Form 105 (version 7)
UCPR 51.16, 51.18, 51.20

FILED
23 JAN 2025
A.V.

SUPREME COURT OF NEW SOUTH WALES

NOTICE OF APPEAL

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2024/427925

TITLE OF PROCEEDINGS

Appellant	**E B MURRAY FAMILY INVESTMENTS PTY LTD t/as BEDE MURRAY RACING STABLES**
Respondent	**JO-ANNE** [redacted]

PROCEEDINGS IN THE COURT BELOW

Title below	E B Murray Family Investments Pty Ltd t/as Bede Murray Racing Stables v Jo-Anne [redacted]
Court below	Personal Injury Commission of New South Wales
Case number below	A1-W5892/22
Date of hearing	31 October 2024
Material date	31 October 2024
Decision of	Deputy President Michael Snell

FILING DETAILS

Filed for	E B Murray Family Investments Pty Ltd t/as Bede Murray Racing Stables, Appellant
Filed in relation to	Whole of the decision below.
Legal representative	[redacted]
Legal representative reference	[redacted] [redacted]
Contact name and telephone	[redacted]
Contact email	[redacted]

HEARING DETAILS

This notice of appeal is listed for directions at 9am on 19/2/25

TYPE OF APPEAL

Workers compensation appeal from the Deputy President of the Personal Injury Commission.

L\316450649.1

185500321 - 217107 (MFF)

DETAILS OF APPEAL

1 This appeal is brought under section 353 of the *Workplace Injury Management and Workers Compensation Act 1998*.

2 This notice of appeal is not filed pursuant to leave to appeal.

3 The appellant has filed and served a notice of intention to appeal, which was served on the respondent on 18 November 2024.

4 The appellant appeals from the whole of the decision below.

APPEAL GROUNDS

1 The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the surveillance evidence relied upon by the appellant.

2 The Deputy President made an error law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the evidence of Dr Smith.

3 The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the evidence of the lay witnesses called by the appellant.

4 The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the evidence of the absence of early complaint.

5 The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to other matters affecting the respondent's credit.

6 The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to give sufficient reasons for his determination that the respondent had no current working capacity.

ORDERS SOUGHT

1 Appeal allowed.

2 The decisions below of the Deputy President and Member Sweeney be set aside.

3 This Court make the following determinations:

a. that the respondent did not suffer injury to her neck and both shoulders arising out of and in the course of her employment on 16 January 2009.

b. the worker has not suffered any incapacity for work as a result of any injury sustained in the employ of the appellant since 21 July 2022.

c. the awards for weekly payments and medical and hospital expenses made by Member Sweeney be set aside.

4 In the alternative an order that the matter be remitted back to the Personal Injury Commission for a determination in accordance with law and this judgment.

5 The respondent pay the appellant's costs.

UCPR 51.22 CERTIFICATE

The right of appeal is not limited by a monetary sum

SIGNATURE OF LEGAL REPRESENTATIVE

I have advised the appellant[s] that court fees will be payable during these proceedings. These fees may include a hearing allocation fee.

Signature [redacted]
Capacity
Date of signature

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.

FURTHER DETAILS ABOUT APPELLANT

Appellant

Name	**E B MURRAY FAMILY INVESTMENTS PTY LTD t/as BEDE MURRAY RACING STABLES**
Address	[redacted]

Legal representative for appellant

Name	[redacted]
Practising certificate number	[redacted]
Firm	[redacted]
Contact solicitor	[redacted]
Address	[redacted]
Postal address:	[redacted]
Telephone	[redacted]
Fax	[redacted]
Email	[redacted]
Electronic service address	[redacted]

DETAILS ABOUT RESPONDENT

Respondent

Name	Jo-Anne [redacted]
Address	[redacted]

APPELLANT'S SUBMISSIONS

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
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#Legal representative	[redacted]
#Legal representative reference	[redacted]
Contact name and telephone	[redacted]
Contact email	[redacted]
APPELLANT'S SUBMISSIONS	

INTRODUCTION

1 This is an appeal from a decision of the Deputy President of the Personal Injury Commission, Workers Compensation Division (**PIC-WCD**). In turn, the decision of the Deputy President arose out of an appeal by the current appellant from a decision of a Member of the PIC-WCD, Member Sweeney.

2 The original proceedings before Member Sweeney concerned an application by the respondent in relation to an accident at work on 16 January 2009. Those proceedings gave rise to two substantive issues.

3 First, was an issue as to the respondent's capacity for work after 21 July 2022 and therefore her entitlement, if any, to further weekly benefits of compensation. Second, was an issue as to whether certain injuries to her left wrist, shoulders and other body parts allegedly injured in falls in April 2018 and April 2020 resulted from earlier *"proven employment injuries in 2009"*[1].

4 In relation to the first issue, the finding by Member Sweeney was that the respondent had no current capacity to carry out suitable employment. Following his decision, he made an award of weekly payments to be paid by the appellant to the respondent.

5 As to the second issue, Member Sweeney found that the falls and subsequent injuries occasioned to the respondent in 2018 and 2020 were unrelated to her earlier, work related, accident.

6 The appellant appealed the decision of Member Sweeney in relation to the first issue, her current capacity to carry out suitable employment. There was no appeal from the second issue. The appeal was to the Deputy President of the PIC. The Deputy President dismissed the appellant's appeal. It is from that decision that this appeal arises.

BACKGROUND

7 The respondent was employed by the appellant from 27 October 2008 to 29 May 2009. Prior to her employment with the appellant the respondent had suffered a significant and permanent back injury when, on 20 July 1987, she was thrown from a horse whilst employed as a track work rider.

8 As a result of that prior fall, she sustained a crush fracture at the L2 level of her lumbar spine with a projection of bone into the spinal cord. She underwent operative treatment for this injury in July 1987, February 1988 and August 1988. Proceedings brought by the respondent against her then employer in the former Compensation Court of NSW, as well as common law proceedings, were settled.

9 These proceedings relate to injuries suffered by the respondent on 16 January 2009. Her claim was that she fell whilst using a whipper snipper to cut grass at the appellant's horse training business at Conjola. She underwent surgery to her right shoulder on 19 October 2009. She also underwent an anterior disc fusion at the C5-C7 levels on 10 July 2013. The appellant accepted liability for those surgeries.

10 On 7 November 2016 the respondent underwent a bilateral posterior cervical foraminotomy at the C7/8 level. The appellant did not accept liability for those

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[1] Member's Decision [2] – page 42 of the Red Book at H

surgeries. However, by Certificate of Determination dated 22 August 2017, an arbitrator of the former Workers Compensation Commission ordered the appellant to pay the respondent's expenses in relation to that treatment.

11 On 2 December 2022, Member Sweeney issued a Certificate of Determination in relation to the respondent's fall in January 2009. The Member found that the appellant was estopped from denying that the respondent had suffered an injury to her neck and both shoulders as a result of the incident on 16 January 2009. No appeal from that decision was brought.

12 In those circumstances, the appellant accepts that it is not open to the appellant to pursue a case that the respondent did not suffer injury to her neck and shoulders in the course of her employment on 16 January 2009. However, that estoppel does not affect any determination as to the level, nature, duration and extent of injury that the respondent suffered. Apart from determining what might be seen as a threshold issue as to injury, the estoppel has no particular determinative effect on whether or not the respondent had any continuing incapacity to work as a result of her initial injuries when the issue of incapacity was later considered by Member Sweeney.

13 In the course of investigating the matter the appellant obtained a significant amount of surveillance of the respondent. The appellant's case before the Member and the Deputy President was that the surveillance was significantly inconsistent with a finding that the respondent had no capacity to work.

14 The appellant obtained expert medical evidence from an orthopaedic surgeon, Dr Smith. Dr Smith was provided with a copy of some of the surveillance. He found it inconsistent with a suggestion that the respondent had no capacity to work. The respondent produced no evidence of any doctor who had viewed the surveillance.

15 At the original hearing before Member Sweeney the appellant relied upon some lay witnesses who are, or were, employees of the appellant. Their evidence, which was not challenged by any cross-examination at all, was to the effect that any injury she suffered in the 2019 accident could only have been minor.

16 This is an appeal of an administrative nature. In part, it is based upon the Member's findings as to whether the surveillance evidence was significant in assessing the respondent's capacity for suitable employment. The Member doubted that to be the case[2]. The appellant says that decision was illogical and vitiated by that illogicality.

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[2] Member's decision [103] – page 55 of the Red Book at *l*

17 Second, the original Member found that as the respondent had signs of what the Member referred to as 'pathology' in her neck, that overrode the probative effect of the surveillance material. That decision was upheld by the Deputy President. The appellant says that was a finding that was illogical and vitiated by that illogicality.

18 The two falls that the respondent sought to have the Member find were related to the original injury occurred in April 2018 and April 2020. As noted, Member Sweeney did not find those falls to be related to the injury occasioned to the respondent during her employment with the appellant.

19 In the present case there are essentially **six issues** the appellant seeks to raise.

20 The **first** of these concerns the surveillance material and the way the Member dealt with it. It was, and is, the appellant's case that the surveillance material significantly undermined many of the assertions made by the respondent. This, it is submitted, resulted in her credit being called into question to a serious degree.

21 The **second** issue is the way that the Member dealt with the evidence of Dr Smith, a surgeon retained by the appellant. Dr Smith was the only doctor who had viewed the surveillance. He formed an opinion that the objective evidence provided by the surveillance confirmed his opinion that the respondent was fit for a wide range of employment.

22 The **third** issue is the way in which the Member utilised the lay evidence called by the appellant. As noted, much of this unchallenged evidence contradicted the evidence of the respondent. This again significantly undermined her credit.

23 The **fourth** issue concerns the approach taken by the Member to the evidence relied upon by the appellant in relation to the absence of early complaint of injury by the respondent following the accident on 16 January 2009.

24 The **fifth** issue relates to the approach taken by the Member to certain other evidence relied upon by the appellant which suggested that the respondent was capable of working.

25 In large part the third, fourth and fifth issues (Grounds 3, 4 and 5) are tied up with the first issue. This is because it is the appellant's contention that the failure to give adequate weight to other evidence called by the appellant, in conjunction with the Member's approach to the surveillance material, demonstrates an illogicality in his approach to weighing up the evidence generally.

26 **Sixth** and lastly, the appellant contends that the reasons given by the Member for finding that the respondent did not have a current work capacity were inadequate.

