

Workers Compensation Extracts

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PFS survives deterioration question

St George Christian School Limited v Ewels [2026] NSWPCPD 40. Phillips J. 31.08.2026.

The President, at [7] “Whilst the provisions of s 322A and s 329 of the 1998 Act sit uneasily with each other, namely the notion of a single assessment as against a subsequent reconsideration, I do not consider that this apparent conflict needs to be resolved in this decision. The respondent has received her single entitlement to a s 66 payment under the 1987 Act and is not indicating any desire to revisit that entitlement. Rather, the present purpose is twofold. It is firstly to ascertain if, after the recent and apparent deterioration in the respondent’s condition, her degree of permanent impairment is ascertainable. Secondly, to obtain the answer to the first purpose, it is necessary to have the original assessment reconsidered. Such evidence will be necessary to be available to the parties prior to any mediation in the Commission or contested hearing in the District Court. It is in the interests of justice that the respondent be permitted to have her recent health issues reviewed and their relationship (if any) to her cause of action be determined. In light of these matters, I decline to exercise my discretion to strike out the PFS.”

A: Ms A Holmes, solicitor, Gair Legal. R: Ms N Sarwar, solicitor, Law Partners.

L5/S1 laminectomy and fusion allowed

Spooner v Woolworths Group Ltd [2026] NSWPIC 518. Mr Cameron Burge, Member. 01.09.2026.

After lifting incident four years ago, worker's award for proposed lumbar laminectomy and fusion recommended by her treating neurosurgeon, Dr Huang, after hearing 31.08.2026.

"In his report dated 17 September 2025, Dr Huang diagnosed the applicant with an L5/S1 disc injury and spondylolisthesis. Dr Huang noted in this report that it had been a year since he had previously seen the applicant, during which time her symptoms had been worsening, including the onset of a limp. He noted the applicant was experiencing intermittent urinary incontinence and bilateral jolting in her lower limbs, especially when she is dozing off to sleep or changing positions when sleeping," [25].

"As a treating surgeon, Dr Huang's opinion is entitled to be given considerable weight, unless it can be shown he has either been provided with a markedly inconsistent or incorrect history, or has made an obvious error in his reasoning. Neither of those preconditions apply in this instance," Mr Burge said [27].

"Additionally, the applicant's IME, Dr Lee, supports the proposed surgery. In so doing, Dr Lee noted the applicant had pre-existing spondylolisthesis at L5/S1. Dr Lee opined the spondylolisthesis may well have developed after the applicant began working with the respondent, which she commenced doing when she was 18. Regardless of the aetiology of the spondylolisthesis, it plainly only became symptomatic after the injury at issue," [28].

"The respondent relied primarily on the report of IME Dr Tan, who provided reports dated 5 December 2024 and 11 November 2025. The applicant also relied on selected parts of the opinion of IME Dr Burrow, who provided a report dated 25 July 2023. The applicant objected to this report going into evidence, however, after hearing from both parties, I agreed the report could be considered," [30].

"The respondent submitted Dr Burrows' opinion is indicative of the applicant's pathology in terms of the spondylolisthesis not being caused by the injury at issue. There are several issues which flow from that submission," [32].

"Firstly, it is symptomology, not pathology which determines any requirement for treatment. A worker may have long-standing degenerative changes in a relevant body system, however, they may be asymptomatic until an aggravating event leads to symptoms arising and treatment being required," [33].

"Secondly, Dr Burrows' view is the applicant continues to suffer from back pain, "with radicular symptoms" which have only partially resolved notwithstanding steroidal injections to her spine. This conclusion is consistent with the applicant's own statement, namely that her symptoms have persisted over time and never resolved following the injury at issue," [34].

"This is not a matter where a worker has suffered an aggravation and reported their symptoms as having resolved, only to flare up again because of a deterioration in underlying and pre-existing pathology not brought about by the injury itself. Rather, the applicant has been consistent in her complaints of symptomology to all medical practitioners, and her credit is not called into question," [35].

Later, "Dr Tan opined the cause of the applicant's ongoing symptoms may well be her hip issues and further radiology of the hip would be appropriate. That examination was carried out, however, no further report from Dr Tan is in evidence. As such, her opinion is essentially mere supposition, as she has not provided a view to contradict that of Dr

Lee, who stated the presence of a cyst in the hip joint region is most unlikely to cause symptoms of the kind from which the applicant suffers," [45].

