant "benefit of the doubt".

- The AMS misconceived his function by giving the applicant "benefit of the doubt" that his work was the cause of his impairment. The role of the AMS was to determine what proportion of the impairment was due to the pre-existing condition (relying on *Cole v Wenaline*), not the contribution of the work to the impairment.

- As there was a dispute on the evidence as to the appropriate deduction to be made in accordance with section 323 of the 1998 Act, the AMS was required to explain what evidence was accepted or preferred in reaching his conclusions as to deduction. The statement by the AMS that he did not accept the reasoning of one expert and that he agreed with another was not enough to satisfy this requirement, further explanation was needed.

- The decision of the Panel and the MAC issued with that decision was quashed. The matter was remitted to the Commission to be determined according to law.

Implications

This decision highlights the need for an Appeal Panel to address and consider each of the grounds

of appeal advanced by the appellant and provide reasons for accepting or rejecting each of those grounds. Merely adopting the AMS's reasoning and conclusions is not enough to satisfy the minimum standard of the obligation to give reasons as outlined in *Vegan.*

It confirms that the AMS's role in determining the extent of the deduction to be made under section 323 of the 1998 Act is to determine what portion of the impairment assessed is due to the pre-existing condition (confirming *Cole v Wenaline*).

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Judgment summary

Trustees of the Roman Catholic Church for the Diocese of Bathurst v Dickinson **[2016] NSWSC 101**
(Harrison AsJ, 24 February 2016)

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Facts

The worker was employed as groundskeeper and handyman with the plaintiff when he sustained injury to his neck and left shoulder on 2 September 2010. On 4 September 2010 he experienced pain and a 'pins and needles' sensation radiating down his left arm and into his index and middle fingers.

The worker saw a number of medical practitioners including a neurosurgeon who advised him to undergo an anterior cervical discectomy at three levels and spinal fusion. In this regard, there was a dispute between the parties regarding the need for the proposed surgery and the matter was referred to the AMS.

General Medical Dispute – MAC dated 15 July 2014

The AMS issued his first MAC on 15 July 2014 and concluded that the proposed surgery was justified and likely to benefit the worker based on the report of the neurosurgeon. He noted that he was unable to give a specific opinion on the details of the operation, given the lack of specifics of the operation, record of a clinical examination or reasoning in the neurosurgeons report.

Assessment of whole person impairment – MAC dated 12 February 2015

The matter came before the AMS a second time to assess the degree of permanent impairment as a result of injury. The AMS assessed the worker's impairment at 16 per cent, including an additional 1 per cent for limitation on activities of daily living. He then applied a one-tenth deduction resulting in total whole person impairment of 15 per cent.

In the MAC, the AMS also referred to a copy of the CT scan report dated 5 June 2013. This report contained the AMS's name and address, suggesting that the worker received medical treatment from the AMS.

The Panel's decision dated 19 August 2015

The plaintiff lodged an appeal against the MAC dated 12 February 2015. The matter came before the Panel and a re-examination of the worker was arranged. The Panel concluded that the worker had been a patient of the AMS and that the AMS created a perception of bias, having failed to disqualify himself in the proceedings. According to the Panel, this fact was not adverted to by the parties and that they were content for the AMS to continue to sit as the AMS given the lack of objection from either side.

The Panel concluded that the worker's injury resulted in a 17 per cent whole person impairment which, when reduced by one tenth for prior injury, resulted in a total whole person impairment of 15 per cent.

Grounds

1. Whether the Panel exceeded its jurisdiction, misunderstood the nature of the task it was to perform and/or misapplied the law to the facts when it went beyond the grounds of appeal on which the appeal was made.

2. Whether the Panel denied the parties natural justice by determining and addressing its own error and directing a medical examination by one of its members without first finding a relevant error as particularised in the pleadings.

Decision

The plaintiff relied on the decision of Davies J in *NSW Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 (*NSW Police Force*).

Her Honour, Harrison AsJ, applied what was said by Davies J in *NSW Police Force*. She held that a re-assessment (re-examination) by a Panel can only be made once the Panel determines that the medical assessment certificate contains a demonstrable error. Her Honour also referred to what Davies J said at [49] and [52] in *NSW Police Force* regarding the need for particularity in the "grounds of appeal" referred to in s 328(2) of the 1998 Act and the distinction between that expression and the expression "grounds for appeal" used in s 327(3) of the 1998 Act.

Her Honour found that the Panel proceeded on the wrong basis. It was not open for the Panel to re-examine the worker because the AMS had never been the worker's treating physician. In fact, it was common ground between the parties that the AMS had never treated the worker.

Accordingly, the Panel misdirected itself by ordering a re-examination of the worker and it was unnecessary for her Honour to determine the second ground of appeal. Still, had the Panel's finding been correct, it was debateable whether the Panel could determine that the AMS had made a demonstrable error. This is because that issue had not been raised in submissions, nor were the parties given an opportunity to address the issue.

Finally, the worker submitted that it would be highly unlikely that a fresh Panel would find any differently to the current Panel. In accordance with *Stead v State Government Insurance Commission* [1986] HCA 54, her Honour was not satisfied that a different result could not be produced by a fresh Panel. She considered that a fresh Panel may decide not to undertake a further examination of the worker.

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Judgment summary

Drosd v Workers Compensation Nominal Insurer **[2016] NSWSC 1053**
(Garling J, 5 August 2016)

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Facts

The worker injured his right leg when he slipped descending stairs at work. As a result, he injured his left knee due to overuse. An Arbitrator found that both injuries were compensable injuries and remitted the matter to the Registrar for referral to an AMS to assess whole person impairment.

The MAC and the Panel's decision

The AMS issued a MAC finding that the worker suffered from 15 per cent whole person impairment. This assessment consisted of the following elements: firstly, 30 per cent whole person impairment in the right lower extremity with a 50 per cent deduction for pre-existing injury or condition, and secondly, 10 per cent whole person impairment in the left lower extremity with a 100 per cent deduction for pre-existing injury or condition.

The worker appealed. The Appeal Panel found that the AMS had made no error with respect to his findings with respect to the worker's right knee.

The Appeal Panel found error in the AMS's findings with respect of the worker's left lower extremity. The Appeal Panel set aside the AMS's MAC and issued a new MAC, which, after deductions found 20 per cent whole person impairment. The worker sought judicial review.

Issues

1. In circumstances where the Appeal Panel found that the MAC issued by the AMS contained demonstrable error; whether the Appeal Panel did not go on to undertake an assessment in compliance with ss 322, 331 and 376 of the 1998 Act.

2. Whether the Appeal Panel in proceeding to reassess the degree of whole person impairment affecting the worker's left lower extremity, did so without reference to the requirements of the *WorkCover Guides to the Evaluation of Permanent Impairment* (the Guides) which the Appeal Panel was required to read together with AMA-5.

3. Whether the Appeal Panel ought to have, but did not, re-examine the worker in circumstances where the original examination by the AMS had not been conducted in accordance with the requirements of the Guides.

4. Whether the deduction of 50 per cent made by the Appeal Panel with respect to the pre-existing disability in the worker's left knee was wrong in law.

Decision

Issue 1: Determination according to law

As demonstrated by the new MAC issued by the Appeal Panel, the Appeal Panel purported to review the AMS's finding of 10 per cent whole person impairment by reference to the provisions of Chapter 17 of AMA 5 and Chapter 3 of the Guides. That was its task. Justice Garling observed that

the Appeal Panel, proceeding in accordance with its task, and prior to making its assessment of whole person impairment, revoked the MAC issued by the AMS.

His Honour held that having found error in the MAC issued by the AMS, the Appeal Panel revoked the MAC and determined for itself that the worker's whole person impairment relating to the left lower extremity was 10 per cent. It did so in a shorthand way. That shorthand way was to adopt the assessment of the AMS because no party had challenged it. This shorthand way, whilst arguably permissible, did not relieve the Appeal Panel from its statutory obligation to conduct its assessment according to law.

His Honour stated that s 322(1) of the 1998 Act required the Appeal Panel to apply the Guides which adopt Table 17-33 of AMA-5. That table did not permit an assessment of 10 per cent of the left lower extremity. Justice Garling held that the fact that there was no appeal against that specific assessment by the AMS was beside the point. Once the Appeal Panel determined to set aside the MAC, it was required to undertake a fresh assessment of the worker's whole person impairment in accordance with the Guides. The finding of 10 per cent whole person impairment was not permissible under Table 17-33 of AMA-5, nor did the figure reflect an accumulation of points which accorded with a calculation carried out. In accordance with Table 17-35 of the Guides, Justice Garling concluded that the assessment of whole person impairment of the worker's left lower extremity by the Appeal Panel did not accord with law and constituted jurisdictional error.

Ground 2: Examination of worker

The worker contended that the MAC issued by the AMS contained internally contradictory findings with respect to the results of the left knee replacement, namely referring to it as either "good" or "poor". The worker submitted that as the Appeal Panel revoked the MAC; it was required to consider afresh which of the three results contemplated by Table 17-33 of AMA-5 applied.

Justice Garling took the view that while on its face, the AMS's report included such a contradiction, it was clear from reading the relevant paragraph that there had been a typographical error and that the "poor" result was referrable to the worker's right knee and not the left knee. His Honour stated that the matter was not a matter of substance and held that there was no jurisdictional error or error of a kind sufficient to give rise to any orders in these proceedings.

Ground 3: Unlawful deduction pursuant to s 323 of the 1998 Act.

Justice Garling stated that the Appeal Panel referred to the assumed deduction of 10 per cent for pre-existing injury or condition under s 323 of the 1998 Act, but applied a greater figure because the evidence revealed extensive degeneration in the worker's left knee. His Honour held that there was no error in the method that the Appeal Panel used to approach this task. His Honour was of the view that it was a matter for medical assessment as to whether the evidence showed that there was pre-existing degeneration and impairment, and if so, its extent.

Justice Garling added that if the Appeal Panel had assigned an arbitrary figure, that would not comply with its statutory obligation. However, his Honour said, the way in which the Appeal Panel approached the issue, and the way in which it expressed its opinion and the reasons for it, did not bespeak jurisdictional error simply because the result it reached was coincidentally the same as for the other knee.

Implications

The decision appears to have departed from the decision in *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792. In that case, Davies J held that the Appeal Panel erred in picking up an error that is not raised in the submissions in respect of the appeal.

Rather the decision seems to have adopted the approach in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116: the Medical Appeal Panel, once it determines that an assessment by the AMS is to be revoked, it is to conduct the assessment afresh and in accordance with the Guides and the law; it is not bound to errors identified in the submissions in support of the appeal application.

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Judgment summary

***El Masri v Woolworths Ltd* [2014] NSWSC 1344**
(Extempore Judgement (Revised), Campbell J, 26 September 2014)

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Facts

Mr Vito El Masri was employed by Woolworths Ltd as a picker, a job which required him to make up orders in a warehouse for delivery to various Woolworths stores. His job required him to exert effort and strain in repetitively bending, lifting and carrying bags and boxes of goods and produce. At the end of 2001 he experienced pain in his left groin whilst performing that "arduous work".

Mr El Masri sought compensation under s 66 of the 1987 Act. The matter was referred to the AMS to assess the degree of permanent impairment and the real dispute between the parties concerned the deduction of the proportion that was due to a pre-existing condition.

On 5 November 2013 the AMS issued a MAC that provided a final whole person impairment of 5 per cent, including a deduction of 8/10ths pursuant to s 323 of the 1998 Act for a pre-existing condition.

Mr El Masri appealed the assessment of the AMS to the Panel on the basis of incorrect criteria and that the MAC contained a demonstrable error. Mr El Masri argued that the extent of the deduction should be 10 per cent under s 323(2) of the 1998 Act because it would have been difficult or costly to accurately calculate the impairment. On 24 February 2014 the Panel delivered its decision and confirmed the MAC. The Panel held that the evidence was at odds with the statutory assumption of 10 per cent under s 323(2). The Panel was not persuaded that there was difficulty in the exercise required by s 323(2) finding that this was "a matter easily determined by clinical judgement".

Decision

Mr El Masri appealed the decision of the Panel on the following grounds:

1. The Panel's failure to take into account a relevant consideration (report of Dr Champion) as to the relationship between the plaintiff's work and the deterioration of his condition.
2. The Panel made an error of law in relation to s 332 [sic, s 323] of the 1998 Act when the panel misstated the legal test and therefore asked itself the wrong question as those ideas are understood in the light of the decision of *Craig v South Australia* (1995) 184 CLR 163 at 179.
3. The Panel's failure to provide adequate reasons.
4. The Panel failed to consider the matter afresh for itself.

With respect to Ground 1, Campbell J held that the Panel did not make a jurisdictional error in the *Craig v South Australia* sense; the failure to give serious consideration to a submission seriously addressed to it on appeal. Although Campbell J was attracted to the view that the Panel had failed to consider Dr Champion's report addressed to it on appeal, his Honour found that the Panel's decision adequately demonstrated its consideration of Dr Champion's report. His Honour also found that Dr Champion was saying no more than what the AMS had said, that is that the work-related aggravation was symptomatic only.

In relation to Ground 2, his Honour held that the Panel did not make an error of law when it used the expression "clinical grounds" as the basis of its assessment of the contribution of the pre-existing condition to Mr El Masri's impairment. His Honour held that that the Panel was required to draw upon its expertise as medical practitioners and exercise its clinical judgment in making its decision.

In his reasoning, his Honour made reference to the High Court's description of the functions of a medical panel in *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 at [47]. Although his Honour did comment (at [34]) that the description of the process in *Wingfoot* was "not entirely apposite" to the process of the Panel under s 328, his Honour later found (at [46]) that much of what was said in *Wingfoot* "is apposite" to the functions of the Panel.

Based on his Honour's reasoning in Ground 2, the argument that that Panel failed to provide adequate reasons was also rejected. In considering Ground 3, his Honour held that what was stated at [55] in *Wingfoot* must be applicable to the case before him because the obligation for the Panel to provide reasons is implied in the general law: *Campbelltown City Council v Vegan* [2006] NSWCA 284. Applying the standard in *Wingfoot,* his Honour held that it was clear from the Panel's decision "what was decided and why", including the reasoning process that led to the Panel's decision.

In relation to Ground 4, his Honour was of the view that the Panel clearly considered the matter for itself. He found that the Panel expressed a view that its members had arrived at independently by a consideration of all the material that had been before the AMS, including his reasons and written submissions of the parties.

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Judgment Summary

***Elsworthy v Forgacs Engineering Pty Ltd* [2018] NSWSC 1638**
(Fagan J, 31 October 2018)

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Facts

The worker suffered an injury in the course of his employment with Forgacs Engineering Pty Ltd. On 2 May 2011, Mr Elsworthy injured himself when he tripped and fell face forward with outstretched hands landing on his left side. As a result, the Mr Elsworthy sustained injuries to his left wrist, left elbow and left knee. As a result, Mr Elsworthy claims to have suffered Complex Regional Pain Syndrome.

On 1 May 2017, Dr Lewington examined the worker and issued a Medical Assessment Certificate on 8 May 2017. Mr Elsworthy was assessed as having a whole person impairment of 0% as he could not satisfy the criteria pursuant to Chapter 17 the Guidelines.

Mr Elsworthy appealed the MAC on the basis that the assessment was made on the basis of incorrect criteria and that the MAC contains a demonstrable error. The Panel found no error in either respect. The Panel summarised Dr Lewington's findings that signs in categories 3i and 3iii were present, although the mild ankle oedema in category 3iii could be caused by a condition other than CRPS, but that no sign in either of categories 3ii and 3iv was exhibited. The Panel confirmed the MAC

Mr Elsworthy sought judicial review of the MAC and MAP decisions.

Issues

The plaintiff contended that the Panel ought to have found that the AMS applied the incorrect criteria in finding that the worker did not suffer from CRPS.

Decision

Fagan J referred to clause 17.1-17.5 of the Guidelines regarding why strict criteria has been adopted when diagnosing CRPS. The Guidelines go on to state that *"Pain is a subjective experience and is, therefore, open to exaggeration or fabrication in the compensation setting"*. Fagan J applied the criteria that diagnoses of CRPS must be confirmed for over a year and by multiple physicians to address the concerns of 17.1-17.5 of the Guidelines.

Fagan J considered whether the Appeal panel's decision conformed to law. The Appeal Panel found no error in Dr Lewington's assessment of whether the worker satisfied the diagnostic criteria of CRPS. Mr Elsworthy failed to satisfy all of the four categories necessary for him to be diagnosed with CRPS. His honour considered that Mr Elsworthy submitted that the Panel failed to provide reasons when they noted that the AMS erred in concluding that his symptoms were more consistent with fibromyalgia. This is because Dr Lewington's conclusion that the worker's symptoms are more consistent with fibromyalgia was superfluous to the assessment of CRPS. Fagan J confirmed that the decision by the Appeal Panel was correct as Dr Lewington applied the correct diagnostic criteria. Fagan J held that Dr Lewington's assessment that Mr Elsworthy could not be diagnosed with CRPS was due to the absence of signs 3ii and 3iv under Table 17.1 of the AMA5.

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Judgment Summary

CSR Limited v Ewins **[2020] NSWSC 511**

(Adamson J, 8 May 2020)

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Facts

The plaintiff suffered a psychological injury in the course of her employment. The AMS issued a MAC, which certified that Ms Ewins had a 17% whole person impairment. The appellant employer retained a surveillance firm to conduct surveillance over the claimant's activities to assess the worker's capacity for work. The appellant later filed an application to appeal the MAC on the basis that the assessment in relation to the PIRS category of Social and Recreational Activities was made on the basis of incorrect criteria and that the MAC contained a demonstrable error. The appellant employer then wrote to the Commission and attached an Application to Admit Late Documents to seeking to admit the surveillance footage.

The matter proceeded to appeal, and the Medical Appeal Panel published its statement of reasons addressing the new evidence sought to be relied on by the employer. The Appeal Panel noted that the appellant made no submissions as to why it should be permitted to rely upon material gathered well after the AMS examination and the MAC. The Appeal Panel concluded that the surveillance report should not be admitted as there was no evidence as to why it could not have been obtained before the proceedings were commenced or at least before the AMS examination. The Appeal Panel conducted a preliminary review of the MAC and was satisfied that Class 3 was appropriate and open to the AMS.

The worker filed a summons in the Supreme Court and relied on the following grounds:

1. The Panel erred in its consideration of the additional relevant information, and in determining that it could have been obtained before the medical assessment.
2. The Panel erred in its rejection of the additional relevant evidence.
3. The Panel denied the employer procedural fairness in determining the matter on a basis not put by or to the parties.

Held: Summons Dismissed

Discussion and Findings

1. The Plaintiff submitted that the Panel was obliged to engage in a two-step process when considering the section 327(3)(b) ground. The Plaintiff further submitted that the Panel was first obliged to determine whether the surveillance material was relevant and then secondly, whether the Panel was required to consider whether the information was not available to, or could not reasonably have been obtained by, the Employer before the assessment by the AMS. After hearing submissions Adamson J was satisfied that the Panel's reasons that the Panel was satisfied that the surveillance report was not information that was not available to, or could not reasonably have been obtained by the Employer before the medical assessment by the AMS. His honour further noted that as long as this finding was open to the Panel, then it was immaterial whether the Panel considered the information to be relevant or not, since the ground under s 327(3)(b) would not be made out in any event. It was open to the Panel to find that the surveillance report did not fall within section 327(3)(b)

because such a report could have been commissioned before the assessment by the AMS. His Honour further noted that in these circumstances, it was not necessary for the Panel to determine the relevance or otherwise of the report since the ground had not been made out whether the report was relevant or not. The Panel was entitled to express its view about relevance, even though it was not necessary to do so since it did not form part of the actual path of reasoning to its conclusion that the ground in s 327(3)(b) was not made out.

2. The Plaintiff submitted that the Panel's refusal to allow an oral hearing amounted to a denial of procedural fairness and was therefore a jurisdictional error, which lead to the decision being set aside. The Panel was obliged, pursuant to clause 5.16 of the Guidelines to "conduct a preliminary review of the matter". However, his Honour was satisfied that there was nothing in the Guidelines or the Act which required the Panel to decide, before it determined any of the three grounds of appeal, which procedure it was to adopt for the remaining grounds of appeal. In respect of this ground, his honour noted earlier that it was open to the Panel to adopt an "on-the-papers" review of the s 327(3)(b) ground, determine the ground and then consider which procedure to adopt for the balance of the grounds. His honour was satisfied that the approach taken by the Panel was in accordance with the Act, Guidelines and general law in relation to procedural fairness.

Orders

Adamson J issued:

1. Dismiss the summons

2. Order the plaintiff to pay the first defendant's costs of the proceedings.

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Judgment summary
***Ferguson v State of New South Wales & Ors* [2017] NSWSC 887**
(Campbell J, 4 July 2017)

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Facts

Ms Ferguson was a police officer who suffered post-traumatic stress disorder and major depression as a result of a work injury. A medical dispute arose regarding the degree of permanent impairment and the dispute was referred to an AMS. The AMS assessed Ms Ferguson's degree of permanent impairment at 19 per cent.

The AMS accepted the account given by Ms Ferguson that she had been in a previous bona fide domestic relationship with another woman. That intimate relationship failed during her psychiatric illness and there was a period of separation of six months. The former partners resumed living under the same roof however their relationship became one of platonic friendship.

The respondent employer lodged an appeal against the AMS's assessment. The Medical Appeal Panel revoked the MAC and issued a new certificate assessing Ms Ferguson's whole person impairment at 9 per cent. The Panel rated Ms Ferguson's social functioning as Class 2 under the psychiatric impairment rating scale (PIRS), instead of Class 3 as assessed by the AMS. As a result, Ms Ferguson applied for judicial review of the Panel's decision.

According to his Honour, Campbell J, the central issue before him was whether the Panel's decision conformed with law.

Preliminary issues

His Honour applied *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 and noted that the AMS and the Panel are not only entitled, but obliged, to apply their professional expertise in the exercise of their functions.

His Honour commented on the language used by the Panel and contrasted this with the role of the Registrar as gatekeeper under s 327(4) of the 1998 Act. His Honour termed the Registrar's decision under s 327(4) as decision at "first blush" and that it was not the Registrar's function to decide whether a ground of appeal has actually been "made good". According to his Honour, it is the Panel that makes that decision and not the Registrar.

Held

His Honour held the Panel glossed over the changed nature of Ms Ferguson's relationship with her partner. The Panel's decision to decline to inquire into that question on the basis that "the nature of the relationship was a private matter between them" was misplaced.

His Honour acknowledged that the Panel was at some disadvantage in its assessment given that it did not have the benefit of the "face to face" assessment enjoyed by the AMS. Still, in order to decide whether the relationship was "severely strained" under Class 3 of Table 11.4, the Panel should have made a full assessment of all aspects of the relationship before and after the separation.

His Honour held that the Panel asked itself the wrong question when it considered alteration of the nature of the relationship over strain or severe strain of the relationship. The Panel also made an error of law when it decided there was no material before the AMS which could support a Class 3 assessment in relation to social functioning. His Honour applied *Kostas v HIA Insurance Services*

Pty Ltd t/as Home Owners Warranty [2010] HCA 32 and found that the material before the AMS 'could' support a Class 3 rating and the Panel's decision that it 'could not' was an error of law.

As a result, the Panel's MAC was set aside and the matter was remitted to the Registrar for determination by a differently constituted Panel.

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Judgment summary

NSW Police Force v Derek Fleming **[2010] NSWSC 216**
(Harrison AsJ, 25 March 2010)

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Facts

The first defendant, Mr Fleming commenced employment with the NSW Police in 1992. He worked as a police officer on general duties for six years before becoming a detective. He ceased duties in July 2005 due to the effects of a post-traumatic stress disorder that was caused by his employment with the NSW Police.

On 29 January 2008 Mr Fleming commenced proceedings in the Commission claiming compensation for permanent impairment and pain and suffering. He was referred by the Registrar to Dr Kaplan, an AMS, for medical assessment. Dr Kaplan issued a MAC noting that Mr Fleming's condition had not stabilized. Consequent upon the MAC the Registrar issued a COD on 28 May 2008 stating that maximum medical improvement had not been reached. Liberty was given to the parties to apply to the Commission to restore the proceedings when maximum medical improvement had been reached.

On 30 September 2008 Mr Fleming's solicitors requested, pursuant to the leave granted, that the Registrar refer their client for assessment by an AMS. A further medical assessment was arranged with Dr Kaplan. Dr Kaplan issued a MAC certifying that Mr Fleming suffered from 1% whole person impairment as a result of his injury.

Mr Fleming appealed the MAC issued by Dr Kaplan on the grounds specified under section 327(3)(b), (c) & (d). Under section 327(3)(b) Mr Fleming requested the Appeal Panel consider a report of Dr James Heiner, his treating psychiatrist dated
9 January 2009 on the factual, medical and legal issues and a further statement made by Mr Fleming. Under section 327(3)(c) & (d) he submitted that the assessment was made on incorrect criteria and/or contained a demonstrable error on the basis that an incorrect history had been taken.

The NSW Police filed a Notice of Opposition to the Appeal submitting that it was not in a position to provide comment on what was reported to Dr Kaplan by Mr Fleming and whether the history had been accurately documented in the MAC. It submitted that in the event it was determined that Dr Kaplan had taken an incorrect history and that this constituted an error under section 327(3)(c) or (d) it requested that the MAP limit its findings to the issue of whether maximum medical improvement had been attained.

A delegate of the Registrar determined that, based on the submissions made and an examination of the MAC, it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel.

The Appeal Panel admitted the report of Dr Heiner as fresh evidence but did not accept the additional statement of Mr Fleming. It revoked the MAC of Dr Kaplan and issued a new MAC stating that there had been "no maximum medical improvement" and that the total whole person impairment was not assessable.

NSW Police sought to challenge the decision of the Registrar's delegate and the decision of the Appeal Panel.

Held

In the Supreme Court Harrison As/J declared that the decision of the delegate of the Registrar was vitiated by jurisdictional error and quashed the delegate's decision. Accordingly the decision of the Appeal Panel was also quashed. The matter was remitted to the Registrar to be determined in accordance with law. The worker was ordered to pay the employer's costs as agreed or assessed.

- There was an evidentiary hurdle which must be overcome to satisfy that section 327(3)(d) is made out. A demonstrable error is not fresh additional evidence. Additional relevant evidence is addressed in section 327(3)(b) not section 327(3)(d) (*Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2007] NSWSC 50 and *Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2008] NSWCA 88 followed).

- Section 327(3)(d) requires the Appellant to demonstrate that there is an arguable case of error appearing on the face of the medical certificate. It may be an error of fact or law but it must be more than one that depends upon evidence that is not within section 327(3)(a) and section 327(3)(b).

- The worker caviled with the history recorded by the AMS and relied on the report of Dr Heiner, commissioned after the MAC was issued, to support his submissions.

- A demonstrable error is not fresh additional evidence and the Registrar's delegate made a jurisdictional error by relying on it.

- As the delegate made a jurisdictional error the decision of the Appeal Panel could not stand and it was not necessary to determine whether or not the Appeal Panel made a jurisdictional error in admitting Dr Heiner's report. However it was noted that the Panel applied the principles set out in *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCCPD 7. That decision was made prior to *Summerfield v The Registrar of the Workers Compensation* [2006] NSWSC 515 and encompasses a consideration as to whether the evidence is of such a probative value that it is reasonably clear that it would change the outcome of the case. This consideration is not one set out in section 328(3) or in *Summerfield*.

Implications

The decision is not controversial. The view held in this decision is that in order to constitute an error under 327(3)(d) it may be an error of fact or law but it cannot be an error established by reference to evidence within section 327(3)(a) and/or section 327(3)(b).

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Judgment summary

***Fullford v Maccas Ferry Services Pty Ltd* [2016] NSWSC 1161**
(Harrison J, 23 August 2016)

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Facts

The worker was assaulted in the course of his employment as a Ferry Driver. He sustained injuries to the head and experienced three significant epileptic seizures. He had disclosed that as a child he had had a few epileptic problems and as an adult had only had one epileptic episode two years prior to the assault.

The worker claimed compensation and the Registrar referred the matter to an AMS to assess whole person impairment.

The MAC and the Panel's decision

The AMS assessed the worker to have 11 per cent whole person impairment. The worker appealed the AMS's decision. Although the Appeal Panel found that the worker's head injury was sufficiently serious to warrant assessment in class 2, not class 1, and thus entitled him to 18 per cent as a baseline entitlement, the effect of its use of the combined tables with respect to the 3 per cent that it found to be appropriate under cl 1.39 of the *WorkCover Guidelines for the Assessment of Permanent Impairment* (the Guidelines) was that the impairment rating was unchanged, and remained at 20 per cent. The worker appealed.

Issues

1. Whether the Appeal Panel exceeded its jurisdiction, and asked the wrong question, and/or misapplied the delegated legislation to the facts when it used the "Combined Tables Chart" to calculate the whole person impairment percentage of 20 per cent with respect to the worker's head injury.

2. Whether the Appeal Panel erred in its application of s 323 of the 1998 Act, in that it asked the wrong question when it applied a 50 per cent deduction for a pre-existing condition because "it was highly unlikely that he would have had seizures had he not had the underlying tendency" to have them.

3. Whether the Appeal Panel failed to set out its path of reasoning so as satisfactorily to demonstrate the basis upon which it had reached the 50 per cent deduction, in the manner required by s 323 of the 1998 Act.

Decision

Ground 1

The worker's submissions were accepted by Harrison J. His Honour stated that the words "[t]his percentage" were a reference to the word "percentage" in clause 1.39 of the Guidelines indicating that "the assessor may increase the percentage of whole person impairment".

His Honour explained the following at [24]:

> "The Combined Values Chart operates in circumstances where an assessment of whole person impairment has to be made in which the person concerned suffers from two or more disabling or impairing conditions. The relevant percentages for these conditions have to be arrived at separately. They are only combined to arrive at the final whole person impairment using the Combined Values Chart once they have been individually calculated or assessed. The calculation of one or more of these percentages may, however, involve an allowance for the prospect of the withdrawal of effective long-term treatment. That allowance, in the form of an increase 'by 1, 2 or 3% WPI' will determine the relevant level of impairment referable to the particular disability concerned. Only after that percentage is determined does the operation of the Combined Values Chart come into effect in order to arrive at a final whole person impairment percentage calculated by the combination of percentages for two or more impairing conditions as anticipated by the chart."

Ground 2

Justice Harrison held that no error had been shown concerning the way in which the Appeal Panel dealt with the effect of the worker's pre-existing condition of epileptic seizures. His Honour indicated that the worker's concern that the Appeal Panel had asked itself or sought to answer the wrong question proceeded upon the existence of some allegedly identifiable distinction without a difference.

His Honour held that the Appeal Panel's concern was clearly to assess the contribution, if any, to the worker's impairment that arose having regard to his history of epileptic seizures. The approach that was taken was unexceptionable and was a correct application of its statutory function.

Ground 3

In relation to whether the Appeal Panel satisfactorily set out its reasoning, *Campbelltown City Council v Vegan* [2006] NSWCA 284; 67 NSWLR 372 at [98] and *Wingfoot Australia Partners Pty Limited v Kocak* [2013] HCA 43; 252 CLR 480 at [28] and [55] were applied.

Justice Harrison was of the view that the reasons of the Appeal Panel were entirely adequate. His Honour held that the Appeal Panel's reasons need not be extensive. Nor are they required to provide a detailed explanation of the way in which the relevant criteria have been applied by medical specialists. His Honour was of the view that the Appeal Panel's opinion and the way in which it arrived at that opinion were perfectly clear and that no error of any kind was discernible.

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Judgment summary

***Galanis v The Registrar of the Workers Compensation Commission of New South Wales & Ors* [2007] NSWSC 648**
(Malpass AJ, 28 June 2007)

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Facts

The plaintiff lodged an application to resolve a dispute with the Commission, claiming lump sum compensation under sections 66 and 67 of *Workers Compensation Act* 1987 in respect of physical and psychological injuries sustained in the course of her employment. The Commission referred the matter for medical assessment under Part 7, Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 ("the Act"), appointing Drs Cameron and Teoh as the two approved medical specialists ("AMS").

The second defendant (employer) lodged an application to appeal against Dr Teoh's medical assessment under section 327(1) of the Act. The Registrar determined, under section 327(3) and (4) of the Act, that the appeal should proceed. An Appeal Panel constituted under section 328(1) of the Act carried out a review, the plaintiff being re-examined by the Appeal Panel. It decided that the original Certificate should be revoked and that a new medical assessment certificate should be issued, reducing the level of impairment.

Before the Supreme Court the plaintiff alleged error on the part of the Registrar's Delegate who decided to allow the Appeal due to the appearance of demonstrable error. The Delegate's decision does not provide any indication as to how she came to that result.

Held

Summons dismissed.

- The plaintiff failed to discharge the onus of demonstrating that the delegate fell into error. In contending that the Delegate reached that result by error, the plaintiff bears the onus of demonstrating that this was the case. The plaintiff did not suggest that the Registrar was required to give reasons [12 and 14].

- His Honour noted that no step was taken to challenge the decision of the Delegate until after the Appeal Panel conducted an examination. Not only did the plaintiff stand by and allow the appeal to proceed, she participated in the conduct of the appeal by attending for examination [15].

Implications

The Court confirmed that the plaintiff bears the onus of demonstrating that the Registrar erred in making determinations pursuant to section 327(4) of the Act.

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Judgment summary

Gardner v Rail Corporation New South Wales **[2013] NSWSC 649**
(Harrison AsJ, 30 May 2013)

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Facts

The plaintiff, Mr Gardner alleged injury to his right upper extremity and cervical spine on 21 May 2003 in the course of his employment with the first defendant, Rail Corporation New South Wales ('Railcorp').

On 20 December 2009 Mr Gardner commenced proceedings in the Commission seeking, among other things, lump sum compensation as a result of the injury to the right upper extremity.

On 28 May 2010 an arbitrator determined that Mr Gardner sustained injuries to his neck and right shoulder which were compensable under the *Workers Compensation Act* 1987. Relevantly there was no claim for lump sum compensation as a result of the injury to the cervical spine for the purposes of these proceedings.

On 1 June 2010 Mr Gardner was referred by the Registrar to Dr Hyde-Page, Approved Medical Specialist ('AMS'), for assessment of permanent impairment resulting from the injury to his right upper extremity. On 7 September 2010 Dr Hyde-Page, AMS, issued a Medical Assessment Certificate ('MAC') assessing Mr Gardner with 10% WPI of the right upper extremity as a result of the injury on 21 May 2003.

On 1 December 2010 the Commission issued a Certificate of Determination - Consent Orders in which Mr Gardner was awarded lump sum compensation and pain and suffering in respect of 10% whole person impairment ('WPI') of the right upper extremity.

On 8 September 2011 Mr Gardner again commenced proceedings in the Commission in respect to a claim for 7% WPI as a result of injury to his cervical spine on 21 May 2003.

Mr Gardner was referred by the Registrar to Dr Hyde-Page, AMS, for assessment of permanent impairment resulting from the injury to his cervical spine.
Dr Hyde-Page issued a MAC on 24 November 2011 assessing Mr Gardner with 7% WPI as a result of the injury to his cervical spine on 21 May 2003.

On 21 December 2011 Railcorp appealed the MAC. A delegate of the Registrar determined that a ground of appeal was made out and referred the appeal to a Medical Appeal Panel (MAP).

On 23 April 2012 the MAP issued its decision. The MAP revoked the AMS's MAC and issued a new MAC assessing Mr Gardner with 0% WPI from the injury to his cervical spine on 21 May 2003. The MAP found that Mr Gardner's current cervical spine condition did not result from the injury.

Issues

Mr Gardner sought judicial review in the Supreme Court of NSW on the grounds that:

(a) it was not open to the Registrar, on the basis of the application and submissions by the parties, to be satisfied that an identified error was capable of being demonstrated to the MAP.

(b) the MAP made findings on causation which were expressly contrary to the findings of the arbitrator, and

(c) the decision to revoke the AMS's decision was not confined to the grounds for appeal identified by the defendant, and the plaintiff was not given the opportunity to be heard.

Held

Harrison AsJ dismissed the summons with costs.

Reasons for decision

The Registrar's decision

- The Registrar applied the correct test set out in s 327(4) of the 1998 Act. She was satisfied that the ground that the MAC contained a demonstrable error had been made out.

- Whether or not the Court could intervene depended upon whether or not the Registrar is required to give reasons.

- The role of the Registrar is that of a "gatekeeper" (refer *Campbelltown City Council v Vegan* [2004] NSWSC 1129 and *Bunnings Group Limited v Hicks & Ors* [2008] NSWSC 874 (*Bunnings*)).

- In *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission* [2007] NSWCA 149 (*Riverina Wines*), Campbell JA (with whom Hodgson and Handley JJA agreed) held that it was unnecessary for the Registrar to give reasons in reaching an opinion that a ground of for appeal exists:
    - the Registrar (or her delegate) is not making a decision of a judicial character (it might be otherwise if the decision is to refuse to allow the appeal to proceed);
    - in reaching the necessary opinion and in deciding to allow an appeal to proceed, the Registrar (or her delegate) is not finally deciding any legal rights or duties, beyond that the application was entitled to "reassessment" by the MAP, and
    - there is no provision for any appeal from decisions under s 327(4).

- In *Bunnings* Simpson J confirmed that the reasoning of Campbell JA in *Riverina Wines* applied in the same way to a determination by the Registrar that a ground of appeal had been made out.

- The Registrar was not required to give reasons for her decision to refer the matter to a MAP. There was no error of law on the face of the record nor was there a jurisdictional error.

The MAP decision

- The question to be answered by the MAP was whether the current injury or disorder of the cervical spine was caused or materially contributed to by the accident in 2003. The MAP determined that the current disorder to Mr Gardner's cervical spine could not be related to the injury in 2003. The MAP posed and answered the correct question (refer *Owen v Motor Accidents Authority of NSW* [2012] NSWSC 650).

- The MAP conducted a review of the material before it and came to the conclusion that the plaintiff's current cervical spine condition did not result from the 2003 injury. The MAP concluded that any injury to the cervical spine at the time of the injury was not severe and any problems appeared to have settled. While the Arbitrator found that there was no evidence to establish that the injury to Mr Gardner's cervical spine had not resolved it was open to the MAP to come to a different conclusion (*Haroun v Rail Corporation of NSW* [2008] NSWCA 192 followed). The MAP did not act beyond power.

- The MAP did not depart from the issues raised on appeal. The parties did not request that an assessment hearing take place. In these circumstances, Mr Gardner was afforded procedural fairness (refer *Galluzzo v Little* [2013] NSWCA 116).

- While there was medical evidence to the effect that upon examination Mr Gardner's cervical movements were limited and there was stiffness and muscle guarding, the issue that had to be determined by the MAP was whether these symptoms were caused by the 2003 accident. The MAP considered this issue and determined that they were not. The MAP did not consider irrelevant material nor did it fail to consider relevant material.

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Judgment summary

George v Wombo Lane Pty Limited **[2010] NSWSC 660**
(Grove J, 24 June 2010)

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Facts

The plaintiff sustained a psychological injury as a result of being subjected to armed robbery in the course of his employment as a hotel manager for the defendant. He claimed lump sum compensation in the Commission for 17% whole person impairment ('WPI').

The Registrar referred the matter for assessment to an approved medical specialist ('AMS'), who assessed him with 17 % WPI. The defendant lodged a medical appeal on the grounds that the assessment was made on the basis of incorrect criteria and/or that the AMS's medical assessment certificate ('MAC') contained a demonstrable error.

In making a determination under section 327(4) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the 1998 Act'), the Registrar's delegate was satisfied that a ground of appeal as specified in section 327(3)(d) was made out "in that an error is capable of being shown in relation to the PIRS-based assessment of the Respondent worker's psychiatric/psychological impairment", and constituted a Medical Appeal Panel to deal with the appeal.

The Medical Appeal Panel revoked the AMS's MAC and issued its own fresh MAC, finding that "the lack of detail in the MAC, and thereby the difficulty in comprehending the reasoning for the AMS's assessment of the Respondent's impairment is such that the MAC contains a demonstrable error".

The plaintiff lodged a summons in the Supreme Court of NSW for judicial review of the decisions of both the Registrar's delegate and the Medical Appeal Panel, submitting that such decisions be quashed for error of law and/or jurisdictional error, and for a writ to issue ordering the Registrar's delegate to reconsider his decision according to law.

Issues

The grounds of review pleaded were as follows:

1. That the Registrar's delegate erred in allowing the medical appeal and constituting a Medical Appeal Panel when no grounds of appeal were made out;
2. The Medical Appeal Panel acted *ultra vires* in exercising its statutory function to review the AMS's MAC because it had no jurisdiction to proceed with the medical appeal as no grounds of appeal under section 327(3) existed;
3. The Medical Appeal Panel denied the plaintiff procedural fairness and took into account irrelevant considerations in making its decision by relying on its qualified AMS member's re-examination report that contained an inaccurate history and record of the plaintiff's symptoms, and
4. The Medical Appeal Panel erred in finding that the difficulty in comprehending the reasoning for the AMS's assessment of the plaintiff's impairment was such that the MAC contained a demonstrable error.

Held

Grove J quashed the decisions of the Registrar's delegate and the Medical Appeal Panel; the defendant's medical appeal application was remitted to the Registrar of the Commission to be dealt with according to the reasons of the Court. Appropriate costs orders were made.

Reasons for Decision

Demonstrable error pursuant to section 327(3) of the 1998 Act

- The Court approached the issues on the basis that "demonstrable error" is "an error which is readily apparent from an examination of the Medical Assessment Certificate and the document referring the matter to the AMS for assessment" (*Merza v Registrar of the WCC* [2006] NSWSC 939), and qualifying such an error as an error of fact or an error of law (*Maria Pitsonis v Registrar of the WCC* [2008] NSWCA 88).

- The defendant's assertion that, on the face of the MAC, there were errors of both law and fact was rejected. The fact that the plaintiff did not show signs of neglect when attending a medical examination with the AMS was not an error. There was no indication that such a mild failure would or should result in observable deficiencies (at [16]).

- His Honour found that there was "no readily apparent" error from examination of the MAC regarding the application of the Psychiatric Impairment Rating Scale (PIRS) in the assessment conducted by the AMS. The proforma that rated the plaintiff's assessment according to the PIRS was appropriately completed by the AMS. The proforma did not oblige a statement of reasons for any difference of opinion between the AMS and another medical expert, and, in this case, the opinion of the AMS was emphasised as being his own (at [24]).

- His Honour stated that the fact that there was no mention in the MAC of the guidelines pursuant to section 376 of the 1998 Act was not an error. Assuming that the AMS was required to apply the guidelines, it cannot be concluded that a failure to mention something which is to be considered in making an assessment creates a demonstrable error, unless, contrary to the implications in *MIMA v Yusuf* (2001) 206 CLR 323 (that a failure to refer to facts may lead to inference that such facts were not taken into consideration), the decision maker was obliged to disclose every aspect of his thought process.

The decision of the Registrar in the context of section 327(4) of the 1998 Act

- Whilst his Honour accepted that section 327(4) does not make arguability, existence or success of a ground of appeal the criterion for reference to a Medical Appeal Panel (cf *Cameron v Registrar of the WCC* [2008] NSWSC 704), it is necessary for what appears on the face of the MAC to be capable of demonstrable error (at [16]).

- Whilst it was not contended that the Registrar was obliged to identify the demonstrable error upon which he relied nor to express his reasons, the Registrar did express that "an error was capable of being shown in relation to the PIRS-based assessment" of the plaintiff's impairment. However, the Registrar did not qualify that the "error" was "demonstrable" despite it being sufficiently indicated by the introduction of "on its face" and the incorporation of a reference to section 327(3)(d) of the 1998 Act.

- The Registrar's delegate had no jurisdiction to refer the matter to a Medical Appeal Panel because there was nothing identifiable in the MAC which was capable of fulfilling the necessary proviso which overcomes the restraint against proceeding in the terms of section 327(4) (cf. *Kirk v Industrial Relations Commission* [2010] 84 ALJR 154 at 71).

The decision of the Medical Appeal Panel

- Having quashed the decision of the Registrar's delegate to refer the matter to a Medical Appeal Panel, the decision of the Medical Appeal Panel was vitiated by jurisdictional error and was thereby quashed.

Implications

- The Court appears to apply a strict reading of "demonstrable error", which has the tendency to limit the ambit of what constitutes an error that allows a medical appeal to proceed to determination by a Medical Appeal Panel. This appears contrary to the types of error that may fall within the contextual definition of "demonstrable error" as set out in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163.

- The Registrar's delegate, in making determinations on the basis of demonstrable error under section 327(3)(d), should be mindful to ensure that the decision was made in the circumstances of each case.

- The Court's decision ambiguously blurs the line between the role and functions of the Registrar and those of the Medical Appeal Panel. The implication however is to ensure that the decision of the Registrar in allowing the matter to proceed to the panel contains sufficient and careful reasoning in the use of "demonstrable error" being arguable before the Medical Appeal Panel.

- Grove J's statement at [16] appears to be consistent with the finding of the NSW Court of Appeal in *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 where a different test of error that "exists" was used, as opposed to a test of error that is "made out". If followed in section 327 determinations, this case has the potential to have a contrary effect to the operation of section 327(4) of the 1998 Act as intended by that legislation. In section 327 determinations, therefore, decision makers must exercise caution in relying on principles set down in various judicial review and appeal actions (the discretion to rely on a principle set down in a particular case must be exercised in the circumstances of the matter being determined).

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Thomas Gray v Geoff Groom Building Pty Ltd [2019] NSWSC 1081
(Leeming JA, 22 August 2019)

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Facts

By way of background Mr Gray suffered an injury to his left hand on 21 October 2015 in the course of his employment with the defendant while using a circular saw. He suffered a partial amputation through the proximal phalanx of his left little finger and severed tendons in the fourth and fifth fingers. He underwent multiple surgical procedures including the taking of skin grafts from his left thigh which were then grafted to the back of his left hand.

Mr Gray made a claim for lump sum compensation and was assessed as suffering from a 10% WPI of the left upper extremity and a 3% WPI for consequential scarring. His solicitor retained Professor Alan Meares, hand surgeon, who expressed the view that Mr Gray's scarring equated to a 9% WPI and a further 13% WPI of the left hand, resulting in a combined 22% WPI.

The medical appeal panel, comprising of Dr Curtin, Dr Giles and arbitrator Daley concluded that Mr Gray suffered from a 10% WPI of the left hand and 4% WPI for scarring.

Mr Gray sought to have the panel's decision set aside and filed an appeal in the Supreme Court seeking judicial review of the panel's decision. The appeal was filed pursuant to s 69 of the *Supreme Court Act* asserting jurisdictional error or an error of law on the face of the record. The appeal was heard by Leeming JA.

Leeming JA was highly critical of the way in which the appeal was brought noting that the amended summons failed to properly particularise the claim and did not comply with the obligation under the uniform civil procedure rules to state "*with any specificity the grounds on which the relief is sought*": UCPR r 59.4. His Honour noted that more than half a page of the summons was largely discursive and was devoted to describing how the medical panel misapplied the guidelines. His Honour further noted that the amended summons failed to distinguish between jurisdictional error and error of law on the face of the record.

The Appellant asserted that the panel had no power to delegate the function of examining Mr Gray to one of its members. That submission was swiftly withdrawn when the Appellants senior counsel was informed that the 2018 guidelines *did* in fact apply to the Appellant's appeal. Clause 5.17 of the 2018 guidelines expressly authorised the MAP to determine the appeal "on the papers" following further examination by *one* of the panels members, or a further hearing. In response the Appellant submitted that a determination involving "clinical judgment" could not be performed by one member of the Panel. It was further submitted that the "second hand" reliance upon Dr Giles' report did not permit the other member of the panel to exercise clinical judgment as required by clause 49 of the Guidelines and that the AMS ought perform a TEMSKI assessment of the injured worker's scarring in person as opposed to "on the papers".

Leeming JA rejected that submission noting that it in effect it attempted to elevate cl 14.9 into a rule of law. Secondly his Honour noted that according to the medical dispute assessment guidelines there will always be one member of the appeal panel (i.e. the arbitrator) who need not be medically qualified and is therefore unable to exercise clinical judgment. Thirdly, Leeming JA noted clause 14.9 is directed to determining the exact impairment value within a range. The appellant ought to have pleaded clause 14.8 which is tasked with identifying a correct category. Fourthly, his Honour remarked that the submission was inherently flawed in that the only remaining medical panel member was the arbitrator who lacked medical expertise and thus could not undertake the assessment.

Leeming JA dismissed this ground of appeal noting that it was "*sufficient to say that the Panel was empowered, in the circumstances of this case, to proceed pursuant to clause 5.17.2, with one of its members undertaking a further medical examination [of Mr Gray, and with the Panel as a whole informing itself based on Dr Giles report*."

In relation to the procedural fairness/constructive failure to exercise jurisdiction submission Leeming JA noted that the Appellant submitted that the medical assessment panel "failed to respond to a substantial argument as articulated in *Roger v De Gelder* [2015] NSWCA 211" or in the alternative the Panel committed a jurisdictional error. Leeming JA was quick to point out that the Panel expressly referred to Professor Meares' reasoning and reached conclusions which were inevitably inconsistent with conclusions expressed by him. Accordingly, Leeming J noted that this ground of appeal was not made out.

In relation to the Appellants submission that the panel failed to make findings and provide reasons, the Appellant relied on *Campbelltown City Council v Vegan* [2006] 67 NSWLR 372 to submit that the Panel "*failed to fulfil a minimum legal standard'* in failing to properly explain their scarring assessment. Leeming JA reviewed the Panels reasoning and again swiftly rejected this ground of appeal noting that there was no inconsistency in the panels reasoning and that they properly explained the scarring category into which Mr Gray was placed. His honour further noted that there was no misapplication or misconstruction of the guidelines and that this ground of appeal was not made out.

Accordingly, Leeming JA ordered that the Appellants amended summons filed 27 March 2019 be dismissed wit costs to follow the event.

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Greater Western Area Health Service v Austin **[2014] NSWSC 604**
(Campbell J, 8 May 2014)

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Facts

Ms Austin was a nurse employed by Greater Western Area Health Service. She contracted Ross River Fever in the course of her employment whilst working in a remote area near Bourke. The acute symptoms were a "closed period" claim. She claimed that she suffered the loss of the efficient use of each of her limbs as a long-term consequence of contracting Ross River Fever.

Ms Austin's case was that Ross River Fever has long term effects that result in joint pain, stiffness and weakness in gripping and grasping activities. The plaintiff's case was that Ms Austin's symptoms were due to osteoarthritis and unconnected to her contracting Ross River Fever.

By consent, the medical dispute was referred to an AMS. The principal order of referral was:

(1) The parties are in dispute as to whether the applicant has loss of efficient use of the right arm at or above the elbow, loss of efficient use of left arm at or above the elbow, loss of efficient use of the left leg at or above the knee, and the loss of efficient use of the right leg at or above the knee resulting from Ross River Fever contracted on 1 December 1998.

The AMS assessed that there was no loss of efficient use of any of the affected limbs resulting from Ross River Fever. Ms Austin appealed to the Medical Appeal Panel which found in favour of Ms Austin on the basis that questions of causation were not raised in the referral to the AMS. The Medical Appeal Panel construed the referral order as limited to the bare assessment of the loss of efficient use of Ms Austin's limbs, whatever its cause.

The MAP decision was made on 4 June 2013. The plaintiff had sought a reconsideration which was refused on 25 September 2013. The summons was filed on 10 February 2014.

Held

As the summons was filed within the time period permitted by the rules, which ran from the decision refusing the reconsideration, and as the other parties filed submitting appearances, and in the absence of any prejudice to them, his Honour extended time to file the summons.

His Honour found that it was impossible to construe the phrase "as a result of Ross River Fever" in context in the referral order as meaning the parties have agreed that any permanent impairment *does* result from Ross River Fever. That construction was untenable. It was an error on the face of the record. More importantly, it was a jurisdictional error because it led the panel to confine their jurisdiction, and as well as that of the AMS, in a wholly unjustified way.

Further, the implicit finding that liability and causation matters are within the powers of arbitrator, and not of AMSs is clearly contrary to the decision of the Court of Appeal in *Haroun v Rail Corporation New South Wales & Ors* [2008] NSWCA 192 (*Haroun*) and the considered dictum of Leeming JA in *Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski* [2013] NSWCA 449.

Further the panel failed to act upon the opinion of its medical specialist members who concurred with the opinion of the AMS (at [41] of the MAP decision).

Implications

Liability and causation matters must be considered by the AMS to the extent that such matters are raised in the referral order. As indicated in *Haroun* the panel is not only entitled to treat a finding of an arbitrator about causation as irrelevant, but it was bound to do so if the panel independently came to a different conclusion.

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***Hanna v Delta Electrical and Security Pty Ltd* [2019] NSWSC 1127**
(Harrison AsJ, 5 September 2019)

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Facts:

The plaintiff injured his right ankle and consequently his cervical spine when he fell from a ladder during the course of his employment. The plaintiff brought a claim for permanent impairment compensation with respect to these injuries, which was referred to the Approved Medical Specialist (AMS), Dr Ian Meakin.

The AMS assessed the plaintiff's relevant injuries at 11% WPI, and the cervical spine at 0% through categorising this as DRE Category I. The plaintiff then lodged an application to appeal against this decision in relation to the assessment of the cervical spine relying on the grounds of appeal of incorrect criteria and demonstrable error. The plaintiff submitted that whilst the AMS had found that there were insufficient symptoms for a finding of radiculopathy, the AMS held that the plaintiff demonstrated cervical impairment at DRE Category I. Thus, the AMS did not consider whether the plaintiff would satisfy the criteria for DRE Category II.

The matter was referred to an Appeal Panel, who confirmed the certificate of an AMS.

Issues before the Court:

Ground 2: Failure to consider whether there was evidence of a herniated disc.

The plaintiff relied upon the imaging study referred to by Dr Tong to indicate evidence of a herniated disc. Per the Appeal Panel at [32], Dr Tong considered that the presence of radiculopathy was attributed to the C7 level. Her Honour held that this ground is not made out since the Appeal Panel accurately summarised the plaintiff's submissions. The Appeal Panel determined that Dr Tong's report did not establish that there was a herniated disc because Dr Tong's reasons for attributing those changes at C7 were unclear and failed to specify the precise location of the sensory changes.

Grounds 1 & 4: Failure to properly consider the plaintiff's argument that he satisfied the criteria for DRE Category II.

The Appeal Panel has not failed to properly consider the plaintiff's argument that he satisfied the alternate criteria for DRE Category II. As discussed in relation to ground 2, the Appeal Panel did not consider that there was evidence of a herniated disc. The Appeal Panel made no error of law and this ground of review fails.

Ground 3: Failure to give reasons why alternative criteria for DRE Category II were not met.

The plaintiff argued that both the AMS and the Appeal Panel failed to engage with the question of what the CT scan revealed and whether it equated to a herniated disc. The plaintiff further argued that there was a failure to give reasons for whether a herniated disc exists. The defendant submitted that per *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, the standard of reasons need not to be extensive.

Her Honour held that as per *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; (2013) 303 ALR 64 (*Wingfoot),* the High Court required at [55] that the standard required of a written statement of reasons is to reveal the actual path of reasoning of the decision maker's opinion. Thus per *Wingfoot* at [56], the AMS and the Appeal Panel were not obliged to explain why they did not reach an opinion they did not form.

Her Honour was not satisfied that the Appeal Panel failed to provide reasons why alternative criteria for DRE Category II were not met, such that it constituted an error of law.

Orders:

Harrison AsJ ordered that:

1. The application for judicial review fails.

2. The summons filed 27 June 2019 is dismissed.

3. The plaintiff is to pay the first defendant's costs on an ordinary basis.

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Judgment summary

Haroun v Rail Corporation New South Wales & Ors **[2008] NSWCA 192**
(McColl JA, Handley AJA, McDougall J, 18 August 2008)

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Facts

Ragga Haroun, the appellant, applied to the Workers Compensation Commission to resolve a dispute regarding her lump sum compensation claim for injuries sustained on two separate occasions in the course of her employment with Rail Corporation New South Wales. She suffered multiple injuries to her knees, back and neck on the first incident (24 June 2005) and to her forearm, right wrist and right knee on the second incident (14 July 2005). The matter went before an Arbitrator who determined there were injuries suffered on both occasions and referred the matter to an approved medical specialist ('AMS') for assessment of the permanent impairment. However, the Arbitrator also made findings with the consent of the parties that "the effects of those injuries continue to contribute to any impairment suffered by the applicant."

The AMS subsequently issued a medical assessment certificate ('MAC"), finding the degree of the appellant's total compensable whole person impairment ('WPI') at 1%. The final calculation was determined following the appropriate deductions made by the AMS in finding that the impairments were due to a previous injury or pre-existing condition.

Mrs Haroun lodged an appeal on the basis that the AMS used incorrect criteria in the assessment (s 327(3)(c)) and that the MAC contained a demonstrable error (s 327(3)(d)). The Appeal Panel found that there was an error on the MAC in that there was no evidence of injury resulting from the incidents, contrary to the Arbitrator's findings. The Appeal Panel further determined that the Arbitrator acted beyond its jurisdiction by purportedly finding permanent impairment. Despite the inconsistent findings of the Arbitrator and the AMS, the Appeal Panel agreed with the AMS's determination on the degree of permanent impairment and confirmed the MAC.

