# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**HERNANDEZ v AAI Ltd t/as GIO (Motor Accident Injuries) [2025] ACAT 45**

**MAI 5/2024**

**Catchwords**: **MOTOR ACCIDENT INJURIES** – quality of life benefits – whole person impairment (WPI) – where independent medical examiner unable to determine applicant's WPI – where private medical examiner determined a WPI of 12% - where insurer adopted independent medical examiner's report – whether final offer WPI made by insurer was lawful – requirement for reasons for decision – good faith provisions - whether private medical examiner's supplementary report should be admitted into evidence – role of tribunal after setting aside decision under review – determination of WPI - costs

**List of Legislation:** *ACT Civil and Administrative Tribunal Act 2008,* s 48
*Legislation Act 2001*, s 179
*Motor Accident Injuries Act 2019*, ss 6, 20, 25, 33, 38, 132, 137, 138, 144, 146, 147, 149, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 192, 193, 197, 198, Schedule 1

**Subordinate legislation cited:** *Motor Accident Injuries (ACAT Costs Orders) Regulation 2020*
Motor Accident Injuries (Whole Person Impairment) Guidelines 2019

**Cases cited:** *Dasreef Pty Ltd v Hawchar* [2011] HCA 21
*Lang v The Queen* [2023] HCA 29
*Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 35
*Montgomery v NRMA* [2024] ACAT 60
*Neish v NRMA* [2022] ACAT 24
*Williams v GIO* [2021] ACAT 100
*Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43

**Tribunal:** Senior Member M Hyman
**Date of Orders:** 12 June 2025
**Date of Reasons for Decision:** 12 June 2025
**Date of Publication:** 23 June 2025

**AUSTRALIAN CAPITAL TERRITORY )**
**CIVIL & ADMINISTRATIVE TRIBUNAL ) MAI 5/2024**

BETWEEN:

**JORGE ALBERTO GUEVARA HERNANDEZ**
Applicant

AND:

**AAI LIMITED ACN 005 297 807 TRADING AS GIO**
Respondent

**TRIBUNAL:** Senior Member M Hyman
**DATE:** 12 June 2025

**ORDER**

The Tribunal orders that:

1. The respondent's decision of 3 September 2024 to determine the applicant's WPI at 0% in its final offer WPI is set aside and the matter is remitted to the respondent with the direction that:

   (a) The respondent is to make a revised final offer WPI to the applicant with the WPI set at 11%, in accordance with this decision.

2. The respondent is to pay the applicant's costs, as agreed or assessed, in accordance with section 198 of the *Motor Accident Injuries Act 2019* and the *Motor Accident Injuries (ACAT Costs Orders) Regulation 2020*.

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Senior Member M Hyman

## REASONS FOR DECISION

### Introduction

1. This decision is about whether quality of life benefits should be paid by an insurer to a person injured in a motor vehicle accident. The applicant, Mr Jorge Guevara Hernandez (**Mr Hernandez**, or **the applicant**), was injured in a motor vehicle accident on 26 April 2022. He was in his own vehicle, which was stationary at the time, when struck from behind by another vehicle. The vehicle that struck him was insured by the respondent (identified in this decision as **the respondent**, or **the insurer**, or **GIO**). Mr Hernandez lodged an application for defined benefits under the *Motor Accidents Injuries Act 2019* (**the MAI Act**). Part of the applicant's claim was for quality of life benefits; the respondent denied that part of the claim, and the applicant applied under section 193 of the MAI Act for external review of that denial by this tribunal (the **Tribunal** or **ACAT**).

2. The matter came before the Tribunal on 1 April 2025. The applicant, being unwell, did not appear in person. He was represented by Mr B Jones of Counsel, instructed by Mr J Treloar of Maliganis Edwards Johnson. Mr D Crowe of Counsel, instructed by Mr I Molencamp, represented the respondent. Because the review process set out in the MAI Act limits the admission of evidence after the internal review decision, no evidence was taken at the hearing, which proceeded by way of final submissions by the parties.