27 These issues are to be seen on the statutory background of what is suitable employment. Suitable employment is defined in section 32A of the *Workers Compensation Act* 1987. It is in the following terms:

> *"**suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited—*
>
> *(a) having regard to—*
>
> *(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and*
>
> *(ii) the worker's age, education, skills and work experience, and*
>
> *(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and*
>
> *(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and*
>
> *(v) such other matters as the Workers Compensation Guidelines may specify, and*
>
> *(b) regardless of—*
>
> *(i) whether the work or the employment is available, and*
>
> *(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and*
>
> *(iii) the nature of the worker's pre-injury employment, and*
>
> *(iv) the worker's place of residence."*

28 Generally, it is the appellant's submission that no reasonable decision maker having regard to the surveillance evidence or the other evidence relating to the credibility of the respondent, could conclude that the respondent was incapable of any suitable work.

29 The finding of Member Sweeney that the respondent was not capable of any suitable work was barely supported by any credible evidence and was so against the weight of the evidence that error must have been involved. A reasonable person in the position of the Member, and the Deputy President, could not have concluded that the respondent had no capacity for work. There was, simply put, little evidence to support such a contention and much that undermines it.

Appeal ground 1

The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the surveillance evidence relied upon by the appellant.

30 The surveillance material relied upon by the appellant was extensive. It extended over 8 years from 2012 to 2020. At the hearing before the original Member and later at the Appeal before the Deputy President, it was the appellant's position that the surveillance footage and the observations of the surveillance operative show the respondent carrying out much more than typical, light, day to day activities. The respondent is repeatedly observed performing tasks that require a significant degree of physical exertion, something she made clear to doctors that she was unable to do. She carried out those tasks over a lengthy period of time.

31 The surveillance carried out of the respondent clearly has a significant objective element to it. This contrasts with her complaints of pain which are necessarily subjective. It was in these circumstances that the appellant submitted that the surveillance, together with other matters that impacted upon the respondent's credibility, meant that the only reasonable outcome could be that the evidence of the respondent as to her subjective complaints could not be accepted. Yet it was these complaints which formed a basis of Member Sweeney's finding that the respondent had no earning capacity.

32 The appellant particularly points to the following examples that are shown in that surveillance film:

(a) 25 October 2012 manoeuvring, lifting and carrying single handed, despite the presence of a companion, a 25kg box from a hardware store;

(b) 19 January 2016 lifting a chair overhead contrary to the history given to several treating doctors and expert specialists that she cannot lift her arms above shoulder height;

(c) 6 – 8 August 2020 carrying bags of shopping, lifting and carrying pieces of wood, including some large pieces, driving a car and turning her head hard to the left, contrary to complaints made to doctors both treating and medico legal;

(d) 10 – 12 September 2020 carrying bags of shopping, carrying cases of beer, spraying and pulling weeds on her property, carrying her grandchild, operating a ride on lawn mower, dragging a hose to the fence line, picking up grass and sticks, rolling and moving rocks, throwing some of them over the fence, using

a rake, operating a tractor, picking up rocks to throw them in a bucket of the trailer and fixing wire on the fence; and

(e) 1 – 4 October 2020 picking up large garbage bags and boxes, lifting and securing a large tarpaulin overhead, unloading goods from a truck, riding a quad bike, carrying her grandchild, lifting a large black tub, lifting a case of beer and carrying shopping.

33 The surveillance shows the respondent undertaking a wide range of physical activities without any obvious sign of pain or restriction of movement. For example, she is seen to be walking normally, carrying groceries and the like in the company of others, moving her head freely on numerous occasions, lifting her arms above her head, holding a chair and lifting her arms above her head to close the tailgate of a Toyota Land Cruiser. These were things that the respondent said she could not do because of the injuries that arose out of the accident in January 2009. In none of the surveillance, which was taken over a period of over eight years, is there any indication of any disability whatsoever. In addition to the actual surveillance, which is provided electronically to the Court, reports in relation thereto can be found at page 283 onwards of the Blue Book.

34 Given that the purpose of her application was for the respondent to receive weekly compensation payments on the basis that she had no current work capacity, the surveillance film is critical for a number of reasons.

35 Firstly, whilst it is the case that the respondent has had surgical treatment to her neck and shoulder, this occurred a considerable time after the accident. She had a repair of her right rotator cuff some nine months after the accident. Surgery to her neck took place in July 2013 with right shoulder surgery occurring in June 2018 after her unrelated fall in April of that year. Her complaints of pain and an inability to move various parts of her body fully are inevitably subjective. The surveillance material provides objective evidence, and it is evidence that is contrary to that which the respondent asserts. Specifically, it was the respondent's case that she has effectively been incapable of working since leaving the employment of the appellant.

36 There are multiple instances shown in the surveillance when she is seen to use her arms outstretched and carrying heavy items. She is shown to be capable of driving without restriction. She is capable of lifting items and reaching above her head to lift chairs or close doors. All of what she is shown doing in that regard is contrary to her case that she is without any ability to work. It raised significant issues as to her credit.

37 Secondly, in his decision Member Sweeney described the respondent as "*not a completely satisfactory witness*"[3]. He found her evidence that she would never complain about her neck difficult to accept in the context of the contemporaneous medical records. He found her account of seeing a doctor following the 2009 injury when there was no record of this consultation in the clinical notes, "*improbable*".[4]

38 In January 2009, at a time just prior to the subject accident, the respondent had approached her GP to obtain a disability pension based upon her back injury in 1987[5]. This was an injury she suffered prior to being employed by the appellant. The respondent gave evidence that she did not mention the 2009 accident to this doctor because she had been told something by an employee of Centrelink. The Member found that her evidence on this issue "*is not completely reliable*"[6].

39 The Member doubted whether the surveillance footage taken before 6 August 2020 was of significant value in assessing the respondent's capacity[7]. Yet he described some of the actions depicted in the surveillance as "*surprising*".

40 The Member went on to conclude that "*it would be wrong to reach a conclusion adverse to the* (respondent's) *credit on the basis of these limited observations*"[8]. It is not clear from his reasons why that is the case or how he arrived at the finding that the extensive surveillance evidence could be considered as "*limited observations*".

41 In the same paragraph, [104] the Member found that surveillance undertaken of the respondent in September and October 2020 cast "*doubt as to whether the* (respondent's) *recent presentation to medical practitioners including Dr Patrick and Dr Rae and Dr Gordiev is entirely reliable. It also suggests the possibility that the* (respondent) *has some capacity for work...*". This finding is not reconciled with the Member's ultimate finding of no capacity for employment.

42 The respondent's statement, and her oral evidence, suggest that she puts herself forward as someone greatly restricted in carrying out any physical activities. Impliedly, the Member has accepted that position and therefore found that she had no current work capacity.

43 In doing so the Member must have i) rejected any notion that the surveillance film demonstrated she had a significant capacity to carry out sedentary and, indeed, non-

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[3] Member's decision [112] – page 57 of the Red Book at C
[4] Member's decision [112] – page 57 of the Red Book at F
[5] Member's decision [113] – page 57 of the Red Book at G
[6] Member's decision [114] – page 57 of the Red Book at L
[7] Member's decision [103] – page 55 of the Red Book at I
[8] Member's decision [104] – page 55 of the Red Book at L

sedentary work and ii) accepted her evidence over what is shown in the surveillance. In that regard he exercised his discretion to accept some evidence and reject other evidence.

44 The appellant submits that the Member was wrong to effectively reject any suggestion that the surveillance evidence showed that she was capable of working. The reasons of the Member would suggest that he was aware that the surveillance film showed the respondent carrying out activity which she essentially denied she could do. At [129] of his reasons[9] he said:

> *"I doubt that the ingestion of medication adequately explains the range of activities demonstrated by the surveillance in 2020."*

45 In the following paragraph[10] the Member said:

> *"Reservations concerning the reliability of a worker's evidence may lead to a finding that they have not proven total or partial incapacity."*

46 The surveillance itself not only counters the case, and the evidence put forward by the respondent that she is incapable of various physical movements, it also objectively demonstrates that she has a significant capacity to carry out work, even the sort of work she was doing prior to the accident in January 2009, that is working with horses. Instead of working with the employer's horses, she was seen to be carrying out much the same tasks for her own.

47 The surveillance material shows the respondent driving a motor car in a seemingly unrestricted manner. She is also seen to be able to move freely and lift heavy packages. These aspects of the surveillance show that she was capable of doing delivery work such as she did for Meals on Wheels.

48 Ultimately, it appears that the reason for Member Sweeney rejecting the surveillance as having any probative effect on the decision as to her current capacity, appears at paragraph [105] of his decision. In that paragraph he found that whilst the surveillance evidence showed the respondent doing matters that were largely inconsistent with her claimed restrictions, the surveillance *"cannot nullify the medical evidence which suggests that the* (respondent) *does have significant pathology in her shoulders and has undergone two bouts of cervical surgery".*[11] In itself, the latter part of this reasoning seems to contradictorily suggest that surgical treatment, which was no

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[9] Member's decision [129] – page 60 of the Red Book at M
[10] Member's decision [130] – page 60 of the Red Book at O
[11] Member's decision [105] – page 55 of the Red Book at Q

doubt intended by her treating doctors to assist her symptoms, is evidence of incapacity.

49 The further critical error in the reasoning process that led to that finding, upheld by the Deputy President, is that a finding of 'significant pathology' does not, of itself, inevitably lead to a conclusion as to the level of pain and restriction suffered by a person. It is trite to say that many persons suffer from 'pathology', including what might be seen as "*significant pathology*", without suffering pain, or significant pain, or being totally or even partially incapacitated for work.

50 For the pathology to have the effect that Member Sweeney and the Deputy President gave it requires acceptable evidence from the respondent as to how she is affected by this pathology. Having found that the respondent's credibility was affected by the surveillance, and other matters, it would be illogical and inconsistent to rely upon her evidence as to her subjective complaints of pain or restriction in lifting, carrying and moving to justify a finding that the pathology observed in her neck was in fact causing her any restriction in relation to work. It was in this way that the reasoning process of both Member Sweeney and the Deputy President miscarried.

51 The result of doubting her evidence meant that the pathology that the Member referred to could provide no realistic basis for a finding that she lacked the capacity to work. The Member's finding, which was upheld by the Deputy President, that, in effect, the surveillance evidence was answered by the significant pathology in her shoulders was vitiated by illogicality and irrationality.

52 The Member's satisfaction as to the respondent's inability to work was generally not supported by any subjective evidence given by the respondent which the Member accepted. It seems that the Member simply accepted that because the respondent has significant pathology in her neck and shoulders, she must not be capable of any suitable employment. Yet such a finding is contrary to what is shown in the surveillance material which the Member accepted as being adverse to her credit and which he found cast doubt upon her representations to doctors. His finding that she was not capable of any suitable employment must be based upon a view that scans showing the pathology overrode the objective evidence of the surveillance and the unreliability of her subjective evidence. As submitted above, that view is illogical and irrational.

