Judicial Review of Workers Compensation Decisions

A paper by Mark Robinson SC to a NSW Bar Association Personal Injury and Common Law Conference, Sydney on 14 March 2020

I am asked me to speak today on Judicial Review of workers compensation decisions.

I shall put my remarks in context first. In doing so, the paper will also deal with:

- Administrative law process and remedies in New South Wales;
- The primary tenets of administrative law;
- Merits review and judicial review in NSW (the legality/merits distinction);
- An overview of jurisdictional error and the grounds of judicial review;
- An overview of workers compensation in NSW, and
- Some recent workers compensation judicial review cases.

Administrative Law in NSW

Before engaging in judicial review, the full range and scope of administrative law process and remedies should be first identified and implemented if appropriate.

At its broadest, administrative law in New South Wales relates to or concerns the following:

1. ***Self-help*** remedies or processes may be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not). It can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision or a letter-writing campaign.

2. ***Internal Review*** - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior in employment status to the original administrative decision-maker to look at and re-make the subject decision (usually afresh). Sometimes it is done without a statutory provision, as a matter or practice or policy.

3. ***Need the Documents? - Freedom of Information*** (under *Government Information (Public Access) Act 2009* (NSW)("**GIPAA**") . The agency decisions under GIPAA are subject to merits appeals to the Information Commissioner and then to the NSW Civil and Administrative Decisions Tribunal ("**NCAT**"));

4. ***Breach of Privacy? - The Privacy Commissioner***, and NCAT in administering the *Privacy and Personal Information Protection Act 1998* (NSW) – involves breach of

privacy by a State government agency only; and,

5. ***Maladministration? - The Ombudsman*** - whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations (which are usually accepted by the NSW Government);

6. ***Corrupt Conduct? - The Independent Commission Against Corruption***;

7. ***Ex gratia or act of grace payments*** – When someone has suffered a financial or other detriment as a result of the workings of the government. This detriment must be of a nature which cannot be remedied or compensated through recourse to legal proceedings. Payments are discretionary in nature and it is for Ministers to determine individual applications (see NSW Treasury Circular NSW TC 11-02 dated 1 February 2011).

8. ***External Independent Merits Review*** - is the process of obtaining an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision "*de novo*" (meaning, literally, from the very beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and concerns a "*remaking*" of the decision under review in order to come to the correct or preferable decision based on evidence now presented. The jurisdiction of the Administrative and Equal Opportunity Division of NCAT is a leading example of an independent, external merits review body. The leading cases on the nature of external merits review is *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 and *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 at [14] to [15].

9. ***Judicial Review*** - the legality of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities. These proceedings known as "*judicial review*" of administrative action are usual dealt with by the Supreme Court of NSW, Common Law Division, in the Administrative Law List. This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available. A leading NSW case concerning the nature of judicial review is *Bruce v Cole* (1998) 45 NSWLR 163. See also, Justice John Basten, "Judicial Review in State Jurisdiction" (2016) 84 AIAL Forum

Administrative law did not develop in a vacuum. It was developed by the courts in England and Australia over 500 years and for good reason. Its purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as to keep check on executive decision-makers so as to ensure they all acted lawfully and within the meaning, scope and purpose of their legal powers.

Primary tenets of administrative law have developed over time.

Overall, they are to ensure that in the making of administrative decisions, there is:

a. legality (judicial review and merits);
b. fairness; (judicial review and merits)
c. participation (merits);
d. accountability; (merits)
e. consistency; (merits)
f. rationality; (judicial review and merits)
g. proportionality (judicial review and merits); and,
f. impartiality (judicial review and merits).

The usual aim of an **external merits review** process in a tribunal is to provide the review applicant with a correct or preferable administrative decision, while at the same time, improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public administration.

The primary aim of **judicial review** in the court is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

The fundamental distinction between the two is known as the "*legality/merits distinction*".

Judicial Review of Administrative Action in NSW

The leading academic text in this area is 1,212 pages long – Aronson, Groves and Weeks, Judicial Review of Administrative Action and Government Liability, 6th ed, 2017 (Lawbook Co, Sydney).