Grounds of appeal

Mrs Haroun challenged the Appeal Panel's decision in the Supreme Court of New South Wales. Associate Justice Harrison dismissed the application, determining that there was no error of law. Mrs Haroun later sought leave to appeal this decision out of time with the New South Wales Court of Appeal. Appearing for Mrs Haroun, Mr Gibb SC argued that the Appeal Panel should have taken into account the Arbitrator's finding made with the consent of the parties because they were binding.

Held

The application to file the summons for leave to appeal out of time is dismissed. The summons for leave to appeal is dismissed.

Handley AJA (McColl JA and McDougall J concurring) found that the Appeal Panel, having disregarded the Arbitrator's consent finding, were correct in not taking it into account [at 15]. His Honour determined that the Arbitrator went beyond its jurisdiction in purporting to determine certain medical issues on the initial application. The Appeal Panel rightfully disregarded this finding and should not be bound by it [at 16 and 22]. Consequently, the Arbitrator's decision cannot bind the Appeal Panel because the Arbitrator did not have the jurisdiction to make such a finding [at 21-22].

The Court further noted that the MAC issued by the AMS superseded the Arbitraror's inconsistent finding [at 22] and affirmed that MAC.

Implications

- The decision reiterated that the Arbitrator's power is confined to its jurisdiction to determine injury. This was distinctly noted by the New South Wales Court of Appeal in upholding the finding of the Appeal Panel regarding the roles and functions of an Arbitrator and an AMS [at 11]. In finding injury, the Arbitrator may then refer the matter to an AMS to determine certain medical issues, including the degree of permanent impairment [at 20]. This distinction was also referred to in, among other decisions, *Wikaira v Registrar of Workers Compensation Commission of NSW & Anor* [2005] NSWSC 954 where Associate Justice Malpass propounded that the task for the AMS was to determine whether or not the permanent impairment was due to the injury upon referral of the Arbitrator after a finding of injury.

- A decision made outside one's jurisdiction cannot be used to bind another who holds the statutory power to make such a decision.

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Judgment summary

***Haroun v Rail Corporation NSW* [2008] NSWSC 160**
(Harrison AsJ, 4 March 2008)

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Facts

The Plaintiff applied to the WCC to resolve a dispute regarding her entitlements to compensation for permanent impairment caused by injuries allegedly suffered at work. The matter came before an Arbitrator, who issued a determination in which he made findings of injuries on 24 June and 14 July 2005, and also determined "The effects of those injuries continue to contribute to any impairment suffered by the applicant". The Arbitrator requested an assessment of permanent impairment by an approved medical specialist ('AMS'). The AMS made findings that there was no evidence of some of the injuries alleged, and made deductions for other injuries on account of pre-existing conditions such as osteoarthritis. He issued a medical assessment certificate ('MAC') assessing a total of 1% Whole Person Impairment for all injuries received.

The worker lodged an appeal against the assessment on the grounds of incorrect criteria and demonstrable error (s 327(3)(c) and (d)) which was referred to a Medical Appeal Panel. The Panel found that the MAC contained an error as alleged by the appellant, in that the AMS made findings contrary to binding findings made by the Arbitrator. However, the Panel agreed with the AMS's findings on the degree of impairment and confirmed the MAC.

The Plaintiff filed a summons in the Supreme Court seeking that the Panel's decision be set aside. The plaintiff submitted the following:

- The AMS used incorrect criteria, as the chapter references in the table on the last page of the MAC were incorrect.
- Although the Appeal Panel identified the error in that the AMS's comments were inconsistent with the referral and the Arbitrator's findings on injury, the Panel failed to correct the error and committed further errors of law; the Panel treated one of the AMS's findings as if it was a finding about permanent impairment; the Appeal Panel erred in treating the Arbitrator's findings as it did (including the Arbitrator's purported findings as to permanent impairment); although the Panel considered its task was to make a fresh assessment, it failed to conduct its own assessment as the Panel relied on the AMS's examination (and did not further examine the Plaintiff).

Held

The Summons is dismissed.

- Although the AMS may have confused his references in the table, in substance the MAC set out the criteria referred to and referred to the correct guidelines. The AMS carried out his assessment in accordance with the relevant guidelines [28]. In any event the Plaintiff's submissions to the Appeal Panel did not make mention of the mixed chapter references as indicating incorrect criteria or demonstrable error. If the Appeal Panel is to consider a purported error made by the AMS, that purported error should be made clear in the submissions. It was not. [29]

- There is a divergence of judicial views as to the approach an Appeal Panel should take [35-37]. The appeal panel identified the error that the AMS made comments inconsistent with the Arbitrator's findings as to injury. The Appeal Panel then agreed with the AMS's conclusion that the effect of the injuries was "likely to have been temporary aggravation with symptoms in areas where there was pre-existing degeneration." In other words, it corrected the erroneous findings by the AMS in relation to injury and decided that in relation

to those injuries there was no permanent impairment. The Appeal Panel considered only the matters raised in the grounds of appeal. It examined the medical records before the AMS and his reasons. It conducted a review of the material before it and reached its own conclusion concerning the impairments suffered by Ms Haroun. The Appeal Panel's approach was not infected by the reasoning process and findings of the AMS. There is no error in the approach of the Appeal Panel [39].

Implications

The decision follows previous authority that it is for the arbitrator to determine injury, and for the AMS to determine impairment resulting from an injury. An AMS is bound by findings made by the arbitrator in respect of injury. Notwithstanding an error made by the AMS in respect of a question of injury, a Panel may agree with the ultimate findings of the AMS in respect of impairment.

The decision also confirms that parties must clearly identify any purported error in their submissions to the Panel.

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Judgment Summary

***Cobar Shire Council v Harpley-Oeser* [2018] NSWSC 964**
(Harrison AsJ, 27 June 2018)

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Facts

The worker sustained injury to her left upper extremity and cervical spine after falling at work, and suffered a further exacerbation while lifting a kettle during the course of employment. The worker made a claim for lump sum compensation, and the AMS assessed 26% WPI.

The AMS commented that the worker had developed a chronic pain condition, but excluded a diagnosis of complex regional pain syndrome. The AMS assessed the worker on the basis of loss of range of motion.
The employer appealed on several grounds. The Panel upheld the MAC.

Decision

Harrison AsJ found that the Panel had committed a jurisdictional error, in failing to address an issue raised by the appellant, namely that the AMS had impermissibly assessed chronic pain as part of the worker's WPI. Chronic pain is excluded by paragraph 1.12 of the guidelines as a basis of assessment.

The appellant contended that the AMS did not consider whether restrictions in range of movement were caused by the chronic pain, and this submission was not dealt with by the Panel, who simply reproduced part of the AMS's findings on examination. In this respect, the Panel was found to have failed to constructively exercise jurisdiction.

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Judgment summary

Hatch v Peel Valley Exporters Pty Ltd **[2010] NSWSC 23**
(Hislop J, 22 February 2010)

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Facts

The plaintiff developed a bilateral carpal tunnel syndrome due to the nature and conditions of his employment with the defendant. The plaintiff underwent surgery for the condition in 2004 and in 2005. At all times the insurer accepted liability for weekly compensation benefits and medical expenses. In 2007 the plaintiff made a claim for lump sum compensation for permanent impairment. The parties could not reach agreement and the plaintiff lodged an application with the Commission.

As the only issue in dispute was the quantum of permanent impairment, the Registrar referred the matter to Dr Blue, an approved medical specialist.

Dr Blue issued a medical assessment certificate certifying that the plaintiff suffered 30% whole person impairment from a Complex Regional Pain Syndrome Type 2 (CPRS 2) as a result of his injury. Dr Blue's diagnosis was made on the basis of his belief that the plaintiff presented as an honest, co-operative patient and his symptoms were genuine.

The defendant appealed the assessment of Dr Blue pursuant to section 327 of the 1998 Act. The appeal identified three bases in respect of which error was alleged, namely:

1. There were insufficient signs to justify a diagnosis of complex regional pain syndrome;
2. Dr Blue had regard to symptoms not evident before the plaintiff recommenced employment with a different employer;
3. Dr Blue applied an incorrect test to determine if the condition had reached maximum medical improvement.

A delegate of the Registrar was satisfied that, on the face of the application and submissions, a ground of appeal specified in section 327(3)(d) had been made out and referred the appeal to an Appeal Panel.

As a result of their preliminary review the Appeal Panel determined that the plaintiff should submit for a further medical examination by both the doctors on the Appeal Panel.

Following re-examination of the plaintiff the Appeal Panel concluded, in the light of the findings on re-examination, that the plaintiff did not have the criteria for CRPS 2 and furthermore that the plaintiff's wrist and hand joint movements were inconsistent and therefore unreliable. The Panel found that there was no diagnosable sensation impairment in either hand and there was no reliable and consistent evidence of impaired opposition strength. In those circumstances the Appeal Panel concluded that there were no objective signs of impairment and there was no objective basis for an impairment rating to be made.

The Appeal Panel revoked the medical assessment certificate of the AMS and issued its own medical assessment certificate recording that the plaintiff had no impairment of his upper extremities.

The plaintiff sought judicial review of the Appeal Panel's determination.

Issues

The plaintiff advanced a number of reasons in support of setting aside the medical assessment certificate of the Appeal Panel. In relation to procedural fairness, the plaintiff submitted the Appeal Panel had raised a totally new issue, namely, the credibility of the plaintiff's symptoms, in circumstances where that issue had not been raised prior to issuing of the Panel's reasons and certificate.

The plaintiff submitted the Appeal Panel failed to accord him procedural fairness by not notifying him of the inconsistent findings on re-examination and before proceeding to a final determination.

Held

Hislop J declared that there was a denial of procedural fairness by the Appeal Panel. The certificate issued by the Appeal Panel was set aside and the matter was remitted to the Registrar for referral to an Appeal Panel for determination according to law.

Reasons for Decision

Procedural fairness

- In this case the defendant had not challenged the plaintiff's claim on credit grounds or on the ground that the plaintiff's presentation was inconsistent or unreliable.

- The Appeal Panel's conclusion regarding the veracity of the plaintiff's presentation was a new issue raised by the Panel.
- The approach required to be followed in these circumstances was set out by the Court of Appeal in *Markovic v Rydges Hotels Limited* [2009] NSWCA 181 in which it was held:

  > "This Panel did not give the respondent worker an opportunity to be heard on the new issues they themselves raised, and having thus misconceived their role, the nature of their jurisdiction and their duty, the Panel's MAC must be quashed, and the appeal from the MAC of the AMS must be reheard by a fresh Panel." (at [35])

- In this case the Appeal Panel should have given notice of the new issue to the plaintiff and his legal representatives (and to the defendant) before finally determining the appeal before it. Had such notice been given, it may well be that the issue raised by the Appeal Panel could have been met by obtaining nerve conduction studies or other evidence.

- The failure to give the plaintiff an opportunity to be heard on this new issue constituted a lack of procedural fairness by the Appeal Panel.

Implications

- The decision is not controversial, but reiterates the need for decision makers to afford procedural fairness to parties, particularly when new issues are being raised that have not previously been put in issue or traversed by the parties.

- It reminds decision makers of the principle set out in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116, namely, while it is open to an Appeal Panel to depart from the grounds of appeal identified, it can only do so if it notifies the parties and gives them an opportunity to be heard.

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Judgement Summary

Hearne v Spamil Discretionary Trust **[2018] NSWSC 1631**
(Hamill J, 4 April 2018)

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Facts

The plaintiff worker, Ms Hearne injured her left shoulder in June 2001 whilst working as an IT Help Desk operator at a law firm. Her injuries at the time did not disclose any major problems. A second injury to her cervical spine was deemed to have occurred in August 2006 and this injury is the subject of the proceedings. A claim for compensation was made by the plaintiff in 2016. The plaintiff was assessed by an AMS and a MAC was issued in October 2016. The AMS found that the plaintiff had restricted movement and features of radiculopathy. The total WPI was 34%. The AMS expressed the opinion that all body parts/systems had stabilised/reached maximum medical improvement. In November 2016, the defendant lodged an application to appeal. The plaintiff filed an opposition and included a neurosurgeon's report raising the consideration of surgery.

The grounds of appeal were that the assessment was made on the basis of incorrect criteria and that the MAC contained a demonstrable error.

In February 2017 a delegate of the Registrar referred the matter back to the AMS for reconsideration. The delegate's reasons noted the neurosurgeon's comments on the possibility of surgery to the cervical spine and the requirements of clauses 1.15 and 1.16 of the *NSW workers compensation guidelines* for the evaluation of permanent impairment. In response, the AMS reconfirmed that there was no significant change in relation to the injuries sustained in 2001 or the deemed injury of 2006.

The matter was referred to an Appeal Panel.

The Appeal Panel determined that the plaintiff should undergo a further clinical examination by an AMS Panel Member. A report was prepared for the Panel. No opinion was expressed as to whether surgery might result in some improvement in the plaintiff's condition. The Appeal Panel adopted the findings of the AMS Panel Member. It accepted that the AMS fell into demonstrable error in his assessment of the injury to the cervical spine and failed to provide adequate reasons for the finding concerning radiculopathy. The MAC was revoked, and a new certificate issued.

Decision

The Court referred to the comments of Basten JA in *Campbelltown City Council v Vegan* [2006] NSWCA 284 at [21] that it will necessary for an Appeal panel to give an explanation of why one conclusion open to it was preferred to another.

Hamill J referred to the decision of Fagan J in *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499 where his Honour said at [14] "all aspects of the …Guides had to be brought to bear in order to produce a substitute certificate." Hamill J stated that this included clause 1.15 of the guidelines which provided that no assessment was to be undertaken unless the plaintiff's condition was "unlikely to improve and had reached maximum medical improvement." The Appeal Panel had not considered the availability of surgery proposed by the neurosurgeon. Hamill J said that it was not possible to discern whether clause 1.5 was considered in the AMS Panel Member's report. His Honour further concluded that the AMS Panel Member's report whilst it set out the clinical findings did not proceed to analyse the plaintiff's WPI.

The Court held the Appeal panel had stated that a WPI of 7% for the cervical spine was calculated by the AMS when the report did not support that statement. The Court found that there was evidence that was capable of support the approach taken by the Appeal Panel but this was not analysed in the reasons of the Appeal Panel. The failure to explain the analysis of the Appeal Panel was in error. The decision of the Medical Appeal Panel dated 26 June 2017 was quashed and the matter was remitted to the Registrar.

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Judgment summary

Bunnings Group Limited v Peter Howard Hicks & Ors **[2008] NSWSC 874**
(Simpson J, 5 September 2008)

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Facts

The Defendant made a claim for compensation for injuries to his right knee and back. The parties agreed that the claim for permanent impairment should be referred to an Approved Medical Specialist ('AMS') for assessment. The parties also agreed that the questions for determination by the AMS were: whether the back injury was an aggravation of pre-existing condition, and if so, whether the Defendant has fully recovered. Dr Blue issued a Medical Assessment Certificate ('MAC') assessing 20% Whole Person Impairment ('WPI') of the back, but attributed that entirely to pre-existing injury and subsequent surgery.

The Defendant appealed against the decision of the AMS on the grounds that the assessment was based on incorrect criteria and that the MAC contains a demonstrable error (subsection 327(3)(c) and (d) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the Act')). The appeal application was solely concerned with the deduction made for pre-existing condition.

A Delegate of the Registrar decided that the ground of appeal specified in subsection 327(3)(d) of the Act was made out and referred the appeal to an Appeal Panel. The Appeal Panel revoked the AMS's MAC and issued a new MAC certifying that the Defendant suffered 20% WPI from which 10% was deducted for pre-existing condition. The Appeal Panel expressly stated that a deduction of 10% would not be at odds with the totality of the available evidence. Accordingly an assessment of 18% WPI was provided for the Defendant's back injury.

The Plaintiff sought review of the delegate's and the Appeal Panel's decisions in the Supreme Court, claiming that the delegate erred in permitting the appeal to proceed to an Appeal Panel and that the Appeal Panel erred in law in the exercise of their jurisdiction. .

Held

Summons dismissed.

- In the context of the original formulation of the subsection (327(4)), it has been held that the role of the Registrar is that of a "gatekeeper". The change of terminology in the amended subsection 327(4) has not altered the role of the Registrar as gatekeeper; it has varied or altered the test that she must apply in determining whether the gates are to be opened, and the appeal permitted to proceed [58]. The intention of the legislature in enacting the amendment was to put in the way of a would-be appellant a hurdle higher than that which had previously existed [66].

- It is not the role of the Registrar (or her delegate) to decide an appeal. That task remains firmly in the hands of the Appeal Panel. Giving full weight to the opening sentence of s 328(1), and to s 328(2), they cannot be taken to require final determination of the ground of the appeal by the Registrar or her delegate [71].

- "Demonstrable" means "capable of being demonstrated" – that is capable of being demonstrated to the tribunal charged with the determination of the appeal. That tribunal is the Appeal Panel. It is not the Registrar or her delegate. "Demonstrable" does not mean "has been demonstrated". Recognition of the proper meaning of "demonstrable" would yield an interpretation of subsection 327(4) that would retain the role of the Registrar as "gatekeeper", and preserve the role of the Appeal Panel as the tribunal to which

determination of the appeal is, by that section, committed [69]. It is possible to conclude that what subsection 327(4) requires is that the Registrar be satisfied that the would-be appellant has made out a case that error (the error identified) was capable of being demonstrated to the Appeal Panel [74].

- Under the pre-amended version of subsection 327(4), it was established that neither the Registrar nor her delegate was obliged to give reasons for a decision to permit an appeal to proceed: *Riverina Wines Pty Ltd v Registrar of Workers Compensation Commission of NSW* [2007] NSWCA 149 ('*Riverina')* [78]. It may then safely be concluded that, even after the amendment, a Registrar (or her delegate), in permitting an appeal to proceed, is not making a decision of a judicial character, and, for the reasons given in *Riverina*, is not obliged to give reasons [85].

- In this case, it was open to the delegate, to be satisfied that demonstrable error – that is, error capable of being demonstrated to the Appeal Panel – had been made out [91]. The delegate approached the issue on the basis that he was the final arbiter of whether the ground advanced had been made out – he expressly accepted that the AMS had erred in making the 100% deduction. That is, the delegate went further than it was necessary for him to do [92].

- The Appeal Panel did not explain its conclusion that it would be "difficult or costly" to determine the extent, if any, of pre-existing impairment. But it is not difficult to understand that such an exercise could involve lengthy and time-consuming medical and physical examination. There is no reason to doubt the correctness of the approach taken in this respect by the Appeal Panel [98-99].

Implications

The Court confirmed that:

- The role of the Registrar is that of a "gatekeeper". That is, the Registrar and her delegates are not the final arbiters of an appeal. That task remains with the Appeal Panel.

- Regardless of the amendments to section 327(4), "demonstrable" means "capable of being demonstrated"; it does not mean "has been demonstrated". Therefore, what subsection 327(4) requires is that the Registrar be satisfied that the appellant has made out a case that error (the error identified) was capable of being demonstrated to the Appeal Panel.

- That the amendments to subsection 327(4) do not require the Registrar or her delegates to give reasons when a matter is referred to an Appeal Panel for determination.

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Judgment summary

Hiron v State of New South Wales & Anor **[2007] NSWSC 152**
(Malpass AsJ, 6 March 2007)

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Facts

The Plaintiff was stabbed while imprisoned and brought proceedings against the State of New South Wales (the First Defendant) seeking damages for negligence.

Pursuant to section 26C of the *Civil Liability Act* 2002 (the 2002 Act) no damages could be awarded unless the Plaintiff's injuries resulted in permanent impairment of at least 15%.

Pursuant to section 26D of the 2002 Act the degree of permanent impairment was to be assessed as provided by Part 7 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act).

The Plaintiff filed an Application in the Commission seeking determination of whether his injuries resulted in at least 15% permanent impairment. The Plaintiff did not file any medical evidence as to the degree of permanent impairment.

The First Defendant filed a Reply claiming that the Commission did not have jurisdiction to determine the matter. It claimed there was no 'medical dispute' because the Plaintiff had not filed any evidence to establish that the statutory threshold of 15% impairment had been met.

The Plaintiff filed a summons seeking declarations and orders concerning the jurisdiction of the Commission to determine the matter.

Issue

Whether there was a "medical dispute" within the meaning of section 321(1) of the 1998 Act.

Held

There was a 'dispute' between the Plaintiff and First Defendant as to the degree of permanent impairment because the First Defendant asserted that the degree of permanent impairment fell short of the 15% requirement and the Plaintiff did not accept those views. This dispute fell within the definition of "medical dispute" as specified in section 319(c) of the 1998 Act.

There was a "medical dispute" within the meaning of section 321(1) of the 1998 Act and the Commission had jurisdiction to determine the matter.
The summons was dismissed and the parties were directed to prepare short minutes.

Implications

An applicant is not obliged to provide medical evidence as to the degree of permanent impairment in order for there to be a "medical dispute" about "the degree of permanent impairment…as a result of the injury" pursuant to section 319(c) of the 1998 Act. This is because section 319 contemplates disputes of a medical nature (as specified in that section) between the parties rather than disputes between medical practitioners.

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Judgment summary

Symbion Health Limited v Hrouda & Anor **[2010] NSWSC 295**
(Hall J, 21 April 2010)

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Facts

The first defendant, Ms Hrouda, sustained injuries in a motor vehicle accident while on a journey from her place of abode to her place of employment with the plaintiff, Symbion Health Limited ("Symbion").

Ms Hrouda made a claim for lump sum compensation, which resulted in proceedings being commenced in the Commission. Ms Hrouda was referred by the Registrar to Dr Williams, AMS, for assessment of her permanent impairment resulting from the injury. Dr Williams issued a MAC on 21 January 2009 assessing Ms Hrouda as suffering 7% whole person impairment ('WPI').

Symbion appealed against the medical assessment, relying on grounds of appeal under section 327(3)(c) & (d). In its appeal application Symbion sought an assessment hearing. A delegate of the Registrar determined that it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel.

On 6 May 2009, the Appeal Panel informed the parties that it would be considering an issue which had not been raised by either party, namely, the question of whether the AMS had erred in attributing Ms Hrouda's partial loss of smell to smoking rather than to the injuries she suffered in the motor vehicle accident. The Appeal Panel invited submissions from the parties on this issue. In its submissions, in response to the issue raised by the Appeal Panel, Symbion again requested an assessment hearing.

The Appeal Panel considered that it had sufficient material before it to enable it to assess the worker's impairment. The Appeal Panel issued its decision on 12 June 2009. On the basis of the material and in the absence of any cogent reason being indicated by Symbion as to why it was necessary to hold an assessment hearing, the Panel was of the view that it would derive no benefit in terms of its consideration and determination of the medical appeal by holding an assessment hearing. The Panel revoked the MAC of Dr Williams and issued a new certificate assessing Ms Hrouda as suffering 9% WPI, a greater assessment than had been allowed in the MAC.

Symbion sought to challenge the decision of the Appeal Panel and lodged a summons in the Supreme Court. The grounds pleaded were that the Appeal Panel erred:

(i) In rejecting Symbion's request to be heard in argument before the panel.
(ii) In failing to consider or, in the alternative, to consider properly the argument advanced by Symbion on appeal where the Registrar had determined that one of the grounds of appeal had been made out.
(iii) In issuing a MAC to the effect that Ms Hrouda's impairment was greater than that originally certified, when the errors made at the time of the MAC were such as to indicate a lesser impairment.
(iv) In issuing a MAC allowing a greater assessment than originally certified, in the absence of any medical evidence or any evidence supporting such a conclusion.
(v) In allowing an assessment for loss of sense of smell, when no application to that effect had been made by Ms Hrouda.
(vi) In revoking the MAC and issuing a new MAC, notwithstanding a finding that the earlier MAC "contained no error".

(vii) In finding, contrary to the original assessment and without allowing Symbion to be heard that Ms Hrouda's loss of smell was the result of injury, rather than the causes identified by the author of the original assessment.
(viii) In failing to observe that the original assessment contained an error in its author's failure to apply the deduction required by section 323 of the 1998 Act in respect of Ms Hrouda's temporomandibular dysfunction, ignoring evidence that a dental splint had not restored full function to the temporomandibular joint.

An additional ground of appeal was added at the hearing that:

(ix) The Workcover Guidelines, and in particular Guideline 45, are invalid to the extent that they are inconsistent with the obligation imposed by section 328(1) which requires that an appeal against a medical assessment "is to be heard". There is an error on the face of the record in the appeal panel refusing an application for a hearing, in light of section 328(1).

Held

In the Supreme Court Hall J dismissed the summons. The reasons for his Honour's decision are summarised below.

Reasons for Decision

The validity of Guideline 45 of the WorkCover Guideline

- It is clear that the provisions of the 1998 Act vest power in the Appeal Panel to determine the type or model of procedure to be applied. In certain cases (such as those involving disputed issues of fact on critical matters) an adversarial hearing may be indicated. The point remains, however, that section 328(1), read in context, does not compel the conclusion that all appeals to which that section applies must be the subject of an adversarial hearing. (*Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* [2006] NSWSC 235 followed; *Dar v State Transit Authority of NSW* [2007] NSWSC 260 distinguished).

- It is well established that, in the case of a statutory power, the statutory framework will be of critical importance in determining what procedural fairness requires (see *Mobil Oil Australia Pty Limited v FCT* (1963) 113 CLR 475, 503-504 per Kitto J.).

- Guideline 45 was valid and was not inconsistent with the provisions of section 328(1) of the 1998 Act.

The procedural fairness issue

- The variable content of the principles of natural justice or procedural fairness has been noted in many authorities (see *Kioa v West* (1985) CLR 550 at 612 per Brennan J). Equally it has been emphasised that the requirements of natural justice will depend on the circumstances of the case, the nature of the inquiry and the rules under which the tribunal is acting as well as the subject matter (see *Russell v Duke of Nolfolk* [1949] 1 All ER 109 at 118).

- The Appeal Panel did not deny the plaintiff procedural fairness. In circumstances in which the Panel had a concern and invited the parties to address the issue, Symbion, effectively elected to take a course of not responding to the opportunity provided. The risk that its request for a hearing would be unsuccessful was relatively high, given the fact that its earlier general request to be heard (again without identifying stated grounds and reasons) had been unsuccessful.

- Even if a breach of the hearing rule could be said to have existed in the Panel not writing back to advise the plaintiff before determining the matter that its request for a hearing was refused, as a matter of discretion, that relief should be refused. There was no reason to conclude that the outcome of the proceedings before the Panel would have been any different if the plaintiff had been permitted a hearing.

Other grounds

- The obligation to give reasons does not require lengthy or elaborate reasons (see *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247).

- The question as to whether or not some pre-existing vulnerability to a recurrence of a condition contributed in any way to a current condition was entirely a conclusion of fact for the Panel's evaluation based on expert evidence.

Implications

- Guideline 45 is valid and not inconsistent with the provisions of section 328(1).

- The decision follows earlier authority confirming that the Appeal Panel is under no obligation to hold an assessment hearing.

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Judgment summary

Ingham's Enterprises v Iogha & Ors **[2006] NSWSC 456**
(Latham J, 17 May 2006)

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Facts

An application was lodged to appeal against a medical assessment. In exercising her "gatekeeper" role, the Registrar permitted the appeal to proceed without providing reasons. The Appeal Panel substituted the assessment of the AMS with its own assessment and provided reasons. The plaintiff Employer sought judicial review of both the decisions of the Registrar and the Appeal Panel.

Held

With respect to the role of the Registrar, the Court held that an obligation to give reasons is an incident of the exercise of judicial power, and that the Registrar is not exercising judicial power when exercising a gatekeeper role under section 327 of the Act. The Registrar is not engaged in "an inquiry concerning the law as it is and that facts as they are, followed by an application of the law as determined to the facts as determined". The Court rejected that special circumstances such as procedural fairness requirements impose an obligation on the Registrar to give reasons. In coming to this conclusion the Court referred to an unqualified right to a re-hearing de-novo before the Appeal Panel, which renders the reasons for the Registrar's decision immaterial.

With respect to the nature of the power exercised by the Appeal Panel, the Court referred to the decision in *Vegan* and noted that it should be inferred that the Court in *Vegan* was not satisfied that the power given to the Appeal Panel was judicial in nature. The Court did note, however, that the position is unclear and that the Court of Appeal may provide clarification in the future. The Court noted that the Supreme Court has consistently followed *Vegan* and saw no reason to depart from it.

In dismissing the plaintiff's summons, the Court held that the Appeal Panel's decision was not based on factual determinations that were illogical, irrational, or lacking a basis in findings or inferences of facts supported on logical grounds. The Appeal Panel's conclusions are open on the basis of the evidence before it. Accordingly, there was no error.

Implications

The unqualified right to a re-hearing de-novo before an Appeal Panel renders the reasons for the Registrar's decision in accordance with section 327(4) of the Act immaterial. The Registrar is not legally obliged to provide reasons for her determination pursuant to section 327(4) where that determination does not conclude the final rights and obligations of the parties.

Although not required to provide reasons for decisions, if the Appeal Panel does so, and a court finds that the conclusions reached by the Appeal Panel were not open on the evidence before it or that factual determinations were illogical or irrational, then the Appeal Panel's decision may be set aside.

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Judgment summary

Inghams Enterprises Pty Limited v Valentina Lakovska **[2013] NSWSC 1489**
(Hidden J, 11 October 2013) (On appeal to the Court of Appeal)

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Facts

On 31 March 2009, Ms Lakovska suffered a back injury whilst bending over to pick up a chicken from the floor. On 28 October 2010, an Application to Resolve a Dispute (the Application) was lodged in the Commission. After extensive proceedings, including two teleconferences and three conciliation/arbitration hearings, Inghams admitted liability, and the matter was referred to an AMS for the assessment of permanent impairment.

The AMS provided an assessment of Ms Lakovska's lumbar spine of 15 per cent whole person impairment. This was reduced by 10 per cent pursuant to section 323 of the 1998 Act due to a degenerative pre-existing condition in the lumbar spine. Following this, the worker's solicitors requested a reconsideration of the medical assessment, as it was apparent that the AMS was not in possession of all the relevant medical material. The AMS reconsidered his decision, and made a deduction of 50 per cent, to a rounded whole person impairment figure of 8 per cent.

Ms Lakovska subsequently lodged an appeal against the MAC, being the reconsidered assessment of 8 per cent whole person impairment. The Panel conducted a preliminary review of the evidence, and invited further submissions on two questions:

- Whether the injury referred to the AMS, in regards to which the AMS was required to assess the degree of the appellant's permanent impairment, is that particularised in part 3 of the ARD being: "to 31.03.09 – due to the nature and conditions of employment with machine controlled pace of process lines particularly on the Holburn line and ergonometrically unsound system of work suffered injury to back, lumbar spine, left leg, radiculopathy post surgery, anxiety and depression";

- If so, whether the AMS limited his assessment of the appellant worker's permanent impairment to the consequences of the incident that occurred on 31 March 2009 when the appellant worker bent down to pick up a chicken that had fallen to the floor, and did not consider the effects preceding that date of the appellant worker working with machine controlled pace of process lines particularly on the Holburn line and ergonometrically unsound system of work; and if so, whether that was an error.

In reply, Inghams maintained that the only injury relied upon by Ms Lakovska was a frank injury on 31 March 2009. They also requested that an oral hearing take place, which was declined. The Panel found that the injury as pleaded was due to the nature and conditions of employment, up to 31 March 2009, and was due to the work she had been undertaking in the period preceding 31 March 2009, resulting in a progression of radial tear or tears.

The Panel revoked the MAC, finding that none of the appellant's impairment was due to any pre-existing abnormality or condition or prior injury and therefore there could be no deduction under s 323 (1) of the 1998 Act. The Panel held that Ms Lakovska suffered 15 per cent whole person impairment.

Inghams sought prerogative relief on three grounds:

1. The Panel travelled beyond the ground of error particularised by Ms Lakovska in the application to appeal, reviewing all aspects of the AMS's decision. In so doing, the Panel wrongly relied on *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*).

2. The Panel's discretion not to hold an assessment hearing miscarried, as it did not take into account the interests of a party wanting to be heard.

3. In any event, there was a denial of procedural fairness because the Panel did not alert the parties to its intention to diagnose "pathology or a series of micro-injuries" not the subject of any other expert opinion, and beyond the scope of the appeal.

Held

The scope of the review

His Honour found the matter "not easy to resolve". The Panel, at [40] and [43] had stated, with reference to *Siddik*:

> "[40]… The Court held that an appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.
> …
>
> [43] In this matter the Registrar has determined that she is satisfied that at least one of the grounds of appeal under section 327(3) is made out. The Panel has accordingly conducted a review of the material before it and reached its own conclusion concerning the correct assessment of the impairments and losses suffered by the Respondent"

His Honour found that the passage at [43] did not point to a hearing *de novo*, but rather a review with the purpose of detecting error and correcting it. The Panel was referring to *Siddik* insofar as it provided guidance to their approach to determining the appeal which had been referred to it, not with ignorance of the amendments made to section 328(2) following the decision in *Siddik*.

More importantly, his Honour was persuaded that the Panel did not travel beyond the boundaries of the grounds of appeal referred to it. The gravamen of the grounds relied on by the appellant related to section 323. The Panel identified that error, and came to a conclusion that no deduction was warranted. His Honour was satisfied that the Panel treated the appeal as one by way of a rehearing, conducting an appropriate examination of the error complained of.

Assessment hearing/denial of procedural fairness

His Honour dealt with these grounds together. In relation to the assessment hearing, his Honour referred to cl 46 of the *WorkCover Medical Assessment Guidelines*. He held that the decision to hold an assessment hearing is a matter within the discretion of the Panel, guided by the question posed by cl 46, whether the matter was capable of determination on the papers, which it addressed.

The procedural fairness issue overlapped with the assessment hearing issue. The Panel invited further submissions after its preliminary review, as identified above. The parties made submissions, and the Panel did not determine an issue which the parties had not had an opportunity to address. There was no denial of procedural fairness.

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Judgment summary

Inghams Enterprises Pty Ltd v Lakovska **[2014] NSWCA 194**
(Basten, Barrett, Gleeson JJA, 18 June 2014)

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Facts

Ms Lakovska was employed by Inghams Enterprises Pty Ltd ('Inghams'). On 31 March 2009, she suffered acute back pain whilst bending down to pick up a chicken carcass that had fallen to the floor at Inghams' processing plant. Inghams admitted liability to pay workers compensation but a dispute arose as to Ms Lakovska's degree of permanent impairment.

The matter was referred to an AMS who assessed Ms Lakovska's whole person impairment at 15 per cent. He made a deduction of one per cent, producing a WPI of 14 per cent on account of a pre-existing spinal condition, pursuant to section 323 of the 1998 Act. This assessment was made on 30 August 2011.

Both parties challenged the degree of deduction for degenerative spinal condition. Pursuant to section 329, the matter was returned to the same AMS who gave a further certificate on 22 November 2011. Upon re-assessment, the AMS referred to "important new clinical information" contained in additional documents provided to him and made a deduction of 50 per cent, resulting in a whole person impairment of eight per cent.

Both parties appealed from the further certificate issued by the AMS. Being satisfied in the way required by section 327(4), the Registrar referred each appeal to the medical Appeal Panel. After conducting a preliminary review of the materials supplied to it, the Panel invited submissions from both parties on two questions:

(i) whether the approved medical specialist had limited his assessment to the consequences of the 31 March 2009 incident, and
(ii) the significance of events in the workplace before the 31 March 2009 incident.

Following receipt of the further submissions it had sought, the Panel found that the degenerative spinal condition had not contributed to Ms Lakovska's impairment. The Panel determined that there should have been no deduction made pursuant to section 323 of the 1998 Act. Accordingly, the Panel assessed Ms Lakovska's degree of whole person impairment at 15 per cent.

Inghams sought judicial review of the Panel's decision pursuant to s 69 of the *Supreme Court Act 1970* (NSW).

Decision of the primary judge

In *Inghams Enterprises Pty Limited v Valentina Lakovska* [2013] NSWSC 1489 the appellant sought prerogative relief on the following three grounds:

4. The Panel travelled beyond the ground of error particularised by Ms Lakovska in the application to appeal, required by section 328(2), reviewing all aspects of the AMS's decision.

5. The Panel's discretion not to hold an assessment hearing miscarried, as it did not take into account the interests of a party wanting to be heard.

6. In any event, there was a denial of procedural fairness because the Panel did not alert the parties to its intention to diagnose "pathology or a series of micro-injuries" not the subject of any other expert opinion, and beyond the scope of the appeal.

The primary judge, Hidden J, held that the medical Appeal Panel had not fallen into error in any of the ways alleged by Inghams.

Inghams appealed to the NSW Court of Appeal contending that the primary judge erred in relation to all three grounds before him. Submissions in the Court of Appeal were advanced on essentially the same basis as in the court below.

Issues before the Court of Appeal

Ground 1:

Did the Panel move beyond the boundaries fixed by s 328(2)? Did the Panel expand its inquiry into matters preceding 31 March 2009 in a way that was impermissible having regard to the original claim in respect of the discrete injury of 31 March 2009 and the grounds of appeal in relation thereto?

Ground 2:

Did the Panel err in law by declining to convene an oral hearing?

Ground 3:

Was there a denial of procedural fairness by the Panel?

Held

None of the bases on which Inghams seeks to impugn the decision of the primary judge had merit. The summons seeking leave to appeal was dismissed and Inghams ordered to pay costs.

Reasons for decision

Basten JA

Leave in this case could have been refused on the papers with a stern warning to the applicant as to a possible abuse of process. His Honour concluded that there was no merit in the appeal, there was an absence of injustice in the result (given the agreed 15 per cent WPI reached by the parties four years ago) and the failure of the employer to rely upon a possible damages claim as a basis for not requiring leave.

His Honour refused leave to appeal with orders as made by Barrett JA.

Barrett JA (Gleeson JA agreeing)

Ground 1:

- There was no substance in Ground 1 advanced before the primary judge and the Court of Appeal.
- Under “Injury description” in Ms Lakovska’s application to refer a dispute to the Commission, it was “clear that a progressing or developing condition - albeit one that had come to a head on 31 March 2009 - was put forward as the ‘injury’” in terms of section 4 of the 1987 Act.
- Ms Lakovska’s claim had been described in a way that was not confined to the particular incident of 31 March 2009. It was on that basis that the AMS conducted the re-assessment, and “the stated grounds on which appeal to the medical Appeal Panel was initiated obviously fell to be construed against that background”.

Ground 2:

- The Panel did not err in law by declining to convene an oral hearing in the matter.
- Although the Panel must take into account a party's expressed desire for an oral hearing, such a decision is clearly open to the Panel, given the provisions of the WIM Act and the Guidelines discussed in *Galluzzo v Little* [2013] NSWCA 116.
- The Panel not only acknowledged that the request had been made but also stated that it saw "no benefit in holding an assessment hearing to hear further submissions from the parties".
- Applying *Galluzzo* the Court found there was a strong emphasis in the applicable provisions (s 328(2) and relevant provisions of the WorkCover Guidelines) on determination without oral hearing. Given Inghams' failure to point to a special reason as to why there should have been an oral hearing, there was no basis on which it could be said that the Panel erred in law by declining to convene such a hearing.

Ground 3:

- No error of law was shown and the conclusions stated in relation to Ground 1 were sufficient to dispose of Ground 3.

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Judgment summary

***Ivaneza v Dalsil Constructions Pty Ltd* [2017] NSWSC 218**
(Button J, 9 March 2017)

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Facts

In 2011 the plaintiff was working at a building site as a carpenter and labourer. While attempting to remove a bolt from a wall at the building site he suffered injuries to his neck, lower back and left shoulder.

The plaintiff was referred to the AMS for assessment of the cervical spine, lumbar spine and left upper extremity. The AMS issued a MAC on 24 July 2013 assessing the plaintiff at 11 per cent WPI and the proceedings were settled by way of consent orders issued on 31 October 2013.

The plaintiff sought judicial review of the MAC and filed a summons with the Supreme Court on 30 June 2016 – approximately three years after the MAC was issued. The plaintiff argued that the AMS failed to give adequate reasons. In particular, the plaintiff argued that there was no explanation given by the AMS as to why he compared the range of motion of the injured left shoulder with the range of motion of the uninjured right shoulder.

In reply, the defendant submitted that the reasons given were perfectly adequate and that if the Supreme Court was to make an order it would be futile because there are simply no proceedings on foot.

Issues

1. Whether the AMS failed to provide adequate reasons thereby committing an error of law.

2. Whether the Court can order a further assessment in circumstances where there are no proceedings on foot.

3. Whether the Court would refuse to make the order sought by the plaintiff based upon discretionary considerations.

Decision

His Honour, Button J, dismissed the summons and ordered the plaintiff to pay the first defendant's costs.

His Honour held that the AMS's reasons complied with the test set out in *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 and were legally adequate. His Honour set out eight factors at [34]–[41] for arriving at this conclusion:

- The AMS recorded the history given by the plaintiff that he had suffered no injury to either of his shoulders. His Honour regarded the AMS's receipt and recording of that history from the plaintiff was an important part of the reasoning of the AMS.
- The AMS set out his knowledge of what he was called upon to do, and his understanding of why he was called upon to do it.
- The reasoning behind the analysis undertaken by the AMS was a matter of common sense. It was hardly complicated or counter-intuitive and does not call for detailed explanation.
- Although the AMS recorded that the plaintiff was right-hand dominant, there was no requirement for the AMS to analyse the role that this fact could play in the process of comparison of the shoulders.

- Despite considering that a rationale for the comparison of the shoulders was provided by the AMS, his Honour held that the paragraph in AMA 5, which was in turn "picked up" by the WorkCover Guides, was no more than a guide.
- The comparison of the range of motion of the shoulders was itself only one aspect of the true subject matter of the MAC.
- The AMS's line of logical reasoning was legally adequate: it set out the reasons of the decision maker for the decision to which he ultimately came.
- One should approach decisions, in other statutory contexts, about different reasons with considerable caution. In any case, his Honour found that there were no gaps in the AMS's reasoning that require supplementation by assumption.

In addition, his Honour accepted the defendant's ancillary argument that it would be inappropriate for the Court to make an order given that there is no medical dispute on foot between the parties. This is because the proceedings that led to the MAC were settled on 31 October 2013 by way of Consent Orders. Accordingly, his Honour accepted that he did not have power to order a further medical assessment.

Finally, if his Honour was wrong in relation to the primary issue and the first ancillary question, his Honour determined that he would not refuse the order sought by the plaintiff. His Honour provided three reasons for this proposition. First, the law in this area was in a state of flux and that legal decisions made on behalf of the plaintiff in the past need to be viewed in that context. Second, a sufficient effort was made by the plaintiff to explore further alternative remedies before his Honour made an order. Third, although there had been delay on the part of the lawyers for the plaintiff, his Honour did not base discretionary refusal to intervene in the circumstances.

Despite the above findings, his Honour made it clear that his answers to the two ancillary questions play no role in the ultimate determination: the reasons of the AMS were legally adequate and reveal no error of law.

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Jenkins v Ambulance Service of New South Wales **[2015] NSWSC 633**
(Garling J, 26 June 2015)

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Facts

Ms Jenkins worked as a paramedic for the Ambulance Service of New South Wales. After 22 years of service she ceased work on 14 March 2012 due to depression and anxiety. She made an application to the Commission for referral to an AMS for medical assessment regarding her entitlement to lump sum compensation for permanent impairment.

A MAC was issued on 2 May 2014 certifying Ms Jenkins as suffering from 6 per cent WPI. Ms Jenkins appealed that decision and the Panel confirmed the MAC issued by the AMS. On appeal to the Supreme Court of NSW Ms Jenkins pointed to a number of errors in the Panel's decision, namely that the Panel wrongly applied and interpreted paragraphs in the WorkCover Guides.

Held

Garling J was not persuaded that the errors claimed in the decision of the Panel had been made out. His Honour held that there was no basis for a judicial review of the kind sought in the summons. At [73] his Honour commented that "a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review".

In relation to the WorkCover Guides, his Honour commented:

- paragraph 1.5(a) provides that assessing permanent impairment involves clinical assessment on the day of assessment. Accordingly a clinical assessment of a claimant is one, but not the only, method of accumulating information about a claimant;
- while paragraph 1.13 requires the medical expert to determine a degree of permanent impairment "using the tables, graphs and methodology given", that does not mean that clinical judgement or assessment has no role to play in that process of assessing the degree of permanent impairment;
- in assigning a class of impairment to each scale under PIRS, the AMS is not restricted to the examples of activities listed in the tables or, alternatively, to those activities as a minimum;
- while paragraph 11.7 provides an expectation that a psychiatrist will provide a rationale for the rating which is assigned "based on the injured worker's psychiatric symptoms", the activities (or perhaps lack of them) listed in the various tables go beyond symptoms.

His Honour also held that it was open to the AMS to find that the plaintiff had capacity for gainful employment from the plaintiff's ability to undertake gardening, a few household activities, and care for her pets and domestic animals.

Costs

The plaintiff applied to the Court for the grant of an indemnity certificate under s 6C(2) of the *Suitors' Fund Act* 1951 in respect of the appeal. Garling J noted that s 6C does not authorise the Court to issue such a certificate. In any case his Honour was not persuaded he could issue a certificate under the *Suitors' Fund Act* 1951 with respect to the proceedings. The plaintiff was ordered to the pay the defendant's costs.

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Judgment summary

Secretary, New South Wales Department of Education v Johnson [2019] NSWCA 321
(Macfarlan JA, Emmett AJA, Simpson AJA, 20 December 2019)

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Facts

The plaintiff suffered a psychological injury in the course of her employment with NSW Education in 2014, when she was abused, threatened and physically assaulted by a student. In 2016 the plaintiff commenced proceedings, for lump sum compensation. The AMS issued a MAC, assessing 19% whole person impairment.

The employer lodged an appeal for reconsideration on the basis that the plaintiff had worked for a subsequent employer, Aboriginal Hostels Ltd, and sustained a psychological injury in 2017, for which a claim had been made under ComCare. The matter was then referred to the Appeal Panel on the basis that the MAC contained a demonstrable error. The Appeal Panel was satisfied that the AMS assessed 19% whole person impairment as a result of the cumulative effect of both injuries. The Appeal Panel held that the psychological injury sustained with NSW Education contributed at the most, one-third of the plaintiff's whole person impairment. The Appeal Panel certified that the percentage of whole person impairment of the worker as a result of the first injury was 6%.

The Supreme Court held that the Appeal Panel's task of reassessing the worker's WPI did not involve any process of apportionment between injuries. Furthermore, his Honour stated that section 323 of the 1998 Act did not apply in the present case. As a result, the medical assessment certificate issued by the Appeal Panel contained an error and the decision ought to have been reached was that the WPI of the worker was 19%.

Grounds of Appeal

The plaintiff employer filed for judicial review from the orders made by the primary judge. The proposed grounds of appeal were that his Honour erred in:

1. Holding that principles of causation applied in tort are not applicable in determining whether an impairment is as a result of an injury for the purposes of ss 319(c) and 326(1)(a) of the Management Act.
2. Alternatively, holding that the applicable common law principles in the circumstances required the Appeal Panel find that the entirety of the whole person impairment of the Worker was the result of the First Injury, without allowing for apportionment on account of the permanent impairment resulting from the Second Injury; and
3. Holding that the Appeal Panel erred in failing to reach a decision that the Worker's WPI that was the result of the first injury was 19% rather than 6%

Held: Amended Summons Dismissed.

Discussion and Findings

1. The Court by majority accepted the common law causation principles enunciated in *State Government Insurance Commission v Oakley* (1990) 10 MVR 570 applied. The primary judge did not hold that common law principles of causation are not applicable. Instead, the primary judge said that it was significant that the Appeal Panel did not conclude that the second injury was a kind that severed the causal chain between the first injury and the worker's impairment. If it had done so, the Appeal Panel would be obliged to find that there was no impairment as a result of the First injury. Furthermore, the primary judge was satisfied that section 323 of the 1998 Act did not apply in the present case and would only apply in respect of an earlier injury and the injury under consideration.
2. The Appeal Panel relied on examination of the worker by the AMS and did not undertake a fresh examination. The Court held that it was insufficient for the Appeal Panel to record and summarise the medical reports as opposed to undertaking a detailed comparison of the respective seriousness of the two incidents.
3. The Court noted that the Appeal Panel failed to properly inquire as to whether by reason of the first injury, the Second injury was more serious than it would have been had the First Injury not occurred. If proper inquiries had occurred, it would follow that there was a causal connection between the First Injury and the degree of permanent impairment of the Worker at the time of the examination of the Worker by the AMS.
4. The Court held [138] that the Appeal Panel made a fundamental error by describing the assault suffered by the worker as a 'minor assault'. The assault was supported by medical reports which pre-dated the second injury. The characterisation of the assault as 'minor' undermined the foundation of the Appeal Panel's approach.
5. The Court accepted, as did the primary judge that the certificate of the Appeal Panel was affected by jurisdictional error. The orders sought in the Supreme Court were properly made and the proceedings properly remitted to the Commission to be determined according to law.

Orders

Macfarlan JA, Emmett AJA, Simpson AJA issued:

1. Dismiss the amended summons.

2. Plaintiff to pay the first defendant's costs of the proceedings.

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Jones v The Registrar WCC **[2010] NSWSC 481**
(James J, 27 May 2010)

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Facts

The plaintiff claimed lump sum compensation for injuries to her cervical spine and her right and left upper limbs and carpal tunnel syndrome. The Registrar referred the matter to an Approved Medical specialist ('AMS') for assessment. The AMS assessed the plaintiff's whole person impairments ('WPI') as 8% WPI for the right upper extremity, 1% WPI for the left upper extremity and 0% WPI for the cervical spine.

The plaintiff appealed against the assessment of the cervical spine on the basis that the AMS took an incorrect history of the injury and failed to consider relevant documents including her statement. The plaintiff also asserted that the AMS failed to consider the impact of her injury on her activities of daily living. The matter proceeded to a Medical Appeal Panel.

The Medical Appeal Panel found no error in the approach taken by the AMS and confirmed his assessment. The Medical Appeal Panel found that the AMS took a clear history of the injury; it was not necessary for the AMS to correlate that history exactly with the plaintiff's detailed statement; the finding of a 0% WPI of the cervical spine did not necessitate any consideration of the impact of the plaintiff's injury on her activities of daily living.

Issues

The plaintiff sought judicial review in the Supreme Court of NSW on the grounds that:

(a) The AMS has failed to give adequate reasons and failed to take into account relevant considerations in making the following findings: (i) the range of motion in the cervical spine was symmetrical; (ii) there was no muscle guarding; and (iii) in not having regard to the plaintiff's statement filed with her original application.

    The AMS had not expressly stated in the MAC that he had investigated asymmetry of motion in all three planes of the cervical spine, from which a constructive failure to exercise his power under section 325 could have been inferred.

(b) The Medical Appeal Panel has failed to conduct its own medical assessment of the plaintiff and has relied on the AMS's findings and reasoning, and has purported to affirm a decision that was not valid.

The plaintiff argued that an AMS is in a similar position to an expert witness in a court case (cf. *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 745), or a judge having to decide which of two bodies of conflicting expert evidence is accepted (cf. *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402; 79 ALJR 1816).

Held

James J dismissed the summons with costs.

Reasons for Decision

- The AMS did not fail to give adequate reasons. There is a presumption of regularity that the AMS had performed such tests as might be required to determine the results of the cervical spine assessment. The medical science that the AMS was applying is not controversial and his reasons were not required to be extensive or detailed (at [50]—[51]). It was not necessary for the AMS to correlate the history he had obtained with the statement the plaintiff had provided some time earlier (at [56]).

- The MAC contains a series of findings, mostly independent of each other. The finding in one paragraph of the MAC should not be read as limited by the AMS's statement in another paragraph. Such a reading of the MAC would involve an approach of the kind criticised in *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175 (at [55]). In *Bojko* Handley AJA, in determining that the worker failed to establish both grounds of appeal, stated at [36]:

  > "Both involved a hyper-critical approach to the reasons of the Panel which is contrary to authority and ignores the presumption of regularity which attends administrative action. The correct approach is that mandated by the joint judgment in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259, 272 which approved the following statement of principle in a decision of the full Federal Court:
  >
  > > '… a court should not be concerned with looseness in the language nor with unhappy phrasing of the reasons of an administrative decision-maker… the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.'"(at [36])

- James J referred to *Campbelltown City Council v Vegan* (2006) 65 NSWLR 372 ('*Vegan*') in determining the adequacy of reasons given by an AMS (having regard to the principle set in the case on the adequacy of reasons of a Medical Appeal Panel). His Honour stated that *Vegan* supported a view that there was little difference in the extent of the obligation to give reasons of an Appeal Panel and of an AMS. The standard of reasons for medical appeal panels was set out at pars [121] and [122] in *Vegan* (at [34] – [35]), while the AMS's obligation to provide adequate reasons is imposed by section 352(2) of the *Workplace Injury Management and Workers Compensation Act* 1998.

- There is no close parallel between the position of an AMS and the position of an expert witness or of a judge deciding which expert evidence he should prefer. An AMS acts as both an expert and as a decision-maker (at [37]).

- Under the WorkCover Guidelines the AMS was required to assess the degree of permanent impairment, by himself making a clinical assessment and by applying the diagnostic criteria in AMA 5. The AMS was not in a position of having to decide which of two conflicting bodies of evidence he should accept (at [49]).

- There was no constructive failure to exercise jurisdiction on the part of the AMS in not expressly considering the issues he was obliged to take into account. The reasons given by the AMS were extensive, the issue was identified and the findings on the range of motion of the cervical spine would have been subsumed in a finding of greater generality (at [64]). The AMS was an expert in testing the cervical spine movement and he had access to, and it can be inferred that he had read, the medical reports of other medical practitioners available to him at the time. The inference that the AMS failed to consider relevant issues cannot be drawn as his reasons were otherwise comprehensive and the issues had at least been identified at some point (cf. *WAEE v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 184 at [47]) (at[61]).

- The challenge to the Medical Appeal Panel's decision was rejected, following the rejection of the challenge to the AMS's assessment. The Medical Appeal Panel was entitled to rely on the findings and reasoning of the AMS (at [65]).

Implications

- The decision clarifies the standard of reasons for an AMS's decision and the role of the AMS as a decision maker. An AMS's role as a decision maker is different from a medical expert as required in the judgment of Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 745, or a trial judge who has to decide two conflicting bodies of medical evidence as in *Waterways Authority v Fitzgibbon* [2005] HCA 57; (2005) 221 ALR 402 79 ALJR 1816). An AMS is not required to decide two conflicting opinions.

- There is a presumed regularity of the medical assessment. Where an AMS's reasons are otherwise comprehensive and the issue has at least been identified at some point, an inference can be drawn that the AMS has considered the issue.

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Judgment summary

State of New South Wales (NSW Department of Education) v Kaur **[2016] NSWSC 346**
(Campbell J, 29 March 2016)

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Facts

The worker was employed as a high school teacher by the plaintiff when she suffered a psychological injury over a period of time leading up to 15 February 2011. The plaintiff disputed liability to pay compensation on a number of grounds including those provided by section 9A and section 11A of the 1987 Act. Consent orders were agreed upon which included a request to refer the matter to an AMS for assessment of whole person impairment as a result of the injury sustained by the plaintiff.

The MAC and the Panel's decision

The AMS assessed the worker as suffering from 15 per cent whole person impairment due to the psychological injury, after making a deduction of 10 per cent under section 323 of the 1998 Act. The plaintiff appealed against the MAC, arguing that the worker's psychological condition was a "secondary psychological injury" caused by the worker's physical health problems, invoking section 65A of the 1998 Act.

The Panel rejected the plaintiff's argument asserting that the questions raised regarding section 65A of the 1998 Act were matters for determination by the WCC and were outside the jurisdiction of the Panel.

Issue

5. Whether, in respect of the Panel's reasoning regarding section 65A of the 1998 Act, the Panel made an error of law on the face of the record and jurisdictional error by way of constructive failure to exercise jurisdiction.

6. Whether the failure of the AMS to consider the issue of the injury as a "secondary psychological injury" resulted in a denial of natural justice in as much as the AMS had failed to consider an argument seriously advanced by the plaintiff.

Decision

Campbell J rejected the submission that section 65A of the 1998 Act was not limited to physical work related injury within the definition of section 4 of the 1987 Act but extended to any physical injury or condition whether or not the injury was work related or compensation was payable for its effects. His Honour held that the definition of "secondary psychological injury" in section 65A of the 1998 Act should be read as a consequence of, or secondary to, a physical *work related* injury, within the meaning of section 4 of the 1987 Act.

Campbell J confirmed this conclusion follows from consideration of section 65A as a whole. Accordingly, His Honour held that the Panel did not make the first error contended by the plaintiff. His Honour further noted that the question of whether an injury is a secondary or primary psychological injury is one for the Commission to determine, and is not an issue arising as a part of a medical dispute.

In relation to the second issue, Campbell J confirmed that the question for the Court was in relation to the legality of the decision by the Panel, not the certificate issued by the AMS. His Honour followed *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43, asserting that the function of the AMS is to form and provide an opinion on the medical question by reference to the AMS' own medical

experience. Accordingly, Campbell J held the Panel's decision that the AMS's reasons in the MAC disclosed no error of fact or law was correct.

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Judgment summary

Mercy Centre Lavington Ltd v Kiely & Ors **[2017] NSWSC 1234**
(*Wilson J, 14 September 2017)*

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Facts

The worker was assaulted by a resident in a care facility, and injured her right shoulder and neck. The worker also sustained a primary psychological injured. The worker returned to work after a period on suitable duties, but found that this exacerbated her physical injuries. The worker then sustained a secondary psychological injury in relation to her physical injuries.

