Workers Compensation Extracts NSW

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Secondary causation

Saad v Secretary (Department of Education) **[2026] NSWPIC 591. 09.10.2026. Mr Anthony Scarcella, Member.**

Maths head teacher Riverside High School fall in October 2018, Allianz accepting "right knee, right elbow and cervical spine", but disputed causation "chronic inflammatory demyelinating polyneuropathy (CIDP) following total right knee replacement surgery on 13 February 2023".

At [212], "The onus of establishing a consequential condition as a result of an accepted injury falls on the applicant and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Nguyen v Cosmopolitan Homes*https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPIC/2026/591.html - fn84 [2008] NSWCA 246 (*Nguyen*)," Mr Scarcella.

Then [214] "The Commission has considered and explained the difference between an injury and a condition that has resulted from an injury in several decisions," citations.

In [215], "Section 9A of the 1987 Act does not apply to a condition that has resulted from an injury: *Tiritabua v Bartter Enterprises Pty Ltd* [2008] NSWWCCPD 145 at [47]."

Then to causation cited Kirby P in *Kooragang Cement Pty Ltd v Bates*, et al.

Later, "Histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence. Care should be taken when considering such evidence, not to place too much weight on the *clinical notes* of treating doctors, given their primary concern with treatment (in this case the right total knee replacement surgery). Experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga,*[104] and applied in *King v Collins*[105] and *Mastronardi v State of New South Wales.*[106] Inconsistencies between a party's evidence and medical histories in clinical records should be treated with caution: *Mason v Demasi* [2009] NSWCA 227,"

"The unchallenged evidence is that there were no prior neurological symptoms recorded in the applicant's general practitioner clinical records. No insult or other factors were identified in those records as potentially being causative of CIDP," [262].

"In conclusion, having regard to the whole of the evidence, applying a commonsense test and for the reasons referred to above, I am satisfied that the applicant has discharged the onus of proving on the balance of probabilities to a degree of actual persuasion or affirmative satisfaction that there is a sufficient causal chain connecting his CIDP to the accepted injury to the right knee on 17 October 2018 and I find accordingly," [267].

Orders for weekly payments and treatment expenses.

A: *Beran J* ins *Mr Claudio Meireles*, solicitor. R: *Tanner C* ins *Ms Fiona King*, solicitor.

Aggravated astrocytoma

Metcalf v Stabilised Pavements of Australia Pty Limited **[2026] NSWPIC 587. 09.10.2026. Ms Rachel Homan, Senior Member.**

A Medical Appeal Panel ascertained 46% WPI.

“In his most recent report, Dr Dan said that the pre-existing *astrocytoma* was asymptomatic prior to the work injuries. Dr Dan said there was no reasonable doubt that the trauma led to the applicant’s symptomatic presentation, noting there was a very clear history of the subject incidents and the development of symptoms from that time. The lack of symptoms prior to the incidents indicated that the applicant’s spinal cord was previously functioning and the two events rendered the underlying tumour symptomatic,” Ms Homan said [131].

“All of the doctors who have expressed an opinion on causation, including Dr Casikar, have described the workplace incidents as “aggravating” the astrocytoma,” [132].

“In considering the opinions of Dr Dan and Dr Ball, I note that the relevant legal test is whether the injuries “materially contributed” to the applicant’s incapacity. The injuries need not be the only cause of the incapacity, and they need not be the main or even a “substantial” cause of the incapacity,” [141].

Cited *Calman v Commissioner of Police* [1999] HCA 60 et al.

“In light of these authorities, I find that the opinions of Dr Dan and Dr Ball are consistent with the workplace injuries materially contributing to the applicant’s current presentation through the mechanism described by Dr Dan. I am satisfied that the two workplace injuries aggravated and rendered symptomatic the spinal cord condition caused by the pre-existing astrocytoma,” [146].

Orders, weekly payments, treatment expenses.

Nerves damaged

***Carey v Tim Cook Pty Ltd* [2026] NSWPIC 597. 12.10.2026. Mr Cameron Burge, Member.**

Accepted right foot and ankle after falling 20 stairs in March 2020, but disputed "alleged injuries to her *peroneal* and *sural* nerves in her right leg, to her lumbar spine and her right knee. In the alternative, the applicant claims to have suffered consequential conditions to her lumbar spine and right knee as a result of her accepted injuries".

In [11], "The respondent's own Independent Medical Examiner (IME) Dr Rosenberg assessed the applicant as suffering from a sensory deficit in her peroneal nerve equating to 5% lower extremity impairment, or 2% Whole Person Impairment (WPI).