"Having regard to the totality of the evidence, I am satisfied on the balance of probabilities the applicant has discharged her onus of proving the surgery is reasonably necessary as a result of her lumbar injury," [47].

"In so finding, I also rely on the final report of Dr Huang dated 10 August 2026, in which he notes he again met with the applicant and her symptoms have not improved, and "in fact, her lumbar back pain and her lower limb symptoms are much worse." At the time of the August 2026 examination, the applicant was describing the same pattern of pain, namely cramping in both calves, now with pins and needles in the feet, which is causing her an inability to sit or stand for prolonged periods," [48].

"In his last report, Dr Huang reiterated that the applicant's L5/S1 symptomology is related to her work injury and again recommended the proposed surgery," [49].

"Dr Huang noted the applicant's symptoms only arose after the injury, such that even had the spondylosis been present in her lumbar spine before the injury, it only became symptomatic after the incident at issue. Given it is now four years since the applicant's injury, Dr Huang was of the view her symptoms are irreversible without surgery," [50].

"I accept that view, and find the proposed surgery is reasonably necessary as a result of the applicant's injury," [51].

"I am unable to accept the views of Dr Tan, noting her opinion is essentially incomplete, having not commented on the scans of the right hip, to which she supposed the applicant's ongoing symptomology may well be due," [52].

A: Mr McEnany, ins Mr Glavan. R: Mr Grimes, ins Ms Walker.

Lumbar aggravation added to assessment referral

Rashem v Big Fresh Group Pty Ltd atf Big Fresh Group Trust [2026] NSWPIC 522. Mr John Wynyard, Member. 03.09.2026.

On 14 May 2021, “Ms Rashem suffered a number of injuries when she tripped and fell in the course of her duty, all of which have been accepted except her claim for injury to the lumbar spine,” Mr Wynyard noted [2].

“This matter was heard in person on 5 August 2026. Ms Rashem was represented by Mr Ty Hickey of counsel instructed by Ms Catherine Le. The respondent was represented by Mr Adele Saleh who was instructed by Ms Samantha Torpey. Mr Paul Lleonart appeared for the insurer. An interpreter, Ms Norma Minnaway, was present as was Ms Rashem’s son, Samer Farhan,” [4].

At [11]: “In her statement Ms Rashem stated that she had previously hurt her lumbar spine in a motor vehicle accident on 2 May 2016. She stated that she was involved in a motor vehicle accident from which she suffered injuries to her neck and lower back. She said:

“After the car accident, I continued to have pain in my lower back. In the years before the workplace injury, I still had lower back pain on and off. Just a few days before the workplace injury, I saw my GP, Dr Abdulrahim, because I was still having intermittent lower back pain. Following my workplace injury of 14 May 2021, my back pain deteriorated and exacerbated further.”

“She said that in contrast her neck symptoms had largely settled,” Mr Wynyard said [12].

Noted the worker’s reliance on Dr Utham K Dias, occupational physician, opining in [46] 80% of the lumbar condition to the injury, and “... employment was the substantial contributing factor to the injuries affecting the right shoulder, right elbow, right foot and head sustained in the course of her employment... Her employment was the main contributing factor to the aggravation, acceleration and exacerbation of her pre-existing conditions affecting her cervical spine and lumbar spine regions”.

The employer advanced Dr Todd Gothelf, orthopaedic surgeon.

At [52], “The first thing to note of course is that Dr Gothelf, notwithstanding saying that the lower back had not been injured in the subject incident, then said that any injury to the lumbar spine as a result of the subject accident had resolved. There was a logical contradiction in his opinion that the ongoing lumbar symptoms were, on the balance of probabilities, due to a pre-existing condition and not due to or consequential to the workplace incident.”

Later, “The only treatment between that report and the subject injury consisted of two visits to [GP] Dr Abdulrahim on 2 March 2020 and 10 May 2021, which is consistent with Ms Rashem’s contention that she had only intermittent pain in her lumbar spine,” [74].

“A further relevant consideration is that the violent nature of the injury itself was consistent with an aggravation of Ms Rashem’s back condition. She injured her head, including her temporomandibular joint, which was a source of considerable discomfort and attention at the start, indeed that was the main reason for the visit on 17 May. I draw no adverse inference from the fact that Ms Rashem did not mention her back at that consultation, as her jaw injury (from which she later recovered after several months of pain and treatment) was the first priority. Moreover, her return 24 hours later complaining about her back is sufficiently contemporaneous to her fall that it carries considerable evidentiary weight,” Mr Wynyard said [75].