Framework and Procedure

The jurisdiction of superior courts by way of judicial review of administrative action was developed by the courts in accordance with the common law or general law. It involves a court assessing or examining a decision or purported decision of an executive or governmental body or a tribunal for legal error (and not on the merits of the particular case).
The relief granted (which is discretionary) may be to quash or set aside the decision, declare the decision invalid or void and, in some cases, to remit the decision to the original or primary

decision-maker for re-consideration according to law (sometimes with a direction that the matter be decided by a different decision-maker or differently constituted tribunal).

While judicial review in NSW lies largely in the realm of the common law, its existence is constitutionally entrenched and protected by section 73 of the Commonwealth *Constitution* (see, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 and, "*The Centrality of Jurisdictional Error*", Hon J Spigelman AC (2010) 21 Public Law Review 77). Because judicial review is protected by the Constitution, it cannot be taken away by any State legislation (at least for correction for jurisdictional error).

The grounds for such review are evolving through decisions of various courts and many of these grounds overlap.

Early identification of the most appropriate ground or grounds of judicial review is the key to success in this area, providing one has also sought the appropriate remedy and the discretionary factors do not work adversely.

The discretionary factors apply at the end of a case. Even an applicant establishes legal error, the Court has discretion as to whether or not to grant a remedy. The discretionary factors are these.

A remedy will not normally be granted (on the finding of a legal error or defect) if:

- a more convenient and satisfactory remedy exists (such as a merits appeal to the NCAT);
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made[1]; also;
- an applicant should not have acquiesced in the conduct of proceedings known to be defective. An applicant cannot "*sleep on their rights*" - they should make an election to challenge or no longer participate in the executive or court-like process below.

Ordinarily then, the grounds of judicial review are known as:

- error of law amounting to identification of the wrong question,
- ignoring relevant material,

1 See the discussion of the discretion and the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [91]-[92] per Kirby J.

- relying on irrelevant material or, at least, in some circumstances,
- making an erroneous finding or reaching a mistaken conclusion,

leading to an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a "**jurisdictional**" error of law.

Jurisdictional Error and the Grounds of Judicial Review

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari, prohibition and mandamus and injunctions and declarations) are available under the *Supreme Court Act* 1970 (NSW) in the Court's exercise of its supervisory jurisdiction over State statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, as we have seen, is discretionary in most cases – except for (possibly) denials of natural justice – see: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at [80] (per McHugh, with Kirby J agreeing)).

Examples of jurisdictional errors of State tribunals and executive decision-makers include identifying a wrong issue; asking a wrong question; ignoring relevant material; relying on irrelevant material; or an incorrect interpretation and/or application to the facts of the applicable law, ***in a way*** that affects the exercise of power (see: *Craig v State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; and *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [60] to [70].

The words there "in a way" are in bold for good reason.
It must be something that moves the Court to find for vitiating legal error.

Jurisdictional errors that may be committed by a tribunal or executive body (post *Craig's case*) that will always be corrected by a Superior Court (as extended by the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [61]-[63]) can also be discussed as follows:

- The definition of "*jurisdictional error*" in *Craig's case*, is not exhaustive (*Kirk's* case also held this at [60] to [70]).
- Those different kinds of error may well overlap.

- The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question, and ignoring relevant material.

If an error of this kind is made, the decision-maker did not have authority to make the decision that was made. He or she did not have jurisdiction to make it - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53].

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error - *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82; and, *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (2001) 206 CLR 57.

The remaining traditional grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness – including actual bias and apprehended bias) in respect of tribunals and executive decision-makers include:

1 Errors of law (including identifying a wrong issue; making an erroneous finding; and reaching a mistaken conclusion).
2 improper purpose;
3 bad faith;
4 irrelevant/relevant considerations;
5 duty to inquire (in very limited circumstances);
6 acting under dictation;
7 legal unreasonableness - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332;
8 proportionality (not presently available, except via legal unreasonableness);
9 no evidence;
10 uncertainty;
11 inflexible application of a policy (without regard to the individual merits of the application);
12 manifest irrationality or illogicality (possibly a sub-branch of legal unreasonableness);
13 failure to afford a "proper, genuine and realistic consideration" of material; and,
14 failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.