"That finding of a nerve injury is consistent with the view of Dr New, who assessed the applicant as suffering from a peroneal nerve together with a sural nerve injury," [14].

"Dr Rosenberg is silent on the question of whether a sural nerve injury was suffered, and as such the only medical evidence in this regard is that of Dr New. Accordingly, I accept this evidence, and also the evidence in relation to the peroneal nerve injury, which is overwhelmingly in favour of the applicant," Mr Burge said [15].

"Accordingly, both the sural and peroneal nerves will be the subject of a referral to a Medical Assessor," [16].

To the consequential back and right knee, "Mr Necovski submitted, and I accept, that Dr Rosenberg's opinion the applicant's altered gait and limping has contributed to her right knee problems, even only partly, is sufficient to satisfy the requirement for a consequential condition. That submission has merit, as a consequential condition does not need to satisfy the requirements of an injury under s 4 of the *Workers Compensation Act 1987* (the 1987 Act)," the Member said [23].

"Mr Stockley took the Commission to the decision in *Kumar v Royal Comfort Bedding Pty Limited* [2012] NSWWCCPD 8 (*Kumar*), in which it was noted there is a need for some medical evidence to support the causal connection between an accepted injury and an alleged consequential condition, such as to satisfy the test of causation as set out in *Kooragang Cement Limited v Bates* (1994) 35 NSWLR 452 (*Kooragang*). It is apparent from the opinion of Dr Rosenberg, that such evidence exists," [24].

"Moreover, as Mr Necovski noted in reply, references made in the clinical records of the applicant's treating surgeon Dr Jones indicated the applicant was hyperextending her right knee while wearing a CAM boot during the course of her recovery from the ankle injury," [25]. "In my view, the requirements for a consequential condition in relation to the applicant's right knee are met," [26].

"Likewise, in my view the evidence overwhelmingly supports the finding the applicant's lumbar spine condition derived from and was caused by her altered gait and recovery from her accepted ankle injury," [27].

Concordant referrals.

A: *Necovksi* ins *Mr Singh*. R: *Stockley* ins *Ms Tippett*.

Arising out of

Wadey v See Civil Pty Ltd **[2026] NSWPIC 605. 16.10.2026. Mr Mitchell Strachan, Member.**

At [20] Mr Strachan, "Section 4 provides a disjunctive test and is satisfied when an injury either arises out of or in the course of employment. "Arising out of employment" requires a causal relationship and "arising in the course of employment" requires a temporal relationship (*Smith v Australian Woolen Mills Ltd* [1933] HCA 60; (1933) 50 CLR 504). In *Smith* at CLR 518 Starke J said:

> "An injury which arises directly out of circumstances encountered because to encounter them falls within the scope of employment, is an injury arising out of the employment. If the worker is injured by contact physically with some part of the place where he works, then, apart from the questions of his own misconducts, he at once associates the injury with his employment."

"Considering first whether the injury arose in the course of employment. The applicant's employment with the respondent as a fly in fly out worker was such that he worked onsite for 14 days, provided with accommodation by his employer, before being rostered off for seven days. On the day of his injury, he was rostered to work from 6.00am to 5.00pm and there is no dispute that the injury occurred during that time, the applicant having left Moree at about 11.00am and travelled the 20 minutes back to the worksite when he began to feel unwell. The applicant submits that the fact that the injury to his back following the fall in the shower occurred during that time is sufficient to find that the injury occurred in the course of his employment," [21].

"However, attending to private hygiene needs is not a fundamental part of the applicant's employment duties with the respondent," [22].

"In *Hatzimanolis v A.N.I. Corporation Limited* [1992] HCA 21; (1992) 173 CLR 473*,* the High Court held:

> ""Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place while the employee was engaged in that activity, unless the employee was guilty of gross misconduct attacking him or her outside the course of employment."

"The Court of Appeal noted in *Watson v Qantas Airways* at [15] that consideration of whether a worker is in the "course of employment" has proven difficult in circumstances where injury is sustained away from the place of employment and where the employment is in a place remote from the worker's home," [24].

"In *Watson* at [58]*,* the majority of the Court of Appeal noted that the test to be applied was that set out by the High Court in *Hatzimanolis:*

> ""This requires, **in the first instance**, a determination or characterization of the period or periods of work of the employee as one overall period or episode of work, or two or more; one does not first, before that task, examine aspects of

> and the employer's attitude to how the period of work is spent; see *Hatzimanolis* at [483]. Once the period of work of the employee is characterised, the circumstances of what occurred are to be analysed within that framework."

