November 2023

Case Note

An error in method alone is not a 'shaw thing' on review

Shaw v Insurance Australia Group Limited t/as NRMA Insurance [2023] NSWSC 1273

Introduction

In this case, Justice Rothman of the Supreme Court, has identified what is necessary for the President of the Commission (or their delegate) to be satisfied when considering whether a material error has occurred, permitting a review of a medical assessment under s 7.26 of the *Motor Accident Injuries Act* 2017 ('**The Act').**

Principles

A methodology error is not, without more, a basis to suspect a material error for the purposes of an application for review.

Background

The claimant was injured on 6 September 2018 when he was hit by a car while riding his bicycle.

He allegedly sustained multiple injuries, including a compression fracture of the L2 vertebrae, torn left hamstring, bruising and injury to the left knee, a strained ligament in the right foot, injured right hip and buttock, sore neck, ribs (on the right) and left hand. These were the subject of a whole person impairment ('**WPI)** medical dispute before the Personal Injury Commission, as the insurer disputed his accident-related impairment exceeded 10%. Significantly, in its internal review decision regarding WPI, the insurer had accepted the L2 fracture gave rise to a 10% WPI, but did not accept a right hip injury was accident-related.

The medical dispute was referred to Assessor Rosenthal, who assessed a 12% WPI comprised of 10% for the L2 fracture (on the basis that radiological reports recorded compression of 25-40%) and 2% for the right hip arising from the accident, but no assessable impairment in the cervical spine.

The insurer lodged a review application of Assessor Rosenthal's assessment of the lumbar spine on the basis he had failed to apply the *Motor Accident Guidelines* and undertake his own measurements on scans, rather than rely on given percentages in the radiological reports. The claimant lodged a reply asserting the insurer had conceded the lumbar spine injury attracted a 10% WPI and for this reason, there was no relevant medical dispute.

The President's delegate issued a determination accepting there was reasonable cause to suspect that Assessor Rosenthal's medical assessment was incorrect in a material respect and referred the matter to a review panel.

The claimant filed a Summons in the Supreme Court seeking judicial review of the Commission's decision.

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Issues

The claimant sought judicial review on three grounds:

1. There was no medical dispute as the insurer had conceded the existence and extent of the L2 compression fracture. The delegate's decision was based on the misconception that there was a medical dispute. The impact of the error was that the delegate considered the assessment of the lumbar spine a "*medical assessment"* within the meaning of the Act, such that it could be a basis for referring the matter for review which was an error of law.

2. The decision of the Commission was so unreasonable that no reasonable decision maker could have arrived at the same conclusion, relying on the decision of *Wood v Insurance Australia Ltd t/as NRMA Insurance [2022] NSWSC 1290.*

3. The insurer's concession meant that it was estopped from asserting the medical assessment for the lumbar spine injury was incorrect in a material respect. It was unconscionable for the insurer to resile from its previous position.

The insurer/First Defendant and the Commission/Second Defendant filed an appearance but did not serve any further evidence or submissions.

Decision

The court considered the following legislative provisions:

s 7.26(5) of the Act which requires the President (or his delegate) *to be satisfied that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect*, before a matter is referred for review.

s 7.17 of the Act *"medical assessment"* is defined as "*an assessment of a medical assessment matter under this Division*"

s 7.17 of the Act "medical dispute" is defined as

> *"(a) a dispute between a claimant and an insurer about a medical assessment matter, or*
>
> *(b) an issue arising about a medical assessment matter in proceedings before a court for damages or in connection with the assessment of a claim by the Commission."*

The Court then concluded:

Ground 1

1. Unlike a referral for assessment to determine the degree of whole person impairment, a referral for review under s7.26 of the Act is not contingent on there being a medical dispute. Once the matter was referred for assessment (to Assessor Rosenthal), a medical dispute existed. The only matter then for consideration by the Commission was whether the medical assessment was incorrect in a material respect.

2. Understood properly, the parties had only agreed to a DRE III category, but not the value within that range under the AMA IV Guides (10-13% WPI). It was incorrect for the claimant to say that there was no dispute in relation to the L2 fracture at all and therefore there was not a medical assessment.

3. The Act does not entitle a party to submit for review to a part of the assessment to which that party objects and prevent the Review Panel from examining the other parts of the assessment or limited to the parts that were said to be incorrect in the review application (the Review Panel must perform a fresh assessment).

4. The claimant failed on the first ground.

Ground 2

5. The test under s 7.26 required the President (or his delegate) not only to find the method was incorrect, but address whether the methodology error affected the medical assessment in circumstances where the agreed facts put the minimum WPI for the claimant at the percentage assessed (10%).

6. The delegate did not ask the correct question as they had not turned their mind to whether, on the agreed facts, there could be an error that adversely affected the assessment or was a material error.

7. The decision of the delegate, in the absence of evidence of the effect of the erred methodology on assessment itself, was not a decision to which a reasonable decision maker could have made.

8. The delegate had made an error of law.

9. The claimant succeeded on ground 2.

Ground 3

10. Should the insurer have been precluded from seeking review of a medical assessment determined in a manner consistent with their position? To establish an equitable principle of conduct estoppel, the party who adopted an assumption (the claimant), must have acted in a way that was detrimental to it, should the assumption not be made good. The claimant had not established this in evidence or submissions. Therefore, the principle was not established. .

11. The variant of *Anshun* estoppel aims to prevent a party to litigation from later agitating an issue that reasonably could have, or should have, been raised in the earlier proceedings. While the insurer did not call into question the degree of compression of the lumbar injury featured in the radiology until its application to refer Dr Rosenthal's assessment to a Review Panel, a review is a hearing *de novo*, and the delegate was to undertake a new assessment of all matters with which the medical assessment was concerned. Therefore, the principle was not established.

12. The claimant failed on ground 3.

Outcome

13. Judgment for the claimant.

14. Order for the decision of the delegate of the Commission in relation to the insurer's review application was quashed.

15. The application for review was to be remitted to the Commission.
16. The insurer was to pay the claimant's costs.

Why this decision is important

- When considering a challenge to a medical assessment, it is insufficient to set out a methodology error alone. The parties applying for review of a PIC Medical Assessment must satisfy the President (or his delegate) by defining how the error is material and adversely affects the medical assessment.
- While the objects of the Act support the parties narrowing issues in dispute, insurers need to be mindful of the potential implications of committing to a position and later resiling from same.

This Case Note was written by Special Counsel Alexandra Kyprianos with review by Principal Andrew Gorman. For further information or advice on any related matters, please contact Alexandra or Andrew.

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