53 In the Supreme Court of NSW and in the High Court, such irrationality or illogicality have been found to be examples of jurisdictional error capable of vitiating an original

decision[12]. For the reasons set out above, these matters alone should have led the Deputy President to conclude that the decision of the Member was unsound and should be set aside.

Appeal ground 2

The Deputy President made an error law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the evidence of Dr Smith.

54 The appellant relied upon the evidence of an orthopaedic surgeon, Dr Smith. Dr Smith had originally provided an opinion that, notwithstanding the pathology that she suffered, the respondent was nevertheless capable of work[13]. Dr Smith was subsequently provided with some of the surveillance material. This included the surveillance videos themselves. He was the only doctor reporting in these proceedings who viewed surveillance material. He concluded that the surveillance confirmed his original opinion that, notwithstanding the pathology shown in the scans, the respondent was capable of working.

55 The surveillance material was provided to the respondent and her lawyers well before the hearing before Member Sweeney. The respondent produced no evidence from any doctor who had seen the film.

56 Dr Smith's evidence was, therefore, the only medical evidence available to the Member that commented upon what was shown in the surveillance. He reported in 2014 that the surveillance videos that he saw made him consider that there was no likelihood of there being anything wrong with the respondent. He found she was fit to do any suitable work for women her age without restriction whatsoever. This is powerful evidence in the face of the evidence of 'pathology' relied upon by Member Sweeney.

57 The Member appears to have rejected Dr Smith's opinion because the respondent had undergone surgery since the time when Dr Smith reported. At [86] of his reasons he said that "*these matters* (the further surgery) *cast doubt on Dr Smith's opinion on the incapacity issue in this case*".[14] How it in fact casts doubt upon Dr Smith's opinion is unclear. Whilst she may have undergone further surgery, that of itself does not deal

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[12] See *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [72] and *AAI Limited t/as GIO v Cooley* [2016] NSWSC 344 at [47] and [85]
[13] Dr Smith's reports dated 19 August and 9 September 2014 at Blue Book 183 onwards
[14] Member's decision [86] – page 52 of the Red Book at K

with the sequalae of that surgery and whether or not the respondent was capable of working in some form or other. Much of the surveillance, of course, was taken after the surgery in 2018. This suggests that far from confirming the respondent's incapacity to work, such surgery assisted her.

58 It appears that the basis on which Member Sweeney discounted the evidence of Dr Smith was because of the Member's view that subsequent surgery invalidated what was shown in the surveillance material and Dr Smith's opinion as to it. Whilst it is the case that the respondent underwent surgery after Dr Smith's opinion was provided, that does not change the fact that what she is shown doing in the surveillance material, both that material seen by Dr Smith and the later surveillance material taken in 2018 and 2020, is in stark contradiction to what the respondent asserted in relation to her pain, her range of movement and her capacity to work.

59 Further, the Member apparently rejected Dr Smith's opinion for other, illogical reasons, set out at [87] of his decision. In that paragraph Member Sweeney says that Dr Smith does not identify what aspects of the videos led him to the opinion that there was no likelihood of there being anything wrong with her. Yet it was not a difficult exercise to correlate what she says was wrong with her with what is shown in the video evidence. Her ability to freely move her head and arms, lift items, including above her head, drive cars and tractors without restriction, lift and carry numerous items, bend and walk freely, use a lawn mower and so on were clearly matters that any reasonable doctor would have looked at and concluded similarly to Dr Smith that there was unlikely to be anything significantly wrong with the respondent.

60 The rejection of the opinion of Dr Smith as to the respondent's ability to work on the basis that the respondent underwent surgery after Dr Smith reported also lacks logicality and rationality. As noted, above, the Member had found that the surveillance of the respondent taken in 2020 cast doubt upon whether what she told medical practitioners was reliable. He also noted that such surveillance suggested the possibility that the respondent had some capacity for work[15]. In those circumstances the rejection of Dr Smith's opinion on the basis that the respondent subsequently underwent surgery, when he found that surveillance taken after that surgery suggested that she had an ability to work, was simply illogical.

61 Logically, his findings as to what the surveillance showed, what he referred to as something that he accepted as being adverse to her credit, ought to have led him to conclude that he could not accept the respondent's subjective complaints at face

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[15] Member's decision [104] – page 55 of the Red Book at N

value. The respondent called no lay evidence to support her complaints. Given what is shown in the surveillance material, the report of Dr Smith and, to some extent, the lay evidence called by the appellant, the Member was entitled to expect that the respondent would in fact call such evidence.[16]

62 In *Henderson v Queensland,*[17] Gageler J, while dissenting in the ultimate result, said:

> *[89] Generally speaking, and subject always to statutory modification, a party who bears the legal burden of proving the happening of an event or the existence of a state of affairs on the balance of probabilities can discharge that burden by adducing evidence of some fact the existence of which, in the absence of further evidence, is sufficient to justify the drawing of an inference that it is more likely than not that the event occurred or that the state of affairs exists. The threshold requirement for the party bearing the burden of proof to adduce evidence at least to establish some fact which provides the basis for such a further inference was explained by Kitto J in Jones v Dunkel (1959) 101 CLR 298 at 305; [1959] HCA 8. See also Carr v Baker(1936) 36 SR (NSW) 301 at 306; TNT Management Pty Ltd v Brooks(1979) 53 ALJR 267 at 269 ; 23 ALR 345 at 350. See generally Hodgson, "The Scales of Justice: Probability and Proof in Legal Fact-finding", (1995) 69 Australian Law Journal 731 at 732—733:*
>
> > *One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed.*

63 The failure to call any lay evidence, when clearly such evidence must have been available to her from family members and friends, is telling. In circumstances where her credit and in particular the nature and extent of any injuries she was still suffering from were called into question and where, further, Member Sweeney had questioned the veracity of her evidence, the Member should not have accepted her complaints without such supporting evidence. To simply rely upon the pathology shown in scans does not prove that she has disabling symptoms or incapacity for employment. With

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[16] *Blatch v Archer* 1774 1 COWP 63 and *Jones v Dunkel (1959) 101 CLR 298 at 304-5.*
[17] 255 CLR 1

respect to the Member, it is a reasoning process based upon an indistinct collective wisdom as to such matters, rather than a reliable evidentiary basis.

64 The respondent had evidence from medicolegal doctors to suggest that she could not work. However, those opinions relied upon the truthfulness or otherwise of the history given by her to relevant doctors. This is where, as noted above, Member Sweeney had variously found her evidence *'improbable'*[18] and *'not completely reliable'*[19] and *'surprising'*.[20] He found her to be *'not a completely satisfactory witness'*.[21] He thought the surveillance cast "*doubt as to whether* (her) *recent presentation to medical practitioners ..... is entirely reliable. It also suggests the possibility that the* (respondent) *has some capacity for work...*".[22]

65 Given those findings, it was incumbent upon Member Sweeney to identify the realistic basis on which he found that she had no capacity for suitable employment. Clearly, given his subordinate findings, he could not have placed much, or any, emphasis upon her complaints, either to doctors or those made before him. It appears that the only real basis on which he did this was his view of the '*pathology*' in her neck. His dismissal of the evidence of Dr Smith, in circumstances where he, the Member, had doubted the truthfulness of the respondent, is also apparently based upon his view of the pathology of the respondent's neck. However, he has not articulated why his view of the pathology of the respondent's neck should lead to him dismissing the evidence of Dr Smith.

66 The Member's concern about the opinion of Dr Smith was set out at paragraphs [86] and [87] of his decision. There he suggested that the doctor's opinion could have no bearing on the respondent's current position because she had undergone further surgery. That would suggest that there was no real basis for dismissing Dr Smith's opinion up to the date when it was provided. His opinion was that the respondent was capable of working. Thereafter the surveillance suggests not only that the respondent had significant capacity but also that her evidence was questionable.

67 Given that what is shown in the later surveillance was a person who clearly had some considerable capacity for activity and that Dr Smith had found the same thing when he provided his report earlier, then logic would dictate that the effect of Dr Smith's evidence is that what is shown in the surveillance, including the surveillance taken

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[18] Member's decision [112] – page 57 of the Red Book at F
[19] Member's decision [114] – page 57 of the Red Book at L
[20] Member's decision [103] – page 55 of the Red Book at J
[21] Member's decision [112] – page 57 of the Red Book at C
[22] Member's decision [104] – page 55 of the Red Book at M

later, was compelling and probative evidence which the Member unreasonably rejected.

68 The Member also sought to reject the evidence of Dr Smith because of what he referred to as *"the respondent's long surgical history"*[23]. However, much of that surgical history was before Dr Smith commented on the surveillance. Further, the appellant contends that there was no change in the respondent's appearance in the videos that post-dated Dr Smith's opinion. Nothing can be identified in those videos as suggesting that subsequent to Dr Smith providing his opinion, the respondent is shown to be less capable of working than she had opined.

69 A third reason for rejecting Dr Smith's opinion was because it was *"very different to the conclusion reached by Dr Bentivoglio"*[24]. Dr Bentivoglio had not seen the surveillance and therefore did not have the evidence available to Dr Smith. Relying upon the conclusions reached by Dr Bentivoglio to reject Dr Smith's opinion was a matter where his discretion on what evidence to accept failed.

70 The reasons Dr Smith gave for his opinion were based on evidence that Dr Bentivoglio had not seen. In that circumstance, the rejection of Dr Smith's opinion because of what is contained in the reports of Dr Bentivoglio is a matter where the Member misled himself in the exercise of his discretion. The rejection of Dr Smith's evidence on the basis of what Dr Bentivoglio opined is seen at paragraph [87] of the Member's decision.[25] The Member subsequently went on to refer to the evidence of Dr Bentivoglio.

71 As can be seen from his report, Dr Bentivoglio himself was reliant upon the subjective complaints of pain and limitation of movement made by the respondent. This was in circumstances where the Member had already found that the respondent's history given to her own doctors was to be doubted. Dr Bentivoglio did not see the surveillance material. Again, recognising that the Member had found that complaints of subjective pain and restrictions made by the respondent to her own doctors were not entirely reliable, the reliance he placed upon the opinion of Dr Bentivoglio in contrast to the opinion of Dr Smith, was, again, illogical.

72 On the one hand there was evidence from Dr Smith who had seen some of the surveillance. There was evidence of the surveillance itself. There was evidence accepted by the Member that surveillance post 6 August 2020 cast doubt on the

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[23] Member's decision [87] – page 52 of the Red Book at N
[24] Member's decision [87] – page 52 of the Red Book at P
[25] Member's decision [87] – page 52 of the Red Book at L

reliability of the respondent's evidence. Against that, on this issue, is the evidence of Dr Bentivoglio who had not seen the surveillance and who relied upon the medical evidence available plus, critically, the subjective complaints of the respondent.