"The applicant was required by the respondent to work a 14-day period at the site near Moree and during the time he was not at the worksite, he was provided with accommodation in the work camp. That is, I am satisfied that the 14-day period was an overall period of employment," [26].

"Having become unwell, the applicant had left the worksite to attend to his needs in facilities provided for him by the respondent for precisely that purpose when the injury to his lower back occurred. This was in an interlude within his overall period of employment. However, there was clearly an implied encouragement on the part of the respondent for him to do so given the respondent had provided the accommodation facilities," [27].

"Applying *Hatzimanolis* I am satisfied that the applicant's injury occurred in the course of his employment," [28].

"Having found that at least one element of the disjunctive test in s 4 is satisfied nothing turns on whether the applicant's injury arose out of his employment and I have not considered it further," [29].

To 1987 Act s 9A, at [30], "Sections 4 and 9A require independent satisfaction. As discussed in *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA (*Badawi)* at [85] there may be times when the factors sufficient to satisfy the test "arising out of employment" for the purpose of s 4 will also be sufficient to satisfy the test under s 9A however, this will depend on the relevant factual matrix, and each must be considered separately," the Member said.

Detailed the provisions.

Noted [46] "The respondent referred to the decision of *Li v Brighton Australia Pty Ltd* [2020] NSWWCCPD 44. In that matter, the worker was working at the direction of his employer in Adelaide for a period of time. He was with colleagues, having finished dinner, when a colleague was attacked by an unknown person. The worker came to the aide of his colleague and was injured. It was held that the activity engaged in at the time of the injury was not the consumption of the meal but rather the defence of his colleague. In the present matter however, the activity the applicant was engaged in was attending to his personal hygiene needs in facilities provided by the respondent while residing in a remote location as required by the respondent.

"I consider the circumstances to be materially different and the decisions distinguishable. The respondent referred to the decision of the High Court in *Comcare v PVYW* [2013] HCA 41 and the concept of an 'inducement test' which illustrates the distinction. In *Li* the respondent was aware that the applicant was required to eat a meal as part of being away from home and there was an implied if not explicit inducement for him to do so. As I understand the reasons of the Member and Presidential Member on appeal, if that had been the cause of the injury then the Mr Li would have succeeded. The activity of coming to the aide of his colleague, however, went beyond that inducement," [47].

“In the present case, the applicant’s use of the donga bathroom provided by the respondent remains within the implied inducement by the respondent demonstrated by the provision of the facilities,” [48].

“I have also considered the decision of *Sydney Trains v Ali-Ahmad* [2020] NSWWCCPD 4 which the respondent submitted demonstrated the limits of workers compensation. However, I find as the matter involved a journey claim and the issues implicit in that that it does not assist in determination of the present matter,” [49].

“For the reasons set out above, I am satisfied that the applicant sustained an injury to his lumbar spine both arising in the course of his employment with the respondent and that his employment was a substantial contributing factor to that injury. As such there will be an award for the applicant with respect to injury to the lumbar spine,” [50].

Orders weeklies, s 60s.

A: *Loukas*, ins *Ms Mackovic*. R: *Robison* ins *Ms Singh*.

2018 MAC review

Glyntzos v Custom Coaches (Sales) Pty Ltd **[2026] NSWPIC 609. 19.10.2026. Ms Rachel Homan, Senior Member.**

Allowed reconsideration of 2018 MAC. At [14], the Senior Member "It was noted that, since the MAC was issued, the applicant had undergone an L4-S1 posterior spinal fusion performed on 1 February 2023 and a C5-C7 anterior cervical decompression and fusion performed on 24 November 2024.

"The applicant provided a medicolegal report prepared by orthopaedic surgeon, Dr Eugene Gehr, dated 10 December 2025. Dr Gehr provided an assessment which was considerably greater than the MAC. The applicant submitted that the evidence demonstrated deterioration within the meaning of s 327(3)(a) of the 1998 Act," [15].

"The respondent relied on the decision in *Cram Fluid Power Pty Ltd v Green,*[1] where the Court of Appeal held that s 66(1A) precluded a further permanent impairment claim notwithstanding a subsequent deterioration and surgery. The earlier claim remained the worker's "one claim" for the purposes of s 66(1A) of the 1987 Act," [23].