How the Grounds of Judicial Review Operate

These grounds of judicial review each operate on their own to quash administrative or tribunal decisions.

Alternatively, the different kinds of errors may sometimes overlap - *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82] (per McHugh, Gummow and Hayne JJ). They can also combine, such that, for example, unreasonableness can be characterised in a number of ways in judicial review. A decision affected by actual bias might lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations. A failure to accord a reasonable opportunity for a person to be heard might contravene a statutory requirement to accord such a hearing. It might also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account – see, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [26] per (French CJ). Further, it is also the case that that some decisions may be considered legally unreasonable in more than one sense and that "*all these things run into one another*" on occasion - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72] (per Hayne, Kiefel and Bell JJ); citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

An overview of workers compensation in NSW

In *Martinovic v Workers Compensation Commission of New South Wales* [2019] NSWSC 1532, Justice N Adams helpfully set out an overview of the legislative regime (at [6]-[21]) in the following terms:

6 Workers compensation legislation in NSW relevantly comprises the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("the **1998 Act**") and the *Workers Compensation Act 1987* (NSW) ("the **1987 Act**"). The 1987 Act is to be read as if it formed part of the 1998 Act in the event of inconsistency. It was accepted that there was no inconsistency relevant to these proceedings. The subordinate legislation includes the Workers Compensation Commission Rules 2011 (NSW), the Workers Compensation Regulations 2016 (NSW) and the New South Wales Workers Compensation Guidelines for the Evaluation of Permanent Impairment.

7 There are two schemes under the workers compensation legislation: compensation awarded by the Commission and modified common law damages awarded by the Court. As to the former, under s 66 of the 1987 Act, the Commission has exclusive jurisdiction to determine an award of compensation for lump-sum amounts as well as weekly benefits and medical expenses. As to the latter, the District Court of New South Wales has a limited jurisdiction to hear and determine claims for modified common law damages for

work injuries meeting the criteria set out in Division 2 of Part 5 of the 1987 Act: s 44 of the *District Court Act 1973* (NSW). Such decisions are subject to appeal to the Court of Appeal: s 127 of the *District Court Act*.

8 Section 151H of the 1987 Act provides that in order for a worker to bring court proceedings for modified common law damages, a threshold of not less than 15% permanent impairment or whole person impairment ("WPI") must exist. If a worker's WPI is assessed at less than 15% he or she is not entitled to bring any proceedings for modified common law damages.

9 Part 7 of the 1998 Act provides for medical assessment of an injured worker seeking workers' compensation where there is a "medical dispute". It also provides for an internal review process by way of an appeal panel. As I noted in *Midson v Workers Compensation Commission & Ors* [2016] NSWSC 1352 at [8] "[t]he purpose of the internal review scheme was to remove the function of assessing injury from the adversarial court system".

10 Section 321 of the 1998 Act provides that the Registrar may refer a degree of permanent impairment to an AMS. The AMS assessment is made according to the guidelines: s 322 (1). Section 323 of the 1998 Act provides that the AMS is to make a deduction for previous injury, pre-existing condition or abnormality.

11 Section 324 provides for the powers of an AMS on assessment of a medical dispute including on an appeal or further assessment. Section 325 provides that the AMS is to provide a medical assessment certificate ("MAC") setting out the reasons and facts on which it is based.

12 Section 326 provides, inter alia, that the MAC is presumed to be correct as to the degree of WPI of the worker.

13 A party to a medical dispute may appeal against any MAC but the appeal is not to proceed unless the Registrar is satisfied on the face of the application and any submissions that at least one of the grounds for appeal specified in s 327(3) of the 1998 Act has been "made out". Section 327(3) is in these terms:

> (3) The grounds for appeal under this section are any of the following grounds—

> (a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,
>
> (b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
>
> (c) the assessment was made on the basis of incorrect criteria,
>
> (d) the medical assessment certificate contains a demonstrable error.