73 The rejection of Dr Smith for the reasons proffered by the Member and accepted by the Deputy President simply lacked a sound evidentiary basis and was, in light of all of the evidence, illogical. This illogicality vitiated the decision of the Member and the decision of the Deputy President upholding that decision of the Member.

Appeal Ground 3

The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the evidence of the lay witnesses called by the appellant

74 The appellant relied upon a number of witness statements from lay witnesses. This evidence was relied upon to contradict aspects of the respondent's evidence. There were significant disputes of fact between these witnesses and the respondent. The Member said that he was reluctant to make adverse findings in relation to the respondent's credit on the basis of discrepancies between her evidence and the evidence of the lay witnesses relied upon by the appellant[26]. This was notwithstanding the adverse comments that the Member had made about the respondent's evidence, referred to above.

75 The respondent was extensively cross-examined by counsel appearing for the appellant. None of the lay witnesses relied upon by the appellant were required for cross-examination. Whilst the rules of evidence do not strictly apply to proceedings in the PIC, what the Member had before him was evidence of the respondent on which she was cross-examined compared to the evidence of three lay, disinterested, witnesses relied upon by the appellant. To exhibit a reluctance to make a finding adverse to the respondent's credit on the basis of discrepancies in that evidence without knowing the extent or otherwise to which the appellant's lay witnesses were able to adequately recall what took place is illogical and a failure of what was the Member's discretion.

76 As noted above, the Member had found that at least some of the respondent's evidence was unreliable. Given the subjective nature of her complaints of pain and restriction of movement and noting that the surveillance material, or at least some of

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[26] Member's decision [106] – page 55 of the Red Book at W

it, caused the Member to express the view that the respondent's representations to some of the medical practitioners was not entirely reliable, the contrasting evidence of the lay witnesses was an important plank of the appellant's case.

77 At [107] of his judgement the Member expressed his view that the cross-examination of the respondent on the circumstances of the injury was intended to adduce evidence to contradict the finding that the respondent suffered injury in the course of her employment in January 2009. He found, correctly, that the respondent was estopped from doing this. However, that was not the intention of the cross-examination or the evidence called from the respondent's lay witnesses and associated documentary evidence. Rather, it was to demonstrate two things. First, that the injury in 2009 was not a major incident. Second, that the respondent's complaints of injury were likely exaggerated. The appellant sought to make this clear in its submissions to the Member.

78 The evidence called by the appellant, by way of witness statements only, was significant evidence of the respondent being an unreliable witness. In paragraphs [112] and [113] of his judgement, the Member was critical of the respondent as a witness. In the following paragraph, [114], he concluded that *"her evidence is not completely reliable"*. Had the Member correctly understood the nature of the evidence being presented and the reasons why it was being presented by the appellant, it was likely to have a significant impact upon the Member's finding of credit in relation to the respondent, someone whom he already found had some question about her reliability.

79 The Member's failure to recognise and/or accept the importance of the appellant's lay evidence, the reason for it being called and his failure to consider it in the context of the respondent's credit, was an error that vitiated his decision. The finding of the Deputy President on this issue can be found at [100] of his decision. He initially mischaracterises the basis of the submission by referring to the Member erring in failing to hear cross-examination of the appellant's lay witnesses. Whilst that was one part of the argument put forward by the appellant to the Deputy President, the appeal ground itself related to the failure to give the evidence of those witnesses appropriate and adequate weight. In focussing only on the failure of the lay witnesses to be cross-examined, which was a forensic decision made by the respondent, not the appellant, the Deputy President has committed an error of law.

80 The Deputy President then went on to refer to the appellant being capably represented and not seeking to call those witnesses.[27] There is an implicit suggestion that the appellant's complaint of a lack of weight being given to its witnesses is answered by the fact that the appellant did not call those witnesses. It is difficult to see the basis for such criticism. The evidence of the appellant's lay witnesses was laid out in writing, served upon the respondent in a timely fashion and put before the Member without objection and addressed upon by counsel for both parties. The Member made findings that the lay evidence would assist him little, largely because of the effluxion of time.

81 The Deputy President, in upholding that decision, focussed upon the Member erring in failing to have heard cross-examination of those witnesses. The Deputy President did not, in terms, deal with the issue put forward by the appellant which was that the evidence of the lay witnesses was not accorded appropriate weight and that had the Member done so the likelihood is that the respondent's credit would have been diminished even more so.

82 In those circumstances the Deputy President has erred in law in failing to address the specific question put in that part of the appeal.

Appeal Ground 4

The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to the evidence of the absence of early complaint.

Appeal Ground 5

The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to accord adequate weight to other matters affecting the respondent's credit.

83 At [18] of his reasons the Member found that it was not until 16 March 2009 that the respondent told her GP, Dr Hayden, of problems concerning her right shoulder. This was two months after the accident in January 2009, the subject of these proceedings. In the interim she had seen a number of doctors at the same practice for matters not related to her accident on 16 January 2009. The clinical notes evidencing her complaints, or lack thereof in relation to her injuries from the subject accident are found at page 228 onwards of the Blue Book.

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[27] Deputy President's reasons [100] – page 104 of the Red Book at E

84 The respondent saw a Dr Riegelhuth at the same practice as Dr Hayden on 22 January 2009[28] in connection with an earlier work-related hernia injury that apparently occurred on 24 December 2008 but failed to mention the subject incident at all, let alone any bodily complaints.

85 At [47] of her statement of 22 August 2022, the respondent said:

> *"On 28 January 2009 I attended my treating GP, who simply thought I had strained a few muscles."*

86 That statement was in relation to her attendance upon Dr Riegelhuth on 28 January 2009 and the Member so found in his reasons[29]. It is important to note that there was no mention in the clinical records relating to that post-accident GP attendance of the subject incident or any problem with her neck or shoulder[30]. Instead, the respondent's stated purpose was to seek medical backing for the disability support pension ("DSP") due to non-specific "*bodily aches and pains*".

87 The failure to make any complaint to the doctor immediately after the accident, despite consulting him in respect of other health issues was a significant matter raised by the appellant in the hearing of this matter. Whilst the appellant is estopped from asserting that the respondent was not injured, the fact that she made no complaint to the GP when she saw him on a number of occasions following the subject accident would attest to the relatively minor nature of her injuries. Further, the clinical note for 28 January 2009 is at odds with the respondent's statement quoted at [84] above, reflecting poorly on her credit.

88 A further clinical note from Dr Riegelhuth dated 30 January 2009[31] disclosed that the doctor apparently provided a DSP certificate[32]. It was for matters relating to her previous back injury and made no mention of her neck or shoulders. In her oral evidence she agreed that was the position[33].

89 The respondent's evidence was that she did not go on to apply for the DSP because she then commenced to receive workers compensation payments[34]. That explanation was noted by the Member at [37] of his judgement. The respondent suggested that she did not want to confuse her application for the DSP with any potential workers compensation rights that she had. Hence, she said, this was the reason she had not

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[28] Page 229 of the Blue Book at J
[29] Member's decision [17] – page 44 of the Red Book at F
[30] Page 229 of the Blue Book at P
[31] Page 229 of the Blue Book at S
[32] Page 566 onwards of the Blue Book
[33] Page 145 of the Black Book at J onwards
[34] Page 144 of the Black Book at O

complained of neck and shoulder problems to the GP. In addressing this evidence, the Member at [113] found "*it difficult to accept her explanation for requesting certification for a disability pension from Dr Riegelhuth, on the basis of the 1987 injury*".

90 She had also told the Member that an employee of Centrelink had told her not to raise the consequences of the 2009 injury with her doctor. At [113] of his decision, the Member doubted this explanation for not reporting such injuries to Dr Riegelhuth.

91 Again, this was an important matter in terms of what evidence of the respondent the Member could accept. The attendance at a GP on 28 January 2009 to seek a medical certificate so she could obtain a disability pension for her lower back, unrelated to the injuries she suffered in the fall in January 2009, again, strongly suggests that whatever happened on 16 January 2009 did not produce any significant injury.

92 The appellant is estopped from asserting that there was no accident or injury on 16 January 2009, but it is not estopped from asserting that the injury was only minor, and it is not estopped from asserting that she was, and is, capable of working irrespective of her sustaining such injury.

93 Shortly put, as with the other matters complained of in this appeal, this and the other discrepancies in the respondent's evidence ought to have meant that the respondent's evidence could not be accepted. When combined with the surveillance evidence, these other matters provided clear support to reject the respondent's case that she was not fit for any work and to find, therefore, that she in fact had a current capacity for work. The appellant contends that it was the only logical conclusion available on the totality of the evidence.

94 Before the Deputy President the appellant submitted that the Member had failed to accord adequate weight to the evidence as to absence of early complaint. In his decision the Deputy President noted the appellant's submissions that the respondent's evidence could not be accepted. At [118] of his judgement the Deputy President seemingly rejected the submission put by the appellant that the respondent's evidence could not be accepted and that her case that she was not fit for work should be rejected[35].

95 At [119] of his reasons, the Deputy President said that the attempts by the appellant to characterise the injury flowing from the accident on 16 January 2009 as minor was *"inconsistent with the various estoppels and the history"*. There was only one

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[35] See Deputy President's reasons [117]-[118] – page 108 of the Red Book at T onwards

estoppel. It is to be found in the decision of Member Sweeney of 2 December 2022[36]. The estoppel is in the following terms:

> *"The* (appellant) *is estopped from asserting that the* (respondent) *did not suffer injury to her cervical spine and both shoulders as a result of the injury on 16 January 2009 by the awards in matter number 5148/14 and 2261/17 in the Workers Compensation Commission."*

96 That estoppel is not inconsistent with the appellant seeking to demonstrate that the respondent's injuries were minor. The finding of the Deputy President in that regard is incorrect.

97 The Deputy President then went on to adopt the findings of this Court in *Workers Compensation Nominal Insurer v Hill*[37]. He found that the appellant's submissions did not specifically challenge the fact-finding process on the basis that the Member's conclusions were not open to him. With respect to the Deputy President that was not correct. The point of the appellant's submissions was, and is, that the Member's fact-finding process failed because on the evidence available to him the only logical finding open to him was that the respondent did in fact have a working capacity.

Appeal Ground 6

The Deputy President made an error of law in failing to find that the Certificate of Determination of Member Sweeney dated 15 August 2023 failed to give sufficient reasons for his determination that the respondent had no current working capacity.