3. The evidence filed by the parties with the Tribunal comprised the following documents:

| **Document** | **Date** |
|---|---|
| Report by Dr J Tomlinson assessing the applicant's whole person impairment (WPI) | 21 February 2024 |
| Supplementary report by Dr J Tomlinson assessing the applicant's WPI | 27 March 2024 |
| Letter from Dr J Tomlinson declining to determine a WPI for the applicant | 16 April 2024 |
| Letter from respondent to applicant advising of no permanent impairment and denying quality of life benefits | 9 May 2024 |
| Report of Dr M Ridhalgh assessing the applicant's whole person impairment | 22 July 2024 |

| | |
|---|---|
| Notice of affirmation or increase by Dr J Tomlinson | 12 August 2024 |
| Letter from respondent to applicant setting whole person impairment at 0% and denying quality of life benefits | 3 September 2024 |

4. The applicant filed a second report from Dr Ridhalgh, dated 30 September 2024, with an application to present additional evidence. This was an issue before the Tribunal at the hearing, and the question is dealt with separately below.

**Issues**

5. The issues before the Tribunal for decision are:

   (a) whether Dr Tomlinson's conclusions were arrived at by a lawful fact-finding process;

   (b) whether the final Whole Person Impairment offer (**the final offer WPI**) by the respondent dated 3 September 2024 was lawful;

   (c) if the tribunal were to conclude that the final offer WPI was not lawful, what remedy the tribunal should order;

   (d) whether the additional report by Dr Ridhalgh, dated 30 September 2024, should be admitted into evidence; and

   (e) whether a costs order should be made.

**The Legislative Framework**

6. The MAI Act establishes a scheme to simplify motor accident insurance in the ACT and make it easier to navigate.[1] A Motor Accident Injuries Commission is established by the Act[2], its functions including the supervision of the scheme, the regulation of insurers and issuing, monitoring and reviewing MAI Guidelines provided for in the Act.[3]

7. The MAI Act includes some overarching provisions that govern the way in which the scheme established under the Act is to operate. For present purposes, section 20 of the MAI Act is of particular relevance. The section requires that insurers, applicants for defined benefits and claimants act in good faith and do

[1] MAI Act s 6
[2] MAI Act Part 1.3
[3] MAI Act s 25

their best to help resolve issues between them and bring the matter to finality. Specific duties are imposed on each type of participant. Applicants, for example, have a duty to act honestly and with integrity and not to mislead, with respect to their application.[4] Insurers have a duty to provide extensive information to applicants,[5] including by providing written reasons with any decision having a material effect on an applicant's entitlement to defined benefits.[6]

8. A person who suffers a personal injury as a result of a motor accident in the ACT is entitled to defined benefits,[7] which include income replacement benefits, treatment and care benefits, quality of life benefits, death benefits and funeral benefits.[8]

9. Part 2.6 of the MAI Act provides for quality of life benefits to be paid to a person who is injured in a motor vehicle accident and is sufficiently impaired as a result. Impairment is assessed through determination of a WPI figure. A person whose WPI is at least 5% is entitled to quality of life benefits[9] (subject to certain exclusions not presently relevant). A person may apply for quality of life benefits,[10] and if the insurer reasonably thinks that the person's injuries have stabilised, and the person has a permanent impairment, the insurer must refer the person to an independent medical examiner (IME) for a WPI assessment.[11]

10. The MAI Act provides detailed guidance on the process by which an injured person's WPI may be assessed and determined, and the Act is in turn supplemented by the Motor Accident Injuries (WPI Assessment) Guidelines 2019 (**the Assessment Guidelines**), which must be issued by the MAI Commission.[12] An IME is tasked by the insurer with preparing a report evaluating the person's injuries, in accordance with the Assessment Guidelines,[13] and that report may, or

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[4] Mai Act, s 20(3)
[5] MAI Act, s 20(4)
[6] MAI Act, s 20(4)(d)
[7] MAI Act s 38
[8] MAI Act s 33
[9] MAI Act s 132(1)
[10] MAI Act, s s 137 7, 138
[11] 7 MAI Act s 138
[12] MAI Act, s 146
[13] MAI Act, ss 144, 147, 149, 152

in some cases must, form the basis of an offer made by the insurer to the claimant.[14] A claimant may, however, arrange for a private doctor to prepare a second report (which must also follow the Assessment Guidelines).[15] That second report must be provided to the injured person, who may forward it to the insurer,[16] which may accept the second report or send the report to the IME, who may then provide a notice either affirming their original conclusion, or increasing the WPI.[17] On the basis of either having accepted the second report, or having a notice of affirmation or increase from the IME, the insurer may decide a final WPI for the claimant,[18] and then proceed to make a final offer WPI to the claimant.[19] If the final offer WPI is less than 5%, no quality of life benefits are payable; if above 5% but less than 10%, quality of life benefits are payable, but the claimant is not entitled to lodge a claim for benefits under the common law provisions in the MAI Act; if above 10%, quality of life benefits are payable and the claimant may be entitled to make a common law claim.