The AMS apportioned symptoms between the primary and secondary psychological injuries, finding that her the secondary condition amounted to 5% of a total of 17% WPI. The worker appealed to the Panel, who applied a 1/10th deduction (pursuant to s323 of the 1998 Act) for the secondary injury to the original 17% assessment.

The employer challenged the approach of the Appeal Panel in the Supreme Court, who concluded that the Panel fell into error for two reasons.

Decision
Held: MAP set aside

Wilson J found that the Panel had erred in reassessing the secondary psychological impairment assessment by the AMS, as this was not a matter in dispute.

Wilson J also held that the Panel had erred when it sought to effect the provisions of s65A by making a s323 deduction from the worker's WPI assessment in the proportion it considered attributable to the secondary psychological condition.

Wilson J held that this approach was an error of law, and commented that while such an application may be a convenient means of resolving the difficulty of apportionment of impairment, "it was not open to the MAP to utilise s 323 as the methodology adopted by which to determine secondary psychological impairment pursuant to s 65A of the 1987 Act."

Wilson J held that sections 65A and 323 serve different purposes and are not intended to work together.

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Judgment Summary

***Mercy Connect Limited v Kiely* [2018] NSWSC 1421**
(Harrison AsJ, 21 September 2018)

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Facts

The worker was assaulted by a resident in a care facility, and injured her right shoulder and neck. The worker also sustained a primary psychological injured. The worker returned to work after a period on suitable duties, but found that this exacerbated her physical injuries. The worker then sustained a secondary psychological injury in relation to her physical injuries.

The AMS apportioned symptoms between the primary and secondary psychological injuries, finding that her the secondary condition amounted to 5% of a total of 17% WPI. The worker appealed to the Panel, who applied a 1/10th deduction (pursuant to s323 of the 1998 Act) for the secondary injury to the original 17% assessment.

The employer challenged the approach of the Appeal Panel in the Supreme Court, who concluded that the Panel fell into error attempting to effect the provisions of s65A of the 1987 Act by application of s323 of the 1998 Act.

The second Appeal Panel issued a decision to quash the MAC and substituted an assessment of 19% WPI based upopn a re-examination of the worker by the Panel speclialist. The employer filed a further summons for judicial review alleging seven grounds of appeal.

Decision

Harrison AsJ determined that the Panel had failed to exercise its statutory task and misconstrued its statutory duty.

Harrison As J determined the second Appeal Panel had not addressed the grounds of appeal raised by the worker in failing to consider whether the AMS had impermissibly assessed the secondary psychological error. The Panel also erred in carrying out a re-examination of the worker without identifying an error in the MAC and thereby falling into jurisdictional error (at [75]- [83]).

Harrison AsJ was not entitled to conduct the re-examination (*New South Wales Police Force v Registrar* [2013] NSWSC 1792 at [34]). Accordingly, the second Panel had misconstrued its statutory duty.

Grounds 4 and 5, whilst not necessary for Harrison AsJ to decide, concerned the alleged failure of the second Panel to consider secondary psychological injury. Her Honour held that the Panel was not obliged to consider the quantification of secondary psychological injury, as the issue was not raised as a ground of appeal. In addition, the Panel was not obliged to revise the WPI when this too was not raised as a ground of appeal.

Her Honour held that had it been necessary for her to express a view she would have determined that the Appeal Panel had misconstrued its statutory task on both these grounds (at [88]- [101]).

The decision of the Panel was set aside and remitted to the Commission to be determined in accordance with law.

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Judgment summary

Kolderie v Murray Brown t/as Goldcard Plumbing & 2 Ors **[2007] NSWSC 657**
(Harrison AsJ, 27 June 2007)

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Facts

The plaintiff lodged an application to resolve a dispute with the Commission, claiming lump sum compensation under sections 66 and 67 of *Workers Compensation Act* 1987 in respect of the injuries sustained in the course of his employment. The Commission referred the matter for medical assessment under Part 7, Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act), appointing Dr Bencsik as the approved medical specialist (AMS).

The Plaintiff lodged an application to appeal against the AMS's medical assessment under sections 327(3)(c) and (d) of the Act. The Registrar determined that the appeal should proceed. The plaintiff indicated in his submissions that "save for re-examination by the Medical Appeal Panel, that the matter is suitable to be determined on the papers" and "a re-examination may assist the Medical Panel to reach its findings".

An Appeal Panel constituted under section 328(1) of the Act carried out a preliminary review and determined that no further medical examination is required because it had sufficient material before it to properly determine the appeal. The Appeal Panel revoked the certificate and replaced it with a new certificate.

Before the Supreme Court, the plaintiff argued that the fact that he was seeking a further examination by the Appeal Panel was not considered on the preliminary review, as the Appeal Panel misread his submissions where the words "save for a re-examination" appear. He argued that the Appeal Panel erred when it made a finding of fact that the parties consented to the review of the original assessment on the papers when clearly that was not the case. This error, according to the plaintiff, led to him being denied procedural fairness, in that he lost the opportunity to be re-examined.

Held

Summons dismissed. Decision of Appeal Panel is affirmed.

- There is no error of law on the face of the record. The Appeal Panel was entitled to take the view on its preliminary review that it was unnecessary for the plaintiff to undergo a further medical examination because all of the material necessary for the panel's determination was before it in the form of documentary evidence. It did not overlook the plaintiff's preference for re-examination. The plaintiff was not denied procedural fairness [17].

- The issue of whether medical re-examination should be conducted is part of the evidence-gathering exercise. It is distinct from the procedure to be adopted on the determination of the appeal. The appeal may be by way of hearing or upon consideration of written submissions [16].

Implications

In accordance with the WorkCover Guidelines, His Honour identified two matters that the Medical Appeal Panel is to consider at the preliminary review stage. First, whether the worker should be re-examined and if new evidence should be allowed; and second, whether there should be an

assessment hearing or whether the appeal should proceed on the papers. The Court Confirmed that the issue of whether a medical re-examination should be conducted is for the panel to determine in light of available evidence before the panel.

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Judgment summary

Kolundzic v Quickflex Constructions Pty Ltd **[2014] NSWSC 1523**
(Campbell J, 7 November 2014)

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Facts

Djuro Kolundzic suffered injuries to his neck, back, right and left shoulders, left knee, left ribs and chest as a result of working for Quickflex Constructions Pty Ltd on 23 April 2007. He was paid lump sum compensation in respect of 10 per cent whole person impairment on 13 September 2010. In 2012 he filed an application for further compensation and was examined by the AMS on 22 May 2012.The AMS issued a new medical assessment certificate certifying the degree of whole person impairment as 13 per cent of the cervical spine, lumbar spine, the upper extremities (shoulders) and the left lower extremity (knee).

It was alleged that the AMS contravened the WorkCover Guides in his assessment of the applicant's shoulders. Mr Kolundzic requested a reconsideration of the AMS's assessment and by letter to the Registrar, dated 27 August 2012, the AMS adhered to his original findings and expressed his reasons why "did not feel the need to reassess or reconsider the medical assessment certificate".

Mr Kolundzic then made an application to appeal against a medical assessment under s 327 of the 1998 Act. The grounds asserted were that the assessment was made on the basis of incorrect criteria, and that the Medical Assessment Certificate contained a demonstrable error. While the Registrar's delegate was satisfied that "special circumstances" justified an increase in the time limit allowed under s 327(5), the delegate refused the application for appeal because Mr Kolundzic "elected" to apply for a reconsideration and, in any event, he was not satisfied that at least one of the grounds for appeal had been made out.

On appeal to the Supreme Court, the plaintiff challenged the legality of the Medical Assessment Certificate, the subsequent reconsideration and the decision to refuse application to appeal to the Panel by the Registrar's delegate.

Issues

His Honour identified the following primary issues for determination:

1. Did the AMS assess the plaintiff's degree of permanent impairment in accordance with WorkCover Guides? What is the legal status of the guidelines and the required strictness of their application?
2. Was the delegate correct to treat reconsideration and appeal as alternatives between which an injured worker must elect?

Decision

WorkCover Guides

With respect to first issue, his Honour held that the WorkCover Guides cannot affect the proper construction of, or limits the rights conferred by, the 1987 or 1998 Act. His Honour found the WorkCover Guides to be subordinate legislation in the nature of regulations whose purpose is to give effect to the provisions of the substantive law. In reaching this conclusion his Honour relied on cases dealing with comparable provisions in the *Motor Accidents Compensation Act* 1999, in particular *McKee v Allianz Australia Insurance Limited* [2008] NSWCA 163; 71 NSWLR 609 at [92] - [95] and *Allianz Australia Limited v Crazzi* [2006] NSWSC 1090; 68 NSWLR 266 at [17].

Campbell J agreed with the applicant's argument that the phrase "in accordance with" in s 322(1) of the 1998 Act means "in conformity with the *WorkCover Guides* and not otherwise", relying on the authorities in *Energy Resources of Australia Limited v Commissioner of Taxation* [2003] FCA 26 at [37] and *Pearson v Richardson* [2012] TASSC 71 at [36] - [38]. In expressing this conclusion, his Honour had regard to the provisions of s 377(2) of the 1998 Act which required the WorkCover Guides to be developed in consultation with peak bodies for the accreditation of medical specialists.

In determining the AMS's compliance with the WorkCover Guides, his Honour stated that the question was not about the strictness or application of the WorkCover Guides but rather it was about the meaning of the WorkCover Guides. His Honour held that the Medical Assessment Certificate and the refusal of the AMS to reconsider his assessment was not vitiated by jurisdictional error or error on the face of the record.

With respect to the first assessment his Honour refused the applicant's propositions namely whether the WorkCover Guides required measurement of active shoulder movement in the erect position. His Honour held that even if they did, the AMS found inconsistency in Mr Kolundzic's presentation and thus WorkCover Guides [1.60] was engaged and the AMS was required by law to rely upon his clinical skill and judgment.

Campbell J held that the AMS did not disregard, or mistake, the limits of his function or powers imposed by the WorkCover Guides. His Honour noted that the terms of the WorkCover Guides provide some scope for the exercise by medical specialists of clinical judgment. However, when it comes to the determination of the "degree of permanent impairment that results from the injury" the tables, graphs and methodology given in the WorkCover Guides and AMA 5 must be complied with to the exclusion of the exercise of individual clinical judgment: WorkCover Guides [1.13].

With respect to the AMS reconsideration, his Honour found the reconsideration decision to be a reiteration of AMS's previous views with some minor correction of clerical error. As there was no error established in the original assessment, the repetition by the AMS of his reasoning in his reconsideration decision was not vitiated by error.

The decision of the Registrar

His Honour held that to the extent that the delegate applied a doctrine of election between inconsistent statutory rights as a ground for refusing the appeal, the Registrar's delegate fell into jurisdictional error. There was nothing in the language of the 1998 Act which suggested that a party having availed him, her or itself of an application for reconsideration may not, if unsuccessful, exercise the statutory right of appeal under s 327 of the 1998 Act.

The Registrar's delegate was not satisfied that the plaintiff had made out either of the specified grounds of appeal relied upon under s 327(3)(c) and (d). His Honour held that this part of the delegate's decision was not vitiated by any illegality.

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Judgment summary

Kuzet v The Registrar of the Workers Compensation Commission **[2015] NSWSC 4**
(McCallum J, 30 January 2015)

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Facts

Ms Stevanija Kuzet was employed as a kitchen hand at Liverpool Hospital. In 2008, while lifting a box weighing between 15 and 20 kilograms she suffered injury to her lumbar spine, her cervical spine and her right upper extremity (shoulder) during the course of her employment. The employer disputed Ms Kuzet's claim for permanent impairment compensation. As a result, Ms Kuzet sought an assessment of the degree of permanent impairment in accordance with s 65 of the 1987 Act.

On 16 February 2011 the AMS certified Ms Kuzet's degree of permanent impairment at five per cent for aggravation of pre-existing asymptomatic degenerative changes in the cervical spine. He determined that there was no permanent impairment of the lumbar spine or the right shoulder. Ms Kuzet made an application to appeal against that assessment and this was allowed by the Registrar.

The matter came before the Panel and on 6 October 2011 it concluded that the medical assessment certificate of the AMS should be confirmed.

On 17 May 2013 judicial review proceedings were commenced in the Supreme Court against the decision of the Panel.

Ms Kuzet alleged that the AMS found her to be suffering from "abnormal illness behaviour". According to AMA 5 and the WorkCover Guides, such a finding meant that she had not reached maximum medical improvement. As a result, the AMS's finding that the plaintiff's injuries were permanent and stabilised was therefore not a finding open to him. Ms Kuzet also sought to set aside the decision of the Panel alleging that by failing to find the error alleged in the AMS's decision and choosing to confirm that decision, the Panel's decision was infected by an error going to its jurisdiction. In this regard, reliance was placed on *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 at [101]-[104] and *Markovic v Rydges Hotels Limited* [2009] NSWCA 181.

Issue(s)

Whether the finding of abnormal illness behaviour by the AMS necessarily precluded the conclusion that the injuries were permanent and stabilised.

Decision

McCallum J held that the above question was properly within the realm of the AMS's clinical judgment, and not a matter for legal analysis. In reaching this conclusion his Honour considered the reasoning of Adams J in *Ojinnaka v ITW Australia Pty Ltd* [2011] NSWSC 208 (*Ojinnaka*).

In line with the remarks of Adams J at [13]–[14] in *Ojinnaka*, his Honour characterised Ms Kuzet's allegation of jurisdictional error as falling under one of two alternatives. The first was whether "a significant feature of the impairment was disregarded and hence the 'degree' of permanent impairment was not actually considered". Using this analysis, his Honour held that the question on whether the "abnormal illness behaviour" was a feature of the impairment was properly within the realm of the AMS's clinical judgment, and not a matter for legal analysis. His Honour relied on the AMS's requirement to use "objective and scientifically based data" and clinical judgment, as referred to in the WorkCover Guides and 1.5 of AMA 5, in reaching this conclusion. As a result, McCallum J was not persuaded that an error of law or jurisdictional error could be established on this ground.

The second analysis which looks at whether “the psychological element was at all events necessarily dynamic and accordingly the degree of permanent impairment could not be at that point fully ascertainable” was also considered by his Honour. He found that the same issue had been determined by the Panel which stated that the “abnormal illness behaviour” was unrelated to the stability of Ms Kuzet’s condition. In its decision, the Panel came to the conclusion that Ms Kuzet’s case had seen no clinical improvement over a period of two and a half years.

As a result, his Honour held that the question of whether the degree of permanent impairment was fully ascertainable was quintessentially a matter of clinical judgment, and not legal analysis. Again, his Honour was not persuaded that error of law or jurisdictional error could be established on this basis.

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Judgment summary

Langham v The Mid-Coast Meat Company Pty Ltd & Ors **[2007] NSWSC 732**
(Malpass AsJ, 11 July 2007)

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Facts

The Plaintiff worker sustained injury during the course of his employment with the First Defendant. He left this employment in July 1995 and bought a sawmill (in which he worked). Thereafter, he experienced further problems. The history identifies three areas of causation - an injury in 1992, an injury on 24 December 1993 and surgery in 1997. The Plaintiff made a claim for permanent impairment of the back, left leg at or above the knee and right leg at or above the knee following injury at work on 24 December 1993. The dispute was referred for assessment to an Approved Medical Specialist (AMS). The AMS issued a Medical Assessment Certificate including 45% for permanent impairment of the back.

The AMS opined that the plaintiff had a severely impaired lumbar spine and that the level of impairment should be assessed at the higher end of the scale. The AMS was of the opinion that the surgery in 1997 was causally connected to the injury of 24 December 1993.

The employer (First Defendant) appealed against the assessment of the AMS on the grounds specified in sections 327(3)(c) and (d) of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act). The appeal was allowed to proceed. The Appeal Panel revoked the original Medical Assessment Certificate and issued a fresh one, which reduced the percentage of permanent impairment to the back, as a result of the 1993 injury, to 10%. The reasons contained the following:

> "Having regard to all the medical evidence before it and taking into account both back injuries and the two back operations, the Panel is of the view that Dr Ostinga's assessment of 45% is too high and that the permanent impairment of the worker's back is 20% - 50% of which is due to the 1993 work injury…"

The Plaintiff filed a Summons in the Supreme Court arguing that the Appeal Panel ventured outside the scope of the Grounds for Appeal as the grounds did not bring a challenge to the percentage of 45% as assessed by the AMS, and that the Appeal Panel failed to give adequate reasons for its assessment (of 45% being "too high"). In so doing, there was a denial of natural justice.

Held

The Certificate issued by the Appeal Panel is set aside. The matter is remitted to the Registrar for referral to an Appeal Panel constituted under section 328.

- The question of what may be encompassed by grounds of appeal may not always be an easy one. Whilst it may be correct to say that there was no express challenge to the effect that the percentage of 45% was "too high", by implication that assessment was challenged by what was raised in respect of "pre-existing condition" and matters after 1993 [21], [22]. The assessment of the Appeal Panel brought about a significantly different result (a reduction of 35%). On one view, it may be said that the grounds do not contemplate a challenge that brought such significant different results [23].

- With respect to the question of reasons, what is required to adequately disclose the reasoning process will vary from case to case. In this case, the assessment of the Appeal Panel represented a significant departure from what had been assessed by the AMS and that departure was expressed and explained in brief and general language. The 45% was

said to be “too high” and the 50% was left unexplained. More should have been offered by way of an explanation of how the Appeal Panel came to the figure of 20%, and for then reducing it by a further 50% [24].

Implications

The Court remitted the matter back on the basis that where an Appeal Panel’s assessment reveals a significant departure from the assessment by the AMS, the Appeal Panel is required to provide sufficiently detailed reasons. However, His Honour pointed out that what is required to adequately disclose the reasoning process will vary from case to case.

In discussing the grounds for appeal and whether the Appeal Panel ventured outside of it, it is clear that his Honour followed the views expressed by the Court of Appeal in *Campbelltown City Council v Vegan* [2006] NSWCA 284 and his Honour’s own judgment in *Skillen v Workcover Authority of New South Wales & Ors* [2007] NSWSC 129. The judgment provides further support for the conclusion that Appeal Panels are to review matters on the basis of grounds of appeal, as opposed to conducting a de novo review.

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Judgment summary

Galluzzo v Little **[2013] NSWCA 116**
(Barrett JA, Ward JA and Tobias AJA, 14 May 2013)

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Facts

The worker made a claim for lump sum compensation for permanent impairment as a result of an injury to her right knee, lumbar spine and left knee. The Approved Medical Specialist (AMS) assessed impairment in relation to the right knee and lumbar spine but declined to assess the left knee because it had not reached maximum medical improvement (MMI).

The employer appealed the Medical Assessment Certificate (MAC). They argued that the AMS erred in providing assessments where all the body parts referred for assessment had not reached MMI. In putting forward their appeal the employer sought an opportunity to make oral submissions.

The Medical Appeal Panel (the Panel) determined the matter on the papers. They found that there was no need to wait until all body parts had reached MMI before an assessment could take place.

The employer commenced judicial review proceedings in the Supreme Court. Schmidt J found that the Panel reached the correct conclusion, that section 322 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) permitted assessment even though not all of the injuries had reached MMI, but that they failed to give adequate reasons for reaching that conclusion. She found that the Panel was not required to conduct an oral hearing but that they denied the employer procedural fairness by failing to give it an opportunity to make further submissions in circumstances where they had formed the view that the submissions before them were inadequate.

In a separate decision, Schmidt J made a declaration that the Panel's decision involved error on the face of the record. She ordered that the employer pay 70% of the worker's costs on an ordinary basis.

The employer sought leave to appeal from Schmidt J's decision. The worker lodged a cross-appeal.

Issues

The employer argued:

(a) Schmidt J erred in finding that the legislation permitted assessment before all impairments suffered as a result of the injury were fully ascertainable.

(b) Schmidt J should have quashed the Panel's decision and remitted the matter for redetermination.

(c) Schmidt J erred in finding that there was no denial of procedural fairness when the Panel declined to hold an oral hearing.

The worker argued (on cross-appeal):

(a) Schmidt J erred in holding the Panel was required to call for further submission from the employer.

(b) Schmidt J erred in not awarding the worker the whole of her costs assessed on an indemnity basis.

Held

- Schmidt J was correct in concluding that it was permissible for a medical assessment to be undertaken before all impairments suffered as a result of the injury were fully ascertainable. Section 322(4) of the 1998 Act gives the AMS discretion to defer making an assessment until all injures have stabilised, it does not create an obligation to do so.

- Barrett JA applied *Estate of Brockmann v Brockmann Metal Roofing Pty Ltd* [2006] NSWSC 235 at [57] – [58] and found that section 328(1) of the 1998 Act did not compel the Panel to conduct a hearing. Rather, the Panel had discretion to decide how the case should proceed, based on the particular needs of the case.

- The employer made no attempt to explain why an oral hearing was necessary. They merely asserted that there should be an oral hearing and declined to give more than a skeleton outline of the grounds of appeal and submissions they relied on.

- The primary judge was correct in her conclusion that there was no denial of procedural fairness when the Panel declined to conduct an oral hearing. The employer knew that "it was plainly on the cards" that the Panel may proceed on the papers (*Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244 (*Fletcher*)).

- A party appealing a MAC must, at the outset, frame their submissions and grounds of appeal sufficiently to enable the Registrar to decide whether any ground of appeal under section 327(4) of the 1998 Act "has been made out".

- Schmidt J fell into error in finding that the Panel denied the employer natural justice by failing to give it an opportunity to make further submissions to supplement those it described as not being of an acceptable standard (citing *Fletcher*). The fact that the Panel formed a poor opinion of the employer's submissions did not give rise to a duty to seek further and better submissions. "The employers had consciously chosen to be brief as part of what can only be regarded as a ploy…to obtain an oral hearing" at [84].

- The primary judge's decision not to remit the matter to a Panel was correct. She found that the Panel had correctly construed the statutory provisions in determining that an assessment could be undertaken before all impairments had reached MMI. Upon remitter, the Panel would have been obliged to proceed according to that view of the law and therefore remitter would have been futile.

- Schmidt J's declaration that the decision of the Panel involved error of law on the face of the record served no useful purpose and should be set aside. The declaration did not state that one of the parties had some entitlement against the other or say how the decision involved error of law on the face of the record.

- In light of the findings made in the current appeal, the employer could not be regarded as having succeeded on any of the issues that arose in the proceedings. In those circumstances it was appropriate that the employer pay the whole of the costs of the worker.

- The proceedings were not spurious or devoid of merit. The primary judge's discretion as to the basis of assessment of costs did not miscarry.

Implications

In this decision Barrett JA makes it clear that parties need to properly outline their submissions and grounds of appeal at the outset. If they fail to do so they may not get an opportunity to present further submissions (either written or oral) to the Panel.

In reaching the conclusion that the Panel was not required to call for further submissions in this particular case, Barrett JA [81] made the following comments about the gatekeeper's function under section 327 of the 1998 Act:

> "The Registrar's function is not to decide whether there is a serious case to be considered or whether some prima facie basis for intervention on appeal has been established. It is to evaluate each of the appeal grounds put forward and decide whether any of them 'has been made out'."

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Judgment summary

TJ Galluzzo and SJ Galluzzo t/as Riverwood Chemworld Chemist v Dianne Little (No 2)
[2012] NSWSC 324
(Schmidt J, 5 April 2012)

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Facts

The worker made a claim for lump sum compensation for permanent impairment as a result of an injury to her right knee, lumbar spine and left knee. She was assessed by an Approved Medical Specialist (AMS) to be suffering 4% whole person impairment (WPI) of the right knee and 6% WPI of the lumbar spine. The AMS declined to make an assessment of the left knee because it had not reached maximum medical improvement (MMI) at the time of the assessment.

The employer appealed the AMS's medical assessment certificate (MAC). The employer argued that the AMS erred in providing assessments of the right knee and the lumbar spine when the worker's left knee condition had not reached MMI.

A delegate of the Registrar determined that a ground of appeal under section 327(3)(d) of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) had been made out opining that the AMS's assessment may have been inconsistent with section 322 of the 1998 Act and paragraph 1.21 of the WorkCover Guides (the construction point).

The Panel confirmed the AMS's MAC and found the employer's submissions on appeal contained nothing but vague and unspecified assertions.

The employer commenced judicial review proceedings in the Supreme Court seeking a declaration that the Panel's decision involved error on the face of the record and jurisdictional error and an order that its decision be quashed.

The Supreme Court dismissed the summons on several grounds, but upheld the employer's arguments on others (*TJ Galluzzo and SJ Galluzzo t/as Riverwood Chemworld Chemist v Dianne Little* [2011] NSWSC 1581).

Schmidt J found that the employer was not entitled to a hearing; however, the Panel erred in not calling for further written submissions on the construction point because the submissions before it were inadequate.

The Panel denied the parties procedural fairness because it had not given the parties an opportunity to be heard and because it failed to give adequate reasons for its decision.

Her Honour determined that section 322 of the 1998 Act permits assessment of a worker even though not all of the injuries suffered are capable of being assessed. Her Honour held that there was no inconsistency in the AMS's assessments with the provisions of either section 322 of the 1998 Act or paragraph 1.21 of the WorkCover Guidelines. This ground of review was dismissed.

The present judgment dealt with the question of the appropriate orders to be made, in light of the above findings.

The worker submitted:

- the decision of *Fletcher International Exports Pty Limited v Barrow* [2007] NSWCA 244 *(Fletcher)* had been overlooked, and

- there was discretion not to uphold the appeal and refer the matter back to the Panel which should be exercised in this case.

The employer submitted:

- the errors found by Schmidt J were jurisdictional errors requiring an order that the decision be quashed.

Held

Orders

- Schmidt J distinguished the present case from *Fletcher*. In this case the plaintiff had not addressed the construction point in its submissions and that the matter for which the delegate had concluded that a ground of appeal had been established was an issue that had to be determined by the Panel. The fact that the Panel had inadequate submissions before it on the construction point meant that it "had no real understanding of the issue which it had to decide" at [7]. Conversely, in the case of *Fletcher* the matters in issue and the parties' positions on those issues were understood by the decision maker.
- If the Panel's failure to give reasons amounted to jurisdictional error the matter had to be referred back to the Panel. Otherwise, an order quashing the Panel's decision should only be made if a different outcome could result from the Panel's proper application of the legislation.
- Until there has been an assessment by an AMS, the condition of the left knee does not arise for assessment by the Panel. There was no utility in referring the matter back to the Panel because it was unlikely that a different outcome could result.
- The Panel considered the appeal based on a proper construction of the legislation. The Panel's decision was within jurisdiction.
- The appropriate order was a declaration that the Panel's decision involved error on the face of the record, but the summons was otherwise dismissed.

Costs

- The worker sought an indemnity costs order because, it submitted, the employer attempted to hold the Panel to ransom in pursuing its desire for an oral hearing and disregarding its obligation to assist the Panel by providing inadequate written submissions.
- The criticisms of the employer were warranted. However, indemnity costs orders may only be made where there is relevant misconduct in connection with the conduct of the proceedings; *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 (*Oshlack*). There was nothing in the conduct of the proceedings which would warrant the exercise of discretion to order indemnity costs.
- The employer succeeded in establishing that the Panel erred in not calling for further submissions on the construction point and in failing to give adequate reasons; however, it failed on the construction point which took up the bulk of the time at the hearing.
- The employer was entitled to its costs for the part of the case on which it succeeded and was to pay the worker's costs in relation to the construction point.
- Orders were made that the employer was to bear 70% of the worker's costs of the proceedings.

Implications

This decision confirms that if an error made by a decision maker is a jurisdictional error, there is a requirement that an order be made quashing the decision, whereas, if the error is within jurisdiction there will be a discretion as to whether to make such an order; *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597.

The decision also confirms the principle that an indemnity costs order will only be made where misconduct is in connection with the conduct of the proceedings (*Oshlack)*.

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Judgment summary

TJ Galluzzo v SJ Galluzzo t/as Riverwood Chemworld Chemist v Dianne Little **[2011] NSWSC 1581**
(Schmidt J, 19 December 2011)

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Facts

The worker made a claim for lump sum compensation for permanent impairment as a result of an injury to her right knee, lumbar spine and left knee. She was assessed by an approved medical specialist (AMS) to be suffering 4% whole person impairment (WPI) of the right knee and 6% WPI of the lumbar spine. The AMS declined to make an assessment of the left knee because it had not reached maximum medical improvement (MMI) at the time of the assessment.

The employer lodged in the Commission a medical appeal of the AMS's medical assessment certificate (MAC) on the grounds that the assessment was made on the basis of incorrect criteria and that the MAC contained a demonstrable error (sections 327(3)(c) and 327(3)(d), respectively, of the 1998 Act).

The employer submitted that the appeal could not be determined by a Medical Appeal Panel (the Panel) on the papers, and it would be appropriate for it to conduct an appeal hearing in order to entertain oral submissions. The employer also argued on appeal that, among other issues, the AMS erred in providing assessments of the right knee and the lumbar spine when the worker's left knee condition had not reached MMI, asserting that assessments of impairments of all the body parts should be made at the same time.

The worker opposed the medical appeal, arguing that the employer had not provided sufficient submissions to show that the AMS erred in the assessment.

A delegate of the Registrar determined that a ground of appeal under section 327(3)(d) had been made out and allowed the appeal to proceed to the Panel, opining that the AMS's assessment may have been inconsistent with the provisions in section 322 of the 1998 Act and paragraph 1.21 of the WorkCover Guidelines.

The Panel confirmed the AMS's MAC, accepting the worker's argument that the employer's submissions on appeal "contained nothing but vague unspecified assertions without reference to the evidence" (at [28] of its reasons).

The employer commenced judicial review proceedings in the Supreme Court, seeking a declaration that the Panel's decision involved error on the face of the record and jurisdictional error and an order that its decision be quashed, on the grounds that the Panel:

- Erred in failing to provide the employer with an appeal hearing, which was sought, and that it failed to properly exercise its discretion to conduct an assessment hearing and that its refusal to grant the request for a hearing was irrational and resulted in legal error (citing *Lukacevic v Coates Hire Operations Pty Ltd* [2011] NSWCA 112 and *Ah-Dar v State Transit Authority of New South Wales* [2007] NSWSC 260);

- Erred in not properly considering the grounds relied on by the employer on appeal in circumstances where the Registrar's delegate was satisfied that at least one of the grounds of appeal had been made out (citing *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 in asserting that the Panel departed from the grounds of appeal without giving them the opportunity to be heard);

- Erred in failing to revoke the MAC consistent with the finding of the Registrar's delegate and the grounds relied on;

- Erred in having regard to irrelevant considerations and in going beyond the matters that it can consider in particular having regard to the availability of interest;

- Erred in its consideration of the requirement for a deduction for pre-existing condition under section 323 of the 1998 Act; and

- Erred in failing to properly consider the application of section 322 of the 1998 Act and of paragraph 1.21 of the WorkCover Guidelines.

Held

The Supreme Court dismissed the summons on several grounds, but upheld the employer's arguments on others, remitting the matter back to the Registrar for referral back to the Panel.

Opportunity to be heard and procedural fairness

- Schmidt J was informed by the statutory regime for medical appeals and determined that there was no automatic right to an oral hearing, with the decision to conduct it resting in the powers of the Panel. Her Honour stated that: "The employer was not entitled to a hearing simply because it had demanded one, nor because it had put on inadequate submissions…. Its failure to avail itself of the opportunity it had, to put on adequate written submissions as to the grounds of appeal which it wished to pursue, did not equate to a failure on the Appeal Panel's part, to give it an opportunity to be heard." (at [31])

- However, her Honour opined that the Panel ought to have given the parties the opportunity to put on further written submissions, if there was to be no oral hearing (at [32]).

- Her Honour distinguished the matter from *Symbion Health Ltd v Hrouda* [2010] NSWSC 295, and held at [37] that:

  "The result was that the issue on which the Registrar's delegate concluded that a ground for appeal had been established, which concerned the construction and operation of provisions of the Act and the Guides and a possible conflict between them, was not properly dealt with. The views expressed were not ones which the parties had specifically addressed. That being so, if the Appeal Panel determined to proceed without an oral hearing, at the least it ought to have called for submissions from them, on the views which the Registrar's delegate had expressed, before coming to a conclusion on the construction point which had arisen for its determination."

- Her Honour found that the Panel denied the parties procedural fairness because it had not given them the opportunity to be heard on matters which it needed to decide on appeal (at [38]).

- The Court upheld this ground of review.

Reasons of the Panel

- The Court found the Panel's reasons to be inadequate, citing the need for it to provide proper reasons for the decision it reached (*Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372).

- Her Honour held that the Panel failed to cite any rule or authority in the statutory scheme on which its determinations rested, and that the inadequacy of the employer's submission did not obviate the need of the Panel to give sufficient reasons (at [39]).

- The Court upheld this ground of review.

Re-assessment or fresh assessment

- Her Honour was of the view that despite the inadequacy of the employer's submissions on appeal, the employer did not provide further explanation for those grounds.

- Citing *Siddik v v WorkCover Authority of NSW* [2008] NSWCA 116, her Honour concluded that, due to the nature of the employer's submissions on appeal which were "an all grounds attack", the Panel had no option but to assess the matter afresh, despite not being assisted by the employer's unclear and insufficient submissions. In the circumstances, the Panel was entitled, even obliged, to consider the assessment afresh (at [44]-[45]).

- The Court dismissed this ground of review.

Award of interest

- The matter was not addressed by either party on appeal. The Court made no determinations on this point, and dismissed this ground of review.

Construction of section 322 of the 1998 Act and paragraph 1.21 of the WorkCover Guidelines

- In assisting the parties regarding the proper construction of the legislative requirements for assessments of multiple impairments of different body parts arising from a single injury, her Honour analysed the operation of the provisions and determined that:

    - "In my view, s 322 permits assessment of a worker who has been permanently impaired as the result of injury resulting from an incident, even though not all of the injuries suffered are then capable of being assessed. Once any other injury is stabilised, the resulting impairment must then be 'assessed together' with any other impairment resulting from injuries which earlier stabilised. That is done by repeated application of the Combined Values Charts." (at [90])

    - "… [T]he aim of the requirement that all injuries and impairments be assessed together is to ensure that an award in accordance with the Combined Values Chart may be calculated, rather than separately compensating for particular injuries and impairments. This reflects that permanent impairment across multiple body parts can have a cumulative and partly concurrent effect, on total impairment… Such an assessment does not, however, require that all impairments be assessed at the same time." (at [91])

    - "In my view the Guides may be read consistently with s 322, when given the beneficial interpretation it was clearly intended to have. Any particular injury may only be assessed when it is stable, as cl 1.21 provides. That does not mean that no assessment of any injury may be undertaken, until all injuries have stabilised. There is a discretion given in s 322(4) to defer assessment of an impairment which has stabilised, but the section does not require such deferment when other injuries have not reached maximum improvement. That is a matter for a medical specialist to determine." (at [95])

- Her Honour held that there was no inconsistency in the AMS's assessments with the provisions of either section 322 of the 1998 Act or paragraph 1.21 of the WorkCover Guidelines.

- The Court dismissed this ground of review.

Implications

1. The decision has implications on the role and function of the Registrar. Although the Registrar's delegate's decision was not the subject of review, and the Court had not made any critical pronouncements about it, the decision appears to insinuate that a Panel should have regard to the Registrar's reasons for allowing the appeal to proceed.

   If so, there is concern that arises as to the nature and extent of the Registrar's reasons in allowing the appeal to proceed so far as to which grounds of appeal had been made out at the gatekeeper level. The practical impact of this appears contrary to the current position that the Registrar does not need to provide extensive reasons for allowing the appeal to proceed to a Panel, supported by the decision of the Supreme Court in *Bunnings Group Limited v Peter Howard Hicks & Ors* [2008] NSWSC 874.

2. Otherwise, the decision is not controversial in that it reiterates the Panel's obligations to provide the parties procedural fairness and to provide adequate reasons for its conclusions, already upheld in various authorities.

3. The judgment also confirms the Panel's discretionary power to conduct an oral/assessment hearing, which does not automatically operate in a medical appeal.

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Judgment summary

***Gatt v State of New South Wales* [2019] NSWSC 451**
(Campbell, 24 April 2019)

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Facts

The worker suffered a frank injury to the right shoulder in 2011 while rescuing a patient who had fallen and suffered fractures. The worker and another paramedic moved the patient in a rescue basket up a steep track to the top of a ridge from where he could be winched to a hovering helicopter. The worker Immediately felt pain in his right shoulder, and an umbilical hernia. Prior to the frank injury to the right shoulder, the worker had suffered a series of injuries with the one employer. On 27 February 2017, the worker commenced proceedings, for lump sum compensation, and an AMS issued a MAC on 2 June 2017 assessing 21% whole person impairment.

The first defendant, State of NSW (Ambulance Service of NSW), appealed against the decision of the AMS. The first defendant submitted that only the WPI resulting from the frank injury in 2011 had been referred. The first defendant also submitted that the AMS had departed from the specific scope of the referral and misapplied s 323 because he ignored the 1977 injury and failed to make a deduction for the 1993 injury and the nature and conditions of employment between 1993 and 2011. On 28 September 2017, the Appeal Panel determined that it would revoke the MAC and issue a new certificate assessing 5% WPI.

The worker filed a summons in the Supreme Court to set aside the decision of the Appeal Panel. The worker submitted that the Appeal Panel fell into jurisdictional error by determining the appeal of grounds in which the appeal was not made and by reviewing the AMS's first MAC rather than the second. The worker also submitted that the Appeal Panel fell into jurisdictional error by misconceiving its function because in substance it found no impairment resulted from the injury.

Held: The Appeal Panel's MAC was confirmed.

Discussion and Findings

1. Campbell J considered the issue whether the Appeal Panel exceeded the limitation upon its powers by deciding the appeal on a ground which was not one of the grounds of appeal.

2. The Appeal Panel identified the *Aircons* error in which the AMS addressed matters other than those referred to him by assessment. Her honour acknowledged that the Appeal Panel erred when they stated that aggregation and causation are not the concern of the AMS. However, the material errors in the MAC were that the AMS went beyond the terms of the referral and failed to make a deduction.

3. Her Honour was not persuaded that the Appeal Panel wrongly concluded that the AMS had assessed the whole person impairment resulting from all of the 1993 injury, the nature and conditions of employment in the interval and the 2011 injury.

4. In the replacement MAC, the AMS omitted the sentence *that "the accident of 2011, if taken separately, would be a quarter of the assessed impairment"*. Her Honour concluded that the

Appeal Panel was open to infer that the withdrawal of that sentence indicated that the AMS remained of the view of the original MAC.

5. Her Honour dismissed the ground that the Appeal Panel fell into jurisdictional error by misconceiving its function because in substance it found no impairment resulted from the injury. Had there have not been any degenerative changes, the accident in 2011 would not have given rise to the need for shoulder surgery.

Orders

Campbell J issued:

1. The relief sought in the Amended Summons is refused;
2. Proceedings dismissed;
3. The plaintiff to pay the first defendant's costs of the proceedings.

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Judgment Summary

Johnson v NSW Workers Compensation Commission **[2019] NSWSC 347**

(Garling J, 3 May 2019)

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Facts

The plaintiff suffered a psychological injury during the course of her employment with NSW Education in 2014, when she was abused, threatened and physically assaulted by a student. In 2016 the plaintiff commenced proceedings, for lump sum compensation. The AMS issued a MAC, assessing 19% whole person impairment.

The employer lodged an appeal for reconsideration on the basis that the plaintiff had worked for a subsequent employer, Aboriginal Hostels Ltd, and sustained a psychological injury in 2017, for which a claim had been made under ComCare. The matter was then referred to the Appeal Panel on the basis that the MAC contained a demonstrable error. The Appeal Panel was satisfied that the AMS assessed 19% whole person impairment as a result of the cumulative effect of both injuries. The Appeal Panel held that the psychological injury sustained with NSW Education contributed at the most, one-third of the plaintiff's whole person impairment.

The worker filed a summons in the Supreme Court to remit the matter to a differently constituted medical appeal panel to determine the medical appeal according to law. The plaintiff submitted that the Appeal Panel did not comply with the Guidelines because it did not express a view about the diagnosis of the plaintiff's condition giving rise to the whole person impairment (the diagnosis issue). The plaintiff also submitted that the Panel failed to identify the relevant legal principle that it was applying in respect of the task upon which it was engaged in in undertaking the reassessment of the whole person impairment (the apportionment issue).

Held: The Appeal Panel's MAC quashed.

Discussion and Findings

3. In regards to the diagnosis issue, the Court referred to Clause 11.4 of the Guidelines that when the AMS or Appeal Panel find the existence of an identifiable whole person impairment, they must set out the medical condition which is the cause of the impairment. Although this may be readily apparent for a physical injury, in the case of a psychological injury a certificate must clearly identify the condition which has been diagnosed and which gives rise to the whole person impairment. In a small minority of cases the condition may be identified on the basis that the conclusion is clear and no alternative conclusion is rationally available. Garling J noted that ordinarily, the certificate would refer to a diagnosis found in the Diagnostic and Statistical Manual of Mental Disorders 5th Edition or other recognised diagnosis to be found in widely accepted publications such as the International Statistical Classification of Diseases and Related Health Problems ("ICD-10").

4. Garling J noted that the Appeal Panel did not set out the diagnosis of the plaintiff's condition. However, Garling J was satisfied that it can be readily inferred that the Panel would have determined that the plaintiff was suffering from a chronic Post-Traumatic Stress Disorder as a result of the NSW Education injury.

5. On the apportionment issue, Garling J was satisfied that there was error in the Appeal Panel's certificate. The task required by ss 9 and 9A of the 1987 Act is for a determination to be made about whether the plaintiff's employment was a substantial contributing factor to the injury. The next step is for the AMS of Appeal Panel to determine the permanent impairment as the worker presents on the day as specified in Clause 1.6 of the Guidelines.

6. That task does not involve any process of apportionment between injuries. Section 323 provides an exception to that general approach, but only in the limited circumstances which that provision contemplates. Section 323 did not apply here.

7. The Court held that it was significant that the Panel did not conclude that the later injury was of a kind that severed the causal chain between the NSW Education injury and the worker's impairment. If it had, then it was obliged to find there was no impairment as a result of the NSW Education injury. To the contrary, the Panel concluded that the impairment resulted from the NSW Education injury and the later Hostels injury. This reasoning followed the principles set out in cases such as *Government Insurance Office of NSW v Aboushadi* [1999] NSWCA 396; (1999) Aust Torts Reports 81-531 at [22], and recently the decision of Harrison AsJ in Nicol v Macquarie University [2018] NSWSC 530 at [140

8. Garling J held that the Appeal Panel certificate contained an error on the face of it. His honour noted that the correct decision would have been to assess the plaintiff at 19% whole person impairment as opposed to 6%.

Orders

Garling J issued:

3. Pursuant to s 69 of the *Supreme Court Act 1970,* the decision of the second defendant made on 18 July 2018 is quashed.

4. Order that the matter be remitted to the first defendant to be dealt with in accordance with law.

5. Third defendant to pay the plaintiff's costs of these proceedings.

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Judgment summary

Ljubisavljevic v Workers Compensation Commission of New South Wales **[2019] NSWSC 1358**
(McCallum J, 9 October 2019)

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Facts

Suncana Ljubisavljevic, the appellant, disputed her lump sum compensation claim for injuries sustained in the course of her employment with Pascoes Pty Ltd. On 29 April 2015, she suffered multiple injuries to her neck and left shoulder and consequentially injured her right shoulder and digestive system.

The approved medical specialist ('AMS'), when assessing for permanent impairment, issued a medical assessment certificate ('MAC"), finding the degree of the appellant's total compensable whole person impairment ('WPI') at 14%.

Ms Ljubisavljevic appealed that the AMS used incorrect criteria in the assessment (s 327(3)(c)) and that the MAC contained a demonstrable error (s 327(3)(d)). The Appeal Panel agreed with the AMS' determination on the degree of permanent impairment and confirmed the MAC.

On 8 June 2018, an Arbitrator of the Commission refused the appellant's application to rescind the Certificate of Determination.

Grounds of appeal

Ms Ljubisavljevic challenged the Arbitrator's and Appeal Panel's decisions in the Supreme Court of New South Wales. Justice McCallum dismissed the application, determining that there was no error of law. Although the challenge to the Appeal Panel's decision was out of time, Pascoes did not oppose an extension of time except on the basis of the merits of the appeal.

Implications

Ms Ljubisavljevic submitted that the Arbitrator's decision contained the following alleged errors:

a) The Arbitrator mischaracterised the plaintiff's case as to delay by ascribing it as a "mistake" or an "oversight" and thereby failed to understand the nature of the proper exercise of her power;

- Justice McCallum found that the Arbitrator adequately engaged with the respective submissions and chose not to accept them. Thus, the Arbitrator's dismissal of the application involved engaging with or giving proper or lawful consideration to the substantive grounds.

b) The Arbitrator wrongly dismissed the fresh evidence of the plaintiff as "not new";

- Justice McCallum further found that the Arbitrator considered the period allowed by the Commission between the determination of the Appeal Panel and the issue of the Certificate of Determination to be adequate.

c) The Arbitrator determined that the plaintiff was "simply dissatisfied" with the outcome of the Panel where there was no evidence for such a finding;

- Justice McCallum determined that sufficient reasoning allowed Ms Ljubisavljevic to understand why her application failed.

d) The Arbitrator failed to engage with substantial aspects of the plaintiff's submissions and evidence and accordingly, the Arbitrator failed to afford the plaintiff procedural fairness;

- Justice McCallum was not persuaded that error was established.

e) The Arbitrator failed to set out her actual path of reasoning or reasons such that would permit a court to identify whether she has fallen into error; and/or

- Justice McCallum found that this complaint was misconceived since the remark relied upon was not a finding of fact but was the Arbitrator's assessment of the nature of the point.

f) The AMS decision, the Panel decision and/or the COD decision were unlawful and the validity of the Arbitrator's decision depended on their lawfulness.

- Justice McCallum considered the challenge to the decision of the Appeal Panel since an Appeal Panel decision vitiated by error causes the Certificate of Determination to be a nullity and the Arbitrator's decision to be without jurisdiction and also a nullity.

Ms Ljubisavljevic submitted that the Appeal Panel's decision not to re-examine Ms Ljubisavljevic was incorrect since she had been denied procedural fairness by the AMS. Ms Ljubisavljevic relied upon the Court of Appeal decision in *Boyce v Alliance Australia Ltd* (2018) 96 NSWLR 356; [2018] NSWCA 22 ('*Boyce*'). In *Boyce*, a failure of the Appeal Panel to examine the plaintiff represents either a constructive failure to exercise jurisdiction or a breach of procedural fairness itself, or both. Justice McCallum distinguished *Boyce* since the Review Panel in this case was not made aware of the plaintiff's request for an examination due to an oversight which resulted in two kinds of error.

Thus, Justice McCallum held that it was open to the Appeal Panel to accept what was said in the certificate in favour of the unsupported assertions made in the submissions. Further, Ms Ljubisavljevic's submission that the Appeal Panel "perpetuated a denial of procedural fairness" by uncritically accepting Dr Kumar's assertion does not fall within the kind of error the Appeal Panel can correct. Justice McCallum dismissed the summons with costs.

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Judgment summary

Lukacevic v Coates Hire Operations Pty Limited **[2011] NSWCA 112**
(Giles JA, Hodgson JA, Handley AJA, 6 May 2011)

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Facts

The dispute before the Commission concerned lump sum compensation for a psychiatric condition arising from an injury to the appellant's back. The appellant was referred to an AMS for assessment of the degree of permanent impairment resulting from the psychiatric condition.

Following the medical assessment by the AMS, a medical assessment certificate was issued on 10 February 2009. On 10 March 2009 the appellant lodged an application to appeal against the assessment. The appellant relied on section 327(3)(b), inter alia. A statement was prepared in this regard.

In the statement, the appellant asserted that the AMS had concluded there was no evidence of significant depression, without mentioning certain matters of which the appellant had informed him at the examination; the AMS had incorrectly reported that the appellant had denied suffering continuing nightmares or flashbacks; and the AMS had failed to question the appellant about various aspects of his condition. There was then a commentary of what the appellant would have said had the AMS asked the relevant questions. The first respondent objected to the statement being considered on the appeal.

The matter proceeded to an Appeal Panel which confirmed the AMS's assessment.

With respect to the statement, the Appeal Panel concluded that the statement should not be received in the appeal as fresh evidence because:

> "…the Appellant comments on the process of the medical examination and there is an interest in finality of litigation which admitting the statement would not serve. For reasons of procedural fairness, the Panel could not consider the allegations made by the Appellant in the absence of a response from the AMS. That continual opening and re-opening of the evidence is not in the interest of justice and not contemplated as part of the appeal mechanism in the Commission."

The appellant sought judicial review of the Panel's decision in the Supreme Court. The issues before the Court were the Appellant's submissions that:

- The Appeal Panel denied the appellant procedural fairness in failing to take into account a relevant consideration as it refused to consider fresh evidence under s 328(3), in the form of the statement.
- Section 328(3) does not confer discretion upon an Appeal Panel to refuse to accept such evidence.
- If the Appeal Panel had discretion, then it erred in the exercise of that discretion in that it had asked the wrong question, applied the wrong test or failed to exercise its discretion at all.
- The Appeal Panel erred in purporting to apply a blanket rule, in holding that the statement challenging the history recorded by the AMS should not be admitted on appeal because the AMS would have to be "accorded procedural fairness" and "the continual opening and re-opening of the evidence is not in the interest of justice".

In dismissing the summons, Hislop J held that it was open to the Appeal Panel to reject the statement. The Appellant had not demonstrated that the exercise of the discretion miscarried. His Honour stated that in exercising the discretion regard must be had to the context in which the discretion arises and to the general public interest in the finality of litigation. Admission of the statement would lead to prolongation of the appeal and cause procedural unfairness to the respondent.

His Honour followed the principle set down by Johnson J in *Summerfield v Registrar of the Workers Compensation Commission of NSW* [2006] NSWSC 515 regarding the construction of section 327(3)(b) of the 1998 Act in relation to "fresh evidence".

His Honour determined that the Appeal Panel had a discretion to refuse to receive "fresh evidence" in an appeal and that the exercise of the discretion had not miscarried. His Honour also found that "no different result would have ensured if the Statement had been admitted into evidence" (at [38].

The Appellant lodged an appeal to the NSW Court of Appeal, on the following grounds:

- The Court erred in finding that the Appeal Panel had the discretion to refuse to admit material further evidence which the Appellant sought to adduce on the appeal even though it was evidence which satisfied the test in section 328(3) of the 1998 Act.

- In the alternative, the Court erred in holding that the Appeal Panel addressed the correct question, applied the correct test, and did not fail to exercise its discretion when it determined that the statement of the Appellant would not be considered or admitted because a response would be required from the AMS as a matter of procedural fairness, and "principles of finality of litigation" required that this not occur.

- The Court was wrong to hold that the failure to consider the Appellant's statement made no difference to the result, because the Appellant's submissions contained the assertions which were contained in the Appellant's statement, hence they were "considered".

Held

Leave to appeal granted. Appeal dismissed with costs.

Giles JA, dissenting

Discretion to refuse to receive "fresh evidence"

- Parts of the appellant's statement, specifically what the appellant said about the AMS's medical examination, was fresh or additional information and could not reasonably have been obtained by him, such that they satisfy the requirements of section 328(3) of the 1998 Act (at [35]).

Exercise of Appeal Panel's discretion and Wednesbury unreasonableness

- His Honour discussed the decision of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223, who found there was *Wednesbury* unreasonableness where the exercise of a discretion is so unreasonable that no reasonable person could have exercised it. His Honour found that the decision of the Appeal Panel to refuse to receive the appellant's statement for the reasons they gave was one to which no Appeal Panel, acting reasonably, could come (at [62]). His Honour stated at [54] that:

> "Having refused to receive the appellant's statement into evidence, they could have taken the AMS's medical certificate at face value because there was no evidence to impugn 'the

> process of the medical examination', and come to their own conclusion on the medical evidence alone or on the medical evidence plus the AMS's medical assessment certificate. The path they took, however, involved determining the very issues to which the evidence they refused to receive was directed, notwithstanding that without the evidence the applicant had nothing on which he could reply for his complaints concerning the AMS's medical examination and its recording."

- His Honour stated at [64] that: "To reason that, although the Appeal Panel's refusal to receive the applicant's statement for the reasons they gave was *Wednesbury* unreasonable, it would have been open to the Appeal Panel reasonably to have refused to receive the applicant's statement for other reasons, would be to make on the merits a decision the Appeal Panel did not make, rather than test the decision they did make against *Wednesbury* unreasonableness.

- "The refusal should have been reconsidered, or the Appeal Panel could have determined to conduct its own medical examination and bypass the applicant's complaints as to the AMS's medical examination." (at [65])

Conduct of medical examinations

- His Honour made *obiter* comments at [66] that "an Appeal Panel is not well equipped to resolve a factual dispute over what occurred at an approved medical specialist's medical examination", further opining that: "no encouragement should be given to an unscrupulous party alleging deficiency in the conduct or recording of a medical examination, and thereby achieving medical examination by the Appeal Panel because dispute over the allegation cannot readily be resolved. This is a particular concern in the assessment of psychiatric or psychological injury, less dependent on objective symptoms".

Result of the medical assessment

- In regard to the view of the judge in the judicial review hearing that the result of the assessment would have been the same if the applicant's statement had been received into evidence, his Honour stated at [70]:

> "The Appeal Panel's reasons described the applicant's submissions quite fully, and thereby substantially took up the applicant's statement. But submissions are not evidence, nor would the evidence necessarily have been only the applicant's statement if it had been received and the first respondent had had occasion to rely on evidence in reply. I do not think that it can be said that the result would have been the same with the confidence appropriate for refusal of relief on discretionary grounds."

Hodgson JA (Handley AJA agreeing)

History taken by the AMS as disputed by the applicant

- If the Appeal Panel dealt with the appellant's dispute against the history-taking of the AMS by conducting another medical examination (by a member of the Appeal Panel), the procedure itself (of dealing with the dispute in this sense) gives rise to the possibility of procedural unfairness (elaborated in *Maricic v The Registrar, Workers Compensation Commission* [2011] NSWCA 42).

- His Honour propounded that if the Appeal Panel is placed in a position of conducting a re-examination of a worker because the dispute as to the correctness of the history taken by the AMS has been raised, it would be inconsistent with the policy of the workers compensation legislation. His Honour stated that:

> "A dispute by the worker as to the history set out in the certificate, or the observations made by the AMS, can readily be raised; and it could be raised honestly or dishonestly, on strong or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an [Appeal Panel] not to admit evidence raising such a dispute unless that evidence had substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the [Appeal Panel] in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the *WIM* Act." (at [78])

Admissibility of applicant's statement as fresh evidence

- Despite exercising its discretion to refuse to receive the applicant's statement as fresh evidence during the preliminary review stage, His Honour found that the Appeal Panel also had the discretion to reverse its earlier decision on the admission of evidence while preparing their final decision. In this regard, His Honour determined that the preliminary decision of the Appeal Panel to exclude the evidence, and its final decision, should not be sharply separated, stating that:

  > "I think it was well open to the Appeal Panel, having regard to the evidence it had, to maintain its non-admission of the worker's additional evidence, while at the same time concluding on the whole of the evidence that the AMS had taken an adequate history and recorded it correctly." (at [80])

- There is no denial of procedural fairness or *Wednesbury* unreasonableness in the decisions of the Appeal Panel, considered as a whole, or in the reasons for those decisions (at [81]).

Handley AJA (Hodgson JA agreeing)

The applicant's statement tested under section 328(3) of the 1998 Act

- The applicant's statement contained details of his activities and habits before and after the work injury. To the extent that this adds to the history given to the AMS and to other doctors reflected in the medical reports and the statement that were before the AMS at the time of the medical examination, it was available and could reasonably have been obtained before the medical assessment, and therefore does not satisfy the "fresh evidence" requirement under section 328(3) of the 1998 Act. The evidence was not admissible.

- The applicant's statement contains details that repeat information in the earlier statement and medical reports that were before the AMS at the time of the medical examination. Therefore, it was not evidence that added something to the already available evidence, and is inadmissible.

Fresh evidence

- The evidence that purports to be evidence of what occurred during the AMS's medical examination was not available before the medical assessment and could not have reasonably been obtained before the medical assessment. This is additional information, rather than fresh evidence.

- The Appeal Panel cannot be obliged to receive irrelevant evidence, because section 328 does not require the Appeal Panel to receive new evidence which meets the threshold in subsection (3).

- WorkCover Guideline 43 empowers an Appeal Panel to reject irrelevant evidence on discretionary grounds at the preliminary review, as Guideline 43 requires the Appeal Panel

to make decisions on the appropriate action to take in the appeal, including whether "new evidence should be allowed".

- The reading of the Appeal Panel's reasons for not conducting a further medical examination and for refusing to receive new evidence at the preliminary review, and for making its final decision, requires beneficial construction and should be read in this way. Having read the Appeal Panel's reasons in that way, the reasons do not disclose legal error or irrationality.

Dispute on the history taken by the AMS

- The Appeal Panel is not equipped to resolve in a just and convenient way an allegation that the AMS failed to record the correct history.

Decision of the Appeal Panel

- The Appeal Panel's finding that the appellant had not discharged the onus of proving the ground of appeal (failure of the AMS to record correct history, etc) was a finding of fact, and there is no error of law on the face of the record (at [151]).

- There is no illegality or irrationality in the Appeal Panel's decision.

Implications

- The decision clarifies the position that an Appeal Panel is not obliged to receive new evidence because it meets the requirements of fresh evidence under section 328(3); the evidence has to be of such relevance and probative value as to be admitted into the proceeding.