14 It has been held that the Registrar of the Commission acts as a "gatekeeper": *Campbelltown City Council v Vegan* [2004] NSWSC 1129, [74] (Wood CJ at CL) and that his or her role is to ensure that the appeal is on its face valid and apparently credible: Campbelltown City Council v Vegan at [8]. See also *Mahal v State of New South Wales* [2017] NSWWCCPD 41 (11 September 2017) at [42].

15 If a party proceeds past the "gatekeeper", then s 328 of the 1998 Act provides that an appeal is to be "by way of review." The appeal panel may confirm the MAC under review or revoke it and issue a new MAC.

16 Although one or more grounds under s 327(3) must be "made out" before an appeal can be heard, the appeal panel is not confined to the grounds of which the Registrar is satisfied: *Siddick v WorkCover Authority* [2008] NSWCA 116 [59]-[104] (McColl JA).

17 After the MAC is either confirmed or modified by the appeal panel, a certificate of determination ("COD") is issued. If the COD has not as yet been issued, the Registrar or the appeal panel may reconsider any matter and "rescind alter or amend" any decision: s 378 of the 1998 Act

18 If a COD has already been issued (as in the present case), then the statutory recourse is s 350 of the 1998 Act which provides as follows:

> (1) Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is final and binding on the parties and is not subject to appeal or review.
>
> (2) A decision of or proceeding before the Commission is not—
>
> (a) to be vitiated because of any informality or want of form, or

> (b) liable to be challenged, appealed against, reviewed, quashed or called into question by any court.
>
> (3) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission.

19 Section 352 provides for an appeal against the decision of an arbitrator: subs (1)-(5) are in these terms:

> (1) A party to a dispute in connection with a claim for compensation may appeal to the Commission constituted by a Presidential member against a decision in respect of the dispute by the Commission constituted by an Arbitrator.
>
> (2) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that the procedural requirements of this section and any applicable Rules and regulations as to the making of an appeal have been complied with. The Registrar is not required to be satisfied as to the substance of the appeal.
>
> (3) There is no appeal under this section unless the amount of compensation at issue on the appeal
>
> (4) An appeal can only be made within 28 days after the making of the decision appealed against.
>
> (5) An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing.

20 The President of the Commission is subject to an appeal to the Court of Appeal on a "point of law" by virtue of s 353 of the 1998 Act.

21 Decisions of an appeal panel and the arbitrator are also subject to judicial review by this court: s 69 of the *Supreme Court Act 1970* (NSW): *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531[2010] HCA 1.

Some Workers Compensation Cases

***Mercy Centre Lavington Ltd v Kiely* [2017] NSWSC 1234**

In this case, Justice Wilson set aside a decision of a Medical Appeal Panel. She also remitted the matter to the Workers Compensation Commission for determination of the worker's appeal by a differently constituted Appeal Panel pursuant to s 328(1) *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("**the 1998 Act**").

The plaintiff operates a residential care facility for people with an intellectual disability, behavioural disorders or other special needs. The first defendant worker took up employment in the facility, working as a residential care co-ordinator. On 19 April 2011, the worker was injured whilst at work when she was assaulted by a resident of the facility. She injured her right shoulder and her neck and claimed a psychological injury. She made a workers compensation claim and ceased working. An Approved Medical Specialist ("AMS") was appointed for assessment of the Whole Person Impairment arising out of the primary psychological injury attributed to the workplace incident. The AMS, a psychiatrist, reported. He found 17% whole person impairment, but 12% of the worker's psychiatric disorder was deemed a result of the primary psychiatric condition, while 5% was deemed related to a secondary psychiatric condition". Under section 65A of the 1987 Act, no compensation is payable for a secondary psychiatric condition.

The worker appealed pursuant to s 327 of the 1998 Act (on the basis of basis of incorrect criteria or demonstrable error).

The appeal went to a Medical Appeal Panel pursuant to s 327(4) of the 1998 Act.
The Panel found error in the approach taken by the AMS and proceeded to make its own assessment. The Panel made its own estimate by "borrowing" the method from section 323 of the 1998 Act and applying it to the present case. It found the primary psychiatric condition to be 15%.