11. The MAI Act provides for certain decisions to be reviewed by ACAT.[20] ACAT reviewable decisions are listed in Schedule 1, Part 1.2, and include, at Item 29, a decision under section 160(2) setting a WPI amount for a final offer WPI. An applicant for defined benefits may apply for ACAT review of such a decision on a question of law or fact.[21] In a decision on such an application, the ACAT must affirm, or amend, or set aside the decision, and if setting it aside, may either make a substitute decision or remit the matter to the insurer for reconsideration in accordance with any directions the ACAT may make.[22] In its review, the ACAT is limited to the evidence reasonably available to the decision-maker at the time the decision under review was taken;[23] but the ACAT may admit additional evidence, on application by a party, where that evidence was not reasonably

[14] MAI Act, ss 154, 155, 156, 157
[15] MAI Act, s 158
[16] MAI Act, s 158
[17] MAI Act, s 159
[18] MAI Act, s 160
[19] MAI Act, ss 161, 162, 163, 164
[20] MAI Act, s 192
[21] MAI Act s 193
[22] MAI Act, s 197(1)
[23] MAI Act, s 197(2)

available to the decision-maker at the time of the decision.[24]

12. The MAI Act allows the ACAT to make a costs order with regard to external review proceedings;[25] the Act provides for a regulation dealing with such orders,[26] and the *Motor Accident Injuries (ACAT Costs Orders) Regulation 2020* (the **Costs Orders Regulation**) sets out the basis on which such orders may be made.

13. The Assessment Guidelines, made under section 146 of the MAI Act, set out how a person's WPI is to be assessed, and the principles and procedures to be followed in the assessment, including the determination of an impairment as permanent. The Guidelines generally follow the fifth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA5), with the Guidelines prevailing where there is inconsistency.[27] The Guidelines require the assessor to determine whether the person has an impairment deriving from a compensable injury, whether that impairment is permanent, the degree of impairment, and any contribution made by an earlier injury.[28] The Guidelines provide detailed guidance for different parts of the body, including the arms, hands and shoulders (the upper extremity).[29] Detailed guidance is provided for determining range of motion[30] and for shoulder impairments.[31]

**The Evidence**

14. Much of the factual material relating to the motor accident, the resultant injury to the applicant's right shoulder and the treatment of that injury are not in dispute. Mr Hernandez was the driver of a vehicle that was hit from behind by another vehicle, insured by the respondent, on 26 April 2022. His right shoulder was painful after the accident (he had had a previous injury to that shoulder, in 2015). He received conservative treatment (physiotherapy and corticosteroid injection)

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[24] MAI Act, s 197(3)
[25] MAI Act, s 198
[26] MAI Act, s 198(4)
[27] MAI (WPI Assessment) Guidelines, clause 1.1
[28] MAI (WPI Assessment) Guidelines, clause 1.6(a)
[29] MAI (WPI Assessment) Guidelines, chapter 2
[30] MAI (WPI Assessment) Guidelines, clause 2.5
[31] MAI (WPI Assessment) Guidelines, clauses 2.14-2.16

but without improvement. Surgery was performed on 16 June 2023 (arthroscopy and bursectomy) but his symptoms were not relieved and may even have worsened.[32] Mr Hernandez lodged an application for defined benefits, including quality of life benefits, under the MAI Act.

15. The dispute between the parties relates only to that part of Mr Hernandez' application relating to quality of life benefits.

**Reports by Dr Jan Tomlinson**

16. The respondent arranged for the applicant to be seen and evaluated by Dr Jan Tomlinson, an IME and consultant orthopaedic surgeon; Dr Tomlinson conducted an assessment on 7 February 2024. Her report includes a table reporting the outcome of the range of motion tests as follows:

| **Range of Motion** | **Right** | **Left** |
|---|---|---|
| Flexion | 40° | 160° |
| Extension | 0° | 70° |
| Abduction | 0° | 160° |
| Adduction | 0° | 0° |
| Internal rotation | 0° | 70° |
| External rotation at neutral | 0° | 90° |

17. Dr Tomlinson added a further comment that passive external rotation was to 40°, and she was unable to determine whether this limit was caused by pain or by "block of movement".