- The decision is not controversial, but reiterates the relevance of WorkCover Guideline 43 and the application of section 328 of the 1998 Act in the discharge of the Appeal Panel's obligation to deal with the appeal.

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Judgment summary

Lukacevic v Coates Hire Operations **[2010] NSWSC 551**
(Hislop J, 4 June 2010)

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Facts

The dispute before the Commission concerned lump sum compensation for a psychiatric condition arising from an injury to the plaintiff's back. The plaintiff was referred to an AMS for assessment of the degree of permanent impairment resulting from the psychiatric condition.
Following the medical assessment by the AMS, a medical assessment certificate was issued on 10 February 2009. On 10 March 2009 the plaintiff lodged an application to appeal against the assessment. The plaintiff relied on s 327(3)(b), inter alia. A statement was prepared in this regard.

In the statement, the plaintiff asserted that the AMS had concluded there was no evidence of significant depression, without mentioning certain matters of which the plaintiff had informed him at the examination; the AMS had incorrectly reported that the plaintiff had denied suffering continuing nightmares or flashbacks; and the AMS had failed to question the plaintiff about various aspects of his condition. There was then a commentary of what the plaintiff would have said had the AMS asked the relevant questions. The first defendant objected to the statement being considered on the appeal.

The matter proceeded to an Appeal Panel which confirmed the AMS's assessment. With respect to the statement, the Panel concluded that the statement should not be received in the appeal as fresh evidence because:

> "…the Appellant comments on the process of the medical examination and there is an interest in finality of litigation which admitting the statement would not serve. For reasons of procedural fairness, the Panel could not consider the allegations made by the Appellant in the absence of a response from the AMS. That continual opening and re-opening of the evidence is not in the interest of justice and not contemplated as part of the appeal mechanism in the Commission."

The plaintiff sought judicial review of the Panel's decision in the Supreme Court.

Issues

The Plaintiff submitted that:

- The Appeal Panel denied the plaintiff procedural fairness in failing to take into account a relevant consideration as it refused to consider fresh evidence under s 328(3), in the form of the statement.

- Section 328(3) does not confer discretion upon an Appeal Panel to refuse to accept such evidence.

- If the Appeal Panel had discretion, then it erred in the exercise of that discretion in that it had asked the wrong question, applied the wrong test or failed to exercise its discretion at all.

- The Appeal Panel erred in purporting to apply a blanket rule, in holding that the statement challenging the history recorded by the AMS should not be admitted on appeal because the AMS would have to be "accorded procedural fairness" and "the continual opening and re-opening of the evidence is not in the interest of justice".

Held

Hislop J ordered that the summons be dismissed.

Reasons for Decision

- The principle in relation to the discovery of fresh evidence was laid down in *Greater Wollongong City Council v Cowan* (1955) 93 CLR 435 where the High Court said:

  > "The discovery of fresh evidence…could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled...Reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial." (at [14])

- The construction of s 327(3)(b) of the 1998 Act was set out by Johnson J in *Summerfield v Registrar of the Workers Compensation Commission of NSW* [2006] NSWSC 515 at [51-52]. (at [15])

- Section 328 tacitly acknowledges the existence of the discretion to determine whether fresh evidence should be allowed on an appeal but limits one aspect of that discretion by precluding the admission of evidence which does not meet the prerequisites in s 328(3). Subject to that limitation, there remains a general discretion. Such a view is consistent with Guideline 43, the comments of Johnson J in *Summerfield* at [57]-[58], and Parliament's intention. (at [25]-[29])

- In exercising the discretion regard must be had to the context in which the discretion arises and to the general public interest in the finality of litigation. Admission of the statement would lead to prolongation of the appeal and cause procedural unfairness to the first defendant. It was open to the Appeal Panel to reject the statement. The plaintiff has not demonstrated that the exercise of the discretion miscarried. (at [30]-[33])

- The statement dealt essentially with two aspects, namely, the manner in which the medical assessment examination was conducted by the AMS and the signs and symptoms of psychiatric problems of relative longstanding. The latter were not admissible within the terms of s 328(3), being the subject of earlier histories and observations. No different result would have ensued if the statement had been admitted into evidence. (at [36])

Implications

- The decision followed the general principles set out in *Summerfield* in regard to the admission of fresh evidence under s 328 of the 1998 Act, and confirmed that:

  - the Appeal Panel has the discretion to allow or refuse fresh evidence in medical appeals; and
  - the Registrar's decision under s 327(4) that additional relevant information appears to exist does not necessarily mean that the information would be admitted by the Appeal Panel.

- Policy consideration and procedural fairness are important in determining the admission of fresh evidence in medical appeals in the Commission.

- The case provides another precedent where a statement concerning how the medical assessment was conducted is not allowed in a medical appeal.

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Judgment summary

***Lukacic v Vickarni Pty Ltd & Anor* [2007] NSWSC 530**
(Harrison AsJ, 28 May 2007)

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Facts

The worker injured her neck, back, both arms and both legs in January 2000. The permanent impairment dispute was referred to an Approved Medical Specialist (AMS). The AMS issued a Medical Assessment Certificate (MAC) certifying permanent impairment due to the injury as follows: neck 6.3%, back 10.8%, arms and legs 0%.

The worker appealed against the MAC. The appeal raised the issue of assessment of impairment of the arms & legs (but not the neck and back).

The appeal proceeded to a Medical Appeal Panel (MAP), who made their decision based on the MAC and the documents and reports that were before the AMS (without re-examining the worker). The MAP revoked the MAC and issued a new MAC certifying impairments as follows: neck 2.7%, back 7.2%, each arm and each leg 1%.

The worker sought review of the MAP decision in the Supreme Court on two grounds: (1) the MAP did not provide adequate reasons (to make it clear what was involved in their reasoning process); (2) the MAP considered matters not raised on appeal (in reducing the impairment assessments for the neck and back).

Medical Appeal Panel's determination: The MAP provided the following reasons:

> "21. Having examined this case de novo we were loathe to interfere with the finding of the AMS. However, from a legal standpoint it does appear that the AMS has indeed applied the incorrect criteria, as the Registrar found that he had. This is because these injuries fall under the now abolished division 4 relating to the assessment of non-economic loss. Such an assessment involves the concept of the loss, the permanent loss or the permanent loss of the efficient use of a part of the body as set out in what was s. 73 of the 1987 Act…
>
> 22. We find that therefore the AMS should at least have expressed proper reasons as to why he did not make any assessment in relation to all the limbs which were complained of.
>
> 23. Having looked at the material afresh we are of the view that we can do justice to this case without the necessity for a further examination. That is chiefly because we find that in the nature of things this Appellant is not so seriously injured that the magnitude of her disabilities requires a fresh assessment. We feel we can do justice to the parties looking at this matter anew by revoking the medical assessment certificate and issuing a new one.
>
> 24. We are of the view that having received some complaint in relation to the limbs – and notwithstanding the lack of complaint of Dr Johnson concerning the neck and arms, that some recognition should be given to the complaints made to the AMS.
>
> 25. However, we do observe that the AMS noted a full range of movement in relation to the back and the neck and indeed the limbs as set out in paragraph 10 hereof. We agree on the totality of the material with the Respondent's submission that the AMS's reasons have not been materially affected, but we disagree that demonstrable error has not been shown.
>
> …
>
> 27. With regard to the back and the neck the panel is of the view that the AMS's assessments are too high and should be reduced. This is based on the panel's experience in dealing with similar cases. The panel is of the view that the AMS attached too much importance to the

existence of the pre-existing spondylolisthesis which the panel finds to be not clinically relevant in view of the other material in the reasons of the AMS".

Held

The decision of the MAP is affirmed and the summons is dismissed

- The MAP relied on its own experience and the AMS's findings (e.g. with regards to complaints made by the worker and range of movement neck and back) when considering the percentages to be applied [18-19]. A tribunal is entitled to rely on its own expertise, and in this matter the MAP provided proper and adequate reasons [20].

- The MAP adopted the correct approach in conducting a de novo review [29]. There is no error of law on the face of the record [30]. In support of the argument for a de novo review, the Court noted that it would be difficult for a MAP to consider parts of a person's body in isolation and excise the primary site of injury when conducting a review [27].

Implications

In considering the case of *Vegan* (at first instance *Campbelltown City Council v Vegan* [2004] NSWSC 1129 and on appeal *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284) this case confirms that a MAP is to conduct a de novo review and is entitled to rely on its own expertise in making an assessment of permanent impairment.

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Judgment summary

Maguire v Lis-Con Services Pty Ltd **[2020] NSWSC 3**
(Campbell J, 10 January 2020)

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Facts

The worker sustained a crushing injury when a load of steel fell onto his left hand resulting in the amputation of a portion of his left thumb through the distal phalanx. The worker appealed to the Commission for an assessment of whole person impairment and claimed lump sum compensation.

The AMS assessed the worker to have suffered a 14% whole person impairment with no award for scarring. An appeal by the worker was made to the Appeal Panel on the basis that the assessment of 1% for scarring made by each of his and the employer's independent medical expert should have been maintained. The worker submitted that the AMS had assessed the scarring with the amputation contrary to the Guidelines which required instability of soft tissue covering or painful scars to be evaluated as a skin condition separately from the consequences of the amputation affecting the upper extremity. The appeal was heard on the papers. In regard to the worker's submission that he AMS had failed to assess the scarring arising from the amputation, the Appeal Panel held that impairment due to the amputation cannot also be attributed to the scarring assessed separately in terms of TEMSKI under Chapter 14 of the Guidelines. The Appeal Panel was satisfied that the AMS had thoroughly addressed the relevant descriptors of his report of the findings on examination in relation to scarring.

The worker sought to set aside the Panel's decision before the Supreme Court.

Appeal to the Supreme Court

The worker appealed on the grounds below:

1. Whether the Appeal Panel erred in failing to correct the AMS' error in failing or declining to assess WPI due to scarring (TEMSKI) as specifically directed by the Registrar.

2. Whether the Appeal Panel erred and fell into jurisdictional error in failing to properly consider the operation of the New South Wales Compensation Guidelines for the evaluation of permanent impairment (Fourth Edition) and its interplay with the AMA guides to the evaluation of permanent impairment (Fifth Edition).

3. Whether the Appeal Panel's conclusion that there was no evidence of a specific injury or disability to justify a finding of no scarring or disfigurement to the skin of the left hand was so unreasonable that no reasonable decision maker could have reached the same conclusion.

Decision

The appeal was heard by Campbell J who considered that the complaints made by the appellant worker supported a broader approach to the evaluation of impairment due to a skin condition rather than mere scarring. These matters included loss of length and consideration that the skin at the tip of the amputation did not adhere to the underlying bone. His Honour found that the Panel made a material error since it had not seriously considered the broader formulation based upon disfigurement as opposed to focusing upon scarring as "a special type of disfigurement". Campbell considered that this constituted a jurisdictional error as discussed in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [23]-[25].

Furthermore, since the Panel misdirected itself, or failed to ask itself the correct question, this represented a constructive failure to exercise its jurisdiction as per *Minister for Immigration v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [41] and [82]. His Honour at [38] stated that "by focusing on the narrow issue of scarring, the Appeal Panel (and for that matter the AMS) failed to direct itself in accordance with the requirements of the Guidelines." His Honour held that the complaints made by the worker and the AMS's findings on examination could support the conclusion that the totality of the skin condition resulting for partial amputation did significantly interfere with activities of daily living. His Honour further noted the significance of these findings when one considered each of the matters relevant to the evaluation of minor skin impairments, the AMS and the Appeal Panel have assessed the worker's skin condition resulting from his work injury somewhere between 1% and 2%.

Campbell J also noted that there were other aspects of the Appeal Panel's decision which were of concern. The Panel incorrectly referred to section 16.2d of the AMA5 in which they stated that associated conditions are to be assessed as part of the upper extremity. Instead, the purpose of section 16.2d is to make clear that skin conditions are to be rated separately.

His Honour also noted that the Appeal Panel's conclusion that the scarring was "not obvious, functionally and cosmetically excellent as they did not restrict the worker" may have supported an evaluation of 0%. However, given the narrow focus of inquiry by the AMS, the assessment was undermined by demonstrable error. This resulted in a constructive failure to exercise the Appeal Panel's jurisdiction constituting a jurisdictional error.

As a result, his Honour set aside the Panel's confirmation of the MAC and remitted the matter to the Registrar for referral to an Appeal Panel.

Orders

1. Set aside the decision of the Appeal Panel.
2. Remit the matter to the Registrar for referral to an Appeal Panel.
3. First defendant to pay the plaintiff's costs of the proceedings
4. Reserve liberty to apply in relation to the Certificate of Determination

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Judgment summary

McKeough v Zoological Parks Board of New South Wales **[2017] NSWSC 868**
(Harrison AsJ, 3 July 2017)

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Facts

The worker was employed as a zookeeper and during the course of her employment she suffered injuries to her:

- neck on 12 September 1993;
- right scapula (shoulder blade) on 13 September 1993, and
- back on 16 November 1996.

The worker made a claim in respect of her injuries on the basis that her injuries had deteriorated following previous awards. The matter was referred to an AMS who found a 10% degree of permanent impairment of the neck: 7% attributable to the incident of 12 September 1993, and 3% attributable to the incident of 13 September 1993. The AMS also found a 5% degree of permanent impairment of the right arm and a 5% degree of permanent impairment of the back. The method of assessment for all three injuries was made under the Table of Disabilities.

An appeal by the worker was made to the Appeal Panel which was unsuccessful and the Panel confirmed the MAC.

The worker sought to set aside the Panel's decision before the Supreme Court.

Held

Her Honour Harrison AsJ made orders quashing the MAC and the Panel's decision. Although the plaintiff did not seek an order to quash the MAC, her Honour was of the view that the MAC should also be quashed as it was made without jurisdiction. The Court also made orders remitting the matter to the Registrar to determine according to law and that the first defendant pay the plaintiff's costs.

Her Honour held that in assessing the permanent impairment of the neck injury that occurred on 12 September 1993 the AMS did not have jurisdiction to attribute a percentage of that impairment to an incident that occurred on the next day. By accepting this approach as being correct, the Panel also acted beyond jurisdiction.

With respect to the worker's complaints that the AMS did not take into account the subjective complaints of pain, her Honour held that the determination of the Panel on this issue was correct. The AMS does not have to believe everything he or she is told and while an AMS is required to consider the worker's complaints, an AMS is also required to consider the documentary evidence and use clinical judgement and experience in the course of the assessment.

Although the AMS misstated the test in the Table of Disabilities, her Honour accepted that the AMS applied the correct methodology. Her Honour also held that procedural fairness was afforded to the plaintiff by the Panel.

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Judgment summary

Mahenthirarasa v State Rail Authority of New South Wales **[2008] NSWCA 101**
(Giles JA, Basten JA, Bell JA, 21 May 2008)

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Facts

The Plaintiff worker lodged a dispute in the Commission, and an arbitrator referred his claim for permanent impairment to an approved medical specialist ('AMS') for assessments under the table of disabilities and whole person impairment ('WPI' – threshold dispute). The AMS issued a medical assessment certificate ('MAC') which relevantly provided assessments of 20% loss of efficient use of the 'left leg at or above the knee', with a 3/4ths deduction for pre-existing conditions (resulting in 5% loss of efficient use), and 11% WPI for the 'left lower extremity', with a 10/11ths deduction for pre-existing conditions (resulting in 1% WPI).

The Plaintiff appealed against the MAC on the grounds that the assessment was made on the basis of incorrect criteria or the MAC contains a demonstrable error (section 327(3) paras (c) and (d)). The appeal included a submission that there was a logical inconsistency between the deductions for pre-existing conditions in the table of disabilities and WPI assessments.

Section 327(4) of the Act at that time provided that an appeal was not to proceed "unless it appears to the Registrar that at least one of the grounds for appeal specified in subsection (3) exists". A delegate of the Registrar determined that it did not appear that grounds for appeal existed. In his reasons, the delegate did not address the Plaintiff's submission regarding the deductions for pre-existing conditions.

Grounds of appeal

The Plaintiff sought judicial review of the delegate's decision in the Supreme Court, alleging that the delegate "asked the wrong question, that error going to jurisdiction... or erred in law, that error being apparent on the face of the record".

The primary judge dismissed the summons, stating that the ground regarding the error in the deductions was not developed and was only faintly pressed at the hearing, and that in any event it was not shown that the ground had any real significance in relation to the assessment.

The Plaintiff appealed to the Court of Appeal. There was no contradictor in the matter – each respondent (the employer, the Registrar and the AMS) filed a submitting appearance.

Held

Appeal allowed. Set aside the decision of the primary judge dismissing the summons. Set aside the decision of the delegate of the Registrar, remit the appeal to the Registrar for reconsideration of the application of section 327(4), to be determined according to law.

Giles JA (Bell JA agreeing), Basten JA

- In the present case the ground for appeal of demonstrable error existed because there was plain inconsistency within the MAC. The AMS attributed much more to pre-existing injury in the WPI assessment than in the table of disabilities assessment. For the same pre-existing injury, this could not be right; or at the least, there was a strong argument that it was not right. The error was asserted in the appeal before the delegate, and was plain from the MAC. On any reasonable view of 'demonstrability' and any view of 'existence', demonstrable error existed [5]. The error relied upon was a "demonstrable error" which was apparent on the face of the MAC [72].

- The delegate failed to address the ground for appeal of demonstrable error on which the Plaintiff relied, and fell into jurisdictional error in not exercising the function as required under s 327(4) [6]. In the absence of any relevant explanation by the delegate for rejecting that contention, it should be inferred that he either overlooked the ground entirely or misunderstood the matter being put. The fact that some reasons were given which make no reference to this ground supports that inference [72].

- Although it may not have been developed, the Plaintiff's submission as to error regarding the logical inconsistency in deductions made commanded acceptance. On its face, the ground showed that a demonstrable error existed without additional explanation. The primary judge erred in failing to grant relief [8], [35].

Giles JA (Bell JA agreeing)

- The meaning of "exists" in section 327(4) as it previously stood has been referred to in various cases in this court. It is not the same as a ground of appeal being "made out". It is less than that [3]-[4].

Basten JA

- *Riverina Wines Pty Limited v Registrar of the Workers Compensation Commission of NSW & ors* [2007] NSWCA 149 approved the test in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284 that 'exists' means "the ground is, on its face, valid and apparently credible" and provided further explanation that a ground can 'exist' where a contention of a reason why the appeal should succeed is "made in circumstances where there is a sufficiently realistic prospect of the ground being made out"; "deciding that the ground exists involves the Registrar forming a view that the ground of appeal has enough substance to warrant the appeal proceeding"[47]-[48]. The primary judge was in error in concluding that the Registrar was required to be satisfied that at least one of the grounds "has been made out" [31].

- In *Riverina*, the Court held that the Registrar is exercising an administrative function, and is not under a duty to provide reasons for the decision under section 327(4). However, Hodgson JA suggested that it might be different where the Registrar's decision "prevents the matter going forward". It is difficult to see that the existence of an obligation to give reasons will turn on whether the Registrar's decision is adverse to the applicant's interests or not: one party will be dissatisfied by the outcome of a contested decision, whichever way it goes. As an administrative function, there is no obligation for the Registrar to give reasons for the decision – *Public Service Board of NSW v Osmond* (1985) 159 CLR 656 ('*Osmond*'). If *Osmond* is to be distinguished in relation to the powers of the Registrar under section 327(4), it may be because the Registrar acts as 'gatekeeper' to the exercise of judicial power by the Appeal Panel. [46], [51]-[56].

- Where no party opposes relief sought by an applicant (at least where the parties are sui juris, the orders properly formulated, the Court has no reason to suppose that its procedures are being abused and the public interest does not require a different result), it will often be appropriate to make orders by consent. Judicial review applications may be different and some cases require that the court be persuaded of error, because the order below will stand unless set aside, and because it may be seen to be inappropriate to set aside the decision of an administrative officer and order him or her to reconsider without identifying the precise error [64]-[65].

Implications

As there was no contradictor in this matter, Giles JA, with whom Bell JA agreed, confined his reasons to those strictly necessary for disposal of the application and appeal. The decision is authority for the proposition that a failure by the Registrar to address a ground of appeal relied upon by an Appellant is a jurisdictional error. All three judges were in agreement that the test to be applied under the former wording of section 327(4) ("exists") is different from and less than the new test of "made out".

Basten JA considered previous authorities and made comments on the function of the Registrar under section 327(4), including the test to be applied and the duty to give reasons. While these obiter dicta comments are not binding, they provide some useful guidance as to how the Court might deal with such questions if they arise in future.

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Judgment summary

Mahenthirarasa v State Rail Authority of NSW & Ors **[2007] NSWSC 22**
(Malpass AsJ, 9 February 2007)

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Facts

The worker was employed by State Rail Authority as a cleaner. On 30 August 2001 he suffered compensable injury to his back and both legs. On 8 December 2004, the medical dispute concerning permanent impairment was referred to an AMS. On 21 February 2005 the AMS examined the worker and subsequently issued a MAC on 4 April 2005. The AMS found evidence of pre-existing condition/injury and made a deduction for it. The worker appealed the MAC submitting that the worker was pain-free and healthy prior to the incident and there should have been no deduction, or, at most, only a 10% deduction.

The Registrar declined the medical appeal application.

The worker submitted that the Registrar asked the wrong question. The Registrar should have asked whether or not the application merely pleaded valid grounds under section 327(3) and which were not "colourable", manifestly hopeless, doomed to failure, or not arguable, or whether there was a serious issue to be tried. Instead the Registrar inquired as to whether or not the grounds pleaded were "made out". Alternatively the Registrar allegedly failed to take into account a relevant consideration in that the AMS applied incorrect criteria or made a demonstrable error regarding the deduction for any pre-existing condition.

Held

Malpass AsJ said that if the Registrar applied the test as stated above, then the correct test was applied by the Registrar, but that it was actually difficult to discern what test was in fact applied. In any event, a court should only refer the matter back to the Registrar if there is utility in doing so. He confirmed what was said in *Merza* that a demonstrable error is an error that is readily apparent from an examination of the MAC and the documentation referring the matter for assessment to the AMS.

Implications

- *Merza* and *Wikaira* followed re tests applied. The correct inquiry for the Registrar is whether or not the grounds pleaded were "made out".
- Demonstrable error is an error that is readily apparent from an examination of the MAC and the documentation referring the matter for assessment to the AMS.
- A court should only refer a matter back to the Registrar if there is utility in doing so.

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Judgment summary

Maricic v The Registrar, Workers Compensation Commission **[2011] NSWCA 42**
(Beazley, Hodgson and Campbell JJA, 11 March 2011)

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Facts

The applicant, Ms Maricic, claimed for lump sum compensation for injuries to her cervical spine (amongst others). In the reply to the Application to Resolve a Dispute, the respondent employer attached a report from Dr Matheson which included a note that Ms Maricic's complaint of restricted movement of the neck was not genuine.

The matter was referred to an Approved Medical Specialist (AMS). The AMS assessed the cervical spine at 0% whole person impairment (WPI). Ms Maricic appealed against the assessment.

Dr Burns of the Appeal Panel (the Panel) re-examined Ms Maricic and assessed 0% WPI for the cervical spine. The Panel did not accept that decreased rotation in the Ms Maricic's cervical spine was genuine because Dr Burns stated in his reasons that he did not feel that the complaint of restricted movement in the cervical spine was genuine. Dr Burns saw Ms Maricic turn her head to speak to her husband after the examination.

Ms Maricic sought a reconsideration of the Panel's decision and asked to be provided with a copy of the report of Dr Burns. The Panel declined to provide Ms Maricic with the report and affirmed their earlier decision.

Ms Maricic commenced proceedings in the New South Wales Supreme Court claiming the Panel misdirected itself in relation to the requirements of procedural fairness under the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) when it decided not to provide her with a copy of Dr Burns' report.

Harrison AsJ considered the decisions of *Estate of Brockmann v Brockmann Metal Roofing Pty Ltd* [2006] NSWSC 235 (*Brockmann)* and *Skillen v MKT Removals Pty Ltd* [2007] NSWSC 608 *(Skillen)* and found the Panel was not obliged to make their findings on medical examination available to the parties because Dr Burns conducted the examination as part of a review of the AMS's decision (in compliance with section 328(3) of the 1998 Act) and that his report was made on the basis of Ms Maricic's reported symptoms: *Maricic v Registrar, Workers Compensation Commission* [2009] NSWSC 925.

Issues

Ms Maricic applied for leave to appeal against the decision of Harrison AsJ on the following grounds:

1. The Panel failed to afford Ms Maricic procedural fairness because it did not give Ms Maricic an opportunity to deal with adverse information that was credible, relevant and significant to the decision being made: *Plaintiff M61-2010E v Commonwealth of Australia* [2010] HCA 41; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 and *Kioa v West* [1985] HCA 81.

2. Dr Burns' report contained adverse information. The report produced a decision adverse to Ms Maricic's interests and she should have been given an opportunity to comment on it.

3. Harrison AsJ erred in holding the Panel was not obliged to make their findings on medical examination available to the parties. The reasoning in *Brockmann* did not operate as an inflexible rule to the effect that Appeal Panels are never required to make their findings on medical examination available to the parties and, if it did, it was wrongly decided and should be overruled.

4. Re-consideration by the same Appeal Panel that included Dr Burns did not cure the denial of procedural fairness that occurred in the first decision: *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

Held

- *Brockmann* was correct insofar as it decided that an Appeal Panel is not generally required to disclose an adverse medical report to the parties if the report is given by a member of that panel who had carried out a medical examination for the purposes of the appeal. This does not mean that there are no circumstances in which failure to provide a report to the parties could amount to a breach of procedural fairness.

- The issue of whether Ms Maricic's complaints about restricted movement in her neck were genuine was 'squarely raised' as an issue in Dr Matheson's report (relied upon by the respondent employer in its reply) and it must have been apparent to the applicant that this would be an issue that would be addressed on examination.

- In circumstances where the report of a panel member relates to an issue that has previously been raised and where the applicant has had an opportunity to put evidence and submissions in relation to that issue, the procedural fairness measures of the 1998 Act do not require that the applicant be given a copy of the report.

- The matters raised in the application for leave were of substance and leave to appeal was granted. The appeal grounds were not made out and the appeal was dismissed with costs.

Implications

- This decision affirms the New South Wales Supreme Court's decision in *Brockmann* that an Appeal Panel's obligation to afford an applicant procedural fairness would not generally require the panel to disclose the contents of an adverse report to an applicant in circumstances where the report had been prepared by a member of the panel for the purpose of the appeal.

- Where a report has been prepared by a panel member for the purpose of the appeal and where the relevant adverse issue has previously been raised with the applicant, and the applicant had an opportunity to make submissions in relation to that issue, the duty of procedural fairness under the 1998 Act does not require a Panel to disclose the adverse material.

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Judgment summary

Maricic v Registrar of Workers Compensation Commission and Ors **[2009] NSWSC 925**
(Harrison AsJ, 8 September 2009)

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Facts

The plaintiff lodged an application to resolve a dispute in the Commission regarding her claims for injuries sustained to her lumbar spine, cervical spine and right lower extremity. The Registrar referred the matter to an Approved Medical Specialist ("the AMS") who assessed and certified whole person impairment of the body parts after conducting a medical examination in the absence of an interpreter.

Pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 ("the Act"), the plaintiff appealed the AMS's assessment. The Registrar allowed the appeal to proceed and referred the matter to a Medical Appeal Panel ("the Panel"). The Panel conducted its own medical examination pursuant to section 328 of the Act and subsequently made orders revoking the AMS's decision and issuing a new Medical Assessment Certificate.

The plaintiff requested the Panel to reconsider its decision, disputing some of the findings on examination made by Dr Mark Burns, an AMS member of the Panel, and to amend its findings so as to increase the percentage of impairment. The Panel declined to alter, amend or rescind its decision.

The Panel, in declining to amend or rescind its decision, indicated that the plaintiff had a different recollection of the examination to that which was conducted by Dr Burns. The Panel also rejected the plaintiff's submission that natural justice compelled it to provide the plaintiff with a copy of Dr Burns' report. It stated that, in accordance with usual practice and in reliance on the decision in *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* [2006] NSWSC 235 ("*Brockmann*"), it was under no obligation to provide the report to the plaintiff because the plaintiff was already advised of Dr Burns' findings.

The plaintiff lodged judicial review proceedings in the Supreme Court on the grounds that the Panel denied her procedural fairness by misdirecting itself and/or asking itself the wrong question in failing to provide her with a copy of Dr Burns' report on which basis the Panel's decision was made.

Held

The decision of the Panel is confirmed and the plaintiff's summons dismissed.

- The court confirmed the proposition established in *Brockmann* and *Skillen v MKT Removals Pty Limited* [2007] NSWSC 608 where the court indicated that the Panel was not obliged to make its findings on its own medical examination available to the parties for comment (at [29]).

- The court rejected the plaintiff's argument that this case is distinguishable from the case of *Brockmann.* In the present case Dr Burns' report contained the examiner's clinical findings, whereas in *Brockmann* the examiner's report was that of the plaintiff's detailed medical history (the examiner's report of the plaintiff's own medical account). In this case, therefore, Dr Burns was not a witness (providing his own clinical opinion on examination) but was and remained a decision maker as a member of the Panel. Dr Burns' report formed only part of the Panel's decision-making process. The Panel therefore was not obliged to make Dr Burns' findings on examination available to the parties and there was no denial of procedural fairness (at [31]).

Implications

The decision confirms the Panel's power, pursuant to section 328 of the Act, to conduct its own medical examinations and rely on the clinical findings of that examination to form its decision without making such findings available to the parties.

The judgment also illuminates on the usual practice that the examining AMS Panel member is not required to provide clinical findings to the Panel in writing (clinical findings and conclusions following examination may be communicated orally to the Panel by the examining AMS Panel member).

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Judgment summary

Markovic v Rydges Hotels Limited & Anor **[2009] NSWCA 181**
(Allsop P, Handley AJA, Hoeben J, 7 July 2009)

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Facts

The employer appealed a medical assessment certificate ("MAC") on the basis that the AMS incorrectly combined the assessments from the two separate injury dates in contravention of s 322 of the Act.

The worker conceded the error in the MAC and initially consented to the appeal being determined by a Medical Appeal Panel ("the Panel") on the papers without a further medical examination. In addition, the worker also sought leave to adduce additional evidence pursuant to s 327(3)(b) to challenge the AMS's assessments of the right and left arms, which were not the subject of the employer's appeal.

In their preliminary review, the Panel determined that the fresh evidence could not be admitted because the worker was not the appellant in the appeal.

The Panel was reconstituted and a further preliminary review was held whereby the worker lodged further submissions and, withdrawing her previous consent to having the matter dealt with on the papers, requested a further medical examination. The worker also sought to adduce fresh evidence that was rejected by the previous panel.

The new Panel determined that the circumstances of the matter did not warrant a further examination of the worker and that the appeal should be dealt with solely on the papers. They also rejected the worker's fresh evidence, but on the basis that it could reasonably have been obtained by the appellant before the medical assessment appealed against, erring in referring to the worker as the appellant in the appeal. The Panel subsequently revoked the MAC.

The worker sought review of the Panel's decision in the Supreme Court.

The Supreme Court affirmed the decision of the Panel and dismissed the summons, having found that the Panel "carried out its review in accordance with the decision of Wood CJ at CL in *Campbelltown City Council v Vegan* [2004] NSWSC 1129 (i.e. *de novo* review)" (at [23]). The Supreme Court also found that only an appellant may seek to furnish new evidence on an appeal (at [28]) and that the Panel provided sufficient reasons for revoking the MAC.

The worker appealed the decision of the Supreme Court to the Court of Appeal.

Held

Appeal allowed; the decision of the Associate Justice is set aside; the decision of the Panel is quashed.

Citing the judgment of McColl JA in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 ("*Siddik*"), Handley AJA (Allsop P and Hoeben J concurring) determined that the Panel failed to provide the worker an opportunity to be heard on new issues that the Panel had identified. In doing so, the Panel had misconceived their role, the nature of their jurisdiction and their duty (at [35]).

The Court of Appeal also noted that the worker could not have introduced fresh evidence pursuant to s 327(3) because she was the Respondent in the medical appeal and that the Panel could only have exercised their power under s 328(2) to admit additional evidence if the worker was the Appellant in the appeal (at [22]).

The Court of Appeal held that the reconstituted Panel failed to consider the worker's subsequent submissions for a further medical examination and assessment hearing because they did not consider whether or not the appeal was capable of determination on the papers in accordance with WorkCover Medical Assessment Guidelines 45 and 46.

The Court of Appeal stated it was not clear in the Panel's reasons if they made such a consideration, and that they mistakenly relied on the previous consent of the parties and failed to notice that the worker's consent had been subsequently withdrawn (at [25]).

Following this, the decision of the Supreme Court in affirming the Panel's decision is set aside, the Panel's assessment is quashed, and the matter remitted to the Registrar for a fresh determination by another Panel according to law.

Implications

The decision reiterates the operation of *Siddik* in medical appeals in that the Panel may depart from the grounds of appeal as the Registrar has allowed through the gates (in contrast to the effect of *Vegan*), but only if they provide the parties sufficient opportunity to be heard.

The Panel should ensure that clear and sufficient reasons are provided in considering the parties' submissions on whether to determine the matter on the papers or by a further examination, according to the procedures set out in section 328 of the Act and the WorkCover Medical Assessment Guideline 46.

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Judgment summary

Markovic v Rydges Parramatta & Anor **[2007] NSWSC 157**
(Harrison AsJ, 6 March 2007)

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Facts

A worker sustained injury to her right arm. At a later date, she sustained further injuries to other body parts including left arm and thoracic spine. An AMS assessed the injuries from the two injury dates, then combined them into a total assessment of 17% WPI. The employer appealed on the grounds of demonstrable error in that the AMS had combined the assessments from two separate incidents in contravention of section 322 of the Act (the worker accepted that this was an error).

The appeal went before a Medical Appeal Panel (MAP). The Panel conducted a de novo review and assessed 9% WPI and 5% WPI for the respective injury dates.

Medical Appeal Panel's determination: The MAP provided the following reasons:

> "In this matter the Registrar has determined that at least one of the grounds of appeal exists. The Panel has accordingly conducted a review of the material before it and reached its own conclusion concerning the impairments and losses suffered by the Appellant."

> "The Panel has determined that material submitted as fresh evidence should not be received as such... We are of the view that this evidence could reasonably have been obtained by the Appellant before the medical assessment in terms of s.328(3), and therefore we refuse leave for such evidence to be admitted."

> "In relation to the thoracic spine we note the injury is caused partly by the presence of degenerative changes and partly by referred pain from the cervical spine... We find that the appropriate DRE category is category I..."

The worker sought review of the Panel's decision in the Supreme Court. Three issues were raised:

1) that the Panel's review should have been limited to correcting the appeal ground specified by the appellant employer, namely that the AMS had combined the two assessments (in this regard the worker referred the Court to the obiter dicta of Basten JA *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284);

2) that the panel had erred in not addressing the second limb of section 328(3) with regard to fresh evidence;

3) That the Panel did not provide adequate reasons.

Held

The decision of the MAP is affirmed and the summons is dismissed

- The Appeal Panel carried out its review in accordance with the decision of Wood CJ at CL in *Campbelltown City Council v Vegan* [2004] NSWSC 1129 (i.e. de novo review).

- Only an appellant may seek to furnish new evidence on an appeal [28].

- The only change made on appeal was in relation to the thoracic spine. The Panel found category DRE I in lieu of DRE II. The Panel's reasons were adequate.

Implications

In considering the cases of *Vegan* (at first instance and on appeal) this case confirms that a MAP is to conduct a de novo review.

Only an appellant may seek to furnish new evidence on an appeal. The reasons in paragraph 28 of the judgment are not entirely clear, however, there is a clear statement of this principle. MAPs should bear this in mind when considering evidence on an appeal.

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Judgment summary

Martinovic v Workers Compensation Commission of New South Wales & Ors [2019] NSWSC 1532
(Adams J, 8 November 2019)

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Facts

The plaintiff injured his lower back in the course of his employment with the defendant. The plaintiff later attended upon Dr Bentivoglio, a neurosurgeon, who provided further reports. A further neurosurgeon and spinal surgeon Dr Cam and Dr Guirgis also provided later reports.

The plaintiff lodged a claim for lump-sum compensation benefits on the defendant's worker's compensation insurer claiming 20%. The defendant relied on a report from Dr Ryan, Associate Professor of Surgery in Orthopaedics and Spinal Surgery, who assessed the worker to suffer from an 11% whole person impairment.

The plaintiff was later referred to an Approved Medical Specialist (AMS) for assessment. The AMS assessed the Plaintiff's WPI at 8% and noted that, in relation to the cervical spine, there was normal flexion, extension and rotation.

The plaintiff appealed the AMS' determination and also relied upon new evidence about radiculopathy from Dr Techenne. The defendant submitted that the AMS' report was based on incorrect criteria and contained a demonstrable error. The defendant further submitted that that the plaintiff did not demonstrate why the new evidence was relevant. The Appeal Panel determined that the Plaintiff was entitled to a further 2% WPI as a result of interference with daily activities. The Appeal Panel determined that the MAP should be revoked and a new MAC should be issued assessing the Plaintiff's WPI at 12%.

The plaintiff made an application to the Commission for reconsideration and submitted that it was negligent of the Appeal Panel not to have undertaken a further physical medical assessment to determine whether or not there were residual symptoms of radiculopathy as required within a strict set of guidelines and tests. The Commission then issued a COD that dismissed the Plaintiff's application to reconsider the COD.

The plaintiff filed a summons in the Supreme Court before N Adams J seeking a declaration that the decisions and reasons of the Arbitrator and Appeal Panel were of no effect. The plaintiff relied upon various separate grounds of appeal:

1. Although the Arbitrator correctly determined that the Appeal Panel failed to deal with the presence of radiculopathy, the Arbitrator erred in law on the face of the record in failing to determine that such omissions vitiated the Panel decision causing fundamental legal errors and the denial of procedural fairness. Furthermore, the Arbitrator failed to engage with substantial aspects of the plaintiff's submissions and evidence, causing the Arbitrator to fail to afford the Plaintiff procedural fairness. Lastly, the validity of the Arbitrator's decision depended on the lawfulness of the AMS decision, the Panel decision and/or the COD decision which were unlawful.

2. The Appeal Panel erred in law on the face of the record in not addressing the plaintiff's application for a new examination, not addressing new evidence and the question of whether there should be an additional 3% for radiculopathy as well as the error in the way in which the cervical spine injury was assessed in breach of DRE category assessment guidelines.

Held

The Arbitrator's and Appeal Panel's decisions are quashed.

1. Her Honour was satisfied that the Arbitrator adequately dealt with the presence of radiculopathy. Her Honour referred to Boyce v Allianz Australia Insurance Ltd (2018) 83 MVR 483 as authority of the requirement of procedural fairness and was not satisfied that it was mandatory for the Arbitrator to quash the Appeal Panel decision. Her Honour found that the broad discretion under section 350 allowed for the adequate disposal of the review in which the plaintiff was afforded procedural fairness. Her Honour considered whether the Arbitrator's decision is vitiated by jurisdictional error through discussion the Appeal Panel's decision.

2. Her Honour agreed with the Arbitrator's view that the first three of the four alleged errors are apparent from the Appeal Panel's decision. However, unlike the Arbitrator who dismissed the review of the Appeal Panel, her Honour was satisfied that the Appeal Panel's decision is vitiated by jurisdictional error, causing the Arbitrator's decision to be liable to be quashed as well.

Orders

Adams J ordered and declared:

1. quash the decision of the Arbitrator dated 30 May 2018;

2. quash the decision of the Appeal Panel dated 7 April 2016;

3. remit the matter to the second defendant for allocation to a review panel for determination according to law;

4. the fourth defendant is to pay the plaintiff's costs.

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Judgment summary

Massie v Southern NSW Timber and Hardware Pty Limited **[2006] NSWSC 1045**
(Sully J, 6 October 2006)

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Facts

The Plaintiff was assessed by an AMS as having 22% WPI. The Respondent appealed to the Registrar on grounds that the MAC contained a demonstrable error. The Registrar granted leave and relied upon the late documents outlining a history of previous injury requiring laminectomy admitted into proceedings but not referred to the AMS.

The Panel admitted the late evidence as 'fresh evidence' and applied the modifiers to arrive at an assessment of 23% WPI. The Panel assessed the pre-existing impairment as 10% WPI and made a 10% deduction to certify 13% WPI as a result of the injury claimed.

The Plaintiff submitted that the determinations of the Registrar and the Panel involved jurisdictional errors, were made beyond power and contained errors on the face of the record.

Held

Sully J quashed the order of the Panel and remitted it for determination by a fresh Panel. The Court found that no 'demonstrable error' (relating to the failure to consider all evidence) could be identified in the MAC. If all evidence had not been referred to the AMS the Registrar should have returned the matter for re-assessment based on the "complete data" (section 329 of the 1998 Act).

The Panel was required to consider the question of 'fresh evidence' in accordance with section 328(3) and that in the present case the statutory requirements could not be met. The Panel's decision demonstrates error in the application of section 323 to make the deduction of 10% WPI.

Implications

The Panel must exercise its powers under section 328(3) and must consider if the 'fresh evidence' was not available before the assessment or if the evidence could not reasonably have been obtained before the assessment.

The Panel must consider whether it would be difficult or costly to determine the issue of antecedent injury when applying section 323 and the percentage figure applied is to be expressed as an appropriate proportion to be deducted from the WPI.

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Judgment summary

Merza v Registrar of the Workers Compensation Commission & Anor **[2006] NSWSC 939**
(Hoeben J, 14 September 2006)

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Facts

The worker alleged he suffered injury to his lower back on 15 September 2001. The worker made a claim for compensation benefits and the claim was accepted by the Insurer. On 29 October 2002 the worker underwent surgery in the nature of a discectomy at the L4/5 level of the back. Liability was accepted for that surgery and associated medical expenses were paid. A claim for permanent impairment was made but attempts to resolve that dispute were unsuccessful and the matter was referred to an AMS.

The AMS referral simply stated "injury to lower back". Despite payments of compensation, the Reply generally placed injury in issue, although there was no issue raised as to the relationship between the operation on L4/5 and the work injury. The AMS considered that the work injury only caused an acute herniation to the L5/S1 disc injury and that, at a later time, there was a spontaneous degenerative herniation of the L4/5 disc unrelated to the work injury. Hence the AMS found no permanent impairment with respect to the L4/5 disc because there was no work injury to that part of the spine.

The Registrar formed the view that what was referred to AMS was a broad finding of injury to the lower back and there was no finding by the Arbitrator that injury was sustained to L4/5 disc. There was no evidence of agreement between the parties regarding injury to that body part in the referral and it was open to the AMS to make the finding as he did on the basis of all the evidence before him particularly given that injury was in issue in the Reply.

Held

The Court confirmed the gatekeeper role of the Registrar and found that the onus is on the worker to establish that it should have appeared to the Registrar that the medical assessment certificate issued by the AMS contained a demonstrable error. The Court said that the Registrar does not need to be satisfied of that fact on a balance of probabilities but that the test "appears to …exist" means no more than that it exists as an arguable proposition.

The case distinguished *Wikaira* where express findings were made prior to the matter being referred to the AMS. In that matter, there were findings of injury to particular body parts and those matters were set out in the referral. In that matter the AMS's findings of no work injury was inconsistent with the Arbitrator's findings.

In this case, there was no such error because there was nothing in the medical assessment certificate which was inconsistent with a finding of the Arbitrator. What was referred was a broad finding of injury on 15 September 2001.

The Court said that "on the basis of the referral not only was it open to the AMS to make the kind of assessment which he did, he was required to do so in order to comply with s 325". The Reply put in issue the nature and extent of injury. If injury to L4/5 was not in dispute it should have been stated in the referral document that it was a matter of agreement between the parties.

Implications

- The gatekeeper role of the Registrar as stated in *Vegan* is confirmed.

- *Wikaira* is confirmed but distinguished.
- The AMS is to give a certificate as to the matters referred.

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Judgment summary

***Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger* [2017] NSWSC 1587**
(*Schmidt J, 22 November 2017*)
Overturned on appeal

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Facts

The worker was killed when an excavator tipped and crushed the cabin in which he was working. Prior to his death the worker was alive for a few minutes (unconscious) after which he died. A claim was brought for death benefits under section 25 and 26 of the 1987 Act. Liability was accepted by the employer. The executor of the worker's estate subsequently made a claim for lump sum compensation under s 66 of the 1987 Act. The matter was referred to an AMS, who assessed the worker as having 100% Whole Person Impairment. On reconsideration, the assessment was amended to nil WPI. The MAC was appealed. The Medical Appeal Panel revoked the MAC and issued a certificate for 100% WPI.

Decision

Held: MAP decision confirmed

The employer appealed to the Supreme Court arguing the MAP had incorrectly construed the meaning of the term "permanent impairment." The employer argued that an injury cannot be permanent in the requisite sense where death will inevitably follow soon after injury, and that to conclude otherwise would give rise to a situation of double compensation for the same consequence of the one injury, which the 1987 and 1998 Acts cannot have contemplated.

The Supreme Court (Schmidt J) found that the MAP did not err in finding that the worker's impairment was 100%. Her Honour held that the term "permanent impairment" was not concerned with the possibility of death occurring shortly after injury, but rather the question of whether the injury has resulted in "permanent" as opposed to "temporary" impairment. Schmidt J held that the time at which the question of whether an injury gives rise to an entitlement for permanent impairment is at the time the injury is suffered. The entitlement does not depend on whether the injury is "permanent," but whether any impairment that the injury causes is permanent. Rights to compensation then accrued are not abrogated by subsequent events, including death.

Her Honour further noted at [53]-[54]:

> "the 1987 Act expressly provides for dependants to be paid benefits in the event of the injured workers death, which do not depend on the worker not having earlier received benefits for the injury which has resulted in death. Further, the Act also does not contemplate that in the event that the worker has received such benefits, that on his or her death the dependants will not receive the death benefits for which the Act makes provision. Either could have been easily provided. That neither has been, tells against the construction for which Hunter Quarries contended."

Schmidt J also held that the AMS had erred in finding nil whole person impairment, as the evidence suggested that the worker's condition was in fact permanent, and there was no suggestion of possible recovery from the injury.

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Judgment summary

Midson v Workers Compensation Commission & Ors (No 2) **[2017] NSWSC 147**
(N Adams J, 1 March 2017)

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Facts

This decision determined the issue of costs arising from the substantive proceedings in *Midson v Workers Compensation Commission & Ors* [2016] NSWSC 1352.
In the substantive proceedings, the third defendant, Enerka Apex Belting Pty Ltd (the employer) filed a submitting appearance save as to costs. The first defendant (Workers Compensation Commission) and second defendant (Medical Appeal Panel of the Workers Compensation Commission) also filed submitting appearances save as to costs.

The matter was heard by Adams J (as Duty Judge) and there was no contradictor. The plaintiff was successful in the substantive proceedings and the orders of the Appeal Panel were quashed. As there was no contradictor, her Honour granted liberty to apply within 14 days to have the matter listed for further argument concerning costs.

Issue

1. The plaintiff made an application for costs and written submissions were filed by the plaintiff and Enerka Apex Belting Pty Ltd.

Decision

Her Honour noted that costs are discretionary under s 98(1)(a) of the *Civil Procedure Act* 2005 and that "the rationale for the principle that costs follow the event is that the successful party to proceedings should be compensated" (at [18]).

Adams J referred to rr 6.11 and 41.2 of the *Uniform Civil Procedure Rules* 2005 and cases that suggest –

> "that the fact that an unsuccessful party [that] has filed a submitting appearance in accordance with r 6.11 of the UCPR may well provide good reason to decline to make the usual order as to costs, notwithstanding the absence of disentitling conduct on the part of the successful party".

Her Honour went on to hold that it is not the case that a submitting party will never be ordered to pay costs. Adams J stated that a relevant contextual consideration is required and noted that Enerka Apex Belting filed a submitting appearance shortly after its first appearance before the Registrar which enabled the matter to be set down for hearing two days later. Her Honour held that its conduct was consistent with the overriding purposes of s 56(3) of the *Civil Procedure Act* and observed that it genuinely played no active role in the proceedings and did nothing which put the plaintiff to further costs. Her Honour further noted that Enerka Apex Belting did not lead the decision-maker into error. Justice Adams distinguished this case from *Mahenthirarasa v State Rail Authority of New South Wales (No 2)* [2008] NSWCA 201; 72 NSWLR 273.

The Court made no order for costs against the third defendant in relation to the substantive proceedings and ordered that the plaintiff pay the third defendant's costs of the application for costs as agreed or assessed.

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Judgment Summary

Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the late Ryan Messenger [2918] NSWCA 178
Appeal upheld
(Basten JA, Gleeson JA, Payne JA, Sackville AJA, Simpson AJA; 16 August 2018)

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Facts

The worker was killed when an excavator tipped and crushed the cabin in which he was working. Prior to his death the worker was alive for a few minutes (unconscious) after which he died. A claim was brought for death benefits under section 25 and 26 of the 1987 Act. Liability was accepted by the employer. The executor of the worker's estate subsequently made a claim for lump sum compensation under s 66 of the 1987 Act. The matter was referred to an AMS, who assessed the worker as having 100% Whole Person Impairment. On reconsideration, the assessment was amended to nil WPI. The MAC was appealed. The Medical Appeal Panel revoked the MAC and issued a certificate for 100% WPI.

The employer appealed to the Supreme Court arguing the MAP had incorrectly construed the meaning of the term "permanent impairment." The Supreme Court (Schmidt J) found that the MAP did not err in finding that Mr Messenger's impairment was 100%. Her Honour held that the term "permanent impairment" was not concerned with the possibility of death occurring shortly after injury, but rather the question of whether the injury has resulted in "permanent" as opposed to "temporary" impairment.

Hunter Quarries appealed to the Court of Appeal.

Decision

The Court of Appeal upheld the appeal, set aside the decision of the Appeal Panel, and dismissed the application to appeal. The Court four found the following:

- The primary function of section 66 (1) is to create a right to a lump sum payment for non-economic loss. The right is defined by the worker suffering and "injury" and the injury resulting in "impairment" (Basten JA at [5]).
- The purpose of section 66 is to compensate an injured worker for the loss of quality of life caused by a workplace injury, that will continue for the duration of the workers life (Simpson AJA at [114]).
- For a person to suffer and impairment, his or her abilities or capabilities must be diminished. Section 66(1) envisages a continuing of life with a compromised ability to work and a compromise capacity for the enjoyment of life. If a person's injuries are so severe that death is inevitable, the injury is not one that results in "impairment" (Basten at [7]).
- It is not a sensible or reasonable application of section 66 to award compensation to an injured worker if the duration of his life is so circumscribed as to allow no meaningful benefit of the award compensation to him or her (Simpson AJA at [114]).
- The court distinguished this matter from *Ansett Australia v Dale* [2001] NSWCA 314 because in that matter there had been a finding that death as a consequence of a compensable injury had not been inevitable [Payne JA at [89].

- The language in section 66 does not encompass circumstances where death follows shortly and inevitably after an injury. In order for there to be "permanent impairment" there must be a continued and enduring experience of living (Payne JA at [95]).
- The expression "permanent impairment" is not apt to describe the impact of an injury which is incompatible with the continuation of life and where the victim survives for a very short period, measured in seconds or a few minutes (Sackville a JA at [107]).
- The court rejected the submission that the question of whether the expression “permanent impairment” encompassed impairment so serious that death would inevitably follow within a short time frame, was a matter for medical professional opinion (Payne JA at [96]).
- The court did not provide a conclusive view as to whether, in all circumstances, the question of whether an injury results in death does or does not give rise to an entitlement to compensation for "permanent impairment" (Payne at [97]). Cases where an injured workers life may be prolonged but where the worker has no awareness or consciousness of impairment will need to be decided on a case-by-case basis (Simpson AJA at [115]).

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Judgment summary

Midson v Workers Compensation Commission & Ors **[2016] NSWSC 1352**
(Adams J, 23 September 2016)

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Facts

In 2002, the plaintiff was working for the third defendant, Enerka Apex Belting Pty Limited, as a conveyer technician. The third defendant introduced random drug testing and the worker was asked provide "clean" urine specimens. He refused. The worker claims that as a result of his refusal he was bullied at work by his co-workers. He claims that he developed a psychological injury as a result of humiliation, victimisation, aggressive and abusive physical and verbal behaviour, harassments and threats by workmates.

The worker claimed compensation for psychological injury and the Registrar referred the matter to an AMS to assess whole person impairment.

The MAC and the Panel's decision

The AMS assessed the worker to have 15 per cent whole person impairment. The employer appealed the AMS's decision. The Panel conducted a preliminary review of the original MAC and further submissions were sought from the parties as to the applicability of s 323 of the 1998 Act. On review, the Panel reduced the WPI assessment from 15% to 13%. The worker appealed to the Supreme Court.

Issues

1. Whether the Panel ordered the plaintiff to undergo a medical assessment before it had upheld any of the grounds of appeal.

2. Whether the Panel erred in not confining its consideration of the MAC to the grounds of appeal asserted by the third defendant.

Note: there was no contradictor in the Supreme Court proceedings.

Decision

Ground 1

The worker's submissions were accepted by Adams J. Her Honour applied the decision of Davies J in *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 in that it is the finding of error that triggers the need for a further examination.

There is no statutory power for the Panel simply to direct the worker to be examined again in order to find error in the MAC. On review of the evidence, her Honour was satisfied that the Panel sought a further examination in order to assess whether a ground of appeal under s 327(3)(d) was made out rather than doing so after it had made a finding of demonstrable error. In doing so, the Panel's action amounted to a jurisdictional error.

Ground 2

After considering a number of case law authorities, her Honour made it clear that the Panel can only consider the grounds of appeal relied upon by the appellant. Although there is no reference to the term “submissions” in s 328(2) of the 1998 Act, her Honour was satisfied that s 328(2) extends to “submissions” detailing the grounds of appeal. In relying upon these additional submissions, the Panel was considering the appeal within the meaning of s 328(2) of the 1998 Act.

Finally, her Honour held that the Panel was entitled to find error on the ground it did and this involved a re-assessment of all PIRS categories. However in doing so, the Panel relied on its further examination of the worker in the absence of power to order a further examination in order to find error in the original MAC. That error formed part of Ground 1. Despite that, her Honour held that no additional error could be made out under Ground 2.

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Judgment summary

***Mirarchi v CPA Australia Ltd* [2017] NSWSC 1161**
(Adamson J ,31 August 2017)

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Facts

The worker suffered an injury to the right arm in the course of employment in 2006. The insurer paid for medical treatment and surgery for both upper limbs, and did not appear to dispute that the worker's left upper limb symptoms were a consequence of the accepted right upper limb injury.

Prior to July 2010, the worker claimed lump sum compensation for permanent impairment in both upper limbs. The claim was resolved by complying agreement, with compensation paid for the right upper limb only. In September 2015 the worker made a further claim for lump sum compensation for both upper limbs. The insurer declined the worker's claim on the basis that the worker did not meet the 10% threshold for lump sum compensation payment. The notice also cited the medical report of the insurer's IME, who opined that the worker's shoulder and wrist injuries had either resolved, or were not work related.

In July 2016 the worker commenced proceedings for further lump sum compensation, and was referred to an AMS for assessment of both upper extremities. The AMS found the worker to have 1% WPI for the right elbow only. The AMS did not assess the left or right shoulders, or the right wrist, as requested in the referral, on the basis that the AMS did not consider those impairments to the employment related injury of 2006.

The worker appealed the MAC on the grounds that the assessment was made on the basis of incorrect criteria, and contained demonstrable error. The Appeal Panel dismissed the appeal on the basis that no error had been shown. The Panel agreed that the shoulder injuries were not related to employment, and confirmed the MAC.

The worker filed summons in the Supreme Court in February 2017 seeking declarations that the MAC be set aside as invalid. The parties agreed that the MAC ought to be set aside on the basis of jurisdictional error. It was common ground that the parties had intended all body parts in the referral to be assessed for permanent impairment, irrespective of the AMS' position on causation.

Decision

Adamson J concluded that the worker had not had her claim for permanent impairment determined in accordance with the section 74 notice, and the employer/insurer had not had the opportunity to have their assertion that the worker would not reach the 10% threshold tested.

Her Honour noted that the Commission had misapprehended the ambit of the dispute subject to the s74 notice, resulting in a referral to the AMS which did not make clear that the dispute was confined to the degree of permanent impairment of the right and left upper limbs, and did not encompass any questions of causation.

The Medical Appeal Panel then dealt with the worker's appeal on the basis that the AMS had issued the certificate within his jurisdiction, when this was not correct.

Her Honour explained that the initial misapprehension of the dispute, which resulted in the AMS and Appeal Panel misconstruing the ambit of the dispute, arose from the declinature notice. The summary of the IME's opinion as to causation was irrelevant to the report, as there was no issue of causation disputed.

Her Honour further noted that care must be taken when defining a dispute in a declinature notice, as this will inform the exercise of the Registrar's power to refer the dispute for medical assessment. An AMS cannot be expected to refrain from expressing opinions as to causation unless they appreciate that those opinions are not sought.

Her Honour determined that because of the nature of the error, the Certificate, Appeal Panel Decision, and the Determination of the Commission must be set aside so that the process could begin afresh.

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Judgment summary

Moy v Emoleum Services Pty Ltd **[2015] NSWSC 1062**
(Davies J, 7 August 2015)

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Facts

Michael Moy was employed as foreman of traffic control when he suffered injury to his right knee and back on 19 May 2008. He returned to work but the pain in his right knee failed to improve. In June 2008 he was treated with analgesics but he continued to complain of pain and underwent arthroscopic surgery in 2009. Following surgery, the condition in his right knee deteriorated and a right total knee replacement was undertaken on 2 November 2011.