98 What occurred between the respondent's injury in 2009 and the date of the decision was of critical importance to a determination as to whether the respondent currently had a capacity for employment. In particular, the fact that the surveillance material showed the respondent moving freely as referred to above would suggest that she is capable of some work. To say that her incapacity at the present time results from the injury 13 years before, largely because of the pathology in her neck and the evidence of doctors who had not seen the surveillance, the balance of the Member's reasoning notwithstanding, simply does not stand examination.

99 What the Member did was to find that the pathology as shown on various scans and referred to in various medical reports overcame everything that would suggest that the respondent was capable of working. The Member did not make it clear why that

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[36] Page 21 of the Red Book
[37] [2020] NSWCA 54

would be the case. He did not say why a scan showing something that may or may not produce pain or restriction of movement, should be accepted as proving an incapacity to work in the face of considerable evidence to the contrary.

100 In *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247 at 279, McHugh JA recorded the rationale for giving reasons thus:

> *"The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice": "The Writing of Judgments" (1948) 26 Can Bar Rev at 491. Thus, the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability."* (the third reason was inapplicable to the decision of the tribunal Member at first instance)

101 In this case there was much evidence relied upon by the appellant that could clearly have a significant impact upon the respondent's credit. Indeed, as the Member's reasons themselves note there were clear discrepancies in the respondent's evidence and in the surveillance that should have adversely affected the respondent's credit.

102 In those circumstances, it was incumbent upon the Member to adequately explain in his reasons why he rejected that evidence or, alternatively why, in the face of that evidence, he accepted the respondent's evidence that she was incapable of carrying out any work following the accident in 2009. He also failed to explain how the incapacity she claimed existed came to be and why it resulted from the 2009 injury.

Dated: 21 May 2025

[redacted]

Filed: 23 June 2025 2:20 PM

D00026AQ8J

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2024/00427925

TITLE OF PROCEEDINGS

First Appellant	E B Murray Family Investments Pty Ltd T/AS Bede Murray Racing Stables
First Respondent	Jo-Anne [redacted]

FILING DETAILS

Filed for	Jo-Anne [redacted],Respondent 1
Legal representative	[redacted]
Legal representative reference	
Telephone	[redacted]
Your reference	[redacted]

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Respondent's Submissions - 23.6.2586.pdf)

[attach.]

RESPONDENT'S SUBMISSIONS

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2024/427925
TITLE OF PROCEEDINGS	
Appellant	**E MURRAY FAMILY INVESTMENTS PTY LTD t/as BEDE MURRAY RACING STABLES**
Respondent	**JO-ANNE** [redacted]
PROCEEDINGS IN THE COURT BELOW	
Title below	E B Murray Family Investments Pty Ltd t/as Bede Murray Racing Stables v Jo-Anne [redacted]
Court below	Personal Injury Commission of New South Wales
Case number below	A1-W5892/22
FILING DETAILS	
Filed for	[redacted]
Legal representative	[redacted]
Legal representative reference	[redacted]
Contact name and telephone	[redacted]
Contact email	[redacted]

RESPONDENT'S SUBMISSIONS

A. INTRODUCTION

1 This appeal is strictly limited by s. 353(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("**the WIM Act**") to a point of law.

2 Each ground raised by the Appellant reflects dissatisfaction with the factual findings made by Member Sweeney ("**the Member**") in the Certificate of Determination ("**COD**") and reasons dated 15 August 2023 ("**Member Reasons**"). These findings were methodically reviewed and affirmed by Deputy President Snell ("**DP Snell**") on 31 October 2024 ("**DP Reasons**").

3 DP Snell correctly identified and applied the relevant statutory framework and comprehensively addressed all arguments presented by the Appellant, issuing clear and logically sound reasons supported by substantial and uncontroverted evidence.

4 As the appeal raises no genuine point of law, the appeal should be dismissed with costs.

B. APPLICABLE LEGAL FRAMEWORK

5 Appeals under s. 353 (1) of the WIM Act require that the party appealing is "aggrieved by a decision in point of law". The relevant decision is that of the DP[1]. The error must be material and will not necessarily require the decision to be overturned even if error is found[2].

6 The Appellant must demonstrate clear errors of law or jurisdictional error[3]. It is trite that, here, appellate jurisdiction does not extend to matters of factual determination, credibility assessments, or the weight given to evidence by the tribunal unless they are demonstrably irrational or legally erroneous[4].

7 DP Snell's role was to determine whether there was an error of fact, law, or discretion under s. 352 of the WIM Act. The Appellant must demonstrate not only that there was an error on the part of the Member, but also that DP Snell erred in a legal point in determining that there was none[5].

8 The adequacy of reasons provided by a tribunal is assessed based on whether they reveal sufficient factual foundations and logical steps underpinning the decision, rather than on exhaustive detail on every evidentiary item[6].

C. PROCEDURAL HISTORY AND MATERIAL FINDINGS

9 The Respondent sustained significant injuries to her cervical spine and both shoulders on 16 January 2009[7].The Appellant, through its workers compensation insurer, Racing NSW Insurance Fund ("**the insurer**"), accepted liability for the injury and paid the Respondent compensation pursuant to the provisions of the 1987 Act[8].

10 Prior to the certificate of determination issued by the Member on 2 December 2022, there had been four occasions on which disputes arose between the Appellant and the Respondent[9]. Those disputes were all determined in the Respondent's favour.

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[1] *Fisher v Nonconformist Pty Ltd* [2024] NSWCA 32 at [3]; [23]; [31] - [49]; [51].
[2] *Fisher*, supra at [50].
[3] *Craig v South Australia* (1995) 184 CLR 163, 179.
[4] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [131].
[5] *Cruceanu v Vix Technology (Aust) Ltd* [2020] NSWCA at [9].
[6] *Beale v Government Insurance Office* (1997) 48 NSWLR 430, 443 - 444.
[7] Certificate of Determination, 2 December 2022; Red 21.
[8] Member Reasons [1]; Red 22.
[9] Member Reasons [2]; Red 22.

11 On 10 December 2014, an Approved Medical Specialist ("**AMS"**) issued a Medical Assessment Certificate ("**MAC"**) which certified the Respondent's injuries at 28% whole person impairment[10].

12 On 14 January 2015, an arbitrator of the Workers Compensation Commission issued a Certificate of Determination ordering that the Appellant pay the Respondent lump sum compensation under s. 66 of the *Workers Compensation Act 1987* (NSW) in the amount of $52,250 and resulting from injuries to the neck and both shoulders on 16 January 2009[11].

13 On 22 August 2017, the Workers Compensation Commission ordered that the Appellant pay the cost of the Respondent's second operation to the cervical spine performed by Dr Mews on 7 November 2016, with a finding that surgery was "reasonably necessary as a result of injury on 16 January 2009"[12].

14 Despite this history, on 9 June 2022, the Appellant declined liability for the Respondent's injuries, which occurred on 16 January 2009, under ss. 4(i) and 9A of the 1987 Act[13].

15 On 2 December 2022, the Member determined that the Appellant was estopped from asserting that the Respondent did not suffer injury to her cervical spine and shoulders due to an injury on 16 January 2009[14]. The Appellant did not challenge this finding before DP Snell on 15 August 2023 and accepts that it is binding here[15].

16 On 15 August 2023, the Member issued a COD in response to the circumstances outlined. The COD, which is at Red 40-41, found that the Respondent suffered injuries to her neck and both shoulders during her employment on 16 January 2019. The finding also stated that the Appellant had been unable to work since 21 July 2022[16]. The Member separately found that injuries sustained in April 2018 and April 2020, caused by falls, were not proven to be consequential or related to the workplace accident on 16 January 2019[17]. The certificate awarded weekly compensation between 21 July 2022 and the date of the certificate, and this

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[10] Member Reasons [3] - [4]; Red 22; Blue 67.
[11] Member Reasons [4]; Red 22; Blue 78.
[12] Member Reasons [5]; Red 22; Blue 106; Reasons: Blue 107 - 123.
[13] Member Reasons [6] - [8]; Red 22 23; Blue 172 H.
[14] Red 21; 22 - 39.
[15] Appellant's submissions, [12].
[16] Member Reasons [127] - [133]; Red 59 - 61.
[17] Member Reasons [115] - [122]; Red 57 - 59.

compensation continues[18]. The Appellant challenged this decision and the reasons provided by the Member, which DP Snell considered.

D. FINDINGS OF THE DEPUTY PRESIDENT

17 DP Snell undertook a careful and structured review of the appeal brought under s. 352 of the 1998 Act[19]. He correctly noted the appeal was limited to identifying an error of fact, law or discretion[20]. The Appellant does not complain this direction was incorrect.

18 Each of the six grounds raised by the Appellant were addressed in detail. On the first ground, DP Snell agreed the surveillance footage did not undermine the medical evidence[21]. He noted that much of the footage pre-dated the relevant compensation period and had been weighed appropriately by the Member[22]. The suggestion that the Member's consideration of this material was legally irrational was implicitly rejected[23].

19 In relation to the second ground, concerning the weight given to Dr Smith's opinion, DP Snell affirmed the Member's conclusion that this evidence had limited utility, particularly as it pre-dated two subsequent surgeries and was inconsistent with the Respondent's longitudinal medical history[24].

20 Turning to the lay evidence, DP Snell found that much of the lay evidence relied on by the Appellant, but in respect of which the Appellant did not call evidence[25], sought to reopen issues already resolved by the estoppel determination[26]. The Member's decision to afford this evidence little weight was therefore appropriate.

21 On the issue of delayed complaint, the DP endorsed the Member's reasoning that any such delay had been sufficiently accounted for through the Respondent's treatment records[27]. He also noted that the Appellant's attempts to classify the Respondents injuries as minor were contrary to the estoppel findings (which were not challenged)[28] and consistent with the principles in *Shellharbour City Council v*

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[18] Red 40 - 41.
[19] Red 73 - 117.
[20] DP Reasons [34] - [40]; Red 84 - 86.
[21] DP Reasons [51] - [71]; Red 90 - 96.
[22] DP Reasons [69] - [71]; Red 95 - 96.
[23] DP Reasons [41] - [71]; Red 87 - 96
[24] DP Reasons [79] - [87]; Red 97 - 99.
[25] DP Reasons [97]; Red 102 - 103.
[26] DP Reasons [98] - [100]; Red 103 - 104.
[27] DP Reasons [109] - [119]; Red 106 - 109.
[28] DP Reasons [119]; Red 109.

Rigby [29]; they were findings open to the Member to make in accordance with *Workers Compensation Nominal Insurer v Hill* [30].