18. The report also summarises the applicant's past medical history (with a focus on the prior injury to the right shoulder), and sets out the results of imaging of the shoulder and cervical spine (MRI of cervical spine and right shoulder dated 8 November 2015, X-ray of right shoulder/cervical spine dated 24 April 2022, MRI of cervical spine and right shoulder dated 2 May 2022, MRI of right shoulder dated 15 May 2023). Various degenerative changes were identified in the imaging.

19. In summarising the overall outcome of the evaluation, Dr Tomlinson noted that in her view there were significant disparities in the sources of information: in her

[32] Dr Tomlinson's report dated 21 February 2024; notices of facts, issues and contentions by applicant (22 November 2024) and respondent (27 November 2024).

words “Findings are excessive when compared to the symptoms and imaging findings”. The MRI report of 2 May 2022 hypothesized a diagnosis of adhesive capsulitis. Dr Tomlinson commented that it was “possible he has ongoing adhesive capsulitis but findings are well in excess of those expected with this diagnosis”. Dr Tomlinson postulated that the applicant had developed a pain condition “either voluntary or involuntary”. Dr Tomlinson was unable to advise whether the applicant had reached maximum medical improvement, to determine a definite diagnosis, or to assign a whole person impairment. She recommended a further MRI, followed by reassessment.

20. A further MRI, dated 22 March 2024, was obtained, and at the insurer’s request Dr Tomlinson undertook a reassessment, based on her earlier assessment and the new imaging. Her supplementary report of 27 March 2024 stated that the applicant had reached maximum medical improvement, diagnosed rotator cuff tendinopathy, and repeated the issue of disparities in information: “findings are excessive when compared to symptoms and imaging findings”. Once again Dr Tomlinson postulated a pain condition and declared herself unable to provide a WPI figure, noting her view that the applicant’s “symptoms and findings are related to a pain condition with only a minor contribution from organic pathology”.

21. The respondent pressed Dr Tomlinson to provide a percentage figure for WPI. On 16 April 2024 she responded in the following terms: “I have been unable to identify any organic pathology in Mr Hernandez’s presentation and as such there is no rateable impairment for a shoulder injury. I do continue to recommend review by a pain physician.”

**Dr Ridhalgh’s report**

22. The applicant engaged Dr Mark Ridhalgh, a consultant orthopaedic surgeon, to prepare a second WPI report. The applicant saw Dr Ridhalgh on 18 July 2024, and Dr Ridhalgh prepared a report dated 22 July 2024. The assessment was done by video, with the assistance of a physiotherapist. The report notes that the applicant’s neck, elbow, wrist and hand showed a full range of motion and the reflexes were brisk and symmetrical. The range of motion outcomes obtained for the shoulders were given in the following table:

| Range of motion | Right shoulder | Left shoulder |
|---|---|---|
| Flexion | 90° | 80° |
| Extension | 0° | 30° |
| Abduction | 50° | 180° |
| Adduction | 30° | 50° |
| External rotation | 40° | 90° |
| Internal rotation | 50° | 70° |

23. Dr Ridhalgh took a history and examined the imaging made available to him, including the X-Ray of 24 April 2022 (although he records it as of 26 April); an MRI of the cervical spine of 28 April 2022; the MRI of the cervical spine and right shoulder of 2 May 2022; and a CT of the right shoulder of 2 May 2022. He apparently was not given the later MRI imaging of the shoulder (15 May 2023 and 22 March 2024).

24. Dr Ridhalgh concluded that on the balance of probabilities, Mr Hernandez had suffered an injury in the accident, and diagnosed supraspinatus tendinitis and bicipital tendinitis. He stated that the applicant's condition had stabilised, but did not go on to comment on whether he had reached maximum medical improvement. Dr Ridhalgh arrived at a WPI of 12%, as follows:

> *I refer to the MAIC Whole Person Impairment Assessment Guidelines 2019 and AMA-5 Guides.*
>
> | ***Range of motion*** | ***Right Shoulder*** | ***UEI*** |
> |---|---|---|
> | *Flexion* | *90°* | *6* |
> | *Extension* | *0°* | *3* |
> | *Abduction* | *50°* | *6* |
> | *Adduction* | *30°* | *1* |
> | *External rotation* | *40°* | *1* |
> | *Internal rotation* | *50°* | *2* |
>
> *Using AMA-5 Figure 16.40, 16.43 and16.46, total Upper Extremity Impairment is 19%. Using Table 16.3, this converts to 11% WPI*
>
> *With reference to the TEMSKI scales, there is an addition 1% for scarring.*
>
> *In total, there is **12% Whole Person Impairment**.*