Mr Moy's initial claim for lump sum compensation was made on 22 October 2010 in respect of both the lumbar spine and right knee injuries. On 18 September 2012 a further claim for lump sum compensation was made for both injuries. Liability for both injuries had been conceded by the employer and the Commission referred the matter to the AMS on 10 March 2014.

The AMS issued a MAC in which he assessed 15 per cent whole person impairment for the right knee and 7 per cent for the lumbar spine. The AMS then applied a four-fifths deduction to the assessment of the right knee and a three-sevenths deduction to the lumbar spine. This resulted in total WPI of 7 per cent.

Mr Moy appealed against the AMS's assessment and the Panel revoked the MAC on the basis of demonstrable error. Mr Moy sought to appeal the Panel's decision on four relevant categories of error, in particular whether the Panel:

1. reached an erroneous conclusion by adopting the AMS's assessment of a deduction of four-fifths in respect of the right lower extremity;
2. failed to consider the material before it that supported a lesser deduction;
3. asked itself the wrong question, in that it asked whether the pre-existing osteoarthritis is an integral part of the assessed impairment, and
4. failed to provide reasons or adequate reasons as to why it assessed the deduction under s 323(1) as four-fifths.

Decision

His Honour, Davies J, first addressed the employer's application to cross-examine the solicitor for Mr Moy. The solicitor for Mr Moy had sworn an affidavit annexing evidentiary material relevant to the Panel's decision. His Honour declined to permit cross-examination. His Honour commented that the appeal before him was not a merits review of the Panel's decision. It was limited to the procedure and decision-making process adopted by the Panel and the additional material would not have assisted his Honour in any case.

His Honour held that the errors committed by the Panel under s 323 of the 1998 Act took place at the third step identified in *Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liquidation)* [2013] NSWSC 365 at [126]. That is, what proportion of the impairment was due to the pre-existing condition?

In this regard, his honour identified three errors:

1. the reasons given by the Panel were entirely inadequate;
2. to the extent that any reasons were given, the deduction was based on assumption or hypothesis, and
3. the Panel's conclusion was not supported by probative or logical grounds.

Adequacy of reasons

His Honour held that Panel's reasons were inadequate. The Panel did not elaborate on the extent of the arthritis that supported a four-fifths deduction, nor did the Panel indicate how the 10 per cent assumption was at odds with the available evidence. His Honour found that the available evidence was identified but the Panel did not disclose how this evidence was used to reach the conclusion of a four-fifths deduction.

The requirement for adequate reasons was heightened when the Panel said that the four-fifths deduction made by the AMS was brought about by a mistaken conclusion. The fact that the Panel arrived at the same result in its decision required "cogent reasons". His Honour also commented that "even if intuition from experience forms some part of the process" reasons must be provided for the conclusion reached.

Deduction was based on assumption or hypothesis

His Honour held that the Panel's deduction was based on an assumption or hypothesis and that this was not distinguishable from what was said in *Cole v Wenaline Pty Limited* [2010] NSWSC 78 at [30] - [31]. In particular, his Honour found that the Panel made its assessment on assumption or hypothesis when it suggested that "because there was extensive pre-existing osteoarthritis that meant that there was extensive impairment". Accordingly, the Panel's reliance on assumption or hypothesis in the absence of "little reasoning" available before it amounted to an error.

Panel's conclusion was not supported by probative or logical grounds

The Panel said that the four-fifths deduction made by the AMS was brought about by a mistaken conclusion. However when the Panel assessed the same proportion without providing adequate reasons, this amounted to an erroneous conclusion. In this regard, his Honour described the Panel's conclusion as illogical, irrational and legally unreasonable. He also held that Panel's conclusion was not supported by probative or logical grounds and that error was demonstrated.

Did the Panel ask itself the wrong question?

At [27] of its Statement of Reasons the Panel relevantly said:

> "In the circumstances, it is the Panel's view that the appellant's extensive and pre-existing osteoarthritis is an **integral part** of his present impairment".

The Plaintiff was critical of the Panel saying that the pre-existing condition was an "integral" part of his present impairment. In this regard, his Honour held that the Panel failed to refer to the words of s 323 of the 1998 Act in performing its task, which was to deduct from its assessment of permanent impairment any proportion of the impairment "that is due to any pre-existing condition".

His Honour concluded that he could not be satisfied whether an error had occurred by the reference to the "integral part" in the Panel's decision. He found that it was unnecessary to determine this question because error was already demonstrated by the inadequacy of the Panel's reasons. At the same time, his Honour did not see any error had the Panel used the term in the second step of a s 323 deduction: that is, whether the pre-existing condition contributed to the impairment.

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Judgment summary

Ahmed Najjar v Agar Cleaning Services **(unreported 2015/00350014, Supreme Court of New South Wales)**
(Fagan J, 7 September 2016)

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Facts

The worker claimed compensation for spinal and shoulder injuries. He injured his right shoulder in 2008 in a car accident. The worker injured his left shoulder in 2010 in a lifting incident. Both had occurred in the course of the worker's employment. The worker claimed lump sum compensation for permanent impairment resulting from the injuries, including as a result of scarring from surgical procedures to attempt to stabilise the worker's shoulders.

The MAC and the Panel's decision

The Registrar referred the matter to an AMS to assess whole person impairment following agreement between the parties. The AMS issued a MAC in which he assessed the worker as having nil whole person impairment attributable to either of the accidents. The worker sought to appeal the MAC and in the appeal application checked the boxes indicating that he did not want to be re-examined and that he did not wish to present oral submissions to the Appeal Panel. The Appeal Panel revoked the MAC and issued a new MAC attributing 2 per cent whole person impairment to the right shoulder from the 2008 accident, a further 1 per cent to the right shoulder from the 2010 accident, for a total of 3 per cent and a 2 per cent whole person impairment to the left shoulder from the 2010 accident. The worker sought judicial review in the Supreme Court of New South Wales.

Issues

1. Whether the Appeal Panel erred by adopting the findings on examination of the AMS in circumstances where the AMS's conclusions and reasoning on injury and causation were found to be in error.

2. Whether there was error in the Appeal Panel having accepted the AMS's findings on the lumbar and cervical spine.

3. Whether the worker was denied procedural fairness by not being re-examined by the Appeal Panel.

4. Whether the Appeal Panel failed to provide any or adequate reasons for its decision to adopt the AMS's findings on examination in circumstances where the AMS's conclusions on injury and causation were found to be in error.

5. Whether the Appeal Panel failed to provide adequate reasons and/or any explanation as to why it accepted the AMS's finding that there was no dysmetria in light of the AMS's recorded observation of asymmetric loss of range of motion of the cervical spine, but unexplained finding of no dysmetria.

6. Whether the Appeal Panel failed to deal with a substantial argument in respect of the cervical spine, being that the AMS had failed to explain why he concluded that the recorded

observed asymmetric loss of range of motion with respect to the cervical spine did not amount to dysmetria. Based on this, there was another issue as to whether the Appeal Panel failed to accord the worker procedural fairness.

7. Whether the Appeal Panel erred by adopting the AMS's findings on examination in circumstances where the AMS found that the worker did not complain of any numbness or tingling in the upper limbs.

Decision

Fagan J held that the Appeal Panel was entitled to read the AMS's certificate in the way they did and their conclusion that the AMS's report could be adopted as to the findings on examination is not compromised by them not having adverted to any other aspect of the terms in which the worker gave a history.

His Honour held that the Appeal Panel did not err in adopting the AMS's 0 per cent whole person impairment with respect to the cervical and lumbar spines. The examination results were fully articulated in the MAC. Fagan J held that the Appeal Panel was entitled to treat them as not in contest. As the worker had not asked to be re-examined, it was open to the Appeal Panel to reach the same conclusion as the initial assessor about what these findings on examination meant in terms of DRE I, DRE II and, ultimately, percentage of whole person impairment.

His Honour held that it was clear from the Appeal Panel's reasons that the path by which the Appeal Panel arrived at its decision with respect to the shoulders was that it accepted the findings on examination and all the factual circumstances and features of the worker's injuries. His Honour was of the view that it was clear that the Appeal Panel differed from the AMS only in that it accepted that these observed impairment to the shoulders flowed from the two accidents.

Fagan J held that with respect to the lumbar and cervical spine, the Appeal Panel showed no error of law in their approach to accepting and agreeing with the AMS's conclusions that what he had observed with respect to the cervical and lumbar spine did not represent impairment of whole person impairment in any degree.

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Judgment Summary

Nicol v Macquarie University **[2018] NSWSC 530**
(Harrison AsJ, 27 April 2018)

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Facts

The worker was employed by Macquarie university as a return to work coordinator. He suffered an accepted psychological in that employment, and ceased work. He shortly returned to work with Cambridge. During that employment he suffered further psychological symptoms when a colleague committed suicide and he criticised his employer's response to that suicide. He was terminated by Cambridge.

The AMS assessed 50% WPI due to psychological injury suffered with Macquarie University. The matter was appealed. The Panel revoked the MAC and found 8% WPI. The Panel's conclusion was made on the basis that the AMS failed to consider the "injury" suffered with Cambridge in his calculation of impairment.

The worker sought judicial review on the abss that he had been denied procedural fairness, and that the Panel had misapplied its statutory taks in relation to causation.

Decision

Her Honour dismissed ground 1 on the basis that the Panel had afforded Mr Nicol procedural fairness

Her Honour upheld ground 2 on the basis that the Panel erred in relation to causation as it failed to make its decision in accordance with statutory requirements, including section 9A(1) of the 1987 Act. Her Honour was of the view that the improvement before commencing employment with Cambridge did "not constitute the required novus actus to snap the causative connection as set out in *Kooragang.*"

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Judgment summary

***Ojinnaka v ITW Australia Pty Ltd* [2011] NSWSC 208**
(Adams J, 17 March 2011)

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Facts

Mr Jude Ojinnaka suffered an injury to his right shoulder following a period of employment with the respondent, ITW Australia. Mr Ojinnaka's qualified doctor assessed his shoulder impairment as 13 per cent WPI, with 15 per cent for the cervical spine.

After an initial examination by the respondent's qualified doctor Mr Ojinnaka was assessed as having 4 per cent WPI for his right shoulder. Upon re-examination approximately one year later, the same doctor was unable to make a valid assessment based on the worker's very abnormal presentation (Mr Ojinnaka could not move his shoulder at all, and when asked to move his neck only moved his eyes). The doctor suggested that the worker's presentation was non-organic.

The matter was then referred to an AMS for assessment. The AMS assessed Mr Ojinnaka at 6 per cent WPI, despite his inability to move his shoulder in any direction at all. The AMS found that the pathology affecting the right shoulder persisted, but the worker's response to physical examination indicated that there was "substantial functional overlay". The worker appealed the MAC. The appeal panel confirmed the MAC.

Issues

Mr Ojinnaka lodged a summons in the Supreme Court seeking orders in the nature of certiorari setting aside the decisions of the AMS, Appeal Panel and the Certificate of Determination issued by the Registrar on the basis that the decisions were vitiated by jurisdictional error and/or error on the face of the record and were of no effect.

The particulars of the errors alleged were:

1. The AMS's finding of "substantial functional overlay" meant that the plaintiff had not reached "maximum medical improvement". In the circumstances the AMS's finding that the plaintiff's shoulder injury was permanent and stabilised was not a finding open to him.
2. The AMS's determination as to the permanent and stabilised nature of the plaintiff's injury was based on illogical or irrational findings or inferences of fact. The determination of the injury as permanent and stabilised was therefore an unreasoned decision.
3. Pursuant to finding the injury was permanent and stabilised the AMS erred in his process of assessment and therefore the process was lacking in practical fairness or justice and was not a process conducted according to law.
4. On this basis the AMS's decision was a decision not supported by reason and had no better foundation than an arbitrary selection of a result.
5. The Appeal Panel erred in failing to find the error alleged as infecting the AMS's decision and in choosing to confirm that decision the Appeal Panel made no decision at all.
6. The Registrar's Certificate of Determination was premised on the decision of the AMS as confirmed by the Appeal Panel, both infected by error, and was therefore no decision at all.

Held

Adams J held that the assessment of the AMS was issued without power and was not made right by the appeal panel, and should be quashed. The matter was referred back to the registrar for fresh assessment.

Counsel for the first defendant had submitted that relief should be denied because adequate modes of correction were available under the Act by way of appeal or request for further assessment. However his Honour was of the opinion that the error made by the AMS had a real potential for serious injustice in light of the statutory conclusiveness of the certificate which is made without judicial sanction or supervision.

The decision largely hinged on the words "functional overlay" as they appeared in the MAC. Adams J made various comments about functional overlay:

- Functional overlay is a relevant consideration that the AMS should take into account when examining a worker.

- The existence of functional overlay should "not be excluded from relevance simply because it is a mental rather than a mechanical phenomenon".

- As the nature of functional overlay is "dynamic and susceptible to treatment which may be more or less effective", which essentially means not stable in the terms of [1.21] of the WorkerCover Guides, full ascertainment of the worker's impairment was not possible.

- Functional overlay was discussed without a particular definition being provided. Functional overlay "further prohibits or impairs the capacity to use a limb" and is a "mental rather than a mechanical phenomenon".

- The AMS confined himself to the "mechanical consequences" of the injury and excluded from his consideration the effects of the substantial functional overlay.

- In ignoring the effects of the functional overlay, the AMS failed to consider all the factors relevant for assessment, or alternatively made an assessment when the extent of the worker's injuries were not fully ascertainable.

As the AMS failed to consider whether the injury was fully ascertainable (in other words, had reached maximum medical improvement), the assessment was made without the power to do so, either because a significant feature of the impairment was disregarded (being the functional overlay component of the worker's injury) or that the functional overlay, being in the nature of a psychological element of the worker's injury, was so dynamic as to make the assessment of impairment not fully ascertainable.

Implications

Section 65A prevents the payment of compensation for secondary psychological injuries. Paragraph [1.17] of the WorkCover Guidelines also outlines this prohibition. The application of this decision should be considered in the light of this section. Adams J does not consider the impact of the section in his decision at all.

According to Adams J's reasoning, an AMS has three choices when a worker presents with functional overlay: take this into consideration when calculating impairment; certify the worker's injury as not fully ascertainable (not reached maximum medical improvement); or find that the functional overlay was "merely a deliberate feigning of incapacity" and provide an assessment based on the physical evidence.

The decision should be treated with caution. Functional overlay is not a term used in the legislation. The decision seemingly impacts on how medical assessments are conducted in circumstances where a worker presents with a physical injury and functional overlay, although the direct implications of the Court's findings to the decision making functions of AMSs and Appeal Panels remains unclear at this stage.

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Judgment Summary

Glenn William Parker v Select Civil Pty Limited **[2018] NSWSC 140**
(Harrison AsJ, 21 February 2018)

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Facts

The worker suffered a psychological injury in the course of his employment with Select Civil in 2014. The worker was operating an excavator on or near the bank of a river, which gave in behind him causing the excavator to sink into the river. The cabin began to fill with water and the worker believed he would die. The worker found a hammer, smashed the windscreen, and swam out onto the rocks. Select Civil accepted liability. On 11 April 2016 Mr Parker commenced proceedings for lump sum compensation, and an AMS issued a MAC on 12 October 2016 assessing 22% whole person impairment.

Select Civil appealed against the decision of the AMS. Select Civil submitted that the AMS had misapplied the assessment criteria under the Psychiatric Impairment Rating Scale (PIRS) for "Self Care and Personal Hygiene" and "Concentration, Persistence, and Pace." The Appeal Panel determined, based on the history taken by the AMS, that the AMS had erred in assessing the worker as Class 3 (moderate impairment) for 'Self Care and Personal Hygiene" and opined that Class 2 (mild impairment) was more appropriate. On 18 April 2017 the Appeal Panel determined that it would revoke the MAC and issue d a new certificate assessing 9% WPI.

On 7 September 2017 Mr Parker filed a summons in the Supreme Court seeking declarations setting aside or declaring invalid the decision of the Appeal Panel. Mr Parker submitted that the Appeal Panel had substituted their own opinion for that of the AMS without identifying any real error or conducting their own assessment. Mr Parker also submitted that the Appeal Panel had failed to provide adequate reasons for its conclusion, and had not properly applied the *Worker's Compensation Guidelines for Evaluation of Permanent Impairment* by taking into account only selective aspects of the history.

Decision

Held: MAP decision set aside.

Her Honour Harrison AsJ considered the central issue to be whether the Appeal Panel's decision conformed to law. Her Honour determined that to find error in the statutory sense, the Appeal Panel must determine whether the AMS had incorrectly applied the PIRS Guidelines.

The Appeal Panel had determined that the AMS had erred in assessing the worker as Class 3 because they considered Class 2 to be more appropriate on the AMS's evidence. Her Honour noted that the descriptors in Classes 2 and 3 are "examples only" (see *Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 633), and not intended to be exclusive in and of themselves.

Her Honour applied *Ferguson v State of New South Wales & Ors* [2017] NSWSC 887, reiterating the position of Campbell J at [24] that "*in relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense*." ([66])

Her Honour concluded that the Appeal Panel had mistakenly determined that the AMS had erred, and that the findings of the AMS were supportive of the material before him. Her Honour thus

found that "*whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ*." ([71]) This difference of opinion does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS, nor does it indicate demonstrable error on the part of the AMS.

Her Honour held that there was an error of law on the face of the record, which did away with the necessity to consider the other grounds of appeal.

The Appeal Panel's MAC was set aside, and the matter remitted to the Worker's Compensation Commission.

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Judgment summary

Pascoe v Mechita Pty Ltd [2019] NSWSC 454
(Button J, 24 April 2019)

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Background

The plaintiff was exposed to varying levels of noise for the best part of 55 years of employment and developed hearing loss, both within and outside New South Wales. The plaintiff worked as a truck driver for the first defendant from July 2014 until October 2014.

A medical expert relied on by the plaintiff had ultimately found 13% Whole Person Impairment (WPI). Another medical expert relied on by the first defendant found a final WPI percentage below 10%. The plaintiff was assessed by an Approved Medical Specialist (AMS) who found 4% WPI for hearing loss attributable to employment with the first defendant, after making four deductions that took into account factors including hearing loss that was the result of work outside of New South Wales, pre-existing conditions such as tinnitus and old age.

The plaintiff appealed against the certificate, pursuant to s 327 of the *1998 Act* on the basis that the AMS had made too great a deduction for work outside New South Wales. The Medical Appeal Panel revoked the MAC on the basis that the AMS had incorrectly assessed percentage of permanent impairment attributable to work with the first defendant based on time worked there. The Panel also assessed 4% WPI, keeping the plaintiff under the 10% threshold. The Appeal Panel applied the ISO (International Organisation for Standardisation) tables 1999 to 2013 with regard to progressive hearing loss induced by noise in attributing a low percentage of permanent impairment to the plaintiff's work with the first defendant.

The plaintiff sought judicial review in the Supreme Court.

Grounds of appeal

There were two broad grounds of appeal.

The first ground was that the Appeal panel denied the plaintiff procedural fairness because it did not warn the plaintiff that it would consider the ISO (International Organisation for Standardisation) tables 1999 to 2013 with regard to progressive hearing loss induced by noise in making its assessment.

The second ground of appeal was that the Appeal Panel fell into legal error by unjustifiably applying generalisations about people with the plaintiff's condition to the plaintiff himself.

Submissions of the Plaintiff

The Plaintiff submitted he had never seen the ISO tables referred to and the defendant's medical expert referred to them only in a specific context. The Plaintiff accordingly had no opportunity to make submissions to the Panel on the ISO tables which were the basis of the Panel's decision.

Submissions of the Defendant

The defendant submitted that the Panel explained its reasons for its calculations and correctly followed the process stipulated by Garling J in *Pereira v Siemens Ltd [*2015] NSWSC 1133. The defendant further submitted that the ISO tables were known to the plaintiff or, alternatively, that the Plaintiff had waived his right to make submissions on the new factors considered by the Panel (factors considered, it was submitted, in accordance with *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).

Judgment

Button J found that the first ground of appeal was made out and that the Appeal Panel had denied procedural fairness to the plaintiff. Button J relied on *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40 to find that there was a stricter standard of

procedural fairness owing to the financial consequences for the plaintiff should his medical assessment fall below 10% WPI. Button J also held that a decision-maker can take into account new evidence where it is common knowledge between the parties but the ISO tables did not meet this description.

On the second ground of appeal, Button J held that sometimes it would be appropriate for an Appeal Panel to make an induction from general evidence that was applied to a specific case but whether or not it was appropriate would depend on the circumstances.

In this case Button J held that he was not sufficiently qualified to analyse the Appeal Panel's comparison between the audiograms of the Plaintiff and the ISO which had led to a determination that there was significant hearing loss prior to the Plaintiff's 2014 employment. Button J found the decision to use the ISO tables was within the discretion of the Panel.

Therefore, Button J found that the Plaintiff had failed to establish that the Medical Appeal had fallen into error and had not made out the second ground of appeal.

Button J considered his opinions on Ground Two to be obiter as his decision regarding the first ground od appeal determined that the Appeal should succeed.

Orders

Button J issued:

a. A declaration pursuant to s 69 of the *Supreme Court Act 1970* (NSW) that the decision and the statement of reasons for decision of the Medical Appeal Panel was void and of no effect;

b. An order setting aside the decision and the statement of reasons for the decision of the third defendant and issued by the second defendant on 5 April 2018;

c. An order remitting the matter for fresh consideration by an appeal panel of the Workers Compensation Commission of New South Wales, that panel to be newly constituted; and

d. An order that the first defendant, Mechita Pty Ltd, pay the costs of the plaintiff in the proceeding.

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Judgment summary

Mark Edward Passey v The Registrar of the Workers Compensation Commission of NSW & ors **[2005] NSWSC 1032**
(Patten AJ, 14 September 2005)

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Facts

The Plaintiff was referred to a urologist and an orthopaedic AMS for assessment. The urologist issued a MAC and certified that the worker had "sexual dysfunction in the order of 5% when compared to a worse (sic) case scenario".

The Plaintiff appealed to the Registrar on the basis of 'demonstrable error' and the application of 'incorrect criteria'. The Medical Appeal Panel did not accept the submissions that a "5 percent loss of sexual dysfunction when compared to a worse (sic) case scenario is very different from the loss of efficient use of sexual organs".

The Plaintiff, in the judicial review proceedings, submitted that the Medical Appeal Panel erred in that it failed to decide the question of the extent of the permanent loss of efficient use of the worker's sexual organs.

Held

Patten AJ quashed the order of the Medical Appeal Panel and remitted it for determination by a fresh panel. The Court found that the Medical Appeal Panel was bound to hold "a hearing de novo and that it was not obliged to confine its attention to a determination as to whether any of the four grounds in s 327(3) has been established".

The Medical Appeal Panel's reasons fall short of demonstrating that it properly understood and exercised the jurisdiction conferred upon it, and that the Medical Appeal Panel confined itself to the question of whether or not error was demonstrated by the AMS and failed to consider what conclusion it would reach upon the material before it.

Implications

The Medical Appeal Panel must exercise its powers in a way which demonstrates that it has understood the jurisdiction conferred upon it, and must act within that jurisdiction.

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Judgment summary

NSW Police Force v Registrar of the Workers Compensation Commission of NSW **[2013] NSWSC 1792**
(Davies J, 11 December 2013)

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Facts

The third defendant (Mr Wild) joined the Police Force in 1988. In October 1994, he began work in a specialist organised crime unit, including acting as an undercover agent. In 1997, he was robbed and a loaded gun was put to his head. Mr Wild was diagnosed as suffering from chronic post-traumatic stress disorder since the incident in 1997, which deteriorated during the course of his employment with the NSW Police Force until he ceased work on 2 September 2010.

Mr Wild was assessed by Dr Anderson, his qualified specialist as suffering from 15 per cent whole person impairment. He was assessed by Dr George for the NSW Police Force as suffering from 10 per cent whole person impairment. An Application to Resolve a Dispute was lodged in the Commission, and the matter was referred for assessment to Dr Rose, Approved Medical Specialist.

The AMS assessed Mr Wild's whole person impairment to be 5 per cent.

Mr Wild appealed against the Medical Assessment Certificate on the ground that the AMS had made a demonstrable error. The submissions relied on by Mr Wild related to the PIRS categories Social and Recreational Activities and Concentration, Persistence and Pace. The matter was referred to an Appeal Panel by a delegate of the Registrar.

During their preliminary review, the Panel determined that a re-examination of the worker was required, stating "given the Panel's doubts in respect of the classes ascribed by Dr Rose, the Panel considered that the best approach would be a re-examination of the worker". In justifying this conclusion, the Panel made the following statement: "The Panel was not satisfied that there was sufficient detail contained in the MAC to enable the Panel to determine the appeal in respect of the matters appealed against and that the appeal had raised sufficient doubt as to the classes assigned".

On re-examination, the Panel identified potential errors in two other PIRS categories not identified in Mr Wild's submissions, in relation to Travel and Employability. Further submissions were elicited from the parties in relation to those categories. Following the re-examination, and relying on the report of Dr Gertler (a member of the Panel who conducted the re-examination), the Panel assessed 15 per cent whole person impairment.

NSW Police Force appealed to the Supreme Court, submitting that there were multiple errors of law in that:

(a) the Panel, determining that statement evidence was inadmissible; proceeded to admit that evidence through the report of Dr Gertler.
(b) the Panel, prior to making a determination that the MAC contained a demonstrable error, conducted a re-examination of the worker. The entitlement to a fresh examination was contingent upon a determination that a ground of appeal in section 327(3) had been established.
(c) the Panel relied on the findings of the re-examination performed by Dr Gertler in reaching their conclusion that the MAC contained a demonstrable error.
(d) Mr Wild had appealed against the MAC on specific grounds, that is that the AMS had erred in assessing the PIRS classes Social and Recreational Activities and Concentration,

Persistence and Pace, and the Panel did not limit its review to the grounds of appeal on which the appeal was made, in breach of section 328(2).

Held

His Honour held that the Panel had erred in conducting a re-examination of Mr Wild before reaching the conclusion that the AMS had made a demonstrable error: "The course of events related earlier and the reasons themselves show that it was at the preliminary stage where the Panel had some doubts… about the classes assigned". It was held that if an assessment can be carried out in the course of an appeal, that assessment cannot take place before the Panel has determined that there is an error in the certificate.

In taking into account the report provided by Dr Gertler following his re-examination of Mr Wild, the error identified in ground (c) above was established. His Honour held that the Panel should also have rejected the material in Dr Gertler's report, in line with their rejection of the further evidence of Mr Wild, accepting submission (a) above.

His Honour held that the Panel had also erred in considering the PIRS categories outside of those identified in Mr Wild's submissions on appeal. The words "grounds of appeal" in section 328(2) are not equivalent to "grounds for appeal" in section 327. The words are directed to greater particularity than simply categorising the appeal as being within one or more of the grounds in section 327(3). That is the purpose of requiring submissions detailing the grounds of the appeal.

Implications

Panels should be aware of two implications arising from this decision. Where a re-examination is required, the preliminary review should identify that a ground for appeal has been established, and not that the re-examination is for the purpose of identifying whether a ground for appeal can be established. This decision also clarifies section 328(2).

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Judgment summary

Pateman v Peninsula Village Limited trading as Peninsula Village Retirement Centre and Ors **[2007] NSWSC 586**
(Johnson J, 8 June 2007)

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Facts

The plaintiff lodged an application to resolve a dispute in the Commission, claiming lump sum compensation under sections 66 and 67 of *Workers Compensation Act* 1987 in respect of the injuries sustained in the course of her employment. The Commission referred the matter for medical assessment under Part 7, Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act), appointing Dr Pillemer as the approved medical specialist (AMS).

The AMS noted on examination that the plaintiff had renal angle percussion tenderness and that she had been having urinary symptoms for a number of years. In providing a summary of the plaintiff's injuries and diagnosis, the AMS found that while it is certainly possible that she is getting symptoms from a mild disc lesion at the L4/5 level of her low back, her presentation cannot be explained on the basis of a mechanical low back problem and that in the AMS's opinion her symptoms were very suggestive of bilateral renal problems.

However, the AMS did provide an assessment of the body parts referred for assessment – the plaintiff's back and lumbar spine. In respect of the back, he found that the plaintiff had "an 8% permanent impairment of her back compared to a most extreme case as a result of her injuries at work in October 2001". In respect of the lumbar spine, he found 5% Whole Person Impairment and noted, "I have not added any additional impairment for interference with activities of daily living as I feel her main impairment is in fact due to an unrelated urological condition" and "all of this impairment is due to her injuries at work and the nature and conditions of her work prior to 1 January 2002".

The Plaintiff lodged an application to appeal against the AMS's medical assessment under section 327(1) of the Act. The Registrar determined, under sections 327(3) and (4) of the Act, that the appeal should proceed. An Appeal Panel constituted under section 328(1) of the Act heard the appeal and confirmed the AMS's medical assessment certificate.

The central issue on appeal was the reference in the AMS's certificate to possible existence of a renal condition or urinary symptoms in the plaintiff. It was common ground that none of the medical reports before the AMS referred to such a condition.

The Appeal Panel in reviewing the AMS's decision held a preliminary review and despite the plaintiff's submissions that the matter should be referred for further assessment by the Appeal Panel or, in the alternative, that the plaintiff should be re-examined by the Appeal Panel, determined that it was not necessary for the plaintiff to undergo a further medical assessment because there was sufficient information to allow the Appeal Panel to make an assessment of the loss suffered by the plaintiff.

The Appeal Panel in confirming the AMS's medical assessment provided the following reasons:

> "Having regard to the ambiguity to be found in the body of the report, the Panel gave considerable thought to whether or not the ultimate assessment by Dr Pillemer was fair and reasonable in the circumstances, or whether the matter should be referred for further assessment or whether the Appellant should be re-examined by the appeal panel. The medical members of the Panel considered that leaving aside completely the question of any symptoms

that may relate to a possible urinary problem, the ultimate determinations by Dr Pillemer were, if anything, somewhat generous, but not such as would require a further assessment".

Before the Supreme Court, the plaintiff argued that the Appeal Panel erred in failing to exercise its statutory power in accordance with law, that it erred in reviewing the AMS's decision rather than conducting a hearing de novo, that it failed to exercise its discretionary power reasonably or in accordance with the overriding policy and purpose of the Act, and finally that the Appeal Panel failed to provide proper or adequate reasons for its decision to confirm the certificate of assessment.

Held

Summons dismissed.

- A fair reading of the AMS's medical assessment certificate suggests that he has not taken into account for the purposes of the assessment, the renal condition that he attributed to the plaintiff. The AMS's report identified specifically the back injuries that were the subject of the claim [106] and [107].

- The Appeal Panel approached its task by examining the AMS's certificate to determine whether he had, erroneously, taken into account the renal condition adversely to the plaintiff. Consistent with the exercise of its de novo review function, the Appeal Panel did not stop there. The Appeal Panel proceeded to form its own conclusions with respect to the plaintiff's impairment. The Appeal Panel understood the nature of its task to conduct a de novo review [108], [110] and [116].

- In the exercise of its statutory function, the Appeal Panel considered whether a further medical examination of the plaintiff should take place or whether the plaintiff should be examined by the Appeal Panel itself. The Appeal Panel determined that those steps ought not be taken in this case and this conclusion was open to the Appeal Panel in the exercise of its discretion and was not manifestly unreasonable [117].

- There has been no failure to give reasons in this case. The conclusions of the Appeal Panel are clear enough. In reality, the Appeal panel has determined, on all the evidence that no better results should arise than that determined by the AMS, despite the Appeal Panel's view that this outcome may have been more favourable to the plaintiff than was warranted. The error of the type identified in *Campbelltown City Council v Vegan* [2006] NSWCA 284 (*Vegan)* is not demonstrated in this case. Unlike *Vegan*, this is not a case where a medical assessment certificate was revoked by the Appeal Panel and where there is an implied obligation to give reasons for reaching a different view to that of the AMS. Rather, the Appeal Panel has formed the view that the AMS's ultimate percentage determinations were appropriate and, indeed, generous to the plaintiff, putting aside entirely the question of a renal condition. It may be taken that the Appeal Panel was otherwise endorsing and adopting the reasoning and conclusions of the AMS [112] and [114].

Implications

The Court confirmed that the decision at first instance of Wood CJ in *Campbelltown City Council v Vegan* [2006] NSWCA 284, concerning the nature of an appeal to an Appeal Panel is unaffected by the decision of the Court of Appeal in *Vegan* and that the question of whether or not to determine an appeal on papers or to conduct further examination is a discretionary matter for the Appeal Panel to determine in the circumstances of each case.

In dismissing the plaintiff's summons, the Court held that the Appeal Panel was not required to give more detailed reasons than those given and that the Appeal Panel understood its statutory function to conduct a de novo review. The Court's view appears to be that in matters where an Appeal

Panel is confirming the AMS's medical assessment, it may be taken that the Panel is adopting or endorsing the AMS's reasoning and as such a detailed reasoning is not necessary as it would be in matters where the AMS's medical assessment is revoked.

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Judgment Summary

***Peachey v Bildom Pty Ltd* [2020] NSWSC 781**

(Adamson J, 22 June 2020)

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Facts

The plaintiff worker suffered a psychological injury in the course of her employment. The plaintiff was referred to an AMS who issued a certificate assessing the plaintiff to suffer from a 13% WPI. Both the plaintiff and the defendant appealed the MAC. The plaintiff appealed the MAC on the basis that the AMS failed to properly apply clauses 1.31 and 1.32 of the of the Guidelines. The plaintiff further submitted that there ought to have been some adjustment in accordance with cl 1.32, which would have resulted in a WPI score of an additional 2 or 3%. In response the employer submitted that although the worker had been prescribed with anti-depressant medication, she had only experienced an improvement in her symptomatology when she went back to work. As a result, the employer contended that the AMS was correct not to make an allowance for the effects of treatment.

The matter proceeded to the Appeal Panel who concluded that the AMS did not specifically refer to the question of whether there should have been an adjustment for the effect of treatment in the MAC. The Appeal Panel was not satisfied that there had been an apparent substantial or total elimination of the applicant's permanent impairment as a result of long term treatment. The Appeal Panel reached the view that no adjustment should be made for the effects of treatment.

The worker filed a summons in the Supreme Court and relied on the following grounds:

1. The Panel erred in law finding that the AMS had correctly applied clause 1.32 of the SIRA NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (the applicable guidelines) and that no adjustment for treatment should be made.
2. The Panel erred in law by impermissibly filling in the gaps in the path of reasoning by reference to an assumption that the decision of the AMS was made according to law in respect of the application of clause 1.32 of the Guidelines by the AMS.
3. The Panel failed to correctly apply clause 1.32 of the Guidelines by failing to consider all relevant considerations such as the plaintiff's ability to return to some employment
4. The Panel failed to give any, or any adequate, reasons for the inference that it drew, or the assumption that it made, that the AMS was of the opinion that no adjustment should be made for the effect of treatment in accordance with clause 1.32 of the applicable guidelines and for the methodology it adopted in respect of the application of clause 1.32

Held: Summons Dismissed

Discussion and Findings

1. The Appeal Panel had an obligation to set out its path of reasoning in sufficient detail to expose whether it had complied with the law. In the present case, the Appeal Panel had to explain why it considered that no adjustment under clause 1.32 of the Guidelines was warranted. The Appeal Panel inferred that the AMS had decided that no adjustment was

warranted under clause 1.32 of the Guidelines. Adamson J did not consider this conclusion was available to the Appeal Panel, having regard to the reasons of the AMS which were insufficient to record that he had considered clause 1.32 of the Guidelines at all. Adamson J was satisfied that the AMS's failure to mention clause 1.32 is consistent with him having overlook it pursuant to *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9.

2. Whilst the Appeal Panel's reasons were insufficient, his Honour was not persuaded that anything turned on the Appeal Panel's incorrect conclusion in this respect since the Appeal Panel's reasons are sufficient to record that it considered the question of whether an adjustment was warranted under cl 1.32 for itself in any event. Clause 1.32 of the Guidelines requires a comparison to be made between the claimant's original degree of impairment as a result of the injury before the effective treatment and the claimant's degree of impairment as a consequence of treatment to determine whether the treatment has resulted in apparent substantial or total elimination of the original impairment. Adamson J was not satisfied that the Appeal Panel explained why it considered that this comparison would indicate the improvement as a consequence of treatment or identify the treatment said to have been effective.

3. Adamson J stated that in order to address clause 1.32, the Appeal Panel was obliged to consider and record in its reasons whether there had been long-term treatment and if so, what the treatment comprised of and whether it has been effective to result in substantial or total elimination of the original permanent impairment. The Appeal Panel was also obliged to consider whether if treatment was withdrawn, is the worker likely to revert to the original degree of impairment. His honour was satisfied that the approach taken by the Appeal Panel as disclosed by its reasons was insufficient.

Orders

Adamson J issued:

1. Set aside the decision of the Appeal Panel
2. Remit the matter to the Commission to be determined by an Appeal Panel
3. Order the first defendant to pay the plaintiff's costs of the proceedings.

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Judgment summary

***Pereira v Siemens Ltd* [2015] NSWSC 1133**
(Garling J, 21 August 2015)

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Facts

The worker had been employed in Pakistan for 17 years and Australia for 32 years. In Australia he worked for Siemens Ltd as a production planner and was exposed to noise during his employment with Siemens. He made a claim for lump sum compensation in respect of 19 per cent whole person impairment for loss of hearing, and a claim for the cost of supply and fitting of hearing aids. The employer denied compensation on the basis that the WPI was assessed at 7 per cent and did not meet the compensable threshold. The worker applied to the Commission to resolve the dispute.

Consent orders were entered by the Commission and the matter was referred to an AMS for assessment of the nature and extent of hearing loss, and whether hearing aids were reasonably necessary. The AMS assessed Mr Pereira's hearing loss at 7 per cent WPI after making a 34 per cent deduction. The AMS made his deduction on the basis that 17 years of Mr Pereira's whole working life, which amount to 34 per cent, was spent in Pakistan.

Mr Pereira appealed against the decision of the AMS. The Panel rejected the appeal but issued a certificate which recorded a WPI of 8 per cent. In its decision, the Panel adopted the reasoning of the AMS and concluded that a 34 per cent deduction was appropriate.

Mr Pereira appealed to the Supreme Court of NSW and the primary issue before the Court was whether the Certificate and reasons of the Panel ought to be set aside.

Decision

Garling J explained the general operation of s 17 of the 1987 Act and the process encompassed by s 323 of the 1998 Act. With respect to s 323, his Honour set out the following steps in making a deduction:

1. there must be a finding of fact that the worker has suffered an injury at work which has resulted in a degree of permanent impairment;
2. there must be an assessment of the extent of that impairment expressed as a percentage of the whole person, and
3. whether the worker had any previous injury, or any pre-existing condition or abnormality.

His Honour noted that a finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition.

In applying the above principles to the current matter, his Honour held that the AMS initially, and the Appeal Panel, fell into jurisdictional error in a number of respects.

First, the Panel made the underlying assumption that the deeming provisions in s 17 may have occurred in employment outside NSW. Second, there was no factual material to support the assumption that Mr Pereira suffered a pre-existing injury in Pakistan. In this regard, his Honour held that it cannot be assumed that the mere existence of a pre-existing injury means that it has

contributed to the current impairment. Accordingly, the facts upon which a pre-existing injury is found must be clearly identified.
Third, the Panel and the AMS wholly failed to consider the question of whether the pre-existing injury caused or contributed to the present whole person impairment. Accordingly, his Honour held that the Panel must have determined whether the pre-existing injury made a difference in the degree of the whole person impairment suffered by Mr Pereira.

Fourth, both the Panel and AMS utilised a methodology, of taking the number of years of exposure and applying it equally across the period, which was unsupported by any evidence before them. In making this finding, his Honour noted the absence of medical knowledge or accepted medical fact in the Panel's reasons to support the assumption that deafness occurs in equal proportions over time.

Finally, the Panel failed to give any consideration as to whether the assessment of the deductible proportion was either costly or difficult pursuant to s 323(2) of the 1998 Act thereby warranting the application of a deduction of 10 per cent.

Accordingly, the Panel's decision was set aside and the matter was remitted to the Panel under s 328(1) of the 1998 Act to determine the matter according to law.

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Judgment summary

Petrovic v BC Serv No 14 Pty Limited & Ors **[2007] NSWSC 1156**
(Hoeben J, 18 October 2007)

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Facts

The Plaintiff suffered injuries to her back, right leg and right arm in February 2003. She claimed compensation under the *Workers Compensation Act* 1987. The matter came before an arbitrator who referred the medical dispute for assessment by an approved medical specialist ('AMS'). The AMS provided Whole Person Impairment ('WPI') assessments of the Plaintiff's cervical/thoracic/lumbar spine and right upper/lower extremity, with a total WPI of 13%.

The Plaintiff appealed against the MAC on the grounds in sections 327(3)(b) and (c) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the 1998 Act') –'additional relevant information' and 'incorrect criteria'. The appeal submissions alleged inconsistencies in the analysis of the AMS, and that the AMS had failed to follow the guidelines. In support of both grounds the Plaintiff relied on statutory declarations of the Plaintiff and her daughter (who accompanied her to the examination), asserting that the AMS did not conduct a proper examination and that the interpreter at the examination did not adequately interpret the history of the Plaintiff and had made mistakes.

A delegate of the Registrar decided that a ground of appeal in section 327(3)(b) was made out in that the statutory declarations filed were 'additional relevant information', and the appeal proceeded to an Appeal Panel.

The Panel concluded that although the statutory declarations came within 'fresh evidence' under section 328(3), it proposed to disregard that evidence because it was contrary to the purpose of the Act (which it said gives prima facie credence to the opinion of the AMS where he has examined the worker and all the competing medical views). The evidence regarding the interpreter was rejected as vague and imprecise.

The Panel confirmed the MAC issued by the AMS (originally it had revoked the MAC and issued a replacement MAC due to issues surrounding the referral of the cervical spine, but it subsequently amended its decision; the later decision confirming the MAC was the decision reviewed by the Court).

The Plaintiff sought review of the Panel's decision in the Supreme Court. The Plaintiff submitted that because of the serious nature of the issues raised in the statutory declarations, the Panel should have conducted a hearing with cross-examination to test the Plaintiff's evidence. The Plaintiff also submitted that the Panel failed to provide reasons for confirming the assessment made by the AMS

Held

The decision of the Appeal Panel is set aside. The matter is remitted to the Registrar for referral to an Appeal Panel for determination according to law.

- The words 'availability of additional relevant information' qualify the words in parentheses in section 327(3)(b) in a significant way. The information must be relevant to the task which was being performed by the AMS i.e. it must be information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by sections 327(3)(c) and (d), but they do not come within subsection 327(3)(b) [31].

- Accordingly the Registrar erred in considering the statutory declarations (which related to the way in which the AMS carried out his examination and the way in which questions and answers were interpreted during the examination) as 'additional relevant information' for the purposes of subsection 327(3)(b) [32]. The Registrar has a gatekeeper function under section 327. To regard statutory declarations such as these as 'additional relevant information' would allow every dissatisfied party to challenge the assessment process of an AMS in the same way thereby gaining automatic access to an appeal [34].

- Once a matter is before the Appeal Panel, its powers are extensive. Section 328(3) does not have the qualification of 'additional relevant information'. The statutory declarations could be considered by the Appeal Panel [35]. The Appeal Panel is not restricted to the grounds considered to be 'made out' by the Registrar but is to carry out its review in accordance with section 328. The matter was properly before the Appeal Panel in this case as no challenge was made to the Registrar's decision [37].

- There was no obligation on the Appeal Panel to conduct a hearing. It could have chosen to do so, but it was also entitled to proceed on the papers as it did [38].

- Given the vague and general nature of the assertions in the statutory declarations, it was open to the Appeal Panel to disregard them when arriving at its decision. It gave full and adequate reasons for taking that course [39].

- The reasons provided by an Appeal Panel need not be lengthy or deal with every matter raised, but a basis for the conclusions reached needs to be set out. [42]. It seems that the Appeal Panel was so focused on dealing with the problems of the statutory declarations, that it failed to provide any reasons, let alone adequate reasons, for why it decided to confirm the MAC issued by the AMS. The Appeal Panel was, at the very least, required to engage the submissions put forward by the plaintiff as to the purported inconsistencies in the assessment of the AMS. This did not occur and that failure constitutes an error of law. [43]

Implications

Although the Court's comments regarding the interpretation of subsection 327(3)(b) are obiter dicta, it is clear that the Court considers that the additional relevant information required to establish a ground of appeal under this subsection must be medical information or information directly related to the decision required to be made, and not matters going to the process whereby the AMS makes the assessment. Information such as statutory declarations of this nature may be given in support of a ground of appeal under subsections 327(3)(c) or (d), but do not make out a ground of appeal under subsection 327(3)(b).

The decision clarifies the Registrar's gatekeeper function with regards to this ground, and in conjunction with the decision in *Riverina Wines Pty Limited v Registrar of the Workers Compensation Commission of NSW & ors* [2007] NSWCA 149 (which referred to the 'significance' of the additional information), providing more scope for the Registrar to refuse appeals made on this basis in accordance with the intent of the legislation.

The Court confirmed that the reasons given by the Appeal Panel need to set out the basis for the conclusions reached (q.v. Basten JA in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284).

The Court also confirmed the broad powers of an Appeal Panel once a matter is properly before it. The Appeal Panel is not limited to considering grounds found to be 'made out' by the Registrar, but must carry out its review in accordance with section 328, addressing the elements of the Certificate challenged in the appeal (q.v. *Crean v Burrangong Pet Food Pty Limited* [2007] NSWSC 839).

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Judgment summary

***Phillips v JW Williamson and RW Williamson trading as Williamson Bros* [2016] NSWSC 1681**
(Schmidt J, 30 November 2016)

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Facts

The worker was injured at work whilst walking backwards in a removalist truck when he fell onto his back, striking his head and right shoulder. He was referred to an AMS for assessment in October 2014.

The MAC and the Panel's decision

The AMS found that the worker suffered 10 per cent upper extremity impairment, which equated to 6 per cent whole person impairment, with a combined total of 13 per cent whole person impairment for all of his injuries. The AMS was of the opinion that deterioration in the worker's condition since 2014 was explained by abnormal illness behaviour.

On appeal, the worker sought to tender additional evidence, not available at the examination by the AMS, which was rejected by the Appeal Panel. The worker also sought to be re-examined by the Appeal Panel to demonstrate that his deterioration was not due to abnormal illness behaviour and that he had not reached maximum medical improvement. The Appeal Panel rejected the applications to tender fresh evidence and for the worker to be re-examined. The worker sought judicial review.

Issues

1. Did the Appeal Panel deny the worker procedural fairness?

2. Was the Appeal Panel's decision otherwise unreasonable?

3. Did the Appeal Panel fail to consider whether the worker had reached maximum medical improvement?

4. Did the Appeal Panel provide adequate reasons?

Decision

Although the summons was filed outside of the three month time limit, the Court granted leave to the worker to bring his application out of time.

Justice Schmidt stated that there was no issue between the parties that the requirements under s 328(2) of the 1998 Act, regarding fresh evidence, were satisfied. The worker was examined by the expert after he had been examined by the AMS. The expert's report was not written until approximately two weeks after he had been examined by the AMS. Her Honour held that the worker sought to demonstrate that there was another explanation for his deterioration, based on the material he tendered. Justice Schmidt stated that the worker's case was also that this material was relevant to the Appeal Panel's determination of whether the AMS had erred in concluding that the worker had reached maximum medical improvement and/or whether further medical investigations were required.

Her Honour concluded that the further material was relevant to what was in issue on the appeal and was apparent on the face of the documents and so accepted by the employer. Justice Schmidt distinguished the decision of *Lukacevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112. In the present case, her Honour held that there was no question as to the probative value of the material on which the worker sought to rely on the appeal. The employer had accepted that it demonstrated that further investigations needed to be carried out.

Her Honour concluded that given the flexible nature of an appeal pursuant to s 328 of the 1998 Act, as discussed in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116, and the obligation to give both parties procedural fairness and natural justice, the Appeal Panel denied the worker procedural fairness. The Panel erred in rejecting the relevant and probative additional material that the worker tendered, unopposed by the employer, to demonstrate the AMS's errors.

Justice Schmidt further held that the exercise of the Appeal Panel's discretion under s 328(3) of the 1998 Act may be challenged on judicial review if it is irrational or vitiated by patent legal error, for example in the case of Wednesbury unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223). Her Honour was of the view that this was such a case.

Her Honour stated that the Appeal Panel failed to understand and consider the worker's case that the deterioration in his condition since his examination in 2014 was the result of consequences of his injuries, which required further investigation, not abnormal illness behaviour.

Justice Schmidt noted that, even reading the reasons in the way discussed in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259, the Appeal Panel also failed to consider the worker's case that his degree of impairment was not fully ascertainable, given the further investigations being pursued into the cause of his worsening symptoms.

Her Honour finally concluded that the reasons given by the Appeal Panel were not sufficient for the Appeal Panel to meet the obligation it had to supply reasons, as discussed in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284.

The Appeal Panel's Medical Assessment Certificate and statement of reasons of 17 August 2015 was set aside and the matter was referred to the Registrar for the appointment of a new Appeal Panel to consider the appeal from the AMS's Medical Assessment Certificate afresh.

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Judgment summary

Marina Pitsonis v Registrar of the Workers Compensation Commission & Anor **[2008] NSWCA 88**
(Mason P, McColl JA and Bell JA, 9 May 2008)

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Facts

The Plaintiff applied to the Commission to determine whether she had suffered whole person impairment ('WPI') for psychological injury. The matter was referred to an approved medical specialist ('AMS') who made an assessment based on the history taken and findings made at examination. The AMS issued a medical assessment certificate ('MAC') assessing a total of 7% WPI.

The worker lodged an appeal against the assessment on the grounds of the availability of additional relevant information, incorrect criteria and demonstrable error (sections 327(3) (b), (c) and (d)). The Registrar was not satisfied that a ground of appeal appeared to exist under section 327(3) and determined the appeal was not to proceed.

The Plaintiff challenged the Registrar's decision by way of judicial review in the Supreme Court and argued that the Registrar was in error in not allowing the appeal to proceed to an Appeal Panel.

The Supreme Court dismissed the summons. The worker then lodged an appeal in the Court of Appeal.

Grounds of appeal

The Plaintiff submitted that:

- The Registrar ought to have proceeded on the basis that the applicant was in a position to prove to the Appeal Panel if necessary, the assertions in their submissions as to matters put to the AMS by way of oral history during the examination and not recorded in the certificate;
- The Registrar ought to have found that the Plaintiff's submissions foreshadowed an arguable appeal showing that the AMS based his assessment on incorrect criteria and demonstrable error;
- An error could be "demonstrable" even though evidence beyond the certificate was required to establish it;
- The AMS failed to apply matters of history or observation recorded in one part of the certificate to the all-important step of determining the relevant class of seriousness applicable with reference to the five PIRS rating criteria that remain contentious;
- The AMS failed to record and take into account material information given to him by the Plaintiff during her examination.

Held

The appeal is dismissed.

- The Plaintiff's submissions filed in the Commission accepted that the AMS had addressed the assessment task by reference to the relevant chapter of the Guides. The thrust of the attack was that the AMS nevertheless failed to give proper effect to aspects of the plaintiff's

history that had been, in some cases, recorded elsewhere in the certificate and, in others, stated by the plaintiff but not recorded [39]. The argument addressing incorrect criteria in section 327(3)(c) went no further than an argument that the AMS had failed to correctly apply the WorkCover Guides for the Evaluation of Permanent Impairment [36].

- Whilst it is arguable that factual errors made by an AMS, as recorded in the Certificate, may be "demonstrable errors" within section 327 (3)(d), they would not usually satisfy the "incorrect criteria" ground for an appeal. Accordingly the Registrar did not err in concluding a ground of appeal under section 327(3) (c) did not exist [39].

- With respect to the meaning of a "demonstrable error" it is implicit that the error has to be a material error [46]. "Demonstrable" means an error that is capable of being demonstrated [47].

- If the word "contained" in section 327(3)(d) were read as no more than "have within itself" then it would follow that section 327(3)(d) would confer the equivalent of a right of appeal on all grounds subject only to the persuasive burden being carried by the Appellant. This would render paragraph (c) redundant and trespass into paragraphs (a) and (b) of section 327(3) [47]. Accordingly, section 327(3)(d) uses "contained" in the more intense meaning of having as a "constituent part, comprising or including". The Appellant must demonstrate to the Registrar that there is an arguable case of error appearing on the face of the Certificate. It may be an error of fact or law, but it must be more than one that depends on evidence that is not within sections 327(3)(a) or (b) being adduced in the appeal [49].

- The appeal to an Appeal Panel is not intended as the opportunity for an application on the basis of fresh evidence tendered without any constraint and/or on the basis of no more than the Appeal Panel being invited to decide the application afresh [48]. Two factors suggested that the jurisdiction and powers of the Appeal Panel are limited. First, if the Appeal Panel's powers were at large, the need to specify grounds of appeal limited to particular categories would be rendered largely otiose. Second, the Appeal Panel is not a tribunal which has any powers other than those necessary to deal with the appeals in question [48].

- The Court did not exclude the possibility that a certificate might be capable of challenge by way of judicial review on the ground that there was, for example, a denial of procedural fairness [60].

Implications

The decision confirms that factual errors in a medical assessment certificate will not usually give rise to a ground of appeal under section 327(3)(c) of the Act.

The decision confirms that the current practice of the Registrar, which is to refuse to allow appeals to proceed where parties rely on subsequent competing assertions to support the contention of error under section 327(3)(d), is appropriate. When challenging a medical assessment certificate on grounds under section 327(3)(d), a party to a medical dispute cannot rely on material other than that contained in the material placed before the AMS and the history and information taken by the AMS at the time of examination.

An error must be a "material" error in order for an appeal to proceed. Accordingly, errors that do not impact upon the assessment of permanent impairment in a material way (for example, errors that would not, if corrected, affect the degree of permanent impairments assessed) do not give rise to a ground of appeal under section 327(3)(d).

Although in the nature of *obiter dictum* the Court of Appeal has confirmed the current preponderance of authority to the effect that the jurisdiction and powers of the Appeal Panel are limited.

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Judgment summary

Pitsonis v Registrar of the Workers Compensation Commission & Anor **[2007] NSWSC 50**
(Malpass AsJ, 13 February 2007)

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Facts

The worker filed an Application to Resolve a Dispute claiming compensation for a psychiatric injury suffered in the course of her employment. The question of the degree of Whole Person Impairment (WPI) was referred for assessment to an Approved Medical Specialist (AMS). The AMS found a WPI of 17%.

The worker appealed against the Medical Assessment Certificate (MAC) pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act). Grounds relied upon were those specified in subsections 327(3)(b), (c) and (d) of the Act. Amongst other submissions, the appellant argued that the history taken by the AMS was inadequate, the inadequacy or error being in the nature of a failure to (accurately) record the history or ask relevant questions. The worker provided statements as evidence of the alleged errors. The appellant also argued that the AMS had failed to correctly apply the PIRS scales in rating the worker's psychiatric impairment.

The Registrar concluded that it did not appear that at least one of the grounds of appeal as specified in section 327(3) of the Act existed.

Held

The summons is dismissed.

- The contents of the MAC do not support the assertion of error. The worker could not overcome the evidentiary hurdle in demonstrating error by looking to competing assertion (made subsequent to the MAC) and speculation [30].

- The error argument failed at this threshold stage so it is unnecessary to further consider whether any alleged error could constitute a 'demonstrable error' [31] (the meaning of this ground was considered at [19]-[22]). Not satisfied the delegate erred in dealing with this ground.

- The meaning of the 'incorrect criteria' ground is unclear, but whatever was intended did not include an appeal on the merits [34]. The assessment process required the AMS to undertake an evaluation of the material placed before him in the context of the guidelines [43]. The case in terms of incorrect criteria is put in terms of failure to correctly apply the guidelines, but the substance of the case now presented is of error in the manner the AMS dealt with the material, and goes to the merits of the assessment made [42]-[43]. This was different to what was submitted to the delegate and accordingly cannot be subject of relief in this court [44]. Not satisfied that the assessment was made on the basis of incorrect criteria; the delegate did not fall into error.

Implications

The meanings of the grounds in sections 327(3)(c) and (d) remain at large, however, this case does put some limits on the extent of these grounds (the ground in section 327(3)(b) was not argued before the Court).

Competing assertion and speculation are insufficient to demonstrate error in a MAC. When statements and assertions are used as evidence of error in history taken, these will not establish a

ground of appeal. It is implied that a demonstrable error must be shown in the MAC with reference to the documents that were before the AMS.

An error in the manner in which an AMS deals with the material before the AMS does not establish an application of incorrect criteria. The ground of incorrect criteria does not allow for a merits review.

The Court also commented on the 'invidious position' of the Registrar or delegate in applying the test under section 327, noted that this has been somewhat clarified by the legislative amendments, and decided at any rate that because the Registrar's reasons employed the statutory language it was impossible to discern what test was applied.

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Judgment summary

Prasad v Workers Compensation Commission **[2010] NSWSC 418**
(Harrison AsJ, 7 May 2010)

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Facts

The plaintiff, Ms Prasad, is a woman of South Indian descent. Ms Prasad had been employed by Rail Corporation New South Wales ("the employer") as a cleaner since 1981. In about 2003 she was a participant in a trial use of a chemical product called "Graffiti Off" that was used in the removal of graffiti from within enclosed railway carriages. Ms Prasad was exposed to this product intermittently and predominantly in the course of cleaning cloths that had been used to apply the chemical. After she commenced to use the chemical Ms Prasad started to experience shortness of breath and thought that she was suffering from asthma. Prior to her exposure to this product Ms Prasad had not displayed any symptoms of lung incapacity.