22 Finally, the DP found the Member's approach to the question of the Respondent's credit as being appropriate on the evidence adduced by the Appellant[31] and he addressed the adequacy of the Member's reasons, concluding they were thorough and legally sufficient. He confirmed that the 38-page decision satisfied the requirements of s. 294 of the 1998 Act and the common law standard articulated in *Soulemezis v Dudley (Holdings) Pty Ltd* [32] and noted the constraints on reasons to which Kirk JA referred in *Fisher* [33], *Ming v Director of Public Prosecutions* [34] and r. 78 of the *Personal Injury Commission Rules 2021* (NSW)[35].

23 The Deputy President identified the correct statutory framework and principles for appellate review under s. 352 of the 1998 Act. His reasons demonstrate an appreciation of the limitations upon his review and the weight to be afforded to factual findings of the Member[36].

24 The Deputy President's analysis and approach to each of the Appellant's submissions, including detailed reference to the surveillance, expert medical opinions, the Respondent's surgical history, and the alleged inconsistencies in her testimony, was thorough and appropriate.

E. RESPONSE TO GROUNDS OF APPEAL

Ground 1 – Surveillance Evidence

25 Much of what the Appellant says in this ground is concerned with the Member's approach to the evidence and the Member's approach to the surveillance material. The Appellant says little about the DP's reasons. The Appellant's approach accordingly misunderstands the confines of this appeal under s. 353(1) of the WIM Act. The primary focus ought to be the DP's decision and reasons[37].

26 The Member reviewed the surveillance footage in depth, acknowledging it raised some concerns about the Respondent's presentation[38]. However, he correctly determined that the surveillance did not undermine the overwhelming medical

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[29] [2006] NSWCA 308 at [144]; DP Reasons [51]; [119]; Red 90 and 109.
[30] [2020] NSWCA 54; DP Reasons [39]; [119]; Red 86.
[31] DP Reasons [125] - [126]; Red 110.
[32] (1987) 10 NSWLR 247, per McHugh JA, 279B.
[33] supra, [136].
[34] [2022] NSWCA 209 [43].
[35] DP Reasons [128] - [147]; Red 111 - 47.
[36] DP Reasons [32] - [35]; Red 84 - 85.
[37] *Fisher,* supra, [48]; [51].
[38] Member Reasons [101] - [105]; Red 54 - 55.

evidence, which documented extensive chronic structural damage and surgical intervention[39].

27 DP Snell systematically reviewed the Appellant's submissions[40], the Respondent's submissions[41], and considered the competing positions. He emphasised that his reasoning related to both grounds 1 and 2 were intended to be read together[42]. DP Snell explained that the Member's approach to the evidence of the witnesses was limited by the principles enunciated in *Rigby* and *SZMDS* [43]. DP Snell noted that the Member had distinguished between the material before 6 August 2020 and thereafter, separating the surveillance prior to and following surgery to the cervical spine (in 2016) and the right shoulder (in 2018). DP Snell also highlighted the Member's emphasis on the fact that the claim for weekly benefits only commenced from 21 July 2022 and the limited probative value of the historical surveillance in those circumstances[44].

28 Contrary to the Appellant's submissions, DP Snell noted that the Member did *not* reject the surveillance evidence outright. Instead, the Member regarded the Respondent as not a "completely reliable" witness and advised that her evidence should be carefully scrutinised when not corroborated by other evidence[45]. At [61], in accordance with the authorities referred to earlier in the reasoning, DP Snell emphasised the need for the Member to assess the Respondent's capacity considering all evidence, with the surveillance material being just one aspect of this material[46].

29 DP Snell endorsed the Member's approach to assessing creditworthiness and the Respondent's employment capacity. He highlighted that the Member's assessment aligned with the principles outlined in *Wollongong Nursing Home Pty Ltd v Dewar* [47] and correctly applied s. 32A of the 1987 Act. The DP also noted the significance of the estoppel findings, which were not challenged[48].

30 At DP [69][49], DP Snell remarked that he had reviewed the surveillance material and determined that the approach taken by the Member was available to him both by

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[39] Member Reasons [103] - [105]; Red 55.
[40] DP Reasons [41] - [45]; Red 87C - 88L.
[41] DP Reasons [46] - [50]; Red 88 - 89.
[42] DP Reasons [51]; Red 90.
[43] DP Reasons [51] - [53]; Red 90.
[44] DP Reasons [53]; Red 90.
[45] DP Reasons [55] - [58]; Red 91 - 92.
[46] DP Reasons [61]; Red 92.
[47] [2014] NSW WCC PD 55 at [62] - [63].
[48] DP Reasons [62 - [68]; Red 93 - 95.
[49] Red 95.

reference to his observations of footage and the contemporaneous medical and other evidence.

31 These findings were clearly rational and permissible evaluations of evidence rather than legal errors. Ground 1 should be dismissed.

Ground 2 – Dr Smith's Evidence

32 The Appellant contends that the Member failed to properly engage with the evidence of its medico-legal expert, Dr Smith[50], and that insufficient weight was given to his opinion. The Appellant complains that DP Snell made an error in law in endorsing the Member's approach.

33 Dr Smith assessed the Respondent on 19 August 2014 and reviewed surveillance footage up to 9 September 2014. By the time the Member determined the application, a period of 8 years, 11 months and 27 days had elapsed since that assessment. In the intervening time, the Respondent had undergone significant further treatment, including a cervical spine fusion and shoulder surgery, for which liability had been accepted by the insurer and there was more contemporaneous medical evidence available to the Member to prefer over Dr Smith's opinion[51].

34 The Appellant submits that the Member's failure to accept or substantively engage with Dr Smith's opinion constituted an error of law, or alternatively, amounted to a failure to provide adequate reasons. That submission cannot be sustained.

35 The Member's reasons, particularly at [84] - [105] of the Certificate of Determination[52], demonstrate that he expressly considered Dr Smith's evidence. He acknowledged that Dr Smith had formed the view that the Respondent was fit for a wide range of employment, based on his assessment in 2014 and a brief review of surveillance footage. However, the Member gave limited weight to that opinion. He observed that Dr Smith had not examined the Respondent in nearly nine years and had relied almost entirely on a short segment of surveillance material which had not been shown to, or adopted by, any treating practitioner. The Member considered this to be a significant limitation, particularly given that the Respondent's condition had evolved over time and included further surgical intervention. Dr Smith's opinion was, in the Member's view, at odds with the broader medical evidence, including the opinions of treating and assessing

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[50] Blue Book, pp. 182, 191.
[51] Member Reasons [84] - [100]; Red 52 - 54.
[52] Red 52 - 55.

specialists such as Dr Bentivoglio[53], Dr Patrick[54], Dr Porter[55], Dr Portev[56], Dr Rae[57], Dr Gordiev[58] and the estoppel finding that the Appellant did not challenge. The medical opinions the Member preferred were not only more contemporaneous, but also grounded in consistent clinical observations, imaging, and ongoing treatment.

36 The Member concluded that Dr Smith's opinion lacked the clinical currency and evidentiary weight necessary to displace the more persuasive assessments provided by other experts. His reasons reveal a clear evaluative process. The submission that he failed to engage with the evidence, or failed to explain his reasoning, is untenable.

37 On appeal, Deputy President Snell addressed the Appellant's complaint regarding the treatment of Dr Smith's evidence in detail[59]. DP Snell was satisfied that the Member had referred directly to Dr Smith's report and was fully aware of the basis upon which it was advanced. The DP accepted that the Member made a reasoned evaluative choice to prefer the opinions of Dr Jain, Dr Liew and Dr Davis, opinions which were consistent with the Respondent's clinical history and diagnostic imaging. DP Snell noted that no other expert had adopted or endorsed Dr Smith's conclusions, and that the surveillance footage on which Dr Smith relied was not interpreted or corroborated by a treating clinician. The assertion that the Member failed to give adequate reasons was expressly rejected. At [86], the DP found it was open to the Member to prefer the evidence of Dr Bentivoglio, as part of the Appellant's medical case, over Dr Smith. That conclusion was open on the evidence and disclosed no error of law.

38 A tribunal is entitled to prefer one expert over another, if it offers intelligible and cogent reasons for doing so. There is no obligation to accept the opinion of a party-appointed expert, even if uncontradicted, if it lacks probative value or if there are valid reasons to reject it[60]. Where an expert opinion is grounded in dated or incomplete information, or, as here, brief surveillance footage of limited probative value, it is entirely proper for a tribunal to assign it lesser weight, particularly when it

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[53] Blue 192 (16 March 2016); 201 (19 June 2017); Member Reasons [87] - [91]; Red 52 - 53.
[54] Blue 134 (23 April 2014); 141 (8 July 2014); 144 (28 March 2017); 154 (22 April 2020).
[55] Blue 167 (1 June 2018); Dr Porter's other reports are not included in Blue book, but were before the Member and DP; Member Reasons [93]; Red 53.
[56] Not in the Blue; Member Reasons [94]; Red 53.
[57] Blue 168 (17 June 2021). The report dated 28 October 2021 is not included in the Blue; Member Reasons [95] - [96]; Red 53.
[58] Blue 170 (16 February 2022). The report dated 4 March 2022 is not in the Blue book; Member Reasons [97]; Red 54.
[59] DP Reasons [13] - [14]; Red 78 - 79; DP Reasons [72] - [87]; Red 96 - 99.
[60] *Tisdall v Webber* (2011) 193 FCR 260; (2011) 122 ALD 49; [2011] FCAFC 76; BC201103822.

conflicts with consistent and clinically supported evidence from treating practitioners[61].

39 The Appellant's argument in Ground 2 does not establish any failure to consider relevant evidence, any denial of procedural fairness, or any legal error in the Member's and DP Snell's reasoning. The challenge is, in truth, a dispute about the weight accorded to Dr Smith's report. That was a matter for the primary decision-maker, which the DP found was available to the Member to make on the evidence, and is not a question of law within the meaning of s. 353 of WIM Act.

40 Accordingly, Ground 2 should be dismissed.

Ground 3 – Lay Witness Evidence

41 The Appellant submits that the Member erred by failing to properly consider, or by giving insufficient weight to, lay evidence from individuals formerly associated with the Appellant's stable and DP Snell made an error in law in endorsing that approach. It is suggested that this evidence undermined the Respondent's credibility and ought to have led the Member to reject the medical evidence that supported a finding of ongoing incapacity.

42 This argument is without merit. The Member directly addressed the lay evidence in his reasons; he provided a clear explanation for the weight he assigned to it, and the Member articulated why it did not disturb his acceptance of the medical and other material[62]. The Member's approach was measured, reasoned, and legally sound. DP Snell considered this ground on appeal and upheld the Member's conclusions, finding no error.