Neck and low back, along with arms, included in AMS referral.

Death benefit interest

McKenna v Incredible Transport NSW Pty Ltd [2026] NSWPIIC 527. Burge, M. 08.09.2026.

“The parties agree interest is payable on the benefit sum [\$955,950] from 3 October 2025 to 4 September 2026 and is agreed to total \$52,739.63. I accept those calculations as accurate,” [14].

6%pa.

Worker deterred by prospect of further assessment

Fulmen v Marshalls Sydney Pty Ltd [2026] NSWPIC 528. Ms Rachel Homan, Senior Member. 09.09.2026.

“The applicant did not dispute that he had indicated that he would not attend a further medical examination. The applicant submitted that after four assessments, he could not psychologically withstand another assessment. The applicant asked the Commission to liaise with his treating psychiatrist instead. The applicant said he wished to resolve the proceedings, not abandon them,” [47].

“As noted above, the Medical Appeal Panel’s Medical Assessment Certificate certified that the applicant had not achieved maximum medical improvement. While the more recent treating evidence, including the most recent report of Dr Rastogi, can be admitted as evidence that the applicant has now achieved maximum medical improvement and form the basis of a new referral to a Medical Assessor, it cannot determine the medical dispute between the parties. The legislation requires that the medical dispute as to the degree of permanent impairment be resolved by a Medical Assessor,” [71].

“The effect of the legislation has been explained to the applicant on a number of occasions, including at the preliminary conference on 27 July 2026. He was given a further opportunity to consider his position after the preliminary conference upon receipt of the transcript of what was said at that conference and after reading the respondent’s submissions. Despite this, the applicant has, in his written submissions, maintained the position that he will not attend an assessment with a Medical Assessor,” [72].

“In those circumstances, I am not satisfied that there would be any utility in rescinding the decision to dismiss the proceedings. In the absence of an agreement between the parties, the applicant’s claim for lump sum compensation pursuant to s 66 of the 1987 Act cannot be resolved without an assessment by a Medical Assessor,” Senior Member Homan said [73].

“For the reasons given above, the application for reconsideration is declined,” [74].

“It should be noted that this determination does not prevent the applicant from seeking to resolve his claim directly with the insurer by agreement. Nor would the applicant be prevented from bringing the claim back to the Commission, should he be willing to attend a medical assessment in the future,” [75].

Costs uplift in widow's claim

Nolan v State of New South Wales (Fire & Rescue NSW) & Ors [2026] NSWPIC 532. Mr Gaius Whiffin, Member. 11.09.2026.

At [3] "It is alleged by the applicant that the worker's death resulted from a compensable injury sustained during the course of his employment with the State of New South Wales – Fire and Rescue NSW (the respondent), in accordance with s 4 of the *Workers Compensation Act 1987* (the 1987 Act). The worker died from liver carcinoma, which resulted from a psychological injury contracted during the course of his employment with the respondent as a firefighter between 1987 and 2013," Whiffin M said.

Then, in [8], "... the respondent agreed that it was liable to pay an amount of \$929,200 pursuant to s 25(1)(a) of the 1987 Act; ... the parties agreed to an order being made pursuant to s 109 of the 1998 Act – in relation to the applicant being entitled to interest of \$15,997.51 if an award was made that she was the only person entitled to the amount of \$929,200 pursuant to s 25(1)(a) of the 1987 Act, ... the applicant requested a further order that the respondent pay her legal costs as agreed or assessed, and including a 15% complexity uplift, in accordance with Table 4, Item 4 to Schedule 6 of the *Workers Compensation Regulation 2016* (the Regulation) - the respondent consented to that order being made and asked that any uplift granted be available to both parties."

To the costs uplift, Mr Whiffin [38] quoted from "... the Commission in *Lake v Hunter Institute of Technology* [2010] NSWCC 437: "Complexity' is not defined in the workers compensation legislation however in the context of proceedings in the Commission the term indicates an intricacy of fact, law and legislation that is higher than that usually encountered in other proceedings for workers compensation disputes. Factors to be considered include the preparation, skill, care, time, novelty and difficulty of a case in terms of legal, medical, factual, procedural, evidentiary and multiplicity of issues."