Ms Prasad made a claim for weekly benefits, medical expenses and lump sum compensation, which resulted in proceedings being commenced in the Commission. Following a teleconference the claim for weekly benefits was settled and the employer was ordered to pay Ms Prasad's medical expenses on production of accounts and receipts. The claim for lump sum compensation was referred by the Registrar to Dr Johnson, AMS, for assessment of Ms Prasad's permanent impairment resulting from the injury to the respiratory system.

Dr Johnson found that Ms Prasad was suffering from Reactive Airways Dysfunction Syndrome ("RADS"). He based his assessment on a lung function test conducted at St Vincent's Clinic on 3 June 2008. This lung function test was said to be the most recent lung test available and using those results Dr Johnson put Ms Prasad's degree of impairment in Class 3 or 26% to 50% whole person impairment ("WPI") according to Table 5-12 on page 195 of AMA5. He issued a MAC on 27 May 2009 certifying that Ms Prasad suffered 38% WPI.

The employer appealed against the medical assessment, relying on grounds of appeal under sections 327(3)(c) and (d). A delegate of the Registrar determined that it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel.

On 28 August 2009, the Appeal Panel issued its preliminary review to the parties in which it proposed an alternative basis for assessing Ms Prasad's WPI. It proposed to apply the provisions of Clause 1.59 of the WorkCover Guides. The Panel considered that KCO (carbon monoxide uptake) was a more accurate measure of impairment than DCO (diffusing capacity for carbon monoxide). The Appeal Panel indicated it had based its alternative approach to the assessment of Ms Prasad's injury on a report from Dr Michael Burns. The Panel noted that its preliminary review had raised issues not raised in the submissions made by the parties. The Panel gave the parties 21 days to file any further submissions concerning the matters raised in its preliminary review.

Both Ms Prasad and the employer made written submissions in response to the Appeal Panel's preliminary review.

The Appeal Panel issued a further preliminary review dated 18 September 2009 noting the plaintiff's concerns as to the application of KCO and the absence of any mention of it in AMA5 and the WorkCover Guides.

In response to the further preliminary review the parties made additional submissions. A report from Dr Ian Gardiner dated 28 September 2009 was included with the submissions made by Ms Prasad. The report from Dr Gardiner specifically addressed Dr Michael Burns' report. Dr Gardiner also cited an article published in 1966 which suggested that people with Ms Prasad's racial

background might have an alveolar volume that is materially less than Europeans. The author proposed that in such cases a proper allowance for alveolar volume should be made when measuring the lung capacity and function of people from this background.

The employer provided further submissions principally arguing that the report of Dr Gardiner amounted to fresh evidence.

By letter dated 7 October 2009 the Appeal Panel sought further results of lung function tests carried out at Concord Hospital on 10 September 2008.

The Appeal Panel went on to consider whether a deduction pursuant to section 323 of the 1998 Act was appropriate and determined it was not. The Appeal Panel issued a decision revoking the MAC issued by Dr Johnson and issuing a new MAC assessing Ms Prasad with an 18% WPI.

Issues

Ms Prasad challenged the decision of the Appeal Panel in the Supreme Court. Ms Prasad submitted that in light of the article highlighted in Dr Gardiner's report the Appeal Panel should have taken into consideration her racial background and the possible relationship between it and her lung function. She submitted that the Appeal Panel should have taken these things into account because they had the potential to establish that she had a higher degree of WPI. Ms Prasad contented that the decision of the Appeal Panel was in these circumstances infected by jurisdictional error and/or error on the face of the record, because it failed to take into account what she contended was a mandatory relevant consideration under the Act.

Ms Prasad made the following submissions in support of her challenge to the Appeal Panel's decision:

(i) A conclusion as to whether a particular matter is a mandatory relevant consideration may be drawn by implication from the subject matter, scope and purpose of the statute (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HAC 40; (1986) 162 CLR 24 per Mason J at [39] and [45]).
(ii) The Appeal Panel was bound to take particular matters into consideration (see *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW* [2007] NSWCA 149 per Campbell at [86]).
(iii) There was no consideration by the Appeal Panel of the scientific matters raised by Dr Gardiner, which went directly to the method devised by the Appeal Panel under clause 1.59 of the WorkCover Guides (see *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 75 ALD 630 at [46] and [47]).
(iv) The Appeal Panel's alternative approach to the assessment of the degree of her whole person impairment was not a general finding of fact in which it could be said that her contentions, including what she relied upon in Dr Gardiner's letter, were appropriately subsumed. Rather, her contentions were material to the decision that the Appeal Panel actually made. (See *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [89] and [91]).
(v) If her material had been taken into account, it would have had the potential to establish that she had a higher degree of WPI.
(vi) The material contained in Dr Gardiner's report was not further evidence as the employer submitted.

The employer's response emphasised that in submissions made by Ms Prasad to the Appeal Panel, Dr Gardiner's opinion was referred to and emphasised, as well as his reasons for disagreeing with the Appeal Panel's preliminary review. It argued having sought and received submissions from the parties on Dr Gardiner's topic of concern, there is no evidence or indication that the Appeal Panel thereafter failed to take into account what he emphasised in any event. It noted that the fact that the Appeal Panel did not change its opinion after receiving Ms Prasad's

submissions, including those of Dr Gardiner, does not mean that the Appeal Panel exceeded its jurisdiction, nor does it indicate that there was an error on the face of the record.

Held

In the Supreme Court Harrison J dismissed the summons with costs. The reasons for her Honour's decision are summarised below.

Reasons for Decision

- Her Honour referred to statements of principle in the following cases:

  - *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HAC 40; (1986) 162 CLR 24 per Mason J at [39]-[41];
  - *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 at [212];
  - *SZCBT v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 9 per Stone J at [26];
  - *Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140 at [48] – [49], and
  - *Minister Administering Crown Lands Act v NSW Aboriginal Land Council* [2009] NSWCA 352; (2009) 171 LGERA 56 per Hodgson JA at [9].

- The workers compensation legislation promotes a system designed to compensate injured workers in a proper case by reference to the measure of his or her degree of WPI. Any factor arguably touching upon a proper assessment of that question, including idiosyncratic physiology of an identified racial or ethnic group, needs to be taken into account as a mandatory relevant requirement affecting the proper exercise of discretion. A failure to refer to such a matter in the tribunal's reasons is said to be evidence, at least inferentially, of a failure to consider it.

- On the other hand, there is support for the proposition that not every matter or thing that is germane or critical to an administrative decision must, or even can, be expected to find a place in the expressed reasons of the tribunal. Nor should too close an examination of those reasons be undertaken in the hope of locating putative error. This might be thought to be all the more forceful in the scheme of legislation such as the workers compensation legislation where the question for consideration has been referred to a specialist tribunal with knowledge and experience of medical matters, which one might expect would relevantly have been brought to account in its deliberations and ultimate consideration of the degree of WPI.

- The burden of the plaintiff's submissions in the final analysis was that the Appeal Panel failed to take into account a relevant consideration in making their decision and further that they must have overlooked it because their reasons do not contain any reference to it in terms. Construction of the 1998 Act, which confers the discretion that the Appeal Panel exercised, is said to be determinative of this proposition. There was no reference, other than in a general sense, to particular parts of the 1998 Act that were said to make clear that the Appeal Panel failed to do something that, on a proper construction of the Act, appeared to be mandatory. It was clear that the Appeal Panel considered it was necessary to assess the plaintiff having regard to the fact that she was suffering from two separate and distinct causes of pulmonary dysfunction, and that resort to the methods enshrined in *WorkCover Guides* 1.59 was therefore necessary. What is not clear is that the Appeal Panel did not take into account the opinions of Dr Gardiner in looking beyond the available parameters of empirically assessable impairments.

- The failure by the Appeal Panel to specifically refer to the 1966 study cited by Dr Gardiner was no more than an expression of confidence by the Appeal Panel in the raw data and test results which they were provided and upon which they might be expected to have confidently relied.

- The entire process of assessment was patently one to which exhaustive attention had been paid. The issue of preliminary reviews on two occasions was apt to excite the production of detailed submissions from all interested parties and that is what occurred. The context in which the Appeal Panel formulated its decision must be taken to include this detailed interplay between it and the parties concerned. The plaintiff's analysis is an example of an over-zealous scrutiny of the decision in an attempt to discern whether some inadequacy may be gleaned from the way in which the Appeal Panel expressed its reasons.

- Even if the racial or ethnic idiosyncracies of Ms Prasad amounted to something that the Appeal Panel were bound by the legislation to take into account, a matter about which there was considerable doubt, the judge was not satisfied that the decision that was reached necessarily failed to take it into account in any event. The argument was one that relied upon the failure by the Appeal Panel to refer to it in terms. That fact is not necessarily co-extensive with, or decisive of, the proposition that the Appeal Panel did not consider it. "… in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the court to determine the appropriate weight to be given to matters which are required to be taken into account in exercising statutory power" (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HAC 40; (1986) 162 CLR 24 per Mason J).

Implications

- Not everything needs to be mentioned in the statement of reasons.

- It cannot be concluded that the absence of reference to a fact/situation necessarily means that it was not considered in the decision making process.

- The way the Appeal Panel goes about its decision making process is important. This Appeal Panel provided the parties with its preliminary reviews and received submissions from the parties which indicated that the Appeal Panel considered "data" on this particular worker.

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Judgment summary

***Railcorp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231**
(Harrison AsJ, 26 March 2013)

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Facts

The plaintiff, Ms Haroun suffered multiple injuries to her knees, back and neck on 24 June 2005 and to her forearm, right wrist and right knee on 14 July 2005 whilst in the course of her employment with Railcorp.

Proceedings were first commenced in the Commission in 2006. The matter was referred to an Arbitrator who determined there were injuries suffered on both occasions. The Arbitrator also made findings with the consent of the parties that "the effects of those injuries continue to contribute to any impairment suffered by the applicant." The medical dispute was referred by the Registrar to Approved Medical Specialist ('AMS'), Dr Schultz, for assessment. Dr Schultz issued a medical assessment certificate (MAC) on 22 November 2006 in which he assessed Ms Haroun with 1% whole person impairment (WPI) for the injuries received on 24 June 2005 and 1% WPI for the injuries received on 14 July 2005.

Ms Haroun appealed the MAC of Dr Schultz issued on 22 November 2006 on the basis that Dr Schultz had made findings, which were at odds with the facts as agreed or determined by the Arbitrator. The appeal proceeded to a MAP. Whilst the MAP in its decision dated 22 May 2007 confirmed the whole person impairment assessments made by Dr Schultz, they found that Dr Schultz had erred in that he had made comments inconsistent with the referral and the Arbitrator's findings as to injury.

Ms Haroun brought proceedings in the Supreme Court seeking judicial review of the MAP decision, that summons was dismissed by Harrison AsJ. An appeal from that decision to the Court of Appeal was unsuccessful.

On 29 June 2007 the Commission determined Ms Haroun's lump sum entitlements in accordance with the AMS and MAP assessments and made orders accordingly.

On 12 September 2011 Ms Haroun commenced further proceedings in the Commission. The claim for lump sum compensation was based upon a report by Dr Conrad dated 11 March 2011. On 29 September 2011 the Registrar referred Ms Haroun's medical dispute to Dr Schultz for assessment. Despite objection to the appointment of Dr Shultz as AMS from Ms Haroun, on 30 September 2011 the Registrar's delegate confirmed his decision to refer the medical dispute to Dr Schultz. On 7 November 2011 however a delegate of the Registrar determined that Ms Haroun should be assessed by a different approved medical specialist, Dr Harvey-Sutton.

Dr Harvey-Sutton issued a MAC on 26 March 2012. Railcorp appealed against the assessment of the AMS on the basis that Dr Harvey-Sutton was incorrectly appointed by the Registrar and that she had failed to take into account the previous assessment by Dr Schultz and the determination of the 29 June 2007.

On 9 March 2012 the Registrar determined that a ground of appeal had not been made out and that the appeal was not to proceed.

Issues

Railcorp sought judicial review in the Supreme Court of NSW. The following legal issues were determined by Harrison AsJ:

- Issue 1: whether the determination by the Registrar on 7 November 2011 to appoint Dr Harvey-Sutton as AMS was invalid by reason of the Registrar having been *functus officio*;

- Issue 2: whether Ms Haroun was entitled, under the law at the relevant time, to commence proceedings for additional lump sum compensation; and

- Issue 3: whether Dr Harvey-Sutton erred by failing to consider and take into account the earlier assessment report of Dr Shultz on the basis of which Ms Haroun's previous claim for lump sum compensation had been determined.

Held

Harrison AsJ dismissed the summons with costs.

Reasons for decision

Issue 1:

- Her Honour considered that either or both sections 350(3) or 378(1) gave the Registrar power to reconsider. Her Honour noted that neither provision "seem[s] to confine the number of reconsiderations to one" (at [53]).
- *Samuel v Sebel Furniture Ltd* [2006] NSWWCCPD 141 was quoted with approval.
- Her Honour noted that in his decision on 30 September 2011 confirming the appointment of Dr Shultz, the delegate did not specifically refer to the powers conferred by either ss 350(3) or 378(1) and did not use the word "reconsideration". Her Honour considered that contrary to the delegate's letter to the parties there was an "appropriate legal basis" to reconsider the matter (at [59]-[60]).
- Her Honour referred to cases regarding jurisdictional error (*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; (2010) 78 NSWLR 393 and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531) and determined that the Registrar's delegate was mistaken in his denial of his power to reconsider the decision on 30 September 2011, therefore the decision on that date not to reconsider the appointment of Dr Shultz was invalid and of no legal effect.
- Her Honour determined that despite the invalidity of the decision on 30 September 2011 the decision made on 7 November 2011 to appoint Dr Harvey-Sutton was a valid exercise of the reconsideration power by the Registrar and therefore should stand.
- Her Honour made *obiter dicta* remarks concerning the possible denial of procedural fairness to Ms Haroun when, having objected to Dr Shultz being appointed as the AMS, the delegate did not request from her any reasons for her objection (despite such a course being suggested by the solicitor's for Railcorp) before deciding to appoint Dr Shultz.

Issues 2 and 3:

- Ms Haroun's claim for further or additional lump sum compensation was supported by medical reports assessing a whole person impairment that was higher than the previous order.
- Her Honour found that Ms Haroun was entitled under the law, as it was at the time her application was made, to commence new proceedings for additional lump sum compensation.

- Her Honour applied the principles discussed in *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158 and *Abou-Haidar v Consolidated Wire Pty Ltd* [2010] NSWWCCPD 128:
    - that there is no issue estoppel in respect of a changing situation; and
    - that a worker's medical condition is a situation that is relevantly capable of change.
- Her Honour upheld the Registrar's finding in respect of the present claim that there was no issue estoppel because the degree of whole person impairment is a circumstance capable of change.
- Her Honour disagreed with Railcorp's contention that the AMS's failure to refer to the previous MAC of Dr Shultz was an error or was evidence of the application of incorrect criteria.
- Her Honour noted that the Registrar stated correctly that the role of an AMS is to give an opinion as to the degree of permanent impairment at the time of the examination without the legal constraint from any prior award. The AMS is entitled to apply his/her expertise on the day of the examination.

Implications

The decision highlights the importance of referring to the relevant statutory provisions when deciding whether a power is available, whether to exercise it and/or when exercising a statutory power.

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Judgment summary

***RailCorp NSW v Registrar of the Workers Compensation Commission of NSW* [2014] NSWCA 108**
(Emmett, Macfarlan, Ward JJA, 11 September 2013)

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Facts

The facts are comprehensively set out in [8]-[32] of the above decision. See also *Railcorp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231 and the summary of that decision as it appears in *On Review*.

Issues

RailCorp lodged an appeal to the NSW Court of Appeal from the orders of 26 March 2013. The following legal issues were determined by Emmett JA (Ward and Macfarlan JJA agreeing):

- Issue 1: whether, despite objection to the appointment of Dr Schutz by Mrs Haroun, the delegate's confirmation of his original decision to refer the medical dispute to Dr Schutz on 30 September 2011 was affected by jurisdictional error and was invalid;
- Issue 2: whether, by making the decision of 30 September 2011, the power of the Registrar to reconsider the original decision to refer the assessment to Dr Schutz was exhausted, such that the Registrar no longer had power to entertain any further request for reconsideration of the decision to refer the assessment to Dr Schutz, and
- Issue 3: whether RailCorp was denied procedural fairness by the Registrar in the process of making the decision of 7 November 2011.

Held

Emmett JA dismissed the appeal with costs.

Reasons for decision

Issue 1:

- His Honour held that the delegate's decision sent on 30 September 2011 did no more than inform the parties that, on the basis of that complaint as particularised, the Registrar's delegate was not satisfied that the original decision to appoint Dr Schutz should be altered.
- His Honour determined that the delegate's decision was not a refusal to exercise jurisdiction or a denial of the existence of jurisdiction. Rather, the Registrar's delegate was exercising his jurisdiction by making a decision not to alter the original decision. In so far as the primary judge concluded that the decision of 30 September 2011 was invalid, her Honour erred.
- His Honour noted that the matter is of no moment unless it can be demonstrated that, by making the decision of 30 September 2011, following Mrs Haroun's request of 29 September 2011 to reconsider the original decision, the Registrar's power to consider referral to a different specialist was exhausted.

Issue 2:

- Although this issue was abandoned by RailCorp, his Honour did note that it was difficult to see why there would be any constraint on the Registrar's power to reconsider a referral, at least at any time prior to the completion of an examination by the AMS.

Issue 3:

- His Honour held that RailCorp had every opportunity to advance submissions in opposition to Mrs Haroun's further request for reconsideration of the appointment of Dr Schutz. His Honour noted that an allegation of a denial of procedural fairness requires an examination of all of the surrounding circumstances to determine whether or not such a claim can be established.
- His Honour did not grant leave to RailCorp to raise the question of alleged denial of procedural fairness, given that such a claim would be deemed to failure based on the contentions advanced in the appeal.

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Judgment summary

Rarasea v The Danks Family Trust trading as Caroline Chisholm Nursing Home & Ors **[2007] NSWSC 1072**
(Malpass AsJ, 4 October 2007)

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Facts

The Plaintiff suffered a workplace injury to her left knee in 2004. Radiological evidence showed the presence of degenerative changes. The Plaintiff underwent a total knee replacement. Her Whole Person Impairment (WPI) claim was referred to an AMS who issued a MAC assessing 20% WPI with nil deduction for pre-existing condition. The employer appealed and the appeal came before an Appeal Panel. The Appeal Panel revoked the MAC and issued a new MAC assessing 20%WPI with a 9/10 deduction for pre-existing condition, resulting in a 2%WPI assessment.

The Appeal Panel's reasons included the following:

> "26. The Panel on reading all the material makes the following observations, that the injuries on the dates contained in the referral were not major in terms of impairment. That an arthroscopy one month after the dates of injury the worker was found to have Grade IV changes in the medial compartment indicative of an advanced long term condition.
> 28. The Panel is satisfied the worker had a significant albeit asymptomatic left knee condition, the medical evidence is clear on that point. *D'Aleo v Ambulance Service of NSW* (1996) 14 NSWCCR 139 is authority to support a deduction for a previously asymptomatic pre-existing condition so long as the condition was a contributing factor causing permanent impairment.
> 29. Whilst it is incumbent for an AMS to give reasons for applying a deduction greater than 10% likewise it is incumbent in the face of overwhelming evidence of a pre-existing condition to give reasons as to why no deduction was applied. The reasons of the AMS clearly indicate the demonstrable error where he states, "There are a number of investigations of the left knee which are irrelevant to the present assessment as they predated the total knee replacement".
> 30. For these reasons, the Panel has therefore determined that the Medical Assessment Certificate dated 31 August 2006 given in this matter should be revoked, and a new Medical Assessment Certificate should be issued."

The Plaintiff sought relief pursuant to section 69 of the Supreme Court Act, claiming the Appeal Panel misdirected itself in relation to section 323 and/or inadequately disclosed its reasoning process.

Held

The Certificate issued by the Appeal Panel is set aside. The matter is remitted to the Registrar for referral to an Appeal Panel for determination according to law.

- The Appeal Panel focused on the error made by the AMS, but did not sufficiently express the findings or reasoning process that led to its own assessment. The Appeal Panel made a significant deduction of 90% for pre-existing condition, but how it came to make that deduction is a matter for conjecture. The parties were not left in a position to understand why a WPI of 2% was assessed. The Court remitted this matter due to an inadequacy of reasons given by the Appeal Panel.

Implications

- An Appeal Panel must provide adequate reasons in accordance with the decision in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284 (however, what is required to adequately disclose the reasoning process will vary from case to case, as observed in *Langham v The Mid-Coast Meat Company Pty Ltd & Ors* [2007] NSWSC 732)

- Whilst it is incumbent on an Appeal Panel to give reasons for applying a deduction under section 323 of the Act greater than 10%, likewise, it is incumbent on it in the face of overwhelming evidence of a pre-existing condition to give reasons as to why no deduction is to be applied.

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Judgment summary

Read v Liverpool City Council & Anor **[2007] NSWSC 320**
(Malpass AsJ, 12 April 2007)

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Facts

An AMS issued a MAC assessing at 0%WPI. The Commission failed to provide the AMS with complete documentation. The Worker appealed and the Registrar allowed the appeal to proceed. The Panel considered the documentation that had not been provided to the AMS and confirmed the decision of the AMS.

The Worker sought a declaration that the matter be referred for further assessment back to the AMS under section 329 of the 1998 Act.

Held

The Supreme Court proceedings were misconceived. The referral to the Appeal Panel by the Registrar may not have been correct.

Where an AMS is not provided with documents, the question of whether there is a demonstrable error will depend on the facts of each matter.

Implications

No significant implications found.

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Judgment summary

Rewitu Pty Ltd v The Registrar of the Workers Compensation Commission of New South Wales & Anor **[2007] NSWSC 441**
(Harrison AsJ, 7 May 2007)

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Facts

A Medical Assessment Certificate (MAC) was issued under cover of letter dated 18 April 2006. The worker appealed against the MAC pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act). The appeal was lodged on 17 May 2006.

The delegate declined the appeal, determining that the appeal was lodged outside of the statutory 28-day limitation period. The delegate determined that the appeal period commenced from the issue of the MAC, and that by counting 28 days commencing from 19 April 2006 (the 18th being excluded by virtue of the application of section 36(1) of the *Interpretation Act* 1987) the last day for lodging the appeal was on 16 May 2006.

The worker lodged a judicial review action in the Supreme Court.

Held

The decision of the Registrar is set aside and the matter is remitted back to the Registrar for determination according to law.

- The Appeal was brought within 28 days. The Court referred to submissions by the Plaintiff regarding seven possible starting points for the 28-day limitation period [12]. One of the possible starting points considered by the Court was the date the form or notice is deemed to have been served by operation of Rule 19 of the *Workers Compensation Commission Rules*.

- In coming to the conclusion that the appeal was brought within 28 days, the Court referred to both Rule 19(6)(c) which deems that a document served by the Commission is received on the day following the leaving in the DX Box, and section 36(1) of the *Interpretation Act* 1987, which excludes the date of sending the MAC from the calculation period. Although not entirely clear, the Court adopted the view that either by virtue of operation of section 36(1) of the *Interpretation Act* 1987, or the application of Rule 19(6)(c) of the WCC Rules, or possibly the combination of both, that the last day for lodging the appeal was 17 May 2006. The Court commented that "no time for service of the certificate has been allowed" referring to Rule 19(6)(c).

Implications

Time allowed for service of documents referred to in the WCC Rules (1 day for DX or 4 days by post) should be factored into the calculation of the medical appeal statutory limitation period. This interpretation of the statutory time limit is at odds with the Commission's practice with respect to the calculation of the 28-day limitation period for Arbitral Appeals. Therefore there will be two calculation methods for the two different types of appeals.

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Judgment summary

***Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW & Ors* [2007] NSWCA 149**
(Hodgson JA, Campbell JA, Handley AJA, 25 June 2007)

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Facts

The worker (Second Respondent) sustained injury to her right arm in the course of her employment with the Plaintiff. She made a claim for 70% permanent loss of use of the arm; the claim was disputed by the Plaintiff. The dispute was referred for assessment to an Approved Medical Specialist (AMS). The AMS issued a medical assessment certificate with 0% loss of efficient use of the right arm.

The worker appealed against the assessment of the AMS on the grounds specified in sections 327(3)(c) and (d) of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act). That appeal was unsuccessful and the Commission issued a Certificate of Determination confirming the AMS's medical assessment certificate. A further application seeking to appeal against the medical assessment certificate on the grounds specified in sections 327(a) and (b) of the Act was lodged, seeking that the matter be referred for further assessment. The worker sought leave to include medical reports from the worker's treating doctors, as fresh evidence of deterioration of the worker's condition. The reports were obtained subsequent to the medical assessment, but, in effect, confirmed the same doctors' earlier reports, which were before the AMS and clearly in contrast with the medical assessment certificate.

A delegate of the Registrar considered the matter, and decided to send the matter for further assessment. The reasons of the delegate for making that decision consisted of an internal file note stating, "deterioration from the AMS MAC dated 26.9.02".

The Plaintiff sought judicial review of the delegate's decision. Hislop J concluded that the claimant did not establish error on the part of the delegate and the summons was dismissed (*Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW & Ors* [2005] NSWSC 1260 at [34]). The plaintiff lodged an appeal to the Court of Appeal, against the decision of Hislop J.

Held

Appeal Dismissed (Handley J Dissenting)

Campbell JA

- The ground of appeal stated in section 327(3)(a) is "deterioration of the worker's condition that results in an increase in the degree of permanent impairment". It is capable of applying, without any need to be modified *mutatis mutandis*, to a situation where an appeal is sought on the ground that there has been a deterioration of the worker's condition that results in an increase in the degree of permanent loss of use, or of the efficient use, of that body part [63]. The "deterioration" that section 327(3)(a) talks of is a deterioration from the degree of impairment that has been certified by the medical assessment certificate, over the time since the examination or examinations on the basis of which the medical assessment certificate was issued took place [94].

- Wood CJ at CL correctly observed in *Campbelltown City Council v Vegan* [2004] NSWSC 1129 at [74] that section 327 provides a "gatekeeper role" for the Registrar. It is of significance that the criterion for the appeal proceeding is that it "appears to the Registrar" that at least one of the grounds for appeal specified in subsection (3) exists. That is to say,

the criterion for the appeal proceeding is not the objective existence of any of the grounds of appeal, but that opinion of the Registrar concerning whether one of those grounds exists. The Registrar is required to form an opinion that does not go as far as deciding that the ground is actually made out. To decide that a ground of appeal "exists" is not the same as deciding that the ground of appeal has actually been made out. [72-73and 76].

- Section 327(4) takes the form of saying that the appeal is *not* to proceed *unless* it appears to the Registrar that one of the grounds exists. Thus, it does not say that the appeal *is* to proceed *if* it appears to the Registrar that one of the grounds exists. This leaves some scope for the Registrar to exercise discretion not to allow the appeal to proceed even if there is a basis for saying that one of the types of facts listed in section 327(3) had been established. For example, if an appeal was sought under section 327(3)(b), a situation might arise where the Registrar took the view that there was "additional relevant information", but that its significance was so slight that permitting the appeal to proceed would not be warranted. The exercise of any such discretion would need to be carried out by reference to the scope and purpose of the workers compensation legislation [78].

- The intention of section 327(6) is that the Registrar can refer a medical assessment for further assessment as an alternative to an appeal against the assessment *proceeding (emphasis added)*. Any question of an appeal proceeding on this basis arises only if the appeal survives the exercise of the Registrar's gatekeeper function [88].

- There is no general rule of the common law or principle of natural justice that requires reasons to be given for administrative decisions [106]. The test as to whether reasons are required is whether the decision maker is engaged in determining the legal rights and duties of parties [109]. The decision of the delegate of the Registrar did not finally decide any legal rights and duties; beyond that the worker was entitled to have a reassessment. That is not a decision concerning any ultimate rights to receive or duties to pay compensation [111].

- The delegate of the Registrar is not making a decision of a judicial character when she decides under section 327(4). When the Registrar, or a delegate of the Registrar, decides that there are circumstances such that an appeal can proceed, she is not under any duty to provide reasons for that decision [114].

Hodgson JA

- Although the existence of a medical assessment certificate certifying nil impairment and a later medical report evidencing some impairment is some evidence of deterioration resulting in an increase in the degree of impairment, this does not mean that a Registrar faced with such material would necessarily be satisfied that the ground in section 327(3)(a) existed. If the later medical report is from a doctor who gave an earlier report to similar effect, with which the medical assessment certificate conflicted, the Registrar could well take the view that there was merely an attempt being made to avoid the conclusive effect of the medical assessment certificate [3].

- There is no need for reasons for a decision allowing a matter to go forward to a further decision-making process. It may be different where the Registrar 's decision prevents the matter going forward and this has the potential to finally determine rights [5].

Handley AJA (Dissenting)

- The relevant ground of appeal (section 327(3)(a)) makes the certificate the starting point of inquiry. The ground does not authorise a challenge to the correctness of the certificate as at the date it was given. It is entirely focused on what has happened to the worker since [122].

- The Act does not authorise a further medical assessment where there is a profound conflict in the medical evidence which makes it desirable to have an assessment by another approved medical specialist [125]. The reports of the treating doctors supported the worker's claim that her condition was substantially worse than the AMS had certified, but they were incapable of supporting a claim that her condition had become worse since that certificate.

- The ground in sub para (b) does not cover or permit such a challenge on the basis of material, which repeats as at a later date material that was before the AMS when the certificate was given. Repetitive material is not capable of being "additional relevant information" for the purposes of this ground [132].

Implications

The Court in dismissing the appeal held that decisions of the Registrar pursuant to section 327(3) of the Act are not of judicial nature and that the Registrar is not required to give reasons for allowing an appeal to proceed to a further decision-making process. This clearly stated that in matters where the Registrar is satisfied that a ground of appeal exists, the Registrar can proceed to refer the matter to an Appeal Panel or for further assessment without providing any reasons. However, Hodgson AJ does indicate that the position may be different when leave is not granted by the Registrar to allow an appeal to proceed. In such matters where the decision of the Registrar affects the parties' rights, reasons may be considered as prudent.

Although Campbell AJ has extensively examined the test under the old section 327(4) of the Act, his Honour has made some important comments regarding the Registrar's role as a "gatekeeper". His Honour has specifically held that for a ground of appeal "to appear to exist" is different to when one is required to be satisfied that a ground "is made out". The existence of a ground of appeal requires the Registrar forming an opinion, short of making a determination, that a ground of appeal is made out.

The Court has provided some significant guidance for the Registrar regarding the grounds of appeal under subsections 327(3)(a) and (b) of the Act. Hodgson AJ in relation to ground of appeal under subsection 327(3)(a) provides that if the later medical report is from a doctor who gave an earlier report to similar effect, with which the medical assessment certificate conflicted, the Registrar could well take the view that there was merely an attempt being made to avoid the conclusive effect of the medical assessment certificate.

The judgment of Campbell AJ provides that if an appeal was sought under section 327(3)(b), a situation might arise where the Registrar took the view that there was "additional relevant information", but that its significance was so slight that permitting the appeal to proceed would not be warranted. However, his Honour warns that such discretion must be exercised with reference to the scope and purpose of the workers compensation legislation. Handley AJA also held that the ground in subsection 327(3)(b) does not cover or permit such a challenge on the basis of material, which repeats as at a later date material that was before the AMS when the certificate was given. Repetitive material is not capable of being "additional relevant information" for the purposes of this ground.

It is sufficiently clear that in matters where a party relies on medical evidence that is repetitive to what was before the AMS or reports from the same doctor who provided a similar report that was before the AMS, the Registrar may decline to allow the appeal to proceed.

Its is also clear from Campbell JA's comments regarding referrals for further assessment or reconsideration by an AMS under section 329 of the Act that the intention of section 327(6) is that the Registrar can refer a medical assessment for further assessment or reconsideration as an

alternative to an appeal against the assessment proceeding, but only if the Registrar as a gatekeeper is satisfied that a ground of appeal under section 327(3) has been made out.

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Judgment summary

***Riverina Wines Pty Limited v Registrar of the Workers Compensation Commission of NSW & ors* [2005] NSWSC 1260**
(Hislop J, 8 December 2005)

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Facts

An AMS conducted an assessment in September 2002 and certified that the worker had 0% loss of efficient use of the right arm. The worker appealed to the Registrar on the basis of deterioration and availability of additional relevant information and relied upon reports of two treating practitioners who conducted assessments in May and June 2003 and who assessed the loss at 45% and 50% (these assessments were less than those originally claimed). The findings on physical examination between the AMS and the treating practitioners were significantly different (e.g. swelling, discoloration and moisture).

The Plaintiff submitted that the Registrar's power to refer for further assessment may only be exercised if the precondition contained in section 327(4) of the 1998 Act has been satisfied being that – "at least one of the grounds of appeal specified in subsection (3) exists"; that precondition can only be met if the Registrar is satisfied that the relevant ground of appeal has been made out, and in the circumstances there could be no evidence that the grounds had been made out. Therefore the Registrar could not be satisfied that "additional relevant information" was available.

Held

Hislop J rejected the submissions that there was no evidence of deterioration because the treating practitioners' assessments were less than that originally claimed and the submission that the appeal should fail because the treating practitioners' reports did not evidence deterioration over the period of treatment. The Plaintiff did not establish error on the part of the Registrar's delegate. Appeal dismissed.

Implications

Inferred from Wood CJ reasons in *Vegan* [at 81] that the Registrar in her role as gatekeeper is required to be satisfied 'on the balance of probabilities' that the grounds of appeal exists.

The Registrar must be satisfied that at least one of the grounds of appeal exists before any referral to a Panel or AMS can be made. If the application to appeal demonstrates to the Registrar that the worker's condition has deteriorated since the original medical assessment, then the Registrar may refer the matter back to an AMS instead of referring it to an Appeal Panel.

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Judgment summary

Roberts v The Registrar of the Workers Compensation Commission of NSW & Ors **[2007] NSWSC 612**
(Malpass AsJ, 19 June 2007)

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Facts

The plaintiff lodged an application to resolve a dispute in the Commission as a result of an injury to the eye suffered during the course of his employment. The application was for a "threshold dispute for work injury damages or commutation" and was referred for assessment to an Approved Medical Specialist (AMS). The AMS assessed the whole person impairment at zero percent.

The AMS had before him material including a report from Dr Petsoglou (procured by the plaintiff) and one from Dr Duke (for the second defendant). Dr Petsoglou assessed the plaintiff as having 15% permanent impairment, while Dr Duke presented a figure of 9%, however that figure was expressed to be subject to qualifications. The qualifications arose because the plaintiff's complaints appeared to be dependent upon subjective symptoms, which could not be verified by objective testing. A Reply by the Respondent was not before the AMS.

The AMS did not accept the plaintiff's subjective complaints and assessed zero percent impairment. The plaintiff made application to appeal against the decision of the AMS. The appeal was allowed to proceed and was referred to an Appeal Panel.

The Appeal Panel had before it all material made available to the AMS together with the Reply (admitted by consent) which contained, inter alia, the following:

> "That the applicant does not suffer any permanent loss or impairment as the result of any injury as alleged, or in the alternative, any loss is less than alleged".

The Appeal Panel issued a new medical assessment certificate with the assessment of 0% whole person impairment. A new certificate was issued because it included material omitted from the original certificate.

Before the Supreme Court, the plaintiff argued that the Appeal Panel addressed the wrong question. The issue was said to be the degree of permanent impairment and did not encompass the question of whether or not there was any impairment at all. The plaintiff relied upon the decision of *Cornett Plateau View Aged Care Facility & Ors* [2006] NSWSC 244. The foundation for the argument was that the Reply was not before the AMS and could not have any relevance to what was in issue before him. The issue before the AMS was to be discerned from the material from Drs Petsoglou and Duke (ie that the area of dispute fell within the range between 15% and 9%).

Held

Summons dismissed.

- The matter argued before the Court was not raised in the grounds of appeal before the Appeal Panel. What was before the Appeal Panel was a review of the issues before the AMS as restricted by the grounds of appeal (see *Skillen v MKT Removals Pty Ltd & Ors* [2007] NSWSC 608 [21].

- The issue of no permanent impairment was before the AMS. The plaintiff's argument did not have regard to the qualifications expressed by Dr Duke. In the circumstances, it was untenable to argue that the Appeal Panel addressed the wrong issue [19] and [21].

Implications

There appears to be no real implications insofar as his Honour's determination of the plaintiff's primary argument is concerned. However, in referring to his Honour's own judgment in *Skillen*, his Honour has concluded that the Appeal Panel is to review issues before the AMS as restricted by the grounds of appeal.

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Judgment summary

Robertson v Registrar of the Workers Compensation Commission & Beny's Joinery Pty Ltd **[2008] NSWSC 918**
(Smart AJ, 5 September 2008)

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Facts

The Plaintiff worker suffered an amputation injury to his left index finger in the course of his employment with the second defendant. The matter was referred to an Approved Medical Specialist ('AMS') who subsequently issued a medical assessment certificate ('MAC') on 6 September 2007. On 26 October 2007, 18 days after the last day permitted to file an appeal, the Plaintiff's solicitors lodged an application to appeal the decision of the AMS outside the prescribed 28-day period pursuant to subsection 327(5) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the Act'), on the grounds of appeal as specified in subsections 327(3)(b), 327(3)(c) and 327(3)(d) of that Act. The delegate of the Registrar determined that there were no special circumstances to justify an increase in the period for an appeal, and that a ground of appeal had not been made out.

In their submissions, the Plaintiff's solicitors declared that they sought instructions from the Plaintiff as to the potential application to appeal immediately after the issuing of the MAC, but could not provide legal advice on the proper basis or justification for lodging an appeal until a comprehensive medical opinion was obtained from the Plaintiff's treating doctor. The treating doctor was unable to provide the medical opinion due to prior commitments overseas. It was not until 18 October 2007 that the Plaintiff's solicitors received the medical opinion, on which basis the appeal was subsequently lodged outside the 28-day period. It was submitted that the unavailability of the medical opinion that was the very basis of the solicitors' decision as to whether or not to certify and lodge the appeal constitutes special circumstances that could justify an increase in the period for an appeal.

The additional relevant information submitted within the scope of subsection 327(3)(b) came in the form of a statutory declaration that raised issues on how the AMS conducted the assessment, in general, and the way the questions and answers were exchanged during the examination, in particular. Relying on the decision of Hoeben J in *Petrovic v BC Serv No 14 Pty Limited & Ors* [2007] NSWSC 1156 ('*Petrovic*'), the delegate of the Registrar determined that this could not be regarded as 'additional relevant information' and therefore a ground of appeal under subsection 327(3)(b) was not made out.

In determining the existence of special circumstances, the delegate of the Registrar considered the decision in *Aguiar v Registrar to the Workers Compensation Commission of NSW & Ors* [2005] NSWSC 1017 ('*Aguiar*') that defined "special circumstances" in the context of subsection 327(5). The delegate found the Plaintiff's case to be analogous to the circumstances in *Aguiar* and adopted Malpass AsJ's decision in that case in finding that the said circumstances could not be regarded as "special" and in declining to allow an increase in the period for an appeal. The delegate of the Registrar further determined that grounds of appeal under subsections 327(3)(c) and 327(3)(d) had not been made out.

The Plaintiff filed a Summons for judicial review in the Supreme Court, challenging the decision of the delegate of the Registrar in not finding special circumstances and seeking an order to quash the decision of not finding a ground of appeal under subsection 327(3). The Plaintiff's solicitors contended that the delegate of the Registrar misdirected herself and ignored relevant matters that constituted arguments for the existence of special circumstances and submissions made towards the grounds of appeal.

Held

The delegate of the Registrar erred in law in considering "special circumstances" in the context of subsection 327(5) of the Act; the decision of the delegate of the Registrar be quashed.

Smart AJ found that the delegate of the Registrar paid too much attention to the details of *Aguiar,* thereby misdirecting herself in not having proper regard to the particular circumstances of the Plaintiff's case (at [51]-[52]. In relying on the principles set out in *Jess v Scott & Others* (1986) 12 FCR 197, his Honour acknowledged the emphasis placed by the appellate courts in focusing on the facts of the particular case in deciding applications for extensions of time to appeal due to the existence of special circumstances (at [47]. He also disagreed with the decision of Malpass AsJ in *Aguiar* that the circumstances, as being argued in the current case, could not be regarded as "special" in the required sense.

In disagreeing with Malpass AsJ in *Aguiar*, his Honour said:

> *'When the "mistake" of a solicitor in not meeting the time limit for the appeal application is because he takes the view that he cannot provide legal services because of s 327(8) of the Act without additional medical advice which cannot be obtained within the time limit, that is also capable of constituting a special circumstance and one justifying an extension of time.'* (at [49]

His Honour further particularized at [51] the issues which the delegate of the Registrar should have considered, including: the reasons for the doctor's unavailability; the period of delay; the costs and constraints in seeking the availability of other suitably qualified specialists on short notice; the underlying reasons in the solicitors' refusal to certify and lodge the appeal without timely medical advice (bearing in mind the statutory duties of the solicitors under the provisions of the *Legal Profession Act* 2004); the blamelessness of the Plaintiff; and, the Plaintiff's reliance on his own solicitors.

In relation to the grounds of appeal under subsection 327(3) proffered in the application, his Honour followed the principles set down in *Petrovic* and affirmed the decision of the delegate of the Registrar in not finding that a ground had been made out in subsection 327(3)(b). His Honour however found that there is an arguable case for the Plaintiff to pursue a ground of appeal under subsection 327(3)(c) and deferred to the power of the Registrar to deal with this issue on remittance of the matter.

Implications

- The decision represents a clear departure from the principles adopted by Malpass AsJ in *Aguiar* by enabling the Registrar to broaden the scope of interpretation of subsection 327(5) in considering "special circumstances".
- The judgment reiterates that decision makers should exercise the utmost care in relying on previous cases. Smart AJ stated that: "*the power to grant or refuse an extension of time should not be exercised in an arbitrary fashion nor be encumbered by a series of further rules*" (at [49]).
- In considering the existence of special circumstances, the decision maker should have proper and careful regard to the facts of the particular case and not be constrained by similar factual bases or principles set down in other or similar cases, in spite of their binding nature.

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Judgment summary

Roads and Maritime Services v Rodger Wilson **[2016] NSWSC 1499**
(Fagan J, 14 October 2016)

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Facts

The worker received an inversion injury to his right ankle when he stepped out of a tow truck on the Sydney Harbour Bridge and his right foot landed on a raised "cat's eye" lane marker. The worker had surgery to his right ankle and made a claim for lump sum compensation for WPI.

The MAC and the Panel's decision

In assessing WPI, the AMS assessed 2 per cent on account of restriction of the right ankle movements and 4 per cent WPI for wasting of the right calf. Ultimately, the MAC only recorded that the worker suffered 4 per cent WPI. Justice Fagan inferred that the AMS did not consider that the two figures could be summed because the MAC was issued for just the greater of them, namely, 4 per cent.

In the medical evidence, there was a suggestion that the worker had a pre-existing condition. However, the AMS made no deduction for any pre-existing condition. This was not of significance as the threshold of greater than 10 per cent WPI had not been met. The worker appealed the AMS's MAC.

The Appeal Panel did not re-examine the worker and revoked the MAC and issued a new certificate, assessing 15 per cent WPI. The Panel was of the view that the AMS failed to consider paragraph 3.18 of the WorkCover Guides to the Evaluation of Permanent Impairment 3rd edition (the WorkCover Guides). The employer appealed.

Issues

1. Whether the Appeal Panel misconstrued its task under s 327(3) and s 328(2) of the 1998 Act in that it failed to consider whether the pre-existing condition of arthritis in the right ankle and pre-existing injuries to the right ankle contributed to the impairment assessed;
2. Whether the Appeal Panel failed to make any deduction for the pre-existing condition of arthritis in the right ankle and pre-existing injuries to the right ankle;
3. Whether the Appeal Panel failed by confining itself to a review of whether the AMS had assessed the right ankle in accordance with the WorkCover Guides;
4. Whether the Appeal Panel failed to have regard to relevant material, being evidence of a pre-existing condition of arthritis or pre-existing injury in the right ankle;
5. Whether the Appeal Panel gave any, or any adequate reasons, as to why it did not consider the relevant material regarding the pre-existing injury, condition or abnormality;
6. Whether the Appeal Panel gave any, or any adequate reasons, as to why it did not make a deduction under s 323 for pre-existing arthritis or pre-existing injury in the right ankle, and
7. Whether as a result of the above alleged errors, the MAC was illogical, irrational and legally unreasonable.

Decision

Justice Fagan stated that it was clear that the AMS's assessment of the degree of WPI to be attributed to the ankylosed ankle applying the AMA Guides was erroneous because their operation was quite inconsistent with paragraph 3.18 of the WorkCover Guides and the latter must prevail.

His Honour stated that when the Appeal Panel revoked the AMS's assessment of WPI, they were bound to consider all medical issues and evidence which bore upon the assessment. This necessarily included consideration of whether any proportion of the WPI which was otherwise demonstrated was due to the previous injury, pre-existing condition or abnormality of the right ankle. Once the Appeal Panel had determined that the MAC should be revoked, it was incumbent upon them, as a matter of law, to apply the WorkCover Guides fully in arriving at a fresh assessment and issuing a new certificate. That necessitated consideration of any contribution to the assessed WPI of 15 per cent (from paragraph 3.18 of the WorkCover Guides) which should be attributed to the pre-existing injury.

Justice Fagan held that it was not open to the Appeal Panel to disregard or fail to assess the evidence of pre-existing injury which was before the Panel. His Honour held that the Appeal Panel erred in its approach in applying *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 (*Police Force*), in that in issuing a new MAC, it was not necessary for the Appeal Panel to consider any aspect of WPI other than the correction of the AMS's erroneous application of the AMA Guides, being the correction of his failure to give effect to paragraph 3.18 of the WorkCover Guides.

Justice Fagan was of the view that [39]–[53] of *Police Force* held that there is a limitation of the grounds to which regard could be had in determining whether or not the MAC under appeal should be revoked. His Honour stated that "Once a ground so raised by the appellant has been upheld by the Appeal Panel resulting in the revocation of the Medical Assessment Certificate, the whole matter of the assessment must be redone in order to provide the basis for generating a new certificate which will stand in the first one's stead".

His Honour expressly stated that there is no conflict between *Police Force* and *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053 (*Drosd*). Fagan J held that in reassessing WPI, the Appeal Panel was bound to make a determination of what, if any, contribution to the worker's WPI had been made by his prior accident or by any other pre-existing condition. The failure to address this question warranted the Appeal Panel's certificate to be declared void by the Court. His Honour agreed with Justice Davies' comment in *Police Force* that the further physical examination could only be requested once the Appeal Panel had determined that the original MAC was to be revoked.

Justice Fagan added that the terms in which the Appeal Panel purported to dispense with the other aspects of the appeal were so vague and uncertain as not to constitute adequate reasons. His Honour further held that it the Appeal Panel meant that they were "unable" to consider afresh the contribution of past injury because the worker was not available for physical examination by a Panel member, that also constituted legal error. Section 324(3) of the 1998 Act gave the Appeal Panel the power to undertake a further medical examination.

Implications

This decision provides clarification regarding the relationship between *Drosd* and *Police Force*. Justice Fagan has stated that the two decisions are not in conflict. His Honour has indicated that in looking for error, the Appeal Panel is confined to the grounds identified by the appellant. However, once error has been found, the Appeal Panel is entitled to look at the matter afresh and consider all material. His Honour held that according to paragraph 3.18, the assessor is to apply 15 per cent WPI to an ankle joint where arthrodesis has fixed the ankle in the optimum position irrespective of what may be the residual range of movement.

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Robbie v Strasburger Enterprises Pty Ltd t/as Quix Food Stores **[2017] NSWSC 363**
(N Adams J, 7 April 2017)

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Facts

In 2003, the worker injured her lower back when she was loading drinks into a fridge. After resuming her pre-injury duties, in 2005, whilst moving milk crates, she felt severe aching in her lower back. She underwent physiotherapy and following deterioration, underwent two L4/5 discectomies. The worker made a claim for lump sum compensation.

The MAC and the Delegate's decision

The AMS, after arriving at 12 per cent, added the two modifiers for the two surgeries before applying the Combined Values Chart. This resulted in an assessment of 14 per cent whole person impairment in the MAC.

The worker lodged an appeal, taking issue with the method of calculation used by the AMS. She submitted that the impairment ratings from the two surgeries should not have been combined prior to the application of the Combined Values Chart.

The Registrar's Delegate determined that the appeal should not proceed as it did not disclose demonstrable error. The Delegate held that in accordance with cl 4.37 and Table 4.2 of the *NSW workers compensation guidelines for the evaluation of permanent impairment* (the Guidelines) that additional ratings must be added together before they are combined with the DRE assessment. The worker sought judicial review of the Delegate's decision.

Issue

1. Whether the Delegate erred in misinterpreting paragraph 4.37 of the Guidelines.

Decision

After reciting extracts from the relevant legislation and guides and setting out the parties' submissions, N Adams J stated that the issue in dispute was a narrow one involving identification of the proper methodology to adopt when making allowance for the effect of multiple surgeries on the calculation of whole person impairment for certain spinal impairments.

Her Honour was of the view that to make out a basis for relief, the worker must establish that the Delegate's construction of paragraph 4.37 was incorrect such that his reasons demonstrated either error of law on the face of the record or jurisdictional error.

Adams J stated that although the Guidelines are not a statute, they are a statutory instrument created under s 376 of the 1998 Act and gazetted like other delegated legislation. Her Honour held that the ordinary principles of statutory interpretation apply to the construction of the Guidelines.

Her Honour was not satisfied that error was disclosed as the text of paragraph 4.37 of the guidelines did not support the worker's construction and her Honour was not satisfied that paragraph 1.18 of the Guidelines was relevant to the interpretation of paragraph 4.37 in the manner that the worker contended.

In relation to the calculation of whole person impairment for persisting radiculopathy, her Honour examined the competing interpretations of the third of three steps which provides:

> "Combine this value [12%] "with the *appropriate additional amount* from Table 4.2 to determine the final WPI." (emphasis added)

Adams J held that the Delegate stated in his reasons that the reference in the third step to combining the "appropriate additional amount" envisages a single amount being combined with the existing whole person impairment. Her Honour was not satisfied that error was disclosed in that interpretation of what is contemplated by the third step. Adams J held that the words "appropriate additional amount" clearly envisage one amount being arrived at after regard is had to Table 4.2 and the relevant moderators identified in that table.

Her Honour was of the view that had it been intended that a two-step process would be undertaken, it would have been described in those terms. Her Honour found that this would give the words "appropriate additional amount" a great deal of work to do to suggest that they imply that a multiple-step process be undertaken.

In regards to the worker's argument concerning paragraph 1.18, the difficulty was that it required each of the modifiers in Table 4.2 to be viewed as a separate "impairment". Her Honour was not satisfied that the separate ratings in Table 4.2 equate to separate impairments before noting that paragraph 1.18 is to be read subject to paragraph 4.37.

Adams J was not satisfied that either jurisdictional error or error on the face of the record was disclosed. The summons was dismissed.

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Ryder v Sundance Bakehouse **[2015] NSWSC 526**
(Campbell J, 7 May 2015)

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Facts

Jodie Ryder worked as a shop assistant at Sundance Bakehouse. She sustained an injury to her lower back on 18 November 2005 when she attempted to lift a box marked 'lettuces' which instead contained pumpkins.

In 2007 Ms Ryder was paid lump sum compensation for 7 per cent WPI in respect of her lumbar spine condition. In 2009 she underwent a L5/S1 discectomy surgery and by 2012 her condition deteriorated. In 2012 Ms Ryder served a medical report on Sundance for the purpose of claiming a further lump sum award for increased impairment. Sundance disputed this claim.

On 13 December 2012 Ms Ryder filed an application with the Commission for referral for medical assessment by an AMS. In his MAC dated 16 December 2013 the AMS assessed Ms Ryder's whole person impairment as 15 per cent but reduced this to 14 per cent, for pre-existing degenerative changes to Ms Ryder's spine. On appeal to the Panel, it was submitted that there was no evidence before the AMS justifying a deduction under s 323 of the 1998 Act. On 20 June 2014 the Panel confirmed the MAC and they were satisfied that the AMS correctly applied the criteria to the evidence before him.

Ms Ryder sought to challenge the legality of the MAC and the decision of the Panel.

Issue(s)

Ms Ryder sought judicial review on three grounds:
1. the Panel fell into legal error in their construction and application of s 323 of the 1998 Act;
2. whether the Panel asked itself the wrong question under s 323 of the 1998 Act, and
3. that there was no evidence available to the Panel to support a finding that a portion of the degree of permanent impairment was due to a pre-existing abnormality.

Procedural issues

The defendant submitted that the challenge to the MAC was not made within the 3 month time limit for bringing proceedings before the Supreme Court (*Uniform Civil Procedure Rules* 2005, Rule 59.10). His Honour rejected this argument in line with the authority in *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 (*Vitaz*) and *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43.

His Honour determined that the Panel's decision had "apparent legal effect" for the purpose of judicial review. He confirmed that the AMS is neither a proper or necessary party to the proceedings, and as such the jurisdiction of the Court did not extend to reviewing the legality of the MAC. Were it otherwise, his Honour would have extended the time for commencing proceedings challenging the MAC.

With respect to the issue of correctly designating the parties, his Honour found that it was not necessary to name the members of the Panel individually. Rather, in applying the reasoning in *Campbelltown City Council v Vegan* [2006] NSWCA 284, his Honour held that the correct approach is to identify the Panel by its official designation; that is "[t]he Appeal Panel constituted under s 328 *Work Injury Management and Workers Compensation Act 1988*".

Held

Issue 1

Campbell J noted that s 323 of the 1998 Act covers a number of different circumstances. In applying s 323 to the facts before him, his Honour referred to the legislative history of s 323 and a summary of its interpretation by Giles JA in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284 at [30]. He also referred to the recent application of s 323 as interpreted by Basten JA in *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 at [43].

His Honour observed that the critical question before him was a causation question; that is whether a portion of the 15 per cent whole person impairment Ms Ryder suffered was due to a pre-existing condition or abnormality i.e. degenerative disc disease. Contrary to Ms Ryder's submission, his Honour held that it is not necessary that the pre-existing condition give rise to rateable percentage impairment under s 323.

In reaching this conclusion, his Honour acknowledged that some definite part of the impairment must be caused by the pre-existing condition under s 323(1) even if it is difficult or costly to assess in precise terms. In such cases an assumption of 10 per cent is adopted pursuant to s 323(1).

Issue 2

His Honour determined that the Panel did not explain the actual path it used to conclude "that in all likelihood the appellant had an abnormal disc predating her injury".

Section 323 requires an inquiry into whether there are other causes of impairment as a result of a work injury. His Honour held that a proportion of the impairment would be due to the pre-existing condition only if it can be said that the condition made a difference to the resulting WPI. Accordingly, "the Panel must be satisfied that but for the pre-existing abnormality, the *degree* of impairment resulting from the work injury would not have been as great" (emphasis added).

His Honour held that the Panel failed to ask the question s 323(1) poses; that is whether any proportion of the 15 per cent impairment assessed as resulting from the work injury was due to the pre-existing abnormality in Ms Ryder's L5/S1 disc. His Honour held that the Panel fell into jurisdictional error in failing to ask this question: a question that was neither expressly posed nor implicit in the Panel's reasons.

While the Panel found that "in all likelihood" Ms Ryder had an abnormal disc predating her injury, his Honour found that there was no consideration by the Panel of the different opinion of the parties' medical evidence. Furthermore there was no consideration of whether the resulting prolapse was worse because of the pre-existing condition, nor was there consideration of the means by which the pre-existing abnormality in the disc as found by the Panel contributed causally to the level of impairment, as opposed to the occurrence of the injury. There was a failure to even refer to the different opinions.

Issue 3

The Panel's actual findings required supporting evidence: *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 (at [91]). In the context of s 323, his Honour held that an essential element of the section is "that a proportion of the permanent impairment is *due to* the pre-existing condition" (emphasis added).

His Honour accepted that the MRI scan showing desiccation at L5/S1 and the expertise of members of the Panel, to support a finding of medical causation, amounted to "evidence" that Ms Ryder suffered from a pre-existing abnormality in L5/S1 disc. However there was no evidence that some portion of the permanent impairment was due to the pre-existing abnormality. His Honour likened the jurisdictional error committed under this ground by the Panel to the error found by

Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78, in that having found a pre-existing abnormality the Panel assumed a proportion of the degree of impairment was due to it.

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Judgment summary

Schofield v Abigroup Limited **[2016] NSWSC 954**
(Fullerton J, 11 July 2016)

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Facts

Mr William Schofield (the worker/plaintiff) suffered from binaural hearing loss as a result of working in different industrial environments in New South Wales between 1957 and 1981. He left New South Wales in 1981 and worked in a number of noisy industrial environments in Queensland, the Northern Territory and Western Australia until 2001.

The worker was deemed to have sustained the injury to his hearing in January 1981, being the last day that he worked in employment to which his hearing loss was due in New South Wales. In 2010 the worker made a claim for lump sum compensation resulting from hearing loss. The matter came before the Commission for determination of a medical dispute pursuant to s 319 of the 1998 Act and the matter was referred to the AMS.