43 The lay evidence in question included statements from Graeme Murray, a representative of the employer, and Hayley Humphry, a former stable hand, both of whom suggested that the Respondent's symptoms were either overstated or not contemporaneously reported. Further evidence was offered by Courtney Gravener (née Gilman), who disputed the seriousness of the incident on 16 January 2009 or the Respondent's description of how it occurred.

44 The Member considered this material in the context of the totality of the evidence, including contemporaneous medical records, diagnostic imaging, and the Respondent's treatment and surgical history. He observed that none of the lay witnesses were cross-examined. In that context, he was entitled to treat their

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[61] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Hevi Lift (PNG) Ltd v Therington* [2005] NSWCA 42 per McColl JA at [80], [84], and [85].
[62] Member Reasons [46] - [64]; Red 47 - 49; Member Reasons [106] - [112]; Red 55 - 57.

evidence with caution, particularly as it was retrospective in nature, untested in the forensic sense, and at times inconsistent with the objective medical record. He further found that the evidence did not directly contradict the Respondent's case. Rather, it raised differences in recollection and emphasis, which did not bear decisively on the central issue of the Respondent's capacity for work[63].

45 The Member also considered that the Respondent's presentation and history were broadly consistent with repeated findings in medical records, with imaging studies, and with multiple Certificates of Determination issued in respect of her accepted injuries over a significant period. He preferred the evidence of treating clinicians, which was not only more probative but also more relevant to the issue of ongoing incapacity. There is no suggestion that the Member applied the wrong legal test or failed to consider material evidence. His reasons make clear why the lay evidence did not displace the expert medical opinion that the Respondent remained unfit for suitable employment.

46 DP Snell considered this ground on appeal and addressed it at [22] - [25] and at [88]- [100][64]. The DP confirmed that the Member was not obliged to accept the lay evidence merely because it was unchallenged. The weight to be given to untested lay opinion was a matter for the Member, particularly in a case involving complex medico-legal issues and a significant treatment history. DP Snell accepted that the Member had weighed the lay material against the Respondent's clinical and radiological evidence and had found that the latter was more compelling and reliable. He also noted the requirements under s. 43 of the *Personal Injury Commission Act* 2020 (NSW) that the proceedings be conducted with as little formality and technicality as the proper consideration of the matter required, that the Commission was not bound by the rules of evidence, and also the common law position respecting the operation of the rule in *Brown v Dunn* [65].

47 DP Snell observed that some of the lay witnesses appeared to have had limited involvement with the Respondent following the incident and were clearly aligned with the employer. DP Snell noted that the Member was entitled to regard their retrospective assessments as less persuasive than contemporaneous clinical findings, and the evidence was in part incompatible with the estoppel finding on injury and causation. The Appellant did not point to any specific legal error in the Member's evaluation of this evidence. The challenge amounted to a disagreement

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[63] Member Reasons [106] - [112]; Red 55 - 57.
[64] Red 81 - 82; 100 - 104.
[65] (1893) 6 R 67.

with factual findings, and did not establish irrationality, illogicality or legal unreasonableness. The Deputy President also noted s. 43 of the *Personal Injury Commission Act 2020* (NSW).

48 The law is clear that a fact-finding tribunal is best placed to assess the reliability and probative force of lay evidence[66]. The absence of cross-examination may not be decisive, but it can be relevant where the tribunal is asked to choose between untested recollection and a consistent body of objective medical evidence. The Member's treatment of the lay evidence in this case was appropriate and consistent with the principles in *Beale v Government Insurance Office (NSW)* [67].

49 The Member clearly considered the lay evidence, gave proper and reasoned explanations for the weight he assigned to it, and lawfully preferred the consistent medical and vocational material which supported a finding of incapacity. The Deputy President correctly affirmed those findings, identifying no error. This ground discloses no question of law and falls outside the scope of an appeal under s. 353 of the WIM Act. Accordingly, Ground 3 should be rejected.

Ground 4 – Delay in Complaints

50 The Appellant maintains that the Member gave insufficient weight to what it characterises as an "absence of early complaint" following the incident of 16 January 2009, arguing that the purported delay undermines the Respondent's credibility and severs any causal link between that incident and her present incapacity. The Appellant in turn argues that DP Snell was in error to endorse that approach. This submission mis-states the Member's reasons; it ignores the detailed way in which the Member dealt with the chronology of the Respondent's symptoms and DP Snell's approach to this complaint.

51 In his COD[68], the Member examined the timing issue with care. He accepted that the Respondent did not present to a doctor on the very day of the accident, but he found, entirely plausibly, that the passage of time had affected all witnesses' memories. The Member also noted the inexplicable inconsistency between Ms Gilman's note about witnessing the Respondent slip on wet grass and subsequent

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[66] *Fox v Percy* (2003) 214 CLR 118 at [25]; *Hutchinson v Van Den Berg [2024] SASCA 117 (all evidence* to be considered holistically, including lay evidence).
[67] (1997) 48 NSWLR 430.
[68] Member Reasons [13] - [18]; [58] - [69]; [69]; [106] - [114] Red 43 - 44; 48 - 50; 50; 55 - 57.

denials[69], and that it was not available to the Appellant to argue the accident and injuries did not occur given the estoppel finding[70].

52 On appeal, the DP considered this issue at [101] - [120][71]. The DP confirmed that the Member had grappled with the timing of the complaints and, after evaluating the Respondent's entire medical journey, found the evidence consistent with an injury sustained on 16 January 2009. The Deputy President accepted that the Member was entitled to view the injury in the broader clinical context: the Respondent had multiple conditions; her attention, and that of her doctors, was initially drawn to the hernia; and the neck and shoulder symptoms were progressively documented in GP notes, specialist referrals and imaging. Far from resting solely on the Respondent's testimony, the Member's finding drew strength from contemporaneous documentation, expert opinion and the issue estoppel. To the contention that the Respondent's injuries were "minor", the DP outwardly rejected this notion at [119][72]. The DP noted the Respondent's requirement to undergo the cervical fusion surgery performed by Dr Mews on 7 November 2016 and the finding by the Commission that the surgery was related to the accident. The DP concluded that the Member's approach was available on the evidence, lawful, rational and free of error.

53 In the present case, the Member cogently explained why the alleged delay did not erode the Respondent's reliability or break the causal chain or inform the minor nature of the Respondent's injuries. DP Snell endorsed that reasoning. The Appellant's argument is, in substance, no more than a disagreement with those factual conclusions and cannot ground an appeal under s. 353 of WIM Act. Ground 4 should therefore be dismissed.

Ground 5 – Miscellaneous Factors Affecting Credit

54 Ground 5 reprises the substance of Ground 4. Although Ground 5 speaks to matters of credit, it concerns principally questions of injury.

55 This submission lacks merit and mischaracterises both the Member's findings on credit and injury and the relevant legal framework. DP Snell dealt with this issue squarely and rejected the contention that the Member had failed to grapple with the evidence at [121] - [127][73]. As the Deputy President observed at [121] - [126], the

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[69] Member Reasons [108]; Red 56.
[70] Member Reasons [107] - [108]; Red 56.
[71] Red 104 - 109.
[72] Red 109.
[73] Red 109 - 110.

Member was alive to the Appellant's credit challenge. DP Snell confirmed that the Member had properly accepted the consistent expert opinions of Dr Jain, Dr Davis and Dr Liew, each of whom diagnosed persistent, structural injuries, including full-thickness tears of the supraspinatus tendon and cervical spine degeneration, that plainly fell outside the "minor injury" contention.

56 This ground, like Ground 4, is no more than a complaint about factual conclusions. It invites this Court to reweigh clinical and diagnostic evidence already considered by the Member and affirmed on appeal. It does not identify any legal error in the application of the statutory definition, nor does it establish that the Member acted on a wrong principle, ignored material evidence, or failed to provide intelligible reasons. Ground 5 should therefore be dismissed.

Ground 6 – Adequacy of Reasons

57 In Ground 6, the Appellant contends that the Member failed to provide adequate reasons for his conclusion that the Respondent had no current capacity for suitable employment within the meaning of s. 32A of the *Workers Compensation Act 1987* (NSW) and DP Snell made an error in law in endorsing this approach. It is said that the reasons given were too general, failed to engage with critical evidence, and did not disclose a clear path to the Member's conclusion.

58 This argument is unfounded. The Member's reasons were structured, intelligible and legally adequate. They disclose both the evidentiary foundation for his findings and the evaluative reasoning by which he arrived at them[74]. DP Snell examined this complaint in detail and rejected it, concluding that the Member's reasons met the standard required of a specialist tribunal such as the Commission[75].

59 The Member's reasoning demonstrates a clear application of the correct legal framework. The Member identified the applicable statutory definition of "suitable employment" in s. 32A and analysed the evidence in that light. His reasons set out the Respondent's relevant background, her injuries, clinical history, treatment and rehabilitation. The Member considered the expert opinions of Dr Jain, Dr Davis and Dr Liew, each of whom had examined the Respondent and formed the view that she was wholly incapacitated for work. The Member explained why he preferred that evidence over the contrary view expressed by Dr Smith, noting the greater recency, consistency and clinical depth of the treating opinions and Dr Bentivoglio's report. The Member also reviewed the surveillance and vocational material relied

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[74] Member Reasons [127] - [133]; Red 59 - 61.
[75] DP Reasons [134] - [136]; [147]; Red 113 - 114; 147.

upon by the Appellant and gave coherent reasons for discounting their significance. In particular, he noted that any hypothetical employment options bore no real correspondence to the Respondent's functional limitations, transferrable skills, or labour market in the context of *Wollongong Nursing Home Pty Ltd v Dewar* [76]. The Member made clear factual findings on capacity, stating that the Respondent's physical and functional impairments, in combination with her age, educational history, and limited prior work experience, precluded her from undertaking any form of suitable employment. Those findings were reasoned and plainly expressed.

60 On appeal, DP Snell addressed the adequacy of the Member's reasons at [128] - [148]. The DP rejected the assertion that the Member's reasons were too general or failed to engage with the evidence. To the contrary, DP Snell found that the Member had identified the evidence he accepted and rejected, articulated the basis for that evaluation, and applied the statutory test in a structured and transparent way. The reasons, he held, clearly conveyed the basis of the decision and satisfied the legal requirement of intelligibility and adequacy.

61 The DP observed that while reasons need not be lengthy or exhaustive, they must permit the parties to understand why the decision was reached. The Member's reasons did exactly that. There was no constructive failure to exercise jurisdiction, no failure to grapple with the determinative issues, and no deficiency capable of giving rise to legal error.