Section 328(2) of the 1998 Act provides "The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made".

The Supreme Court found (at [55]) that the Medical Appeal Panel took into account issues that were not matters raised by the worker in the grounds as pleaded, and should not have formed part of the MAP's consideration of error. The Court held that the appeal decision in this regard "was made outside the bounds imposed by s 328(2)".

The Court also found (at [57]) that it "was not open" to the Panel to utilise s 323 as the methodology adopted by which to determine secondary psychological impairment pursuant to s 65A of the 1987 Act. That section was for a different purpose (deduction for previous injury or pre-existing condition or abnormality). The Court held that in wrongly applying a different formula (at [61]) the Panel also failed to have regard to the medical evidence upon which the assessment could have been made. Using section 323 was held to be an error of law (at [63]).

***Martinovic v Workers Compensation Commission of New South Wales* [2019] NSWSC 1532**

In this decision, Justice N Adams quashed the decision of an Arbitrator and the decision of an Appeal Panel. She remitted the matter to the Workers Compensation Commission for allocation to a review panel for determination according to law.

The worker challenged the validity of the decisions of an AMS, the Medical Appeal Panel and an Arbitrator. The worker here worked for Corporate Projects as a gyprocker. He is a carpenter by trade. He lifted some heavy exit doors and experienced pain in his lower back. On 21 October 2013, he consulted a neurosurgeon, Dr Bentivoglio. The worker made a claim for lump-sum compensation benefits on the worker's compensation insurer and there was a dispute about the extent of whole person impairment (20% verses 11%).

The AMS assessed him at 8%. The Appeal Panel assessed him at 12%. A Certificate of Determination was quickly issued and the worker was paid some money. The worker got new solicitors. He made an application to the Commission for reconsideration under s 350 of the 1998 Act. The Arbitrator refused to alter the Appeal Panel's decision.

The Supreme Court correctly noted (at [60]):

> "A privative clause applies to the decision of the Commission under s 350(3) of the 1998 Act: s 350(1). Therefore, consistent with the principles in *Kirk v Industrial Relations Court of New South Wales* (2010) 239 CLR 531, the proceedings for judicial review against the decision of the Arbitrator are confined to the establishment of jurisdictional error. A failure to afford procedural fairness to a party constitutes both jurisdictional error and error of law within jurisdiction: *Kirk* at 569 [60], citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at 89 [5], 91-101 [17]-[42], 143 [170]."

There is no ouster clause for the Medical Appeal Panel's decision.

In the challenge to the Appeal Panel, the worker contended that the Panel failed to respond to his submissions requesting a re-examination and he made submissions concerning radiculopathy. He also adduced new medical evidence. The Panel simply failed to deal with these issues. The Supreme Court found that this failure constituted three jurisdictional errors (at [125]) classified as a failure to engage with the worker's arguments (*Dranichnikov v Minister for Immigration and Cultural Affairs* (2003) 77 ALJR 1088) or as a failure to provide reasons (*Campbelltown City Council v Vegan* (2006) 67 NSWLR 272).

In the face of jurisdictional error in the Panel, the Arbitrator's decision fell as well (at [126]).

***Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 663 (Garling J)**

In this case, Justice Garling dismissed a worker's summons challenging the decision of a Medical Appeal Panel. The worker was a paramedic with the Ambulance Service. She ceased work due to depression and anxiety. The AMS certified her 6% WPI. She appealed to the Medical Appeal Panel and it did not change the result.

The Court considered the Workcover Guidelines and the Psychiatric Impairment Rating Scales ("PIRS") which were applied by the AMS and the Panel. The Supreme Court held that the AMS and the Panel did not have to apply each "class descriptor" listed in the PIRS (departing from what happened in *Crnobrnja v Motor Accidents Authority of NSW* [2010] NSWSC 633).

The Court emphasised the use of clinical judgment (at [54] and [73]) especially in psychiatric cases rather than slavishly following class descriptors in the guidelines.