**Dr Tomlinson's Notice of Affirmation or Increase**

25. GIO sent Dr Ridhalgh's report to Dr Tomlinson for review. Dr Tomlinson

submitted a report dated 12 August 2024, affirming her original assessment and explaining that affirmation in the following terms:

> *At the time of my original assessment, I advised I did not consider it was possible to assess Mr Hernandez for a whole person impairment as I considered his findings were not consistent with organic pathology. I reaffirmed this view in my supplementary report dated 27 March 2024 and my clarification report dated 16 April 2024.*
>
> *To provide Mr Hernandez a whole person impairment with reference to his right shoulder, with reference to the MAIC Whole Person Impairment Assessment Guidelines and AMA5, the only method of assessing the upper limb is with respect to range pf motion. I do not consider it possible to assess Mr Hernandez with respect to his right shoulder range of motion for the reasons outlined previously.*
>
> *I respectfully disagree with the report of Dr Ridhalgh dated 22 July 2024 in which he has attributed a whole person impairment of 12%, including scarring. I note Dr Ridhalgh has not made a deduction for the contralateral left shoulder restriction in range of motion in accordance with the MAIC guide and the AMA5 guide, page 453. Regardless, the range of motion assessment by Dr Ridhalgh is significantly better than that which I achieved at the time of my review, which has resulted in the impairment assessment by Dr Ridhalgh. I can find, however, no reason to change my assessment, that being that there is no rateable impairment of the right shoulder, based on the presentation of Mr Hernandez at the time of my assessment on 7 December 2024.*

**GIO's final offer WPI**

26. The respondent wrote to Mr Hernandez on 3 September 2024. The letter noted the insurer's obligations under Division 2.6.3 of the MAI Act, advised that the report of Dr Ridhalgh had been sent to Dr Tomlinson, and that she had affirmed her original assessment. The respondent made a final offer WPI of 0%.

**The submissions of the parties.**

27. Each of the parties provided a notice of facts, issues and contentions, and subsequently, made a written submission and elaborated on that submission in the hearing.

28. The applicant's position is in part founded on the significance of the WPI outcome for the applicant's case. A WPI of less than 5% denies him quality of life benefits; an outcome of less than 10% denies him any opportunity to make a damages claim under Chapter 5 of the MAI Act. In the applicant's written submission, dated 10 March 2025, these threshold entitlement considerations underpin an argument that the denial of the applicant's interests by a 0% final offer WPI required that

written reasons for that decision be provided, and in particular that some explanation be provided why Dr Tomlinson's WPI outcome should be preferred to that of Dr Ridhalgh. The procedural fairness point was elaborated on at some length, especially with regard to the common law authorities. The submission also challenges Dr Tomlinson's reports, on the basis that her findings are not adequately explained, that she did not accord the applicant procedural fairness (for example by not putting her conclusions to him when she sensed he might be feigning or exaggerating pain or constraints on movement), and that her successive reports contain contradictions and inconsistencies with each other.

29. At the hearing Mr Jones for the applicant elaborated on these points, laying emphasis in particular on the judicial (rather than administrative) quality of the insurer's decision under section 160 of the MAI Act, as a basis for the requirement for reasons in support of the decision; and arguing that, were the decision under review to be set aside, Dr Ridhalgh's WPI determination, as revised by his supplementary report, should be preferred as the basis for a remittal to the respondent.

30. The respondent's submissions asserted that the respondent had met its statutory obligations in the decision-making process; that any procedural fairness obligations had either been met or were beyond the requirements of the statute; and that the criticisms of Dr Tomlinson's reports were wrong or misguided. At the hearing Mr Crowe emphasised the role of the Assessment Guidelines, and of the necessity for any report to be relied on by the insurer, or by the tribunal standing in the insurer's shoes, to be prepared in accordance with those Guidelines.

**Consideration**

31. Section 193 of the MAI Act allows an applicant for defined benefits to seek a review of various kinds of decisions "on a question of fact or law". This wording means that the question to be asked in the tribunal's review process is whether the decision under review was properly made in accordance with law; that is, the review goes not to the merits of the decision, but to whether it was vitiated by one

or more errors of law or fact.[33]

**Was the respondent's final offer WPI lawfully made?**

32. I have concluded, for the reasons set out below, that