

RECENT DECISIONS

Challenging the delegate's decision on grounds for appeal from AMS determination

CASE 1: *Wentworth Community Housing Limited v Brennan* [2019] NSWSC 152 Harrison AsJ
27 February 2019

[Link to decision](#)

Background

The worker suffered a primary psychological injury in the nature of aggravated Bi-polar Affective Disorder Type 2 that was allegedly due to harassment and ill-treatment she received from other managers in the workplace culminating in January 2013.

The worker made a claim for lump sum compensation pursuant to section 66 of the WCA 1987 as to which compensation is only payable if the degree of permanent impairment resulting from the injury is at least 15%: section 65A(1) of the Act.

The matter was referred to an AMS to assess WPI with a subsequent finding of 24% WPI.

The respondent then sought to appeal from the decision of the AMS, however, the delegate of the Registrar issued a decision refusing the appeal on the basis that he was not satisfied that at least one of the grounds of appeal specified in section 327(3) of the WIM Act 1998 was made out.

The respondent's application to appeal from the AMS decision was on the basis that the AMS had failed to consider the evidence contained in the ARD and Reply, had based his opinion solely on the worker's subjective reporting of symptoms during the examination and had failed to compare the history obtained from the worker to the evidence contained in the ARD and Reply.

The respondent also sought leave to rely upon 'fresh evidence' consisting of reports obtained as an investigation of the accuracy of the AMS's history and circumstances. These were the primary subject of the appeal.

The respondent was particularly concerned that the AMS

had relied solely on the subjective report of symptoms by the worker that she was unable to engage in social activities or go shopping. However, the surveillance and social media reports plainly contradicted those complaints.

Appeal from Registrar's decision

The respondent filed an application to appeal from the Registrar's decision by way of judicial review based on eight grounds to the effect that the Registrar's decision was tainted by jurisdictional error or error on the face of the record and erred in dealing with demonstrable error.

The respondent contended that the Registrar had erred by misconstruing the construction of 'additional relevant information' for the purposes of section 327(3).

In delivering her judgment Associate Justice Harrison of the Supreme Court commented that it was fair to say that aside from the general statements by the AMS, he did not specifically refer to either the surveillance or social media reports. The AMS also failed to address the respondent's submissions on the inconsistent matters raised in the reports and did not refer to the worker's statements in his reasoning, which suggested that he had overlooked the reports or failed to consider 'relevant and significant' material provided by the respondent.

Her Honour ultimately formed the view that the Registrar had erred when he stated that the AMS had regard to the material placed before him and that the evidence was broadly consistent with that sought to be relied upon in the appeal, in circumstances where the AMS had not referred to the discrepancy between the worker's evidence and the surveillance and social media reports.

[back to top](#)

The Registrar was considered to have 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 Her Honour's opinion this constituted an error of law on the face of the record as the Registrar had misconstrued his statutory task under section 327(3).

The court ordered that the Registrar's decision be set aside and the proceedings remitted to the Workers Compensation Commission for determination.

CASE 2: *Ballas v Department of Education (State of NSW)* [2019] NSWSC 234 Wright J 8 March 2019

[Link to decision](#)

Background

The worker made a claim for lump sum compensation pursuant to section 66 in respect of a psychological injury suffered during her employment as a primary school teacher for which liability was not disputed.

The matter was duly referred to an AMS who assessed 8% WPI falling within class 2 in respect of the "PIRS Category: Social and recreational activities". Relevantly, if the worker was assessed as class 3 in this category, her WPI would have been either 15% or 17% (thereby entitling her to a lump sum payment by having satisfied the 15% threshold applicable for psychological injury).

The worker filed an application to appeal from the AMS decision pursuant to section 327 of the WIM Act as to which the delegate of the Registrar determined that no ground of appeal under sub section (3) had been made out and as such, the appeal was not to proceed.

The worker then filed a summons in the Supreme Court seeking a judicial review of the decision on grounds including; failing to take account of whether the AMS had considered the correct criteria when assessing Social and Recreational Activities, failing to consider whether the activity of attending a club on her own to play poker machines was something that could be taken into account and erring in point of law when she considered that what matters were relevant to each category was a matter of discretion rather than an application of the guides.

Decision

Mr Justice Wright in delivering his decision, rejected the argument that the delegate of the Registrar had failed to

Insights

The decision provides a useful guide to what needs to be considered by the Registrar (or his delegate) in deciding whether there are grounds for appeal under section 327(3) particularly in claims referred for psychological assessment by an AMS.

properly consider the submission, as the delegate had specifically addressed the appropriate class under the heading 'social and recreational activities' and referred to six scales or categories that were not limited to classes other than the distinctions between different scales or categories.

His Honour went on to state that: the Delegate's reliance on the decision in *Jenkins* does not establish a failure to address or consider the argument put in the worker's submissions and even if the Delegate may have misapprehended precisely what was held in that decision, she had not misapprehended the argument put by the worker.

Note: *Jenkins* established 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 including the relevant tables.

His Honour found that none of the substantive grounds of the appeal had been made out and therefore dismissed the summons.

For more information, please contact:



John Hick
Partner
john.hick@turkslegal.com.au

[back to top](#)