***Hunter Quarries Pty Ltd v Mexon* (2018) 98 NSWLR 526**

This appeal concerned the meaning of "permanent impairment" in section 66 of the 1987 Act. A worker suffered a severe crush injury when the excavator he was operating overturned. He died of his injury a few minutes after sustaining it. The employer accepted liability to the worker's estate for death benefits under the Act but resisted a claim under s 66 for compensation for "permanent impairment" by reason of the crush injury.

The primary judge held (at [37]) that the term "permanent impairment" is not concerned with the possibility of death occurring shortly after injury, but rather with the question of whether the injury has resulted in "permanent", as opposed to "temporary", impairment. The primary judge held that if a worker is killed "instantly", then the injury results in death and a "permanent impairment" does not arise.

The Court of Appeal held the term "permanent impairment" involves a diminution in function experienced by a worker which is lasting or enduring while the worker is living. It does not encompass an impairment resulting from an injury so serious as to result shortly and inevitably in death.

***Bluescope Steel (AIS) Pty Ltd v Sekulovski* [2019] NSWCA 136**

This case concerned a pair of hearing aids, the cost of which was $5,657.80. Leave to appeal was refused. The Commission was constituted by a Presidential member. The worker had been exposed to noise at work for 35 years. However, ten years after he left his employment, he saw

an ENT who certified that he needed hearing aids. There was a binding 2002 Commission certificate stating he had 1.9% binaural loss. However, the Commission accepted the new medical evidence over the Certificate. The Court of Appeal held that the Commission's approach was acceptable (at [30]).

***Bhusal v Catholic Health Care Ltd* [2018] NSWCA 56**

The worker was employed as an assistant nurse by Catholic Health Care Ltd ("CHC"). She suffered injury to her back in the course of that employment. She made a claim for compensation under the 1987 Act. Liability was admitted, but denied after a "work capacity decision" was made within the meaning of s 43 of the Act. A work capacity decision is subject to "internal review" by the insurer; to "merit review" by the State Insurance Regulatory Authority ("SIRA"); and to procedural review by an Independent Review Officer.

The applicant sought internal review of the decision to the employer. The employer did not change its decision but it wrote to her while she was overseas. She got the notice later. She filed for merits review and the Delegate of SIRA wrote back saying the Authority had no jurisdiction as the application was not made within 30 days of the applicant being notified of the employer's internal review decision.
She applied to the Independent Review Officer who dismissed the application.

The primary judge accepted that the word "must" in s 44BB(3)(a) was "mandatory in the true sense". He therefore rejected the submission that SIRA ought to have given the applicant an opportunity to explain why she did not lodge her application within 30 days from 2 May 2016, and dismissed the summons.

On appeal, the Court of Appeal held there was a denial of procedural fairness in that the procedure adopted by the Delegate of SIRA caused the worker to suffer practical injustice. This is not because SIRA's decision on the jurisdictional question was wrong but because the applicant was denied the opportunity to make submissions to SIRA on the issue that proved critical to the outcome of her merit review application. There was a denial of procedural fairness here because neither the Delegate nor the employer directed the worker's attention to the critical issue on which SIRA's decision turned. The applicant was thus denied the opportunity to be heard on that issue.

***Pacific National Pty Ltd v Baldacchino* (2018) 98 NSWLR 483**

In this Court of Appeal case the question was whether a total knee replacement was different in character from the expression "artificial aids" expressly identified in s 59A(6)(a) of the 1987 Act. The Act provided for compensation for:

> "This section does not apply to compensation in respect of any of the following kinds of medical or related treatment:
> (a) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries),
> (b) the modification of a worker's home or vehicle,
> (c) secondary surgery"

The employer argued that an "artificial aid" was a single object or a composite of objects which is complete in itself operating together to ameliorate a disability and that on no proper interpretation of "artificial aid" could pieces of plastic inserted into the knee come within its meaning.

The Court of Appeal held an "artificial aid" may comprise a single object or a composite of objects working together to ameliorate the effect of a disability. As a total knee replacement had these characteristics, it was an "artificial aid". That the article or object must be complete in itself is not supported by the language of the statute or by authority.

Thank You