The AMS diagnosed a noise induced high frequency sensorineural hearing loss which caused a total binaural hearing impairment of 9.8%. The AMS found that 51.2% (21 years) of the 9.8% WPI was due to exposure to noise in New South Wales. Accordingly, the AMS certified a total WPI of 5% for injury deemed to have occurred in January 1981. In arriving at this figure, the AMS found that 4.8% WPI was due to noise exposure outside New South Wales after the deemed date of injury.

The plaintiff appealed against the AMS's assessment and the gatekeeper determined that there was no demonstrable error in the approach of the AMS. Accordingly, the appeal did not proceed and the worker sought an order from the Supreme Court quashing the decision of the gatekeeper and referring the matter to the Panel.

Submissions

The plaintiff submitted that pursuant to s 17 of the 1987 Act the worker was entitled to claim compensation from the defendant for the total permanent impairment of his hearing, whenever and wherever this impairment occurred. According to the plaintiff, the worker was entitled to be compensated for the gradual process of hearing loss despite that process continuing after the deemed date of injury outside New South Wales.

The defendant submitted that AMS was required to assess the degree of permanent impairment to the worker's hearing "as a result of the injury" under s 319(c) of the 1998 Act. This meant that the AMS was required to assess and certify the degree of permanent impairment resulting from the injury deemed under s 17(1)(c) of the 1987 Act to have occurred in New South Wales in January 1981. According to the defendant, any impairment that was attributable to the worker's employment in noisy environments outside New South Wales after the deemed date should be factored by the AMS.

Issues

4. Whether the last noisy employer in New South Wales (the defendant) was liable to compensate the worker for impairment to hearing sustained outside New South Wales after the deemed date of injury.

5. Whether the Medical Assessment Certificate and, in turn, the gatekeeper's finding that there was no error in the approach taken by the AMS, was wrong at law.

Decision

Her Honour, Fullerton J, dismissed the summons and ordered the plaintiff to pay the first defendant's costs.

At the outset, her Honour pointed out that the contention of the parties regarding the construction of the words "resulting from the injury" in s 319(c) of the 1998 Act was not put before the gatekeeper. However, it was the sole question in the parties' oral argument before the Court.

Her Honour held that the defendant's construction of s 319(c) of the 1998 Act as applied in the context of s 17 of the 1987 Act was the correct construction. That is, the defendant was liable under s 17(1)(c)(ii) for the worker's hearing loss that had occurred "in one blow" as at the deemed date of injury of January 1981.

Her Honour considered that the worker's hearing loss was caused by a gradual process predating the deemed date of injury. Therefore, in assessing the degree of permanent impairment as a result of that injury, the AMS was required to make an appropriate adjustment for injury that was the result of the worker's employment outside New South Wales after the deemed date of injury.

Her Honour held that the question of apportionment did not arise in *A & G Engineering Pty Ltd v Civitarese* (1996) 41 NSWLR 41 (*A & G Engineering*) nor did it arise in *Russo v World Services & Constructions Pty Ltd* [1979] 1 NSWLR 330. Her honour made it clear that unlike the situation in *A & G Engineering*, the question is not the identity of the last noisy employer but rather the question is the extent of the liability of the defendant for the injury deemed to have occurred in New South Wales.

Further, although the plaintiff referred to *Pereira v Siemens Ltd* [2015] NSWSC 1133 as a case analogous to the present case and relied on the observations of Garling J concerning s 17 of the 1987 Act, her Honour did not find them to be of assistance in resolving the present case.

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Judgment summary

Shanahan v Trojan Workforce Recruitment (No 4) Pty Ltd **[2005] NSWSC 610**
(James J, 29 June 2005)

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Facts

A worker was injured in the course of employment on 6 December 2001. On 10 January 2003 the worker was examined by Dr Johnson for the insurer, who reported that the worker had not suffered any impairment as a result of the injury.

The Arbitrator at teleconference remitted the medical dispute to the Registrar for referral to an AMS, and also made a ruling that Dr Johnson's report was inadmissible and should not be forwarded to the AMS.

Dr Johnson's report was sent to the AMS, who referred to and concurred with Dr Johnson's assessment that the worker had not suffered any permanent impairment.

The worker appealed under section 327, alleging that the assessment was made on the basis of incorrect criteria or the MAC contained a demonstrable error because the AMS had had regard to Dr Johnson's report. The Registrar decided that she was not satisfied that a ground of appeal existed, so the appeal did not proceed.

The Registrar's reasons referred to the decision in *Fletchers International Exports Pty Limited v Regan* [2004] NSWWCCPD 7 ("*Fletchers*"), and stated that "as the AMS is not a member of the Commission and… the making of a medical assessment is not a 'proceeding' before the Commission… the Commission has no power to restrict the material sent to the AMS".

The plaintiff sought review of the Registrar's conduct in sending Dr Johnson's report to the AMS. The plaintiff also sought to quash the MAC because it was infected by this conduct. It was argued that the Registrar had exceeded her powers in sending the report to the AMS (whether advertently or inadvertently, contravening the Arbitrator's ruling).

Held

The Court referred to the decision in *Fletchers*, and noted that clauses 43 & 44 of the *Workers Compensation Regulation* 2003 apply to the admission of medical reports in proceedings before the Commission.

In *Vegan*, 'the Commission' was found to mean the Commission as constituted by an Arbitrator or Presidential Member and does not include an Appeal Panel. The Court accepted the defendant's submission that 'the Commission' also does not include an AMS.

The Court noted that clause 43A of the 2003 Regulation now provides that a medical report is not to be disclosed to an AMS unless it has been admitted in proceedings. However, clause 43A was not in force at the relevant time.

The Court held that the purported ruling made by the Arbitrator (that Dr Johnson's report was not to be sent to the AMS) was made without power and was of no effect, and accordingly dismissed the summons.

Implications

This decision confirms the view expressed in *Fletchers* that the Commission does not have power to restrict material sent to an AMS because an AMS is not a member of the Commission and medical assessments are not proceedings before the Commission.

It is important to note that clause 43A of the 2003 Regulation (now clause 51 of the *Workers Compensation Regulation* 2010) was not applied in this case. Pursuant to this clause the Commission can now restrict material sent to an AMS in the specified circumstances.

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Judgment summary

***Siddik v WorkCover Authority of NSW* [2008] NSWCA 116**
(Mason P, Giles JA, McColl JA, 30 May 2008)

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Facts

The Respondent lodged an Application to Resolve a Dispute in the Commission which led to the Plaintiff being assessed by an Approved Medical Specialist (AMS) under section 325 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act). The AMS issued a Medical Assessment Certificate (MAC) assessing the Plaintiff as DRE Category II with 5% whole permanent impairment (WPI) due to his neck injury.

The Respondent appealed against the assessment of the AMS on the grounds specified in subsections 327(3)(b),(c) and (d) of the Act.

The Respondent relied upon the report of Dr Davis as additional relevant information and submitted that the assessment of the AMS was based on incorrect criteria and contained a demonstrable error, as the AMS had not taken into account all the evidence filed by the parties and that the date of injury was misrecorded. The Registrar allowed the appeal to proceed to an Appeal Panel.

The Appeal Panel rejected the grounds of appeal relied upon by the Respondent. It refused to admit Dr Davis's report because it was not persuaded that the information was either not available or could not have been obtained prior to the assessment. It was also satisfied that the AMS considered all medical evidence and rejected the complaint about the date of injury as a typographical error with no bearing on the integrity of the MAC. However, in directing itself that its task was to conduct a review of the AMS's assessment, the Appeal Panel revoked the MAC because it concluded that it was based on incorrect criteria by reference to the AMA 5 Guides (although these incorrect criteria were not raised by the parties in the appeal submissions). The Appeal Panel concluded that the history, symptoms and investigations demonstrated a category of DRE I and awarded the Plaintiff 0% WPI.

The Plaintiff challenged the Appeal Panel's decision in the Supreme Court; Malpass AsJ dismissed the proceedings (*Siddik v WorkCover Authority of New South Wales* [2007] NSWSC 129).

Grounds of appeal

The Plaintiff appealed to the Court of Appeal, against the decision of Malpass AsJ on the grounds that the primary judge ought to have found that the Appeal Panel erred in law in the exercise of its jurisdiction and that the Appeal Panel erred in applying table 15-5 of the AMA5 Guides as if it were prescriptive, rather than illustrative, of matters which had to be found to bring an injury within a category.

Held

Appeal is allowed, quashing the decision of the Appeal Panel and remitting the matter to the Appeal Panel to be dealt with according to law.

McColl JA (Mason P agreeing)

- There are no decisions of this Court whose ratio identifies the nature of the section 328 review. The question arose in *Campbelltown City Council v Vegan* [2006] NSWCA 284 (*Vegan*), but not in a determinative manner [82]. However, Basten JA tentatively concluded that "the powers of the Appeal Panel may be limited to addressing, and if thought

necessary, correcting errors identified in the certificate granted by the approved medical specialist, as specified by the appellant". Basten JA's tentative observations were approved by Mason P (McColl and Bell JJA agreeing) in *Marina Pitsonis v Registrar of the Workers Compensation Commission* [2008] NSWCA 88 [86]. Further, Handley JA's observations in *Vegan* did not indicate a view that a section 328 review is an appeal *de novo* [88].

- While guidance may be obtained from authorities, which have characterised an "appeal" or "review" by reference to the powers conferred on the appellate body, the nature of the section 328 review must turn on the terms of the statute, taking into account the context and history of the legislation [92]. It is inappropriate to resolve the issues by applying prescriptive labels to the nature of the section 328 review. While prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gate, it can consider other grounds capable of coming within one or other of the section 327(3) heads, if it gives the parties an opportunity to be heard [101]. The conclusion that the Appeal Panel can consider grounds of appeal not subject of section 327(3) leave as long as it accords procedural fairness, is consistent with the objectives of the Act [103].

- Section 327 is not only an error-based jurisdiction. It also contemplates an appeal arising because of changed circumstances: either a deterioration of the worker's condition or the availability of additional relevant information: subsections 327(3)(a) and (b). In such circumstances the Appeal Panel might be expected to review the MAC to determine whether the changed circumstances affect the conclusions that the AMS reached. If it reaches that conclusion, then it must have the power to conduct the assessment anew, including, if necessary, undertaking an examination of the injured worker as contemplated by section 324 [96]-[97].

- While it was open to the Appeal Panel to depart from the grounds of appeal the Respondent has identified, it could only do so if it notified the parties and gave them an opportunity to be heard. It did not do so and therefore misconceived its role, the nature of its jurisdiction and its duty [104].

Giles JA

- Once an appeal is proceeding on a ground for appeal under section 327 the Appeal Panel with its special expertise should not be hamstrung if it emerges that the ground for appeal has been poorly stated or misstated by the party appealing, nor would it be just that an assessment of impairment open to appeal on a ground for appeal under section 327 had to be left intact for that reason. The description of the appeal as "by way of review of the original medical certificate", did not suggest a narrow power of review. The importance of MACs also does not indicate a narrow power of review [9].

- There was no want of power in the Appeal Panel finding that the assessment of the AMS was based on incorrect criteria in that the AMS has misapplied the criteria in the AMA5 guidelines; the problem was that the Appeal Panel so found without notice to the appellant, or the first respondent [10]-[11].

Implications

This is a significant judgment, in that the Court of Appeal finds that the Appeal Panel's powers under section 328 of the Act are not limited to correcting errors identified in the Appellant's grounds of appeal. The Court in considering the objectives of the Act and authorities concerning the meaning of "appeal" and "review" concludes that an Appeal Panel with its special expertise is not limited to correcting errors, but can conduct a hearing de novo provided the parties are offered procedural fairness.

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Judgment summary

Siddik v WorkCover Authority of New South Wales & 2 Ors **[2007] NSWSC 129**
(Malpass AsJ, 1 March 2007)

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Facts

An AMS issued a MAC assessing the worker's cervical spine as DRE II, 5%WPI based on a finding of "some restriction of movement". The employer appealed and the appeal came before a Medical Appeal Panel. The Panel decided the appeal on the papers and revoked the MAC.

Medical Appeal Panel's determination: The Panel's reasons included the following:

> "32. In considering the MAC the Panel observed that the AMS categorised the injury to the Respondent's cervical spine as DRE Cervical Category II and allocated 5% whole person impairment in this regard
>
> 33. The Panel confirmed the requirement for this category according to the AMA 5th edition is for a clinical finding of non-specific radiculopathy or an asymmetrical range of movement.
>
> 34. In this respect the Panel notes that the AMS did not make a finding of non-specific symptoms of radiculopathy or an asymmetrical range of movement. Rather the AMS noted that the Respondent had "*some restriction of movement*". In this regard the Panel formed the view that the AMS based his assessment on incorrect criteria."

The worker sought relief pursuant to section 69 of the Supreme Court Act, alleging:

1) The findings listed in the DRE categories in Chapter 15 of AMA5 are only indicative of findings used in categorisation. The Panel erred in treating the findings as an exhaustive list.

2) The Panel should have conducted a hearing (as provided for in section 328(4)).

Held

The proceedings are dismissed.

- The DRE provisions apply where there is a clinical history and examination findings, which are comparable with a specific injury. This opening expression of criteria is then followed by a non-exhaustive definition of "findings" [12]. The AMS's findings fell well short of making out this criterion. The Panel did not err in concluding that category II did not apply [13].

- The argument that a Panel is required to hold a hearing was rejected by Studdert J in *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Limited & Ors* [2006] NSWSC 235; I am not persuaded that his Honour erred [17]-[18]. The WorkCover Guidelines also allow for a matter to be determined on the papers [20].

Implications

- This case follows the case of *Brockmann* and confirms that a Panel is not required to conduct a hearing and may determine a matter on the papers.

- The DRE ‘findings’ in AMA5 Chapter 15 are not exhaustive. This must be borne in mind when considering Whole Person Impairment assessments of the spine.

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Judgment summary

Skates v Hills Industries Ltd [2020] NSWSC 837

(Adamson J, 30 June 2020)

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Facts

On 7 June 2013, the claimant was employed by the respondent when he fell from a ladder and suffered an injury. In 2017, he filed a claim in the Commission and a delegate of the Registrar issued a referral for assessment of permanent impairment to an Approved Medical Specialist (**AMS**). The body parts referred to the AMS were "Left upper extremity (joint ring finger), scarring (TEMSKI)".

In subsequent emails to which the Registrar was copied, the parties agreed that the left wrist was also referred for assessment.

On examination, the AMS found the claimant had not reached maximum medical improvement (**MMI**), a pre-condition to assessment of whole person impairment (**WPI**). The Commission issued a certificate of determination stating the claimant's degree of permanent impairment was not fully ascertainable and the proceedings could be restored once he had attained MMI.

In 2019, the claimant asked that the proceedings be restored and that he be referred for assessment by an AMS. A referral was issued by the Registrar's delegate on the same terms as in 2017. While it was common ground between the parties that the left wrist ought to have been included in the referral, neither party informed the Registrar of this omission.

On re-examination, the AMS assessed the claimant as suffering 61% WPI, which comprised 60% for the left upper extremity (including the shoulder, elbow, wrist and all fingers of the left hand, including the thumb) and an additional 2% for scarring. The respondent appealed the AMS's decision and the matter was referred to an Appeal Panel. The Appeal Panel revoked the AMS's certificate and issued a new certificate assessing the claimant's WPI as 7%, which comprised 5% WPI for the left upper extremity (ring finger) and 2% WPI for TEMSKI scarring.

Grounds of Appeal

The claimant filed judicial review proceedings in the supreme court. The grounds of appeal were whether the Appeal Panel erred at law when it found that the AMS:

1. had been wrong to assess impairment of the left wrist, elbow and shoulder when assessing whole person impairment of the left upper extremity;
2. was only entitled to assess the joint ring finger when the referral was to assess the left upper extremity; and
3. was only entitled to assess the body parts referred when it was not disputed that there was an established injury to the left wrist and where there had been no determination of injury by an Arbitrator.

Held: The Appeal Panel erred in its decision

Discussion and Findings

1. Adamson J held the Appeal Panel fell into error by finding that the AMS was not entitled to assess the WPI by reference to the claimant's left wrist since the employer had conceded that this ought to have been included in the referral. This error led the Appeal Panel to omit the left wrist from its own assessment of WPI. The Appeal Panel was not entitled to ignore the agreement that the left wrist ought to have been included in the body parts referred for assessment.

2. The Appeal Panel was otherwise correct to find that the AMS had gone beyond the terms of the referral in assessing WPI for the whole of the claimant's left upper extremity (left shoulder and elbow). The AMS's jurisdiction is limited by the terms of referral and the AMS is bound to confine the matters determined to those which have been referred. The purpose of s 325(1) of the 1998 Act is not only to provide an AMS with the parameters of his or her task but also to provide procedural fairness to the parties.

3. Adamson J considered *Aircons*, *Bindah*, *Dening v Alloy Pty Ltd trading as Noble Toyota* [2014] NSWSC 1224 (*Dening*) and *Cincotta* and found that the question of whether any impairment in the claimant's left upper limb (apart from the ring finger, the wrist and the scarring) arose from the injury to the ring finger, the wrist and the scarring was a medical dispute which could have been determined by the AMS. However, Adamson J held that the AMS was not entitled to assess the whole of the left upper extremity and went beyond the jurisdiction conferred on him by the referral. Her Honour noted the claimant had failed to avail himself of the opportunity to review the terms of the referral and claim that the whole of the left upper limb was implicated and ought to be included in the referral. Had the claimant done so, the question of causation could have been determined by the AMS, as it was in *Bindah* and *Cincotta*.

Orders

Adamson J ordered set aside the decision of the Appeal Panel and remitted the matter to the Registrar to be referred to an AMS to be determined in accordance with law.

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Judgment summary

Skillen v MKT Removals Pty Ltd & Ors **[2007] NSWSC 608**
(Malpass AsJ, 19 June 2007)

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Facts

The plaintiff lodged an application to resolve a dispute in the Commission as a result of a back injury suffered during the course of his employment. The dispute was referred for assessment by an Approved Medical Specialist (AMS). The AMS assessed the whole person impairment (WPI) at 20%, being 8% for thoracic spine and 13% for the lumbar spine.

The first defendant made an application to appeal the decision of the AMS. Their submissions made no mention of the lumbar spine. The plaintiff's submissions in reply also contained no express mention of the lumbar spine. The appeal was allowed to proceed and was referred to an Appeal Panel.

The Appeal Panel had the material that was before the AMS and the parties' submissions. The AMSs on the panel conducted a medical examination of the plaintiff. The results of the medical examination were not conveyed to the parties prior to making the assessment. The Appeal Panel issued a medical assessment certificate assessing the plaintiff's lumbar spine at 6% WPI.

Before the Supreme Court, the plaintiff alleged two errors of law. First, that the Appeal Panel should have disclosed the examination findings made by the two AMSs in the Panel to the parties and sought submissions. The second ground was the argument that the scope of the appeal was of addressing alleged errors and matters put in issue by the parties.

Held

The medical assessment certificate issued by the Appeal Panel is set aside. The matter is remitted to the Registrar for referral to an Appeal Panel constituted under section 328 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act).

- In this statutory context (Part 7 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998), it does not seem that it was intended that the review be a hearing de novo. It would be a denial of natural justice for the Appeal Panel to deal with matters falling either outside the scope of the grounds of appeal or the submissions without first giving the parties the opportunity to be heard [23] and [25].

- In the present case there is no precise definition of the grounds of appeal. The submissions cannot be construed as ventilating a ground for appeal in respect of the lumbar spine. In the circumstances, the Appeal Panel fell into error in reducing the assessment made by the AMS in respect of the lumbar spine [26] and [27].

- A medical examination of the plaintiff is an option that may be pursued by the Appeal Panel. It is part of the review process. The power to conduct a medical examination is a tool that is provided to the Appeal Panel to better enable it to perform its role of review. The Workcover Guidelines impose no requirement that such findings be made available to the parties. In conducting the examination, the Appeal Panel was dealing with a medical question. The plaintiff had already been examined by his own experts and their reports were before the Appeal Panel. The failure to give the parties an opportunity to make submissions on the examination findings does not bring about any denial of natural justice in this case [29].

Implications

In examining the context of Part 7 of Chapter 7 of the Act, Associate Justice Malpass held that the intention is not to allow a de novo review of an AMS's decision by an Appeal Panel. Although the judgment refers to the decision of Wood CJ in *Campbelltown City Council v Vegan* [2004] NSWSC 1129, the Court of Appeal's judgement in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284 and Associate Justice Harrison's decision in *Lukacic v Vickarni Pty Ltd & Anor* [2007] NSWSC 530, his Honour seems to have primarily focused on Part 7 of Chapter 7 of the Act in concluding that Appeal Panels have restricted powers and that the intention of the Act is not to allow de novo review by Appeal Panels.

His Honour does not seem to have had the benefit of the recent judgment in *Pateman v Peninsula Village Limited trading as Peninsula Village Retirement Centre and Ors* [2007] NSWSC 586, in which Johnson J confirmed that the decision at first instance of Wood CJ in *Campbelltown City Council v Vegan* [2004] NSWSC 1129, concerning the nature of an appeal to an Appeal Panel is unaffected by the decision of the Court of Appeal in *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284.

The judgment confirms the existing view that a failure to give the parties an opportunity to make submissions on the examination findings does not bring about any denial of natural justice.

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Judgment summary

Smith v Liquip Services Pty Limited & Ors **[2007] NSWSC 687**
(Hoeben J, 4 July 2007)

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Facts

The Plaintiff made a claim for compensation in respect of a back injury and loss of efficient use of sexual organs. The Plaintiff applied to the Commission to resolve a dispute and was referred for assessment to two Approved Medical Specialists (AMS), Dr Blake, in respect of his back and Dr Taylor, in respect of his claim for loss of efficient use of sexual organs. The Plaintiff's claim for loss of efficient use of sexual organs was based on his reduced capacity to engage in sexual activity because of back pain. Dr Blake assessed the Plaintiff as having suffered a 5% permanent impairment of the back, 1.7% in respect of his right leg and 1.7% in respect of his left leg. Dr Taylor assessed the Plaintiff as having suffered 0% permanent loss of the efficient use of his sexual organs.

The Plaintiff appealed against both assessments and the First Defendant separately appealed against the assessment by Dr Blake. The Registrar referred both appeals to an Appeal Panel.

The Appeal Panel upheld the appeals and substituted a new medical assessment certificate (awarding 0% in respect of all of Plaintiff's claims) in place of the original certificates given by the AMSs. No reasons were given for revoking Dr Taylor's assessment.

The Plaintiff sought judicial review of the Appeal Panel's determination. The two specified grounds of appeal relied upon by the plaintiff for challenging the decision of the Appeal Panel were:

- The Appeal Panel failed to consider the exercise of a discretion, failed to take into account a relevant consideration and/or failed to accord the plaintiff procedural fairness in failing to consider whether to exercise their discretion to request medical reports in the possession of the first defendant as requested by the plaintiff. It was submitted that section 324(1)(b) of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act) gave to an AMS power to require production by a party of a medico-legal report which it had obtained for use in the proceedings before the Commission, and that the Appeal Panel was bound to consider the Plaintiff's request to obtain such reports from the first defendant and to provide reasons when deciding not to exercise discretion.

- The Appeal Panel failed to exercise its jurisdiction, failed to understand the nature of its task and erred in law in conducting a hearing de novo rather than confining itself to the correction of demonstrable error or application of incorrect criteria. The Plaintiff submitted that the tentative view of Basten JA in *Vegan* ought to be applied to the decision of the Appeal Panel.

Held

Final orders not made.

- The phrase 'medical records' used in section 324(1)(b) of the Act does not include medico-legal reports obtained by either side for use in application for compensation before the Commission. The phrase 'medical records' would undoubtedly include medical reports, which may have been obtained in the past, but not medico-legal reports specifically obtained for use in the actual proceedings in relation to which the AMS or Appeal Panel is performing a function. Such documents are not normally considered to be medical records as such [44].

- The concept of a 'record' and the context in which the phrase is used in section 324 suggest documents, which comprise the medical history of applicant for compensation [44]. The AMS or Appeal Panel has the power to seek out other material such as medical records from persons who have treated the worker including test results so as to provide the full medical picture, but not the involuntary provision by a party of medico-legal reports obtained for use in the proceedings current in the Commission [46].

- Following the decision of Court of Appeal in *Campbelltown City Council v Vegan* [2006] NSWCA 284 (*Vegan*), there has been some division of opinion in this Court. In *Lukacic v Vickarni Pty Limited & Anor* [2007] NSWSC 530 Harrison As J adopted the approach of Wood CJ at CL at first instance in *Campbelltown City Council v Vegan* [2004] NSWSC 1129. However, the decision of Malpass As J in *Skillen v MKT Removals Pty Limited Ors* [2007] NSWSC 608 is more in accord with the 'tentative view' of Basten JA [50]. A final decision as to which approach is correct must await further consideration by the Court of Appeal [52].

- The approach suggested by Malpass As J (in *Skillen*) has considerable force. The grounds of appeal impose a restraint on the scope of the review to be conducted by the Appeal Panel. Once error of the necessary kind has been identified, the Appeal panel can exercise its particular expertise to correct that error which may involve fact-finding depending on the nature of the error identified [53].

- In this case the ground of appeal was that 'the medical assessment certificate contains a demonstrable error' [54]. Factual errors particularly of a medical kind, or errors of logic and analysis if they are readily 'demonstrable' from an examination of the medical assessment certificate, would amount to demonstrable error for the purposes of section 327(3) of the Act [58].

- Although the Appeal Panel approached its task in the way recommended by Wood CJ at CL in *Vegan*, the medical assessment certificate of Dr Blake reveals demonstrable inconsistency and it is clear from an analysis of the Appeal Panel's reasons that in carrying out their review they identified demonstrable error and that their conclusion did no more than to correct that demonstrable error [59]-[62]. On the 'tentative view' of Basten JA the Appeal Panel in describing its function may well have asked itself the wrong question, but had it asked the correct question, that is, whether the medical assessment certificate contained a demonstrable error, it is clear from its analysis and process of reasoning that it would have reached the same conclusion [63]-[64].

- The Appeal Panel does not explain why it quashed the medical assessment certificate of Dr Taylor, nor does it explain why it then issued its own medical assessment certificate which came to the same result, i.e. 0% permanent loss of efficient use of sexual organs [66]. The parties are to make submissions as to what the Court should do in relation to that part of Appeal Panel certificate which deals with the medical assessment of Dr Taylor. No final orders made in this matter.

Implications

The Court refrained from making final orders in this matter until both parties have had the opportunity to provide further submissions regarding the Appeal Panel's conclusion about Dr Taylor's assessment. However, in dealing with the Plaintiff's grounds of appeal and the Appeal Panel's decision regarding Dr Blake's assessment, the Court pointed out the diverse opinions of the Supreme Court Judges regarding the Appeal Panel's powers of review.

In referring to Malpass AJ's judgment in *Skillen*, Hoeben J expressed agreement with Malpass AJ's view that the grounds of appeal impose a restraint on the scope of the review to be conducted by the Appeal Panel, and that once error of the necessary kind has been identified, the Appeal panel

is to use its particular expertise to correct that error. However, although it was noted that in accordance with the 'tentative view' of Basten JA the Appeal Panel in describing its function may well have asked itself the wrong question, it was evident from an analysis of their reasoning for revoking Dr Blake's assessment that the Panel identified a demonstrable error in the assessment and did nothing more than to correct that error. As such the plaintiff's ground of appeal was said to have failed on this point.

Further of interest is the Court's comments and interpretation of the phrase 'medical records' used in section 324(1)(b) of the Act. Hoeben J interpreted the phrase 'medical records' to include medical reports, which may have been obtained in the past, but not medico-legal reports specifically obtained for use in the actual proceedings in relation to which the AMS or Appeal Panel is performing a function. This appears to be a narrow interpretation of what constitutes 'medical records' for the purposes of section 324(1)(b) of the Act.

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Judgment Summary

Starr v Pendergast Painting Pty Ltd **[2020] NSWSC 725**

(Adamson J, 11 June 2020)

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Facts

The plaintiff injured his right shoulder rolling paint on the external wall of a residential property in the course of his employment with the employer. The plaintiff underwent two operations on his right shoulder and then a further operation to his left shoulder which was accepted to have been caused by over-compensating for his injury to the right shoulder. The plaintiff was assessed by an AMS who issued a certificate which determined that the claimant had suffered 9% WPI of the left upper extremity, a 6% WPI of the right upper extremity and 0% of the skin. The worker wrote to the Registrar seeking that the AMS reconsider the certificate. The application was supported by submissions and three photographs. The AMS issued a further certificate considering the additional information provided and was not persuaded to change the WPI assessment. The worker then filed an application to appeal the MAC on the basis that the observations of his scarring were a better fit for 1% than they were for 0%, having regard to the TEMKSI. The Appeal Panel confirmed the findings of the AMS on the basis that the photographs relied upon by Mr Starr were clear, in focus and in colour and that re-examination would not have assisted the Appeal Panel any further.

The worker filed a summons in the Supreme Court and relied on the following grounds:

1. The Panel failed to correct the error by the AMS

2. The Panel failed to consider the fourth edition guidelines

3. The Panel failed to give adequate reasons and came to a decision that was not open to it

4. the Panel failed to conduct a re-examination in circumstances which amounted to a denial of procedural fairness to the claimant.

Held: Summons Dismissed

Discussion and Findings

1. The Plaintiff submitted that the Appeal Panel's reasons for not re-examining the claimant were inadequate and that the refusal to re-examine the claimant amounted to a denial of procedural fairness. The plaintiff further submitted that that the Appeal Panel would not be able to detect trophic changes from a photograph and would need to see the scars through re-examination. Adamson J was not persuaded that there was any deficiency in the reasons given by the Appeal Panel for its decision not to re-examine the claimant. His honour was satisfied that although the reasons provided by the Appeal Panel were brief, they were sufficient to explain why the Appeal Panel did not see the need to examine the claimant for itself.

2. Adamson J rejected the Plaintiff's submission that the Appeal Panel was obliged to examine the worker as a matter of procedural fairness. His honour differentiated the present case with *Secretary, New South Wales Department of Education v Johnson* in which the Appeal Panel reached a different conclusion from that reached by the AMS and made significant adverse credibility findings. However, in the present case, the Appeal Panel relied on the examination conducted by the AMS but did not reach a different conclusion. The Appeal Panel drew an inference in favour of the worker, in that he could locate the scars and noted that he had not said that he was conscious of them.

3. His honour was satisfied that as the worker did not adduce any material to the AMS to the effect that he was conscious of his scars, it was open to both the AMS and Appeal Panel to proceed on the basis that he satisfied the criteria for 1% under Table 14.1 of the Guidelines. As a result, the worker had the opportunity but failed to avail himself of it. His honour was satisfied that this did not amount to a denial of procedural fairness.

Orders

Adamson J issued:

1. Dismiss the summons

2. Order the plaintiff to pay the first defendant's costs of the proceedings.

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Judgment summary

Strbac v QBE Insurance (Australia) Limited **[2010] NSWSC 602**
(Harrison AsJ, 8 June 2010)

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Facts

The Plaintiff, Mr Strbac, slipped on the gutter of a path and fell on his way home from work. He sustained injures to his lower back, neck, left knee and shoulder. The Plaintiff commenced proceedings in the Commission for lump sum compensation. He was assessed by an AMS for permanent impairment in relation to the lumbar and cervical spine, right upper extremity and left lower extremity.
The Plaintiff subsequently lodged an appeal against the AMS's assessment in relation to the lumbar spine. The matter went before a Medical Appeal Panel which confirmed the assessment of the AMS.
The Plaintiff sought judicial review of the decisions of the AMS and the Medical Appeal Panel.

Issues

The Plaintiff argued that the AMS had a statutory duty to conduct his assessment exhaustively so as to find incontrovertibly that none of the indicia necessary to appropriate DRE Category II was present.
Based on this argument, the Plaintiff submitted that:

(a) the AMS failed to make further and more accurate investigations into the relevant differentiators such as non-verifiable radicular symptoms and asymmetry of spinal motion;
(b) The AMS failed to make objective reproducible findings as to asymmetry and that he has failed to exhaust the indicia relevant to a history of radiating pain such as testing for strength, tone and reflexes in the lower limbs, and
(c) The Medical Appeal Panel failed to conduct its own assessment of the Plaintiff, failed to find an error in the decision of the AMS, and affirmed the AMS's decision which was no decision at all.

Held

The Application for judicial review before Harrison AsJ fails.

Reasons for Decision

Judicial review and jurisdictional error

- Her Honour cited and adopted Johnson J's approach in *Martin v Kelly* [2008] NSWSC 577 (at [13]-[23]) in the conduct of judicial review. Her Honour also referred to *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 as a source for discussions on jurisdictional error in Australia (at [5]-[6]).

The duty to give reasons - the AMS and the Medical Appeal Panel

- The duty to give reasons arises by implication from the statute not from the common law (*Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372 (at [117] – [118]). The AMS's duty to give reasons is provided by section 325 of the 1998 Act. The Appeal Panel was subject to an implied statutory obligation to give reasons and that conclusion follows from the analysis of the statutory context and from an understanding of the nature of the functions imposed on the Appeal Panel. (at [15]-17])

The AMS's duty to make further investigations under the guidelines

- Her Honour considered the effects of the WorkCover Guides and the AMA Guides 5th edition, noting that, "Guidelines in general have varying legal effects. Some guidelines amount to delegated legislation and are inflexible. Others exhibit no legislative intention to create precise or inflexible rules" (at [18]).

- Her Honour noted that the statute is silent as to the effect of the guides, turning to the WorkCover Guides on the effects of the two Guides. Paragraph 1.3 of the WorkCover Guides provides that the WorkCover Guides are to prevail over the AMA 5 Guides in case of inconsistency. Paragraph 1.4 states that the Guides are not meant to provide a "recipe approach" to the assessment of permanent impairment (at [19] – [22]).

- Her Honour went through clauses 1.25, 1.26, 1.47 and 1.48 of the WorkCover Guides in relation to the need for further investigations by an AMS and examined the MAC. Her Honour found that the AMS provided his reasons in accordance with section 325 of the 1998 Act and the AMS was not obliged to make further investigations into the relevant differentiators.

The Medical Appeal Panel's decision

- The Medical Appeal Panel set out the findings made by the AMS, directed its attention to the Plaintiff's submissions and gave reasons as to why it did not agree with those submissions. The Medical Appeal Panel in affirming the determination of the AMS did not make an error on the face of the record or a jurisdictional error.

Implications

- The decision confirmed the principles laid down in various cases on judicial review of an AMS's or a Medical Appeal Panel's decision regarding the standard of reasons. A relevant case in this context includes *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175 ("*Bojko*").

- In determining whether the AMS or a Medical Appeal Panel has fulfilled its duty to give reasons, it is important to look at the statutory context, including the Guides.

- The Court in this decision, like in *Bojko* and *Jones v The Registrar WCC* [2010] NSWSC 481, disapproved the adoption of a hyper-critical approach in reading an AMS's or a Medical Appeal's decision with eyes keenly attuned to the perception of error.

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Judgment summary

Sydney Night Patrol & Inc Co v Absolom **[2015] NSWSC 60**
(Harrison AsJ, 12 February 2015)

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Facts

Beryl Absolom was working as a security guard for Sydney Night Patrol & Inc Co on 12 December 2003. She was required to stand for a prolonged period of time and there was no seating. After two days she was unable to sit down and developed lower back pain with right sciatica.

On 12 December 2012 Ms Absolom lodged an application with the Commission in relation to her back injury in 2003. The Registrar referred the medical dispute to the AMS and on 11 November 2013, the AMS issued the MAC assessing the WPI of Ms Absolom's lower back at 5 per cent. The AMS did not believe there was any specific injury on 12 December 2003 and recorded that her back became sore after standing for a prolonged period. He recorded that had it not been for Ms Absolom's surgery in 1994 for sciatica she would not have developed her current symptoms and required a spinal fusion.

On 9 December 2013 Ms Absolom lodged an appeal against the decision of the AMS. On 28 March 2014 the Panel issued a new MAC assessing Ms Absolom's WPI at 14 per cent. Sydney Night Patrol sought judicial review of the Panel's decision.

Issue(s)

The plaintiff sought judicial review on two grounds:

1. that the Panel failed to take into account a matter which it was required to take into account, when it determined not to hold a hearing, and
2. that mistake gave rise to a failure by the Panel to accord procedural fairness.

Held

The Panel's decision dated 28 March 2014 was vitiated by an error of law. That decision was quashed and the matter was remitted to the Registrar of the Commission to determine matter in accordance with law.

Decision

Harrison AsJ briefly referred to the cases relied upon by the parties: *Inghams Enterprises Pty Ltd v Lakovska* [2014] NSWCA 194 (*Lakovska*) and *Ah-Dar v State Transit Authority of New South Wales; Registrar of the Workers Compensation Commission* [2007] NSWSC 260 (*Ah-Dar*).

Referring to *Lakovska*, the defendant submitted that it is not for the parties to determine whether there is a need to order a hearing. According to the WorkCover Guidelines it is the Panel that has an obligation to make an assessment of the documents and determine whether there is a need to order a hearing. However, her Honour drew a distinction between the factual situation in the current proceedings and the factual situation in *Lakovska*. This finding was based on the Panel's misstatement that "neither party sought an assessment hearing" as it appeared in the Panel's decision at [21].

In fact, her Honour found the factual situation in *Ah-Dar* to be identical to the factual situation in the current proceedings, given that the Panel wrongly stated that the parties wanted the appeal to be determined on the papers. Because Sydney Night Patrol indicated its desire to make oral

submissions at a hearing in its Notice of Opposition, her Honour held that it was a mandatory consideration and one that the Panel was bound to take into account.

Her Honour held that the failure to take into consideration the request of a party to make oral submissions at a hearing constitutes a jurisdictional error. This was important to both parties because the medical assessment, either by the AMS or the Panel, is conclusively presumed to be correct in any proceedings.

Given that her Honour decided that there was jurisdictional error, it was unnecessary for her to determine whether there has been a failure to afford procedural fairness.

In considering whether the Panel's decision should be quashed, her Honour had to be satisfied a different result could be produced if the matter was remitted to the Registrar: *Stead v State Government Insurance Commission* [1986] HCA 54. Although Harrison AsJ did acknowledge that the amount in dispute was modest (about $4,500) she was satisfied that a different result could potentially be produced.

Her Honour did add that had the Panel declined to grant an assessment hearing on the basis that no reasons had been proffered by the plaintiff, her decision would have been different.

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Judgment summary

Summerfield v The Registrar of the WCC & Anor **[2006] NSWSC 515**
(Johnson J, 31 May 2006)

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Facts

On 14 May 2002 the worker claimed she injured her left shoulder and experienced pain radiating to her left elbow as she pulled a sheet, which was jammed between two rollers of a folding machine. As a result she claimed that she suffered pain in her left and right shoulders, neck pain and pain in her left arm.

The medical dispute aspect of the worker's claim was referred to an AMS who examined the cervical spine and the left and right shoulders. He found "pain free very good range of motion" with no significant clinical findings, no muscle guarding and no documentable neurological impairment with respect to the worker's cervical spine.

The AMS assessed 0% WPI (DRE I) for the cervical spine and 5% WPI re the left shoulder and 4% WPI re the right shoulder resulting in a total on 9% WPI.

An appeal was lodged by the worker and included in the application some late evidence, including a CT scan of the neck and left shoulder and X-rays of the cervical and thoracic spines. The CT scan revealed a disc protrusion at C3/4 with severe narrowing and degenerative changes at C5/6 and C6/7.

The Registrar's delegate decided no grounds of appeal existed having found there was no information from the appellant as to why it was claimed the "fresh evidence" was not available prior to the medical assessment or could not reasonably have been obtained before the medical assessment.

Held

The application to the Registrar is in the nature of leave to appeal but power is limited and restricted. The word "or" in section 327(3)(b) is to be given its ordinary disjunctive meaning. The Registrar only needs to be satisfied that a state of affairs exists from the documentary evidence. The CT scan and X-rays did constitute fresh evidence as, clearly, they were not available prior to the medical assessment and were therefore relevant.

Implications

- The Registrar does not determine the appeal and the Appeal Panel itself will apply a fresh evidence test under section 328(3) of the 1998 Act for the purposes of the appeal.
- The Registrar's decision under sections 327(3)(b) and 327(4) does not have the result that the additional relevant information will necessarily be admitted by the Appeal Panel at the hearing of the appeal. The question for the Registrar is whether it appears to the Registrar that a ground of appeal exists by way of the availability of additional relevant information and, in considering this question, the Registrar should consider whether the ground refers to evidence in one of the two alternative categories expressed in the section.
- The word "or" in section 327(3)(b) is to be given its ordinary disjunctive meaning.

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Judgment summary

Tattersall v Registrar of the Workers Compensation Commission of NSW and Anor **[2007] NSWSC 453**
(Adams J, 9 May 2007)

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Facts

The Worker filed an Application to Resolve a Dispute claiming compensation for the psychological injury suffered by him in the course of his employment. The question of the degree of Whole Person Impairment (WPI) was referred for assessment to an Approved Medical Specialist (AMS). The AMS found that the worker was suffering from chronic post-traumatic stress disorder and assessed his WPI at 5%.

The worker appealed against the Medical Assessment Certificate (MAC) pursuant to section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the Act). Grounds relied upon were those specified in subsections 327(3)(b) and (d) of the Act. Amongst other submissions, the appellant argued that the Commission failed to supply the report of Mr Baddeley, psychologist dated 12 July 2004 to the AMS, and that the AMS failed to consider this specific report by Mr Baddeley.

The Registrar concluded that it did not appear that at least one of the grounds of appeal as specified in section 327(3) of the Act existed. The reasons provided were as follows:

> "The appellant asserts that the Commission failed to provide the AMS with the report of Mr Mark Baddeley, psychologist dated 12 July 2004. However, a perusal of the medical assessment certificate does not reveal this to be the case as the AMS clearly refers to Mr Baddeley as the worker's treating psychologist in the history obtained. The AMS was only required to list the medical reports that were before him…I have the benefit of examining the contents of the medical brief sent to the AMS and confirm that the Application to Resolve a Dispute and all supporting documents were sent to the AMS."

Held

The decision of the Registrar is set aside and the Registrar shall refer the application to appeal the decision of the AMS to a Medical Appeal Panel pursuant to section 327 of the Act.

- The Registrar's reasons deal only with whether the report of Dr Baddeley was sent to the AMS but not with the contention he did not consider it [9]. This amounts to an error of law on the face of the record for the Registrar not to have considered the ground of appeal as to whether the AMS considered Dr Baddeley's report [19]. A failure to consider relevant and significant material provided by one of the parties must be regarded as a significant error amounting to denial of natural justice [14].

- It is true that the AMS refers, in the context of taking the worker's history, that "his treating psychologist Mr Baddeley as required, generally every several weeks", but this cannot be an inference that the AMS had Mr Baddeley's report in the absence of being specified in the place particularly identified in his certificate as the appropriate place for identifying the documentary material relied upon. Further, the AMS commented briefly on other medical opinions and findings submitted by the parties, but did not mention Me Baddeley's report. Mr Baddeley's report was important and significant and his conclusions were markedly at odds with that of the AMS. It is impossible to think that the AMS had Mr Baddeley's report before him with a conclusion with which he so substantially disagreed, that he would not have stated even briefly the reasons why he had came to such a different conclusion [12].

- The implicit conclusion that the AMS received and considered Mr Baddeley's report is illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds [19].

Implications

Although the Court has not specifically considered the judgments in *Massie v NSW Timber v Hardware Pty Ltd* ([2006] NSWSC 1045 or *Dar v State Transit Authority of NSW* [2007] NSWSC 260 in finding that it is impossible to think that the AMS had Mr Baddeley's report before him, the Court's alternative basis for setting aside the Registrar's decision, namely that the Registrar failed to consider the appellant's ground of appeal that the AMS did not consider Mr Baddeley's report dated 12 July 2004, is in line with the current status of the law on this point.

It is significant that the Registrar in determining whether a ground of appeal exists or is made out considers all submissions made and grounds of appeal identified by the Appellant.

In determining whether or not an AMS was provided with and considered all evidence provided for the purposes of the assessment, the Registrar is to examine the MAC as a whole and point to relevant parts of the MAC to support conclusions that the AMS was in fact provided with all documentary evidence (as specified in the referral) and has considered all relevant and significant evidence provided by the parties. Although there is Supreme Court authority that the Commission's failure to provide the AMS with all documentary evidence cannot establish demonstrable error on the part of the AMS, it is significant to note that implicit or vague conclusions by the Registrar that all documentary evidence was provided by the AMS may lead to error.

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Judgment Summary

Department of Education v TF **[2017] NSWSC 1596**
(Garling J, 23 November 2017)

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Facts

The worker was a school teacher who suffered a psychological injury sustained during his employment over a number of years.

The AMS assessed the worker as having 7% whole person impairment. This assessment was revoked by the Appeal Panel, who found that the worker suffered 17% whole person impairment.

The employer appealed the decision on the basis that the Panel had made a jurisdictional error in finding a demonstrable error, where no error had been identified by the Registrar in allowing the appeal. The employer also submitted that the Panhel did not take into account relevant evidence and that the errors found by the Panel in the MAC amounted to nothing more than "mere professional disagreement."

Decision

MAP decision upheld

The employer submitted that the Panel is limited to reviewing only those grounds of appeal identified by the Registrar as "made out on the face of the appliacation."

Garling J held that that there is no obligation upon the Registrar to identify more than one ground of appeal, and that that the Panel may consider all grounds of appeal submitted.

Garling J also found that the Panel had sufficiently considered the relevant evidence, even where it did not explicity deal with an investigation report provided by the insurer. Taking relevant factors into consideration, the Pnael undertook a process of reasoning to reach its conclusion, which was held to amount to more than simply a difference of professional opinion.

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Judgment Summary

Tomislav & Ranka Divljak (trading as DTR Ceilings) v Workers Compensation Commission & Ors [2018] NSWSC 760
(Latham J, 28 May 2018)

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Facts

The worker was injured at work in 2012, and made a lump sum claim based on a medical assessment of injuries to his upper and lower gastrointestinal tracts. The worker claimed impairment of the upper and lower digestive systems as a consequence of a physical injury to his spine. The matter was referred to an AMS, who assessed 2% for the upper digestive system and nil for colorectal disorder under tables 6.3 and 6.4 of AMA 5. The AMS included an assessment of the anus (haemorrhoids) of 1% WPI under table 6.5.

The appellant employer appealed against that assessment, essentially on the basis that no claim had been made, nor was there a dispute, relating to the assessment of the anus. The Panel rejected the appeal on the basis that AMS had appropriately exercised his clinical judgment.

Decision

Latham J held that the dispute that was referred to the AMS was the assessment of the colon and rectum under table 6.4, not the anus under table 6.5. The employer would be subject to a "practical injustice" on the basis of an assessment on which it had no notice, no opportunity to address and no opportunity to provide medical evidence.
.
Ultimately, the decision was quashed on the basis that that the Panel's reasons were inadequate in that they did not address the arguments raised by the appellant beyond simply referring to them. The Court found that this failure to address the substantive arguments gives rise to a situation where the court reviewing the decision is unable to determine whether it contains an error of law. This category of inadequacy constitutes an error of law on the face of the record. The Court also held that the decision constituted a denial of procedural fairness and a constructive failure to exercise jurisdiction.

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***Tran v J Robins & Sons Pty Ltd* [2006] NSWSC 1013**
(Bell J, 29 September 2006)

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Facts

The Court considered the construction of the "fresh evidence" in section 327(3)(b) of the 1998 Act as applied by the Registrar when exercising her "gatekeeper" role. The Plaintiff made an argument that the *WorkCover Medical Assessment Guidelines* and second reading speech gave support to the argument that "or" was to be read as "and".

Held

The Supreme Court did not consider the guidelines or second reading speech to be material to which it had recourse in determining the meaning of the word "or" as it appears in the Act. The Supreme Court essentially confirmed the approach taken in *Summerfield* where the Supreme Court determined that the word "or" in section 327(3)(b) is to be given its usual disjunctive meaning, with the result that "additional relevant information" may fall either one of the two categories described in section 327(3)(b) of the 1998 Act.

Implications

The Court has affirmed the accepted principle set out in *Summerfield*, the context of what "additional relevant information" is under section 327(3)(b) of the Act.

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Judgment summary

Treverrow v Registrar, WCCC **[2008] NSWSC 632**
(Harrison AsJ, 25 June 2008)

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Facts

The Plaintiff suffered injury to her right and left arms when she slipped in a car park. The Registrar referred her for assessment by an approved medical specialist ('AMS'), who issued a medical assessment certificate ('MAC') assessing 25% loss of efficient use of the right arm, and 0% for the left arm (the MAC also provided WPI assessments of 13% and 0% respectively for these body parts (threshold dispute)).

In the MAC, the AMS noted restrictions in the Plaintiff's left shoulder and opined that the current condition of that limb would entitle her to 4%WPI. However, the AMS determined that those symptoms arose some years after the subject injury in 2001, and were not a result of that injury; accordingly he made a finding of 0% impairment as a result of the injury referred for assessment. The AMS provided reasons for his conclusions with reference to the medical evidence, and also referred to a 'template' which instructed that deductions for subsequent injury should not be made in the table at the end of the MAC (which provides a column for deductions for *previous* injury).

The Plaintiff appealed against the MAC on the grounds of incorrect criteria and demonstrable error, but a delegate of the Registrar refused leave to appeal. The Plaintiff sought review of the delegate's decision in the Supreme Court, claiming that the delegate erred in law.

Held

The Summons is dismissed.

- Incorrect criteria must refer to such matters as the tests set out in the Guidelines, where they are applicable; factual errors in a MAC would not usually satisfy this ground (*Marina Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2008] NSWCA 88 ('*Pitsonis'*) followed) [35]. The table at the end of the MAC is headed "table of disabilities"; it is not surprising that the delegate did not dwell on the submission that the AMS did not apply the table of disabilities [39]. The AMS explained his reasons for the 0% assessment, and the delegate addressed this in his reasons [40].

- Demonstrable error is an error readily apparent from an examination of the MAC and the referral document (*Merza v Registrar of the Workers Compensation Commission of NSW & Anor* [2006] NSWSC 939 and *Pitsonis* followed). The AMS concluded that whatever impairment the Plaintiff is suffering to her left shoulder was not caused by the subject injury – this case is distinguished from *Wikaira v Registrar of the Workers Compensation Commission of NSW & Anor* [2005] NSWSC 954, in which an AMS made findings that were expressly inconsistent with an arbitrator's previous ruling [43]. The AMS was to assess the degree of permanent impairment as a result of the injury. It does not follow that every injury suffered will result in a permanent impairment. The delegate considered the submissions in relation to causation and addressed those issues in his reasons. The delegate found that the AMS did not make a determination on causation – the AMS accepted that the injury did occur and assessed impairment as a result of that injury. The delegate's decision is correct [44]-[46].

Implications

The decision follows previous authority regarding the grounds of ‘incorrect criteria’ and ‘demonstrable error’, and affirms that not every injury results in permanent impairment.

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Judgment summary

***Trustees of the Maronite Sisters of the Holy Family t/as Our Lady of Lebanon School v Carpenter* [2013] NSWSC 1149**
(Harrison AsJ, 22 August 2013)

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Facts

Mr Carpenter injured his right knee on 7 November 2001, whilst in the employ of C Management Services. On 16 September 2005, he again injured his right knee whilst in the employ of the plaintiff. In late 2005, Mr Carpenter claimed a consequential condition in his left hip as a result of an altered gait from his right knee injuries. Mr Carpenter received compensation for the injuries suffered to his right knee injuries. The proceedings in the current matter relate to the consequential condition in Mr Carpenter's left hip.

On 23 October 2012, Mr Carpenter was examined by Approved Medical Specialist (AMS) Dr Mastroianni, who was asked to assess loss of use of the left leg at or above the knee, including any loss below the knee due to injury sustained on 7 November 2001, and whole person impairment of the left lower extremity due to injury sustained on 16 September 2005.

The AMS certified that Mr Carpenter suffered zero per cent loss of efficient use due to injury on 7 November 2001, and 10 per cent whole person impairment of the left lower extremity, with a date of injury of 16 September 2005.

The plaintiff appealed against the AMS's decision. On 18 February 2013, the Appeal Panel confirmed the Medical Assessment Certificate. The plaintiff commenced proceedings in the Supreme Court against the Medical Appeal Panel's decision on the grounds that:

1. The Appeal Panel exceed its jurisdiction, misunderstood the nature of the task it was to perform, and misapplied the law to the facts, in breach of section 328(2) of the 1998 Act. The Appeal Panel failed to confine the review to the grounds upon which the appeal was made.

2. If the Appeal Panel had the power to go beyond the particulars in the grounds of review, they failed to warn the parties they intended to do so, denying the parties natural justice.

3. The Appeal Panel failed to give genuine, realistic and proper consideration and constructively failed to exercise its jurisdiction, sidestepped an aspect of the employer's case, asked the wrong question, and failed to give adequate reasons.

Held

Grounds 1 and 2

Grounds 1 and 2 were dealt with concurrently. Both parties (and Her Honour) agreed that section 328(2) of the 1998 Act and *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*) are authority for the proposition that if the Appeal Panel has power to go beyond the grounds of appeal, it can do so if it notifies the parties and gives them an opportunity to be heard.

The Appeal Panel's decision at [26] was the focus of criticism in grounds 1 and 2. At [26], the Panel noted that the AMS approached the matter on the basis that there was no injury to Mr Carpenter's hip on 16 September 2005. The Panel noted that the Application claimed injury to the left hip on 16 September 2005, sustained when Mr Carpenter slipped, although that point was not taken by Mr Carpenter in the appeal proceedings. The Panel noted that injury was not disputed and accordingly the assessment must be based on the acceptance that injury to the left hip was

not only a consequence of the right knee injury but also as a direct result of the fall. According to the Panel, this lent further support to the conclusion that the appropriate deduction should be 50 per cent.

Her Honour held that although reasons should not be read with an eye too keenly attuned to error, when the decision is read as a whole, and with the limited grounds of review available pursuant to section 328(2), [26] cannot stand alone as an obiter comment. In her Honour's view, the Panel was entitled to refer to the contents of the Application, but the Panel went further by pointing out that the AMS in his assessment did not refer to any injury of the left hip resulting from a fall. The Panel's consideration of a fall contributing to Mr Carpenter's left hip condition formed part of the reasoning process in confirming the MAC, and raised an issue that did not form part of the basis for the appeal.

In raising an issue that did not form part of the basis for the appeal, the Panel acted beyond its powers. In accordance with *Siddik*, the parties should have been given an opportunity to be heard on the issue.

The plaintiff was successful on grounds 1 and 2.

Ground 3

Harrison AsJ briefly considered ground 3 of the appeal in light of her findings in relation to grounds 1 and 2. She was satisfied that the Panel sufficiently dealt with the gravamen of the plaintiff's complaint with regard to the relative contribution of the two right knee injuries. Ground 3 failed.

The matter was remitted to the Registrar for determination according to law.

Implications

This case confirms the jurisdiction of an Appeal Panel, limited to the grounds of review on which the appeal is made. A Panel should be cautious not to raise an issue that did not form the basis for the appeal, and, if new issues arise during preliminary review, in accordance with *Siddik* the parties should be given an opportunity to be heard on the issue.

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Judgment Summary

Vannini v Worldwide Demolitions Pty Ltd [2018] NSWSC 572
(Fagan J, 3 May 2018)

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Facts

The worker suffered a lower back injury in March 2009 while working as a demolition labourer. The worker had a long history of lower back and leg pain prior to the workplace incident, and had undergone surgery on his lumbar spine prior to the injury in August 2008. In July 2010 an orthopaedic surgeon provided a report assessing the worker's WPI to be 15%, of which two-thirds attributed to his pre-existing condition. However in August 2016 the surgeon provided a further assessment of 22% WPI, with nil impairment attributable to his pre-2009 condition.

After spinal fusion surgery in 2015 a dispute arose as to the contribution of the worker's pre-existing condition to his current impairment. The AMS issued a MAC finding nil contribution from the 2008 condition. The employer appealed the MAC to the Appeal Panel, who found that one-half of the WPI was attributable to the pre-existing condition. The worker sought judicial review of the Panel's decision.

Decision

The primary issue before the Court was whether the Appeal Panel had made an error of law by substituting its own view of the degree of contribution, based on its review of the evidence, without identifying any error in the reasoning of the AMS.

Fagan J held that the Panel had not fallen into an error of law by substituting its own finding. Rather, the Panel's substitution of its own view as to the factual issues was in itself the requisite identification of error.

Fagan J held that the error of fact identified identified by the Panel amounted to a "demonstrable error" in the MAC, and commented at [56]:

> "For an error to be demonstrable within this meaning it is not necessary that it should be so self-evident that no consideration of the evidence, no reasoning or no application of clinical judgment is required. If par (d) were intended to limit the appellability of findings of fact as tightly as that, it would hardly be necessary for a ground under (d) to be considered by a Panel comprising two medical experts."

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Vannini v Worldwide Demolitions Pty Ltd [2018] NSWCA 324
(Gleeson JA, Macfarlan JA and Barrett AJA, 17 December 2018)

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Facts

Mr Vannini was employed in heavy labouring work. In 2008, at the age of 23, he developed gradual onset back pain. This resulted in L5/S1 surgery, and after a period of around 6 months off work, Mr Vannini returned to work with a different employer. On 6 March 2009, Mr Vannini was lifting a sheet of roofing iron when he felt sudden severe pain in his lower back. He brought a claim for lump sum compensation to the Commission, based on a report of Dr Bodel who initially assessed 15% WPI, apportioning two thirds to the original injury and one third to the 2009 injury. Dr Bodel then revised his assessment to 22% WPI with no deduction under section 323. The proceedings were referred to an AMS who assessed 22% with no deduction. The Panel revoked the MAC and made a deduction of one half. Fagan J dismissed judicial review proceedings brought by Mr Vannini in the Supreme Court discussed above.