At [39] "The applicant applied for the 15% uplift, and the respondent consented to the application. The uplift applied for has been granted by me, taking into account specifically: (a) the respondent's consent to the application; (b) the nature of these proceedings did involve inherent complexity, especially considering the significant amount of compensation that was claimed, and the emotional nature of the proceedings – care, skill and time were required; (c) there were numerous potential dependents to consult in the proceedings – including 10 siblings of the worker's; (d) there were (at least initially) liability aspects in the proceedings which required consideration - and advice to be given, and (e) while the proceedings were only listed for one preliminary conference, orders were made by the Commission on both 29 May 2026 and 12 August 2026, requesting further information or action."

Orders, from [40+]: "I find that the worker died on 8 May 2024 as a result of injury in his employment with the respondent, pursuant to s 4 of the 1987 Act. I find that the applicant was the only person dependent on the worker for support at the date of his death. I find that the respondent is therefore liable to pay the applicant the amount of \$929,200 pursuant to s 25(1)(a) of the 1987 Act. I order interest, in accordance with s 109 of the 1998 Act, on the amount payable to the applicant, in accordance with the agreement referred to at paragraph 8(d) above. I make an award in favour of the applicant in the amount of \$929,200, together with interest of \$15,997.51. I order payment of this award to be made directly to the applicant in accordance with s 85A of the 1987 Act, as requested by her – see paragraph 8(c) above. I order the

respondent to pay the applicant's legal costs as agreed or assessed, and I certify a 15% complexity uplift in this regard (applicable to the respondent also), in accordance with Table 4, Item 4 to Schedule 6 of the Regulation," and two more.

A: Mr Jones, solicitor. R: Ms Dyson, solicitor.

PIAWE differs from statutory maximum

Sonic Health Plus Pty Ltd (EML) v Wong [2026] NSWPCPD 49. Ms Kylie Nomchong SC, ADP. 18.09.2026.

“The respondent worker (Dr Wong) was employed as a medical practitioner with the appellant (Sonic Health Plus Pty Ltd) with her first day at work being 4 July 2023.”

“The respondent worker injured her head, nose, jaw, right ear, neck, right arm and hand, left shoulder and left lower leg when a wall unit fell on to her at work on 4 July 2023.”

Error in accepted wages schedule.

Nomchong ADP [47] “I note that the NSW Court of Appeal in *State of New South Wales v Culhane* [2025] NSWCA 157, [91] held that a Presidential Member in the application of s 352(5) of the 1998 Act, in identifying an error in the fact-finding process, can no longer follow *Whiteley Muir & Zwanenberg Ltd v Kerr*, *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* and *Raulston v Toll Pty Ltd*. Those tests were too narrow and it is wrong for an appeal to be dismissed on the basis that it was “open” to the Member to reach his or her conclusion.”

At [49] “In respect of Ground One, I find that the Member erred in making a determination that the respondent’s PIAWE was \$2,423.60 for the entire period. Whilst the respondent’s further wages schedule had a column titled “PIAWE”, it is palpably clear that the figures in that column were in fact the statutory maximum. That is a figure which is the subject of regular indexation under the legislative scheme. It was also made evident in the appellant’s amended wages schedule where the column containing identical figures was titled “Statutory Max.”

“Neither party argued for a finding as to the respondent’s PIAWE, but rather both parties accepted that the maximum compensation under s 37(2)(b) of the 1987 Act applied. Further, both parties in their wages schedules correctly indicated that the sum increased on 1 April 2024 to \$2,497.70,” [50].

At [75] “The respondent worker’s FWS asserts the PIAWE is \$2,423.60 from 9 October 2023 to 31 March 2024 and \$2,497.70 from 1 April 2024 to 15 July 2024. These figures are the maximum compensation set under s 37(2)(b) of the 1987 Act. Similarly, the appellant’s AWS asserted that the statutory maximum applied for the period and utilised the same figures. I accept that it is not necessary to determine the respondent worker’s actual PIAWE and that the statutory maximum should be utilised. I accept that the figures adopted by both parties for the statutory maximum for the period are correct.”

Later, “To calculate the respondent worker’s weekly losses, the combined earnings from the appellant and HHMP are deducted from the statutory maximum. Where the earnings exceeded the statutory maximum, there was no loss. These figures are set out in Column M in the Table marked A attached to these reasons. The total loss is \$16,402.48,” [96].

A: Ms S Dunn, of BBW. R: P. Stockley, ins Stacks Goudkamp.