62 The law in this area is well settled. The obligation to give reasons does not require a tribunal to refer to every piece of evidence or argument advanced, particularly in a specialist forum such as the Commission[77]. What is required is that the reasons disclose the essential grounds of decision, sufficient to show that the tribunal has addressed the real questions in the case and explained its conclusions[78].

63 This standard was plainly met here. The Member's reasoning was cogent, structured and complete. DP Snell conducted a thorough review and found no deficiency in the reasoning, and no basis for appellate intervention.

64 The Member gave legally adequate reasons for concluding that the Respondent had no current work capacity. His evaluative findings were based on a fair reading of the evidence and were appropriately upheld on appeal. The Appellant's

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[76] [2014] NSDW WCC PD 55 at [62] - [63].
[77] *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 444.
[78] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279; *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728.

submission does not disclose any failure to give reasons capable of founding an appeal under s. 353 of the WIM Act. Ground 6 should therefore be dismissed.

E. CONCLUSION

65 This appeal amounts to a collateral attempt to re-litigate factual findings made by the Member and affirmed by the Deputy President of the Personal Injury Commission. Each of the six grounds are, in substance, a disagreement with the weight given to the evidence, whether medical, lay, surveillance or other, and fail to identify any true error in a point of law capable of sustaining an appeal under s. 353 of the WIM Act.

66 The Member's reasons were detailed, coherent, and grounded in the evidentiary record. He expressly considered the Appellant's surveillance footage, vocational assessments, lay witnesses and expert evidence (including that of Dr Smith), and explained why he preferred the consistent, longitudinal medical opinions that supported the Respondent's incapacity.

67 DP Snell carefully examined each of the Appellant's arguments on appeal and upheld the Member's determinations in full. DP Snell correctly found that the Member engaged with the central issues in the case, made findings that were open on the evidence, and gave legally sufficient reasons for those findings.

68 None of the Appellant's grounds establishes error of law, jurisdictional error, failure to exercise discretion, or inadequacy of reasons. Any assertion that DP Snell misunderstood the applicable statutory test, ignored relevant considerations, or otherwise erred in a point of law is misplaced. The Appellant's attempt to elevate ordinary fact-finding disputes into legal error is impermissible.

69 For these reasons, and for the reasons outlined in response to each of the six grounds, the appeal should be dismissed with costs.

Date: 23 June 2025

[redacted]

Filed: 8 July 2025 8:13 AM

D00026L2H7

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2024/00427925

TITLE OF PROCEEDINGS

First Appellant	E B Murray Family Investments Pty Ltd T/AS Bede Murray Racing Stables
First Respondent	Jo-Anne [redacted]

FILING DETAILS

Filed for	E B Murray Family Investments Pty Ltd T/AS Bede Murray Racing Stables,Appellant 1
Legal representative	[redacted]
Legal representative reference	
Telephone	[redacted]
Your reference	[redacted]

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Racing NSW v Howard - Appellant Reply Submissions dated 7 July 2025.pdf)

[attach.]

APPELLANT'S SUBMISSIONS IN REPLY

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2024/427925
TITLE OF PROCEEDINGS	
Appellant	**E B MURRAY FAMILY INVESTMENTS PTY LTD t/as BEDE MURRAY RACING STABLES**
Respondent	**JO-ANNE** [redacted]
PROCEEDINGS IN THE COURT BELOW	
Title below	E B Murray Family Investments Pty Ltd t/as Bede Murray Racing Stables v Jo-Anne [redacted]
Court below	Personal Injury Commission of New South Wales
Case number below	A1-W5892/22
FILING DETAILS	
Filed for	E B Murray Family Investments Pty Ltd t/as Bede Murray Racing Stables, Appellant
#Legal representative	[redacted]
#Legal representative reference	[redacted]
Contact name and telephone	[redacted]
Contact email	[redacted]

APPELLANT'S SUBMISSIONS IN REPLY

1 At paragraph 2 of the respondent's submissions, it is said that each ground raised by the appellant reflects dissatisfaction with the factual findings made by the Member. Clearly, the appellant having appealed this decision, it is dissatisfied with the factual findings. Equally, the appellant has made it clear that it understands that this is an administrative appeal. It is not merely the findings themselves which this appeal challenges. It is the illogicality of the reasoning in light of the evidence and the lack of understandable reasoning leading to those factual findings that the appellant complains of.

2 At paragraph 10 of the respondent's submissions, reference is made to "*four occasions on which disputes arose between the appellant and the respondent*". It is

then said that those disputes were determined in the respondent's favour. Three particular disputes are then referred to. It is unknown what the fourth dispute is.

3 In any event it is difficult to see what the purpose of that submission is. This appeal does not seek to set aside any of the decisions set out in paragraphs 11, 12 or 13 of the respondent's submissions. Equally, the appellant does not seek to set aside the estoppel arising from a decision on 16 January 2009. Rather, and as the appellant's submissions have made clear, the lay evidence called was to show that the injury, which it is admitted occurred, was a minor one. The estoppel (which appears at [95] of the appellant's primary submissions) does not prevent the appellant from bringing this appeal on that basis.

4 Further, even if there were some reason why those earlier three or four decisions were relevant, the appellant notes that the most recent of them was nearly five years prior to the determination under consideration in this matter. Clearly, none of them could have anything to say about whether the respondent has had a capacity to work since 21 July 2022.

5 Paragraph 20 of the respondent's submissions identifies the way in which the Deputy President mischaracterised the appellant's decision to call lay evidence. The Deputy President mischaracterised the lay evidence as being presented to reopen the issues resolved by the estoppel determination. That was clearly incorrect. This issue has been dealt with in the appellant's primary submissions. The lay evidence was to show that the injury was not a major one.

6 In the following paragraph 21 of the appellant's submissions, the respondent again misunderstands what the estoppel actually found. The fact that the Deputy President said that the appellant's attempts to classify the respondent's injuries as minor was contrary to the estoppel findings is, once again, wrong. The words of the relevant Member that created the estoppel can be seen in paragraph 95 of the appellant's primary submissions.

7 In relation to paragraph 25 of the respondent's submissions, the appellant's approach does not misunderstand the confines of the appeal. Clearly, the primary focus is on the Deputy President's decision and reasons. However, it is not possible to understand how the appellant frames it case against the Deputy President without understanding the mistakes that are contained in the Member's original findings. It is those findings, which were ultimately accepted by the Deputy President, which also need to be considered.

8 The Deputy President clearly concluded that there was no administrative error in the way that the Member approached his decision. If there was administrative error in the

way the Member approached his decision then, by necessary implication, the Deputy President's reasoning is wrong.

9 As the appellant has sought to make clear, it is not just the reasons but the illogicality of the approach by the Member, which approach was apparently accepted by the Deputy President, that forms the basis of the appellant's appeal.

10 In relation to paragraph 28 of the respondent's submissions, it is not the appellant's case that the Member rejected the surveillance evidence outright. Indeed, the appellant's primary submissions make it clear that, as we understand it, the Member relied upon, inter alia, the surveillance to question the veracity of the respondent's evidence.

11 Rather, it was the illogicality of accepting the respondent's evidence, which the Member had reason to question on the objective evidence before him. Additionally, the medical evidence on which the Member relied, over the objective evidence of the surveillance and the evidence of Dr Smith, forms a significant aspect of the appellant's case. Dr Smith, having seen some of the surveillance material, confirmed his earlier opinion that the respondent was capable of working. There was little by way of understandable reasoning in coming to that conclusion and it was on the evidence, clearly illogical.

12 At paragraph 35 of the respondent's submissions, reference is made to *"a short segment of surveillance material which had not been shown to, or adopted by, any treating practitioner"*. There was, as the evidence shows, rather more than *"a short segment"* of surveillance. It was surveillance traversing some eight years on many occasions. Nothing in the surveillance suggested that the respondent had any injury stopping her from doing any work she might reasonably be able to do.

13 Further, it is correct that it was not shown to any treating practitioner. Clearly one might have expected the respondent to do this. The suggestion that it was not adopted by any treating practitioner has to be seen in the light of the fact that the respondent sought not to show it to any of her treating practitioners, nor, indeed, any medicolegal doctor that she had engaged. This was not an obligation of the appellant. It was something that the respondent could have done as has been set out in the appellant's primary submissions.

14 At paragraph 33 of the respondent's submissions, criticism is made of Dr Smith's opinion because since that time *"the respondent had undergone significant further treatment"* for which liability had been accepted by the insurer. Further, it is said that more contemporaneous medical evidence was available.

15 What is said in that paragraph misunderstands the position of the appellant. It is true that Dr Smith did not see all of the surveillance and gave his opinion prior to the claimant undergoing further surgery. In that regard the appellant first makes the point that what is shown in the film, both before and after the further surgery the respondent had, is evidence of no incapacity. Dr Smith saw some of it, and it confirmed his opinion that there was no incapacity.

16 To suggest that the further surgery means that Dr Smith's opinion cannot be accepted, must inherently mean that the further surgery caused her to have no working capacity after June 2022, the issue in the original hearing. The Member did not say that, and the Deputy President did not say that. If their decisions were to be accepted, reason would need to be given why having further surgery vitiates the opinion of Dr Smith.

17 Further, the Member recorded that Dr Smith had not seen all of the surveillance. The implication here being that had he done so, it might have changed his opinion. No reasons are given for supporting that view.

18 The second matter about Dr Smith's evidence is that it counters the Member's reliance upon *"the pathology"* in the respondent's neck as being a reason for finding that she did not have a capacity to work. As outlined in the appellant's primary submissions, pathology itself does not necessarily lead to pain or incapacity. Dr Smith's evidence makes that abundantly clear.

19 It was incumbent upon the Member to explain why or how *"the pathology"* meant that the respondent did not have a capacity to work. That reasoning was never given and was an error made by the Member. To accept that the Member had given adequate reasons for that issue was an error made by the Deputy President.

20 The Member's rejection of Dr Smith's opinion, and the Deputy President's acceptance of such rejection, because the respondent had undergone, presumably restorative, surgery lacked rationality. There was no evidence that, as seems to be suggested by the Member and accepted by the Deputy President, that the surgery in some way vitiated Dr Smith's opinion.

21 As the appellant has noted in the primary submissions, the Member questioned the respondent's reliability because of the surveillance and other matters and accepted that the surveillance was inconsistent with some of her evidence. However, the Member then accepted her claim and, impliedly, her evidence about her capacity, simply on the basis, it seems, of "*the pathology"* in her neck. He has not explained how that pathology leads to her incapacity to work, particularly in light of the evidence of Dr Smith and the surveillance.

[redacted]

Dated: 7 July 2025

[redacted]