"Having regard to the considerations in *Samuel v Sebel Furniture Limited,*[2] the respondent submitted that the application was brought approximately seven years and eight months after the original MAC. Although the subsequent surgeries explained why some evidence was not available at the time of the original assessment, a satisfactory explanation had not been provided for the entirety of the delay," [24].

Ms Homan at [31] "I have proceeded on the assumption, therefore, that the further assessment is sought solely for the purpose of a threshold dispute, for example, for the purposes of s 39 of the 1987 Act or s 151H of the 1987 Act.

"Section 57 of the *Personal Injury Commission Act 2020* (PIC Act 2020) gives the Commission power to reconsider any matter dealt with by the Commission in the Workers Compensation Division and rescind, alter or amend and decision previously made or given by the Commission in that Division," [41].

Factors of delay, public interest in finality, *Anshun* estoppel, or hypothetical legal professional error did not weight against the application.

Under sub-heading "Justice between the parties and the substantial merits of the case", Senior Member Homan at [59] "As indicated above, I have inferred that the applicant is seeking to have the COD rescinded to facilitate an appeal under s 327(3)(a) and/or (b) or reconsideration as an alternative to an appeal for the purposes of a threshold dispute with regard to his entitlement to ongoing weekly compensation pursuant to s 39 of the 1987 Act or a work injury damages claim. For this limited purpose, I accept that there is a relevant purpose to the application for reconsideration. I do not accept that the applicant has any further entitlement to lump sum compensation under s 66 of the 1987 Act."

"Dr Gehr has, in his report of 10 December 2025, made an assessment of 23% WPI plus 2% scarring for the lumbar spine and 25% WPI plus 1% modifier for the cervical spine. The applicant has therefore provided evidence of a deterioration resulting in an

increase in the degree of permanent impairment of at least a further 10 percentage points," [62].

"The additional information relied on by the applicant was clearly not available to, and could not reasonably have been obtained by, the applicant before Dr Lahz's medical assessment," [63].

"I am satisfied, for these reasons that there is merit in the Application for Reconsideration," [64].

"Weighing the considerations above, I am satisfied that in the particular circumstances of this case, the discretion to reconsider the COD should be exercised and the COD rescinded to enable an application to appeal. There will be an order to that effect," [65].

History fail

***Juklen v Blacktown City Council* [2026] NSWPICPD 51. 23.10.2026. President Judge Phillips.**

At [1], the President "Ms Besima Juklen (appellant) was employed by the Blacktown City Council (respondent) as a childcare worker. On 19 October 2018 the appellant suffered a fall while working for the respondent, suffering various injuries. These injuries resulted in a C5/6 cervical fusion and discectomy being performed by Dr James Van Gelder on 8 May 2019. The history is that initially the appellant experienced a measure of relief as a result of the surgery, but this subsided with a return to pain and disability over time. The appellant was recommended to have further surgery on her neck, to deal with what was described as a non-union of the surgical fusion. The respondent disputed the need for this surgery. The appellant filed proceedings in the Personal Injury Commission (Commission) with the matter being heard by Member J Wynyard on 10 February 2023. In a written decision dated 3 April 2023,[1] the Member found in favour of the appellant. The Member found that the appellant had suffered injury to her neck in the subject incident and that the surgery was reasonably necessary.

"The appellant, consequent upon this decision, underwent a C5/6 posterior cervical decompression and fusion performed by Dr Brian Hsu on 16 May 2023. After the second operation, the neck pain returned and the appellant suffered pain in her lumbar spine. Dr Hsu recommended surgery to the appellant's neck and lumbar spine, the details of which I will refer to later in this decision. The insurer declined to approve this surgery," [2].

"The appellant therefore commenced a second application before the Commission with the matter returning to Member Wynyard, the same member who had determined *Juklen No 1* in the appellant's favour. This application was heard before the Member on 1 September 2025. In a decision dated 5 December 2025,[2] the Member found that the appellant had suffered an injury to her lumbar spine on 19 October 2018 but held that neither of the proposed further surgeries were reasonably necessary. The appellant appeals the decision in *Juklen No 2*," [3].

A: *Mr C Lehmann*, solicitor, of *Gerard Malouf & Partners*. R: *Stiles D* ins *Sparke Helmore*.

Backyard

“The respondent submits that it was the consumption of the sandwich which commenced the chain of events leading to the injury and that “everything that follows is the fruit of that poisoned tree” and that the applicant cannot satisfy s 9A on that basis,” Mr Strachan, *Wadey*.

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