Issues

Four grounds were raised on appeal:

(a) Grounds 1 and 2 contended that the primary judge erred in construing s 327(3) to permit the Panel to review a MAC on the merits, without identifying error;
(b) Ground 3 contended that the primary judge erred in finding that the Panel found that the MAC contained a demonstrable error;
(c) Ground 4 contended that the Panel failed to give adequate reasons.

Decision

Gleeson JA (Macfarlan JA and Barrett AJA agreeing) dismissed Mr Vannini's appeal from the decision of Fagan J. The judgement provides an important analysis of the role of the MAP, the meaning of demonstrable error, and the powers of a Panel on review. It may provide some answers to unresolved questions about the role and powers of the Panel. Relevant paragraphs of note include inter alia:

- [22] – Siddik is still good law despite the amendment to s 328(2)
- [53-54] – what constitutes jurisdictional error
- [77-79] – consideration of the concept of demonstrable error, including what material the Panel may have regard to when considering whether the MAC contains a demonstrable error
- [83] – discussion of the role of the Registrar with reference to Merza and Pitsonis
- [90-92] – discussion of the causation question involved in section 323, identifying the difference between whether any proportion of impairment was due to a previous injury (a "unique outcome"), and the extent of that proportion (a matter of "degree and impression")

Ultimately it was held that the Panel implicitly found error (at [97]) and there is no "fixed or formulaic way" in which a Panel must express its finding of error (at [99]). The error in the MAC was capable of being demonstrated and the Panel found so by reference to the relevant evidence before the AMS (at [104]). Having not found any of grounds 1-3, Mr Vannini properly conceded that ground 4 would likely fail, which it did. The Panel's reasons were held to be adequate (at [110]).

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Campbelltown City Council v Vegan **[2006] NSWCA 284**
(Handley JA, McColl JA, Basten JA, 25 October 2006)

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Campbelltown City Council v Vegan **[2004] NSWSC 1129**
(Wood CJ at CL, 25 November 2004)

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Grounds of appeal in the Supreme Court and Court of Appeal matters

The Council brought proceedings for judicial review of the Appeal Panel, on the basis that the reasons given by the Appeal Panel in revoking the AMS's MAC and issuing a new MAC that assessed the percentage loss under the Table of Disabilities at a higher rate were insufficient.

Wood CJ of the Supreme Court dismissed the application. The Council appealed against Wood CJ's decision that the reasons given by the Appeal Panel were brief and minimal.

Held – Supreme Court

Wood CJ in the Supreme Court proceedings determined that the task of determining whether an appealable error exists falls to the Registrar. Once the Registrar, as gatekeeper, is satisfied that an error exists, the matter is referred to the Appeal Panel. In his view the Appeal Panel does not consider whether an error exists within one of the section 327(3) grounds, rather the Panel's task is to conduct a review de novo of the original assessment. The Panel is free to conduct a review on the basis of the material properly before it, without the need to make a finding as to the existence of an error falling within an available ground of appeal and without being confined to the correction of that error.

Wood CJ stated that a decision of the Appeal Panel is not a decision of the Commission or proceedings before the Commission.

Wood CJ was of the view that the legislation did not require the Appeal Panel to give reasons. All the Appeal Panel had to do was to revoke or confirm the MAC and that there is no provision under section 328 to disclose its reasons. Having undertaken a review de novo the Appeal Panel's conclusion was based on a clinical judgment or opinion based on the information before it, which provided sufficient disclosure of the Panel's reasons for it. No error was found and the summons was dismissed.

Held - Court of Appeal

The Court of Appeal allowed the appeal. The Court decided that although there is no statutory obligation to give reasons, an Appeal Panel has an obligation to give reasons in relation to the exercise of judicial power and "justice must not only be done it must be seen to be done". The assessment of permanent impairment undertaken by the Appeal Panel involves the application of a statutory test, by which legal rights as between an employee or employer are determined. Accordingly, it is in the nature of a judicial function.

It was held that the reasons given by the former Appeal Panel were deficient and did not constitute compliance with the minimum requirements of that obligation. This failure constituted an error of law allowing the decision to be set aside on appeal. Where more than one conclusion is open on the evidence it will be necessary for the Appeal Panel to give some explanation for its preference for one conclusion over another.

In *obiter*, Basten JA commented that the Appeal Panel may be limited to a correction of the error found by the Registrar. On the other hand Handley JA expressed the view that the Appeal Panel was exercising original jurisdiction. In the absence of a clear ruling by the Court, Appeal Panels have adopted different approaches as to the nature of powers exercised by panels.

Implications

- An Appeal Panel is required to give reasons.
- An Appeal Panel is exercising a judicial function.
- Review by an Appeal Panel is de novo (although this is not entirely clear) to be made on the basis of the evidence properly before it.
- Decisions of Appeal Panels are not decisions of the Commission.

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Judgment summary

Vekic v Registrar of Workers Compensation Commission and Ors **[2009] NSWSC 552**
(Patten AJ, 18 June 2009)

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Facts

The plaintiff lodged an application to resolve a dispute with the Commission. The plaintiff's injuries of her cervical spine, lumbar spine and left lower extremity were referred for assessment by an Approved Medical Specialist (AMS). The AMS certified permanent impairment of 5% for cervical spine, 5% for lumbar spine, and added a further 1% Whole Person Impairment for restrictions of Activities of Daily Living (ADLs) to his assessment of lumbar spine.

Pursuant to section 327 of the *Workplace Management Injury and Workers Compensation Act* 1998 (the Act), the plaintiff appealed the AMS's assessment relying on the ground that the assessment was made on the basis of incorrect criteria. The Registrar in accordance with subsection 327(4) of the Act allowed the appeal to proceed to an Appeal Panel.

The Appeal Panel, in affirming the AMS's assessment indicated that it was open to the AMS to find that the extent to which the assessed impairment of the lumbar spine affected the plaintiff's activities of daily living was at the low end of the scale. The panel also found it "regrettable" that the AMS did not explain why he decided not to make any award for ADLs in respect of the plaintiff's cervical spine, but formed the view that in the absence of evidence of any material functional restriction resulting from impairment of the cervical spine the assessment did not contain a demonstrable error.

The issue before the Supreme Court concerned the Appeal Panel's conclusions regarding ADLs.

Held

The decision of the Appeal Panel is quashed and the proceedings returned to the Workers Compensation Commission to be dealt with according to law.

- The AMS's assessment contained an error of law on its face, namely, it did not comply with section 325(2)(c) of the Act. The error infected the Appeal Panel's decision, in that it forewent the opportunity of investigating the matter itself as required by law [35].

- The Registrar found, and the Appeal Panel apparently recognised, there was a failure by the AMS to provide reasons in support of his assessment as to the impact of the plaintiff's impairment upon ADLs. This deficiency was capable of cure by the appeal Panel but it passed the opportunity to do so [33].

- The plaintiff was entitled to know why her claim for impact upon ADLs was assessed at 1% and not a greater or lesser percentage. The Appeal Panel pointing to "the absence of evidence of any material functional restriction arising from the impairment of the cervical spine" was no answer [33].

Implications

The judgment is uncontroversial, in that it highlights the statutory obligation of AMSs to give reasons for their assessments and obligation of Appeal Panels to explore and cure errors due to lack of reasons in medical assessments.

The Court did not decide whether or not the AMS was in error by not increasing impairment for both the cervical and lumbar spine due to impact on ADLs. However, it is worth noting that the new

WorkCover Guides for the Evaluation of Permanent Impairment (3rd Edition), at paragraph 4.32, makes it clear that an additional amount for ADLs can only be assessed for one spinal region, irrespective of the number of spinal region injuries.

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Judgment summary

Velickovich v Registrar of the Workers Compensation Commission & Anor **[2007] NSWSC 1208**
(Malpass, AsJ, 1 November 2007)

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Facts

A Medical Assessment Certificate ('MAC') was issued dated 19 February 2007. The worker appealed against the MAC pursuant to section 327(c) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the Act'), claiming the assessment was made on incorrect criteria only. The appeal was lodged on 23 February 2007.

The worker alleged that the AMS: failed to conduct a proper physical examination and comply with paragraph 4.32 of the WorkCover Guides; erred in making a one-tenth deduction for pre-existing condition; failed to make an allowance for the effects of surgery in accordance with paragraph 4.34 of the WorkCover Guides.

A delegate of the Registrar determined that she was not satisfied that at least one of the grounds of appeal had been made out, and accordingly the appeal did not proceed.

The plaintiff filed a Summons in the Supreme Court. The Summons named the Registrar of Workers Compensation Commission as the first defendant. The second defendant was the employer. The AMS was not named as a defendant. Relief was sought pursuant to section 69 of the *Supreme Court Act* 1970 (by way of judicial review).

Held

The Summons is dismissed.

- The plaintiff's submissions to the Court expressed a challenge to what was done by the AMS, inter alia, by way of an attack on the sufficiency of his reasoning process. The ground of appeal put to the Registrar in the appeal application did not raise any complaint regarding the sufficiency of the AMS's reasoning. Accordingly it cannot afford any basis for a challenge directed to a decision of the Registrar on the basis of jurisdictional error [18]-[19].

- The AMS has a statutory obligation to give reasons for his assessment (section 325 of the Act). A failure to perform that statutory obligation does not provide a ground of appeal. If it is to be the subject of challenge, perhaps the only avenue may be by way of judicial review of the decision of the AMS [20].

- The plaintiff's submissions are in substance a challenge on the merits to the findings made by the AMS. Such a challenge is not open to the plaintiff in proceedings for judicial review [21].

- Although only the ground of incorrect criteria was argued in the appeal submissions, there was a suggestion that the "Registrar had a duty to consider any other ground of appeal that became apparent from the material." However, the Associate Justice found this was an unlikely proposition under the language of subsection 327(4) and in any event was not open for argument in this case [25]-[27].

Implications

The decision has very few implications, if any, regarding decisions made by the Registrar under section 327 of the Act. The Court made *obiter* comments to the effect that a failure to provide reasons by an AMS, although a statutory obligation, does not provide a basis for an appeal. It is anticipated that these comments will have minimal impact upon the current practice adopted by the Registrar.

The Court also indicated a view that the Registrar does not have to consider grounds of appeal that have not been put by the appellant. This view accords with the practice already adopted by the Registrar.

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Judgment summary

***Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254**
(McColl JA, Basten JA and Handley AJA, 22 June 2010) [Return to List]

Facts

The applicant claimed for lump sum compensation for injuries to his lumbar, cervical and thoracic spines.

The matter was referred to an Approved Medical Specialist (AMS) who assessed 7% whole person impairment (WPI) of the lumbar spine (this included a 10% deduction for a pre-existing condition) and 0% WPI in relation to the thoracic or cervical spines. An Appeal Panel (the Panel) confirmed the Medical Assessment Certificate (MAC).

An application for judicial review of the decisions of the AMS and the Panel was rejected by the Supreme Court on the basis that the applicant had not demonstrated any error of law on the face of the record or jurisdictional error.

The applicant sought leave to appeal from the Supreme Court's decision.

Issues

The applicant argued:

(d) The AMS did not make a finding with respect to any causal connection between the pre-existing degenerative condition and the impairment consequent upon the compensable injury.

(e) The AMS failed to provide adequate reasons for making the 10% deduction in respect of the lumbar spine and failed to provide adequate reasons in relation to the assessments of the thoracic and cervical spines.

(f) The Panel failed to provide adequate reasons for its decision.

Held

- The Court found that a challenge by way of judicial review to the decision of the AMS was incompetent because there had been an appeal to the Panel and the Panel had confirmed the MAC.

- The Court determined that if it were open to the applicant to challenge the MAC, there was no failure on the part of the AMS to make a finding as to causation as asserted by the applicant because the AMS had sufficiently identified the pre-existing condition to which a portion of the permanent impairment of the lumbar spine was due.

- An AMS is required to give reasons, however, those reasons do not necessarily need to be comprehensible to a person with no medical expertise. The applicant's submission regarding the AMS's failure to give reasons for making a deduction was rejected because there was no medical evidence establishing a dispute as to whether the pre-existing condition contributed to the impairment. An AMS is not required to give reasons where an alternative conclusion is not presented on the evidence and not shown to be necessarily available.

- Before the Panel, the applicant argued that because the MAC did not record any physical examination of the thoracic spine an inference could be made that no examination had taken place. The Panel found that while the AMS had not provided findings of an examination a clinical view had been expressed. The Court found that the Panel dealt with the issue raised before it and no reviewable error occurred. Because the Panel confirmed the MAC any alleged invalidity of the MAC was no longer relevant.

- The Court accepted that the AMS did not state which of the doctors' opinions he preferred in relation to injury to the cervical spine and why. However, the applicant failed to raise this issue before the Panel and it was not an issue that could now be dealt with by the Court.

- It was not necessary or appropriate for the Court to review the MAC in circumstances where the Panel had confirmed the MAC and the applicant had not argued that the Panel could not properly deal with the merits of the claim or that there was a deficiency in the MAC that prevented the Panel from conducting a review pursuant to section 328(2) of the *Workplace Injury Management and Workers Compensation Act* 1998 or established that the decision of the Panel was itself attended by reviewable error.

- Leave to appeal was granted but the appeal was dismissed.

Implications

- The decision confirms previous authorities on various issues and principles. However, the Court reiterates that the supervisory jurisdiction of the courts does not extend to the original MAC (see [20] and [53] of Basten JA's reasons).

- An AMS has an obligation to provide reasons for their decision but those reasons do not need to be comprehensible to a person with no medical expertise. If there is no medical evidence produced in a particular matter to establish that a pre-existing condition does not contribute to impairment, thus making the issue 'medically contestable', it may be self-evident that the pre-existing condition contributed to the impairment (to those with medical expertise) and the AMS may not be required to give reasons.

- Where an Appeal Panel has confirmed a MAC the decision of the Panel will be taken as the decision in respect of the substantive issues resolving the medical dispute. A challenge to that MAC can only be brought in the Supreme Court if the matter relied upon in support of that challenge could not reasonably have been raised before the Panel and remains relevant. However, the MAC may still be relevant if the Panel's decision is challenged.

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Judgment summary

Vitaz v Westform (NSW) Pty Limited and Ors **[2010] NSWSC 667**
(Johnson J, 22 June 2010)

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Facts

The plaintiff, Mr Vitaz, sustained injuries to his neck, lower back, left shoulder, right shoulder and left foot on 13 December 2007 in the course of his employment with the first defendant, Westform (NSW) Pty Limited ("Westform"). Mr Vitaz made a claim for lump sum compensation and pain and suffering as a result of the injuries to his cervical spine, thoracic spine, lumbar spine and left shoulder which resulted in proceedings being commenced in the Commission on 3 January 2009.

Mr Vitaz was referred by the Registrar to Dr Giblin, AMS, for assessment of Mr Vitaz's permanent impairment resulting from the injuries to his cervical spine, thoracic spine, lumbar spine and left shoulder. Dr Giblin issued a MAC on 26 February 2009, assessing Mr Vitaz with 0% whole person impairment ("WPI") of his cervical spine, 0% WPI of his thoracic spine and 2% WPI of his left upper extremity. In relation to the injury to the lumbar spine, Dr Giblin assessed Mr Vitaz with 6% WPI to which he made a deduction of 10% pursuant to section 323 of the 1998 Act for a pre-existing condition which resulted in 5% WPI as a result of the injury to the lumbar spine.

Mr Vitaz appealed against the medical assessment, relying on the grounds of appeal under sections 327(3)(c) & (d). The appeal was lodged out of time. A delegate of the Registrar determined that there were sufficient special circumstances to justify an increase in the time to appeal. The delegate also determined that it could be shown that the MAC contained a demonstrable error under section 327(3)(d) and referred the matter to an Appeal Panel. The Appeal Panel issued a decision on 16 June 2009, confirming the MAC issued by Dr Giblin.

Issues

Mr Vitaz sought to challenge the decisions of the AMS and the Appeal Panel and lodged a summons in the Supreme Court. The grounds of review pleaded were as follows:

1) The AMS misdirected himself as to the effect of section 323 of the 1998 Act;
2) The AMS failed to comply with the statutory task incumbent upon him pursuant to section 325 of the 1998 Act or at common law to give reasons;
3) The AMS denied the plaintiff procedural fairness by failing to advise the plaintiff of his adverse conclusions arrived at which were not obviously open on the known material;
4) The Appeal Panel failed to conduct its own examination of the plaintiff;
5) The Appeal Panel relied on the facts found and the reasoning of the AMS and failed to cure the errors in his decision, and
6) The Appeal Panel affirmed the purported decision of the AMS and thereby affirmed a decision that was no decision at all.

Held

Johnson J dismissed the summons with costs.

Reasons for Decision

Confines of Judicial Review

- The limited role of a court reviewing the exercise of an administrative decision must constantly be borne in mind. It is not the function of the Court to substitute its own decision for that of the administrative tribunal exercising power which the legislature has vested in that body (*Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; 162 CLR 24 at 40-41).

- The reasons for an administrative decision are not to be minutely and finely construed with an eye keenly attuned to the perception of error. The reasons for an administrative decision maker are meant to inform, and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 271-272).

- A finding of fact may reveal error of law where it appears that the decision maker has misdirected himself or herself or where there is no evidence to support a finding (*Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 155-156; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 355-357).

- A failure on the part of an administrative tribunal to give any or any adequate reasons does not, without more, establish that the decision involved some error, although there may be cases that warrant the inference that the relevant tribunal has failed in some respect to exercise its powers or jurisdiction according to law (*Absolon v New South Wales TAFE* [1999] NSWCA 311 at [67]; *YG v Minister for Community Services* [2002] NSWCA 247 at [37].

- Where a challenge is one that relates to the formation of an opinion by an administrative tribunal, then the ground of legal error is somewhat confined by reference to the principles in *Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 118-199; *Bruce v Cole* (1998) 45 NSWLR 163 at 183-184.

Alleged misdirection by the AMS as to the proper construction of section 323 of the 1998 Act

- His Honour accepted based on the authorities of *Matthew Hall Pty Limited v Smart* [2000] NSWCA 284 and *Cole v Wenaline Pty Limited* [2010] NSWSC 78 ("*Cole*") that section 323 requires the pre-existing condition to have contributed to impairment arising from the later injury.

- It is not sufficient to assume that the existence of a pre-existing injury or condition will always contribute to the impairment flowing from any subsequent injury (*Cole* at [30]). There must be evidence before the AMS to support a conclusion that the pre-existing injury or condition contributed to the level of post-injury impairment.

- While there was some degree of ambiguity in the AMS's wording, a fair reading of his reasons shows it was implicit that he considered the muscle spasms to be clinically related to the pre-existing condition. It is not an error of law to omit to state expressly a finding that is clear on a fair reading of the decision maker's decision (*Polglaze v Veterinary Practitioners Board of NSW and Anor* [2009] NSWSC 347 at [56] ("*Polglaze*")).

- It was noted that the AMS stated at page 7 of the MAC:

> "This client presents with a clear history of symptoms occurring in the spine and left shoulder as a result of the subject accident and consistent with abnormalities noted in the MRI scan of the spine and left shoulder."

His Honour considered the above extract to be demonstrative of the AMS's regard for the evidence available to him, and not merely an assumption that the plaintiff's pre-existing condition must have contributed to his current level of permanent impairment (*Cole* at [28]).

- Having found, on the evidence that the plaintiff's pre-existing degenerative facet joint arthritis contributed to the level of impairment of the lumbar spine, the AMS was entitled to make a deduction in accordance with section 323(1) of the 1998 Act.

Failure by the AMS to give reasons

- There is an implied statutory obligation on an AMS to give reasons, like an assessment by an Appeal Panel an assessment of permanent impairment by an AMS involves the application of a statutory test by which legal rights as between an employee and employer are determined, and ought therefore be considered an exercise in the nature of judicial function (*Campbelltown City Council v Vegan* [2006] NSWCA 284 ; 67 NSWLR 372 at 394 ("*Vegan*") and *Jones v The Registrar WCC* [2010] NSWSC 481 at [34] ("*Jones*")).

- The "minimum legal standard" as described in *Vegan* at 397 is equally applicable to an AMS.

- There is a presumption of regularity that an AMS has performed such tests as might be required to determine whether certain diagnostic criteria are present (*Jones* at [50]). The medical science the AMS was required to apply was not controversial and his reasons were not required to be extensive or detailed. It is not necessary for an AMS to systematically deal with each and every criterion he does not consider to be indicated in a particular case, simply so he can expressly say that they do not apply.

- The AMS satisfactorily discharged his statutory and common law duty to give reasons.

Obligation of procedural fairness

- The content of the rules of procedural fairness is variable (*Kioa v West* [1985] HCA 81; 159 CLR 550 at 612 per Brennan J). The requirements depend on the circumstances of the case, the nature of the inquiry and the rules under which the decision maker is acting as well as the subject matter (*Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 per Tucker LJ.

- There is no provision in the 1998 Act which gives the right to have informal observations made by an AMS in assessing a worker's permanent impairment put to them during examination. While certain procedural matters are proscribed with respect to appeals against an assessment (section 327 and 328 of the 1998 Act), the only statutory procedural requirement for assessments themselves is that they be carried out in accordance with the WorkCover Guides. The WorkCover Guides may be characterised as delegated legislation, and therefore unable to affect a proper construction of the 1998 Act or limit rights governed by it (*Ackling v QBE Insurance (Australia) Limited and Anor* at [83]).

- The assessment of permanent impairment under Chapter 7 Part 7 of the 1998 Act is to be conducted by a suitably qualified and independent medical specialist within a clinical setting. The independent medical specialist's professional and clinical judgment is presumed correct. It is not a quasi-judicial inquiry where the claimant has the right to advocate their interests. In practical terms having to ask for and take into account a person's subjective response to informal observations made by a medical practitioner could undermine the clinical utility of those observations and the intended independence of the assessment process. The final requirement of paragraph 1.32 of the WorkCover Guides reinforces this view.

Failure by the Appeal Panel to conduct its own examination

- The decision of the Appeal Panel not to re-examine Mr Vitaz must have at least in part been influenced by the fact that the plaintiff himself did not consider it necessary or wish to be re-examined.

- Having found that the decision of the AMS contained no error of law there was no necessity for the Appeal Panel to conduct its own examination of Mr Vitaz.

- It was a clinical and discretionary decision by the Appeal Panel not to re-examine the plaintiff, one it was entitled to make (*Bukorovic v The Registrar of the WCC* [2010] NSWSC 507 at [43], [57]).

Failure by the Appeal Panel to cure errors in the AMS's decision

- As no error of law or jurisdictional error was found in the decision of the AMS the foundation for this ground does not exist.

Affirmation by the Appeal Panel of the AMS's decision was no decision

- As no error of law or jurisdictional error was found in the decision of the AMS the foundation for this ground does not exist.

Implications

The decision is uncontroversial in confirming the following principles:

- An AMS must demonstrate on the available evidence that a worker's pre-existing condition contributed to his/her current level of permanent impairment. It is not sufficient to merely make an assumption that a pre-existing condition would have contributed to the current level of permanent impairment (*Cole* followed).

- It is not an error of law to omit to state expressly a finding that is clear on a fair reading of the decision maker's decision (*Polglaze* followed).

- There is no denial of procedural fairness in circumstances where an AMS does not put to a worker inconsistencies observed during the formal and informal conduct of the examination.

- The decision follows previous judicial review decisions regarding the standard of reasons required in the decision of an AMS or Appeal Panel.

- The decision by an Appeal Panel not to re-examine a worker is a matter within its discretion and is based on its clinical judgment.

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Judgment summary

Inghams Enterprises Pty Limited v Vojnikovich **[2014] NSWSC 1519**
(Schmidt J, 4 November 2014)

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Facts

On 6 December 2013 the AMS issued a Medical Assessment Certificate certifying Ms Vojnikovich's whole person impairment at 14 per cent in respect of injury to her upper extremities. In his decision, the AMS had "elected" not to apply a deduction under s 323 on account of a pre-existing condition. Inghams Enterprises Pty Limited (Inghams) appealed against this medical assessment on the grounds that the assessment was made on the basis of incorrect criteria and that the medical assessment certificate contained a demonstrable error. Essentially, its case was that a deduction for a pre-existing abnormality was not a matter of discretion by the AMS.

In a decision dated 19 May 2014, the Panel concluded that there should be no deduction because there was no impairment prior to the work injury, accepting that Ms Vojnikovich had no symptoms before she commenced work with Inghams.

Inghams appealed to the Supreme Court and sought consent orders quashing the Panel's decision, and to remit the matter to the Registrar for referral to a differently constituted Panel under s 328 of the 1998 Act. It was submitted that an error occurred in the Panel's decision and that both parties had reached an agreement which resolved the dispute between them.

The Court had to be satisfied that the orders sought were within power and appropriate. It was submitted that in order for the Court to have this power there needs to be at least a prima facie view that there had been reviewable error. Inghams submitted the error to be the Panel's treatment of the deduction under s 323 of the Act. Inghams argued that the Panel had asked itself the wrong question where the correct question was whether any pre-existing condition or abnormality contributed to the current impairment, regardless of whether it had previously caused symptoms.

Issue

The issue before the Court was whether the Court had a sufficient jurisdictional basis to make the consent orders sought. As noted by her Honour, the difficulty in this case was that while the underlying dispute between the parties had been entirely resolved, it was not agreed between the parties that the Panel erred in the way submitted by Inghams.

Decision

The consent orders sought to be made were declined. Justice Schmidt found that while the Court had supervisory jurisdiction over the Commission, the exercise of that jurisdiction is not at large, as has long been recognised: *Victims Compensation Fund Corp v GM* [2004] NSWCA 185.

Her Honour indicated that the exercise of the Supreme Court's [supervisory] jurisdiction depends on relevant error being established, referring to *Kirk v Industrial Relations Commission (NSW); Kirk Group Holdings Pty Ltd v WorkCover Authority of (NSW) (Inspector Childs)* [2010] HCA 1; (2010) 239 CLR 531.

Her Honour was not satisfied that jurisdictional error was established. These were adversarial proceedings and while an error was identified by Inghams, the contrary argument had not been identified or articulated. Her Honour commented that even if the error occurred in paragraph [30] of the Panel's decision, as contended by Inghams, the parties have not established a basis on which such a finding can rest. While Inghams' case rested on *Cole v Wenaline Pty Limited* [2010] NSWSC 78 her Honour said that there was no question in that case as to the Court's jurisdiction to

make orders quashing the decision given by a Panel, on the ground of error on the face of the record.

As a result, despite the terms of the parties' agreement, her Honour was not satisfied that the Court had jurisdiction to make orders quashing the Panel's decision. There was no finding that the Panel made a decision outside the limits of the functions and powers conferred upon it, or that it did something which it lacks power to do under the 1998 Act.

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***Wentworth Community Housing Limited v Brennan* [2019] NSWSC 152**
(Harrison ASJ, 27 February 2019)

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Facts

Ms Brennan was a manager of the plaintiff company. Over time she experienced harassment and ill-treatment at work that led to psychological injury (aggravated Bipolar Affective Disorder Type 2). Ms Brennan was assessed by an AMS and a MAC issued. The AMS assessed Ms Brennan as having WPI of 24%. The employer applied to the Registrar to appeal the MAC. The employer relied upon the grounds of the availability of additional relevant information, incorrect criteria, and demonstrable error. The employer submitted that the AMS had dailed to take into account surveillance and social media investigation reports in the assessment.

A Delegate of the Registrar determined that a ground of appeal had not been made out. The plaintiff appealed that decision. The employer sought judicial review of the Delegate's decision.

Issues

The employer submitted that the Delegate had erred in the construction of additional relevant information for the purposes of s327(3)(b) in stating that the further investigative material supplied was broadly consistent with the material before the AMS.

The employer also submitted that the Delegate's decision contained a jurisdictional error by failing to accept their submission that the MAC did not refer to, and as such the AMS did not consider, the investigative information attached to the Reply.

Decision

Harrison ASJ found that the AMS did not refer to the investigative reports submitted by the employer in their Reply, which was inconsistent with the history reported by the claimant. The Court considered that the AMS had overlooked, or failed to consider, this material in the assessment.

The Court found that the Delegate erred when stating that the AMS had regard to the material before him in circumstances where the AMS had not referred to the discrepancy between the claimant's reported symptoms and the investigative material provided.

Harrison ASJ held at [76]:

> "The Registrar offered an explanation for, rather than a consideration of, the underpinning error, which concerned whether the AMS had either failed to consider the material shown in the media posts and surveillance reports, or simply overlooked them. In my opinion, it was an error of law on the face of the record for the Registrar to not have considered the submission that the AMS had either not considered or had overlooked these reports. Accordingly, the Registrar misconstrued his statutory task under s 327(3)(d) of the WIM Act, and made a jurisdictional error."

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Judgment summary

Wikaira v Registrar of the Workers Compensation Commission of NSW & Anor **[2005] NSWSC 954**
(Malpass AsJ, 27 September 2005)

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Facts

On 22 August 2000 the worker slipped whilst mopping the floor of a railway carriage causing injury to her back, neck and both shoulders. On 17 May 2004, the worker lodged a claim for weekly benefits, medical expenses and non-expenses compensation. The insurer denied liability. The dispute was brought to the Commission and an Arbitrator decided the weekly benefits and section 60 claims in the worker's favour. Concessions were recorded that the worker had sustained orthopaedic injuries to her neck, back and both shoulders in the incident on 22 August 2000 and that she was not fit to perform her pre-injury employment and that she would not be able to work more than 20 hours per week. The medical dispute was referred to an AMS who found no permanent impairment and no evidence of an injury.

Held

The Supreme Court held the Registrar was in error and the decision of the Registrar was set aside.

Implications

The role of the Registrar is that of determining whether or not the appeal is to proceed and in the performance of that role the Registrar is required to determine whether or not there is a ground of appeal.

The task of the AMS is to determine whether the injury gave rise to permanent impairment. The AMS had come to the view that there was no permanent impairment because there was no injury but the evidence was evidence of an injury as the fact of injury had been established.

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Judgment summary

Wilkinson v C & M Leussink Pty Ltd **[2015] NSWSC 69**
(Harrison AsJ, 17 February 2015)

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Facts

George Wilkinson was employed as a sales manager and sustained an injury to his right hip and lumbar spine on 18 February 2004. On 31 July 2008 he entered into a complying agreement with his employer, C & M Leussink Pty Ltd, in respect of the claim to his right hip for 2 per cent WPI pursuant to s 66A of the 1987 Act.

On 10 May 2012 Mr Wilkinson lodged an application with the Commission seeking lump sum compensation for his lumbar spine and right hip where the degree of permanent impairment was in dispute. An arbitration hearing was held and the matter was referred to the AMS who issued a MAC certifying Mr Wilkinson at 18 per cent WPI with 6 per cent being attributable to his right hip.

On 14 March 2013 his employer appealed against the assessment of the AMS to the Panel. Following a preliminary review, the Panel determined that Mr Wilkinson should undergo a further medical examination. Following this examination the Panel assessed Mr Wilkinson at 13 per cent WPI with 0 per cent being attributable to his right hip.

On 27 August 2013 Mr Wilkinson sought a reconsideration of the Panel's decision and the Panel declined this request on 14 October 2013.

On appeal to the Supreme Court of NSW, Mr Wilkinson sought to quash the decision of the Panel along with its declinature of Mr Wilkinson's request for reconsideration. Harrison AsJ emphasised that it was only the injury to the right hip that was the subject of the judicial review.

Issue(s)

Whether the Panel's decision and its reconsideration decision was invalid for jurisdictional error? In particular, whether the Panel:

1. exceeded its jurisdiction by basing its decision on both s 327(3)(c) and (d) of the 1998 Act;
2. erred in its construction of s 328(2) of the 1998 Act by conducting a de novo review, instead of a rehearing;
3. was required to confine its task to the grounds of appeal and their particularisations;
4. erred in holding that the complying agreement under s 66A of the 1987 Act was irrelevant;
5. purported to exercise a statutory function it did not have by determining the causation of Mr Wilkinson's injury to his right hip;
6. failed to address s 323(1) of the 1998 Act;
7. denied procedural fairness when it failed to put the parties on notice that it intended to consider the role of arthritis

Held

Harrison AsJ held that there had been a number of jurisdictional errors in the Panel's decisions. These errors were not cured by reconsideration and therefore both decisions were quashed.

Decision

1. **Whether the Panel exceeded its jurisdiction by considering both s 327(3)(c) and (d) of the 1998 Act?**

On appeal to the Panel, the defendant raised two grounds of appeal under s 327(3) of the 1998 Act. Mr Wilkinson argued that the Panel exceeded its jurisdiction under s 328(2) by considering two grounds of appeal in circumstances where the Registrar was satisfied that only one ground, s 327(3)(d), was made out.

Harrison AsJ acknowledged that a difficulty occurred for the Panel when the defendant's submissions failed to differentiate between the 'incorrect criteria' ground under s 327(3)(c) on the one hand, and the 'demonstrable error' ground under s 327(3)(d) on the other. However her Honour held that the Panel was empowered to consider both s 327(c) and (d). He Honour found that the Panel indicated the grounds on which the defendant relied on and determined the appeal by reference only to those grounds in its reconsideration decision. Accordingly, the approach of the Panel in considering both s 327(3)(c) and (d) did not contain any error.

2. **Did the Panel err in its construction of s 328(2) of the 1998 Act?**

Her Honour said that it was not in dispute that the Panel was required to undertake a review in the nature of a rehearing under the grounds of appeal in s 327(3)(c) and (d). Her Honour found that the Panel did not conduct the appeal as a hearing de novo. Although the Panel did indicate it will conduct a hearing de novo, and misstated the principles in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 to conduct a fresh assessment, this was only after it identified a demonstrable error in the MAC.

Accordingly it was the Panel's approach to the nature of the task that was relevant. In making this finding, her Honour described the Panel's approach as a rehearing because it reviewed the MAC for error. Her Honour relied on the distinction between the Panel's approach in the current matter and that approach in *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792. Her Honour held that this ground of judicial review failed.

3. **Whether the Panel was required to confine its task to the grounds of appeal?**

In its particulars on demonstrable error, the defendant complained of the effect of subsequent non-work Parkinson's disease on the assessment of Mr Wilkinson's right hip. It alleged that the AMS failed to compare the extent to which the worker's non-work Parkinson's disease has restricted the movement and flexibility in the uninjured left hip.
The defendant did not raise the issue of "arthritis" in any submissions made before the Panel.

Harrison AsJ held that a proper reading of the grounds of appeal and submissions did not confine the Panel's analysis to Parkinson's disease. The Appeal Panel was entitled to consider other "non-work" explanations. Her Honour found that the demonstrable error raised by the defendant was the failure of the AMS to examine Mr Wilkinson's left hip. While Parkinson's disease may have been offered as an explanation, her Honour confirmed that the question on appeal before the Panel was whether the failure to examine the left hip amounted to a demonstrable error.

4. **Did the Panel err in holding that the complying agreement under s 66A of the 1987 Act was irrelevant?**

The issue to be decided was whether the complying agreement bound the Panel to the extent that the Panel could not assess WPI as being lower than that provided for in the complying agreement.

He Honour had regard to the decision in *Prisk v Department of Ageing, Disability and Home Care (No 2)* [2009] NSWWCCPD 13 and her Honour's comments in *Railcorp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231. Having considered these decisions, s 66A and the original

referral by the Registrar to the AMS, her Honour held that a complying agreement does not affect the ability of the Panel or the Commission to assess Mr Wilkinson's degree of permanent impairment. This is so, even if the figure reached is lower than what was agreed to in the complying agreement.

Accordingly, her Honour found that the Panel was not estopped from finding a lower WPI due to the complying agreement. This ground of judicial review also failed.

5. Did the Panel exercise a statutory function that it did not have by determining the causation of Mr Wilkinson's injury to his right hip?

Her Honour found the statements of the Panel at [30] and [32] of its decision were findings in relation to causation. The Panel determined that Mr Wilkinson's restriction of movement in his right hip is not due to the injury suffered on 18 February 2004, but rather is a consequence of Mr Wilkinson's arthritis in both hips.

Her Honour held that the Panel purported to exercise a statutory function it did not have. This jurisdictional error occurred when the Panel considered that the impairment to Mr Wilkinson's right leg was not due to his work-related injury, but rather to an underlying arthritic condition.

6. Did the Panel fail to address s 323(1) of the 1998 Act?

It was held that the Panel failed to address s 323(1) in that it failed to make a deduction for the pre-existing condition of "arthritis". Her Honour determined that the correct approach was to assess Mr Wilkinson's permanent impairment arising from his work-related injury, and deduct from that the proportion of the impairment that was due to his arthritis.

Her Honour held that the Panel's failure to address s 323(1) amounted to jurisdictional error.

7. Was procedural fairness denied by the Panel?

Before her Honour, it was argued that Mr Wilkinson was denied procedural fairness when the issue of "arthritis" was not disclosed to him before the Panel delivered its decision. The plaintiff relied on the authority in *Markovic v Rydges Hotels Ltd* [2009] NSWCA 181 and this was accepted by Harrision AsJ.

Her Honour held that failure of the Appeal Panel to put the parties on notice when it intended to consider the role of "arthritis" as an explanation for the restriction of movement in Mr Wilkinson's right hip amounted to a denial of procedural fairness. Accordingly, Mr Wilkinson was denied a reasonable opportunity to present his case and was denied procedural fairness when the Panel made its decision.

Her Honour also made tentative comments with respect to the Panel's reconsideration decision. She commented that the Panel's jurisdiction is limited to rescinding, altering or amending its decision under s 378 of the 1998 Act only if it is satisfied that its original decision contains an obvious error. Her Honour found that Panel may not consider that a denial of procedural fairness is an obvious error. However the Panel should have given parties the opportunity to make submissions and seek to rely on medical evidence dealing with this issue before it reached its reconsideration decision.

Accordingly, her Honour quashed the Panel's decision and the reconsideration decision.

<u>Implications</u>

Her Honour's findings in relation to causation should be viewed in light of the apparent contrary opinion in *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd* [2014] NSWCA 264 where it was held that questions of causation are not foreign to medical disputes.

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Broadspectrum (Australia) Pty Ltd v Fiona Louise Wills **[2018] NSWSC 1320**
(Harrison AsJ, 31 August 2018)

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Facts

The worker suffered a psychological injury as a result of a sexual assault on the Manus Island detention facility. The worker's factual background included a history of psychiatric illness including sexual abuse as a child, rape as an adult, and domestic violence. She was referred for assessment by an AMS. The AMS assessed the worker as suffering 21% WPI, and applied a deduction of 1/10th. The matter was appealed in relation to the application of section 323 of the 1998 Act. The Appeal Panel confirmed the MAC.

On judicial review, the plaintiff employer alleged that the Appeal Panel failed to perform its statutory task in failing to find a demonstrable error. The Panel only had the power to confirm or revoke the MAC, but despite acknowledging a failure to provide reasons for the deduction made, the Panel failed to conduct a review as required by the legislation, instead engaging in an exercise justifying the final assessment of the AMS.

Decision

Her Honour was persuaded by the plaintiff's submissions. She held that the AMS failed to provide any reasons as to why he applied a 1/10th deduction under section 323(2) (at [78]). The Panel did not find a demonstrable error, but rather approached its task by filling in the gaps omitted by the AMS, inconsistent with the approach of Hamill J in *Sadsad v NRMA Insurance Limited* [2014] NSWSC 1216. In so doing, the Panel misconstrued its statutory task (at [79] and [96]).

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***Wise v Sardale Pty Ltd & 4 ors* [2005] NSWSC 1264**
(Hislop J, 8 December 2005)

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Facts

An AMS issued a MAC in July 2004 and certified that the worker had 3% permanent loss of use attributable to the injury for claims made in respect of both arms, sight in both eyes, smell, taste, facial disfigurement, and 2% for loss of sexual organs. The worker appealed to the Registrar on the basis of "demonstrable error and incorrect criteria". The Medical Appeal Panel found that the worker's impairments "correlate with the assessments made by the AMS". The Medical Appeal Panel commented that it was not satisfied that the MAC contained a demonstrable error or that the assessment was based on incorrect criteria.

The Plaintiff submitted that the Medical Appeal Panel erred in that it considered whether the original AMS assessment was made on the basis of incorrect criteria or that the MAC contained a demonstrable error. The claimant relied upon the absence of any independent reasoning of the Medical Appeal Panel as to how it reached the assessment of impairment it adopted and its failure to consider the reasoning or assessments of other practitioners who provided reports (the Medical Appeal Panel did not conduct its own assessment).

Held

Hislop J rejected the submissions that the Medical Appeal Panel erred in failing to consider the appeal in accordance with the authority provided in *Vegan*. It was clear that the Medical Appeal Panel purported to determine the dispute de novo. Appeal dismissed.

Implications

There is no general rule of common law or principle of natural justice that requires reasons to be given for administrative decisions, absent a statutory obligation to do so, and there was no such obligation on the Medical Appeal Panel to do so (*Vegan*).

The Medical Appeal Panel was not required to give reasons as to how it reached the figure of impairment it adopted or to provide a detailed review of all of the medical evidence. The Medical Appeal Panel exercised its discretion not to conduct a further medical examination.

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Woolworths Limited v Michelle Howarth **[2015] NSWSC 1624**
(Hamill J, 11 November 2015)

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Facts

Ms Howarth was working for Woolworths Limited when she developed sharp shooting pain that shot up her left arm and shoulder and into her neck. She made a permanent impairment claim for her "cervical spine and left upper extremity" and a medical dispute developed between the parties. The matter came before the Commission and it was referred to an AMS.

The AMS assessed the worker's WPI at 17 per cent. Woolworths applied to the Commission to appeal against the AMS's assessment under s 327 of the 1998 Act. The Registrar's delegate found that none of the grounds under s 327(3) were made out and determined that the appeal was not to proceed under s 327(4).

Woolworths sought judicial review of the MAC and the delegate's decision.

Woolworths argued that the AMS:

(a) denied it natural justice;
(b) failed to exercise his jurisdiction properly by merely accepting what Ms Howarth told him and not testing that against the other evidence before him, and
(c) failing to give reasons why he accepted Ms Howarth's version in the face of all the material before him.

In addition, Woolworths contended that the Registrar erred in law by misconceiving the bases of the application for appeal.

Issues

His Honour, Hamill J, noted that the primary subject of the dispute was whether the AMS conducted the medical assessment in accordance with the law. The plaintiff's submissions were largely directed to the MAC, with submissions going to the decision of the delegate being a "back up", that became unnecessary to deal with.

Decision

His Honour held that the specific grounds raised in the summons were not established. Further, his Honour was not satisfied that the AMS fell into jurisdictional error or that the Medical Assessment Certificate was attended with error.

His Honour first considered whether the AMS went "Outside His Remit" and whether Woolworths was denied procedural fairness. Woolworths argued that the AMS went beyond the terms of the questions and issues remitted for his consideration in the referral. Item 1 of the referral only made specific reference to the left shoulder and cervical spine. It made no reference to the right shoulder. However item 2 referred to the material to which the AMS was to have access, including an independent medical examiner's report retained by Woolworths. This report indicated that the lack of mobility in Ms Howarth's right shoulder was used as a baseline against which the loss of movement in her left shoulder was assessed.

His Honour found that the AMS took a different approach to Ms Howarth's disability. Accordingly, the fact that the AMS considered the IME's report and came to a different conclusion does not mean that he made a jurisdictional error or exceeded the terms of the referral. In fact, the AMS's

reference to the right shoulder was merely to consider the approach adopted by the IME. Had the AMS added the loss of mobility in the right shoulder in his calculation of Ms Howarth's WPI, he would have exceeded his jurisdiction. In this regard, his Honour distinguished the case of *Wikaira v Workers Compensation Commission* [2005] NSWSC 954.

His Honour also distinguished the case of *Haroun v Rail Corporation* [2008] NSWCA 192 (*Haroun*) from the matter before him. He held that *Haroun* did not support Woolworth's contention that the AMS erred by exceeding the terms of the referral.

Ground 1 - Natural justice and procedural fairness

Hamill J determined that there was no denial of natural justice by the AMS. Woolworths was provided the opportunity to reply to Ms Howarth's application before the Commission. It presented its position through the report of its IME and this was taken into account by the AMS.

A question which arose at hearing was what action could the AMS have taken in order to afford Woolworths natural justice. It was submitted that the AMS could have applied AMA 5 and treated the right shoulder condition as being something that formed the base line of the assessment of the left shoulder (*contralateral 'normal' joint*). In response to this, his Honour held that the AMS was conscious of AMA 5 and its provisions relating to "contralateral 'normal' joints". The AMS explained the rationale of his decision in the MAC, as required by AMA 5 and it was open to the AMS to approach the matter in the way that he did.

His Honour also commented that the AMS was required to provide the parties procedural fairness. In cases like *Markovic v Rydges Hotels Ltd* [2009] NSWCA 181 and *Hatch v Peel Valley Exporters Pty Ltd* [2010] NSWSC 23 the Panel introduced a new issue and procedural fairness required the party affected to be afforded an opportunity to be heard. His Honour held that similar considerations arise as to a MAC issued by an AMS.

Grounds 2 and 3 – failure to exercise jurisdiction and adequacy of reasons

His Honour held that there was nothing in the documentary evidence that supported the suggestion that the AMS "merely accepted" what the worker told him or that he failed to "test that version against other evidence". Further, it was not appropriate to parse the language of the MAC or to examine the AMS's reasons with a critical eye attuned to error. Accordingly, the AMS adequately explained his reasons for taking a different approach to the IME and the method that he used in coming to his conclusions. His Honour held that those reasons were not irrational or unreasonable.

Ground 4 – appeal against the decision of the Registrar not to allow the appeal

His Honour disposed of this ground quickly given that the application for judicial review was directed at the medical assessment, and that this ground was raised as a 'back-up'. It was determined that, in the way the case was argued, that if the MAC was set aside then there would be no need for his Honour to go to the Registrar's decision.

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Judgment summary

Zeineddine v Matar **[2009] NSWSC 646**
(Price J, 10 July 2009)

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Facts

The Commission determined that the worker suffered loss of use of the sexual organs as a result of a psychological injury. The employer sought and was granted leave to appeal the decision of the Arbitrator. The Deputy President dismissed the appeal and remitted the matter to the Registrar for referral to an AMS for medical assessment.

The AMS assessed the worker as suffering 0% loss of use of the sexual organs and that the proportion of permanent impairment due to pre-existing condition was 100%.

The worker appealed the MAC. The Medical Appeal Panel ("the Panel") confirmed the MAC, finding no demonstrable errors.

The worker lodged judicial review proceedings in the Supreme Court, claiming for relief in the nature of certiorari, on the grounds that:

1. The Panel identified the wrong issue or asked the wrong question in affirming the AMS's findings that the worker's loss of sexual function entirely pre-existed the injury;

2. The Panel (and the AMS) were bound in law to determine that the worker suffered a permanent loss of sexual function due to the injury as determined by the Arbitrator and affirmed by the Deputy President;

3. The Panel and the AMS erred in concluding that the deductible proportion for pre-existing condition was 100%; and

4. The Panel erred in concluding that the AMS meant to find that the worker had 100% loss of sexual function due to the injury.

The Court identified that the worker's main complaint was that the AMS and the Panel wrongly exercised their jurisdiction in determining the question of causation which had previously and appropriately been determined by the Arbitrator and the Deputy President. (at [44])

The respondent employer argued that the Court should not now consider the appellant worker's grounds for review as they were not issues raised by the worker before the Panel.

Held

Summons dismissed.

- On proceedings for judicial review, the worker was permitted to raise arguments not previously raised before the Panel. (at [35] and [40])

- It was the task of the AMS and the Panel (*Haroun* followed) to assess the worker's degree of permanent impairment arising from the injury. (at [50])

- It was open to the AMS and the Panel to disregard any finding of permanent impairment by the Deputy President. (at [50])

- The AMS in this case was merely determining the extent of permanent impairment arising from a pre-existing condition and was not determining the question of causation (*Wikaira* distinguished). (at [52]-[53])

- The AMS was entitled to make a deduction of 100% pursuant to section 323 of the Act if the extent of the impairment amounts to all of the worker's permanent impairment. (at [68]) In coming to this conclusion the Court rejected the worker's argument that the meaning of the word "proportion" is "a portion or part in its relation to the whole" (at [59]), stating that this construction would produce a "peculiar result" of preventing an AMS from making all of the deduction if necessary.

Implications

1. A party may raise issues on judicial review not put before the Panel at the Court's discretion. The discretion to allow fresh arguments may be exercised after consideration of the nature of the relief claimed, the principles of judicial review and procedural fairness, and after subjecting such arguments to further written and oral submissions before the Court.

2. It is open to an AMS or a Panel to make a 100% deduction for pre-existing condition pursuant to s 323 of the 1998 Act or s 68A of the 1987 Act, if the AMS or the Panel determines that the extent of the permanent impairment arising from a pre-existing condition amounts to all or the whole of the worker's impairment.

3. Whilst it is open to the AMS or the Panel to make a 100% deduction for pre-existing condition, the distinctive powers and roles of an AMS (to determine the degree of permanent impairment) and the Arbitrator/Commission (to determine injury or causation) remain.

Judgment Summary

Ziraki v The Australian Islamic House Liverpool Area **[2019] NSWSC 1158**

(Harrison AsJ, 9 September 2019)

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Facts

The plaintiff suffered a distal radial fracture and consequent carpal tunnel syndrome when he slipped on plastic while alighting from a ladder and fell heavily onto his right arm. On 3 August 2018, the plaintiff's degree of permanent impairment resulting from the workplace injury was assessed by Dr Neil Berry, an Approved Medical Specialist, as being 11% whole person impairment for injury to the right upper extremity.

The plaintiff lodged an appeal on the basis that the AMS erred when applying the provisions of page 495 of the AMA5 Guides relating to carpal tunnel syndrome following surgical decompression. The plaintiff further submitted that the AMS failed to afford the worker procedural fairness by proceeding to adopt a method of assessment, and applying provisions of AMA5, which had not previously been considered or relied upon by the respondent and which were not the subject of the dispute between the parties.

On 16 October 2018, the Registrar was satisfied that, on the face of the application, at least one ground of appeal had been made out and referred the application to the Appeal Panel for determination. The Appeal Panel was satisfied that the AMS correctly applied Tables 16–15 and 16–10a of the AMA5, and confirmed the MAC.

The worker filed a summons in the Supreme Court. The plaintiff submitted that the Appeal Panel misapplied, and misconstrued the operation of, p 495 of the AMA5 Guidelines and cl 2.9 of the PI Guidelines for the evaluation of permanent impairment in respect of the plaintiff's carpal tunnel syndrome.

Held: The Appeal Panel's MAC confirmed.

Discussion and Findings

Harrison AsJ considered the plaintiff's argument that the Appeal Panel misapplied or misconstrued the operation of p 495 of the AMA5 Guides and SIRA Guidelines, and erred in its findings and/or by giving insufficient reasons. The Plaintiff further submitted that the Appeal Panel should have reassessed the plaintiff's condition. However Harrison AsJ noted that in order to re-examine a plaintiff, the Appeal Panel must first have identified an error in the MAC, which in this case the Appeal Panel declined to do: *NSW Police Force v Registrar of the Workers Compensation Commission* [2013] NSWSC 1792 [30]–[33]. Her honour further noted that the Appeal Panel's decision not to re-examine the plaintiff is clinical and discretionary, and was not a misconstrual of its functions or of the AMA5 Guides and SIRA Guidelines.

Harrison AsJ considered the plaintiff's submission that the Appeal Panel erred in applying scenario 2 under p 495 of the AMA5 Guidelines, and misunderstood and/or failed to deal with the plaintiff's articulated case in relation to Dr Endrey-Walder's medico-legal opinion. Her honour noted that the Appeal Panel's decision to consider the plaintiff's IME report must also be understood in the

context of s 328(3) of the WIM Act. The report of Dr Endrey-Walder was not before the AMS. Harrison AsJ was satisfied that the Appeal Panel's dismissal of the report does not reflect a general hostility towards medical opinions which differ to that of an AMS, but rather a restatement of its statutory duty. Pursuant to s 328(3) of the 1998 Act, the Appeal Panel could only receive such a report if it constituted "new evidence", which is evidence "not available to the party before the medical assessment" and which "could not reasonably have been obtained by the party before that medical assessment".

Her Honour was further satisfied that the Appeal Panel was entitled to make the conclusion that it found that as it did not consider there to be evidence of median nerve dysfunction and therefore, the plaintiff did not satisfy the criteria for scenario 1 of Carpal Tunnel Syndrome under page 495 of the AMA5. Her Honour held that the Appeal Panel did not fail to engage with the plaintiff's articulated case, nor did it fail to afford the plaintiff procedural fairness.

Orders

Harrison AsJ ordered:

1. The summons filed 8 February 2019 is dismissed.
2. The plaintiff is to pay the first defendant's costs on an ordinary basis.

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Judgment summary

Zuanic v Gypro-Tech (Australia) Pty limited (in liquidation) and Ors **[2006] NSWSC 739**
(Hoeben J, 25 July 2006)

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Facts

The plaintiff filed an Application to Resolve a Dispute seeking lump sum compensation for alleged industrial hearing loss suffered while in the employ of the defendant. An Approved Medical Specialist (AMS) assessed biannual hearing loss at 20.2%.

The plaintiff served an audiogram on the defendant's insurer in relation to an earlier claim indicating binaural hearing loss of 6.5%. The audiogram was not filed in the current proceedings and was not considered by the AMS.

The defendant appealed against the AMS's assessment. An Appeal Panel (the Panel) admitted the audiogram as fresh evidence in the appeal, revoked the previous MAC (Medical Assessment Certificate) and issued a new one assessing hearing loss at 7.3%.

The plaintiff sought orders quashing the decision of the Registrar's delegate to allow the defendant's appeal to proceed and orders quashing the Panel's decision.

Issues

In relation to the decision of the Registrar's delegate the plaintiff submitted:

1. The matters relied upon by the defendant were 'hopelessly unarguable' and it was not open to the delegate to allow the appeal to progress on the basis of the material before him.

2. There was no basis on which the delegate could form an opinion that a ground of appeal existed under:
    a) section 327(3)(b) because the only 'additional relevant information' was the audiogram which could have been reasonably obtained by the defendant before the medical assessment;
    b) section 327(3)(c) because this ground could only exist if the audiogram had been before the AMS and been disregarded by him, or
    c) section 327(3)(d) because no demonstrable error had been identified in the MAC.

3. In the alternative, the decision was defective in form because it referred to "grounds of appeal under section 327(4)" rather than grounds of appeal under section 327(3).

In relation to the Panel's decision the plaintiff submitted:

1. The Panel committed an error on the face of the record by admitting the audiogram as fresh or additional evidence.

2. In the alternative, the Panel committed jurisdictional error by relying on the improperly admitted audiogram.

3. There is tension between sections 324 and 328(3) and section 324 should be read as a general provision subject to the express prescription in section 328(3).

Held

Decision of the Registrar's Delegate

Hoeben J noted the different approaches taken by Studdert J in *Estate of Heinrich Christian Joseph Brockmann v Brockmann Metal Roofing Pty Ltd* [2006] NSWSC 235 and Latham J in *Inghams Enterprises Pty Ltd v Iogha* [2006] NSWSC 456, and Johnson J in *Summerfield v Registrar of the Workers Compensation Commission of NSW* [2006] NSWSC 515 to the delegate's function under section 327. Following the approach of Studdert and Latham JJ it was only necessary for the delegate to make a subjective assessment of whether it appeared that a ground of appeal existed and it did not matter whether that assessment was correct. However, the approach of Johnson J was open to the interpretation that "under s 69 of the *Supreme Court Act* this Court can assess on a prima facie basis the correctness of the Registrar's determination."

There was nothing to suggest that a subjective assessment as described by Studdert and Latham JJ had not been carried out. Even on the approach of Johnson J, the plaintiff's submissions failed. It was open to the delegate to determine that that the audiogram could not 'reasonably' have been obtained because it was not reasonable to expect the insurer to conduct a full search of its records to locate the audiogram in circumstances where the plaintiff had been directed to file a copy of the audiogram and the defendant was not aware that the audiogram had not been filed until after the MAC was issued.

Further, it was open to the delegate to determine that a ground of appeal pursuant to section 327(3)(c) was made out because the AMS did not have regard to the audiogram when he assessed hearing loss as required by Chapter 9 of the WorkCover Guides.

The delegate's determination was not bad in form. If the reference to "grounds of appeal under s 327(4)" was incorrect it did not amount to jurisdictional error or error on the face of the record.

The Appeal Panel's decision

Hoeben J held that sections 324 and 328(3) performed very different functions and could be easily read together. Section 324 gives appeal panel members powers of inquiry while section 328(3) refers to and restricts evidence to be given by parties in an appeal.

The Panel had power to admit the audiogram as evidence in the appeal.

The plaintiff's summons was dismissed.

Implications

Hoeben J outlines the possibility of differing judicial opinion as to the extent to which a decision of a delegate is reviewable, that is, whether the Court is limited to determining if the delegate made a subjective assessment of whether a ground of appeal in section 327(3) existed or whether it can go further and look at the correctness of the delegate's decision.

This decision is authority for the proposition that an appeal panel member's powers of inquiry are not generally subject to the prescription in section 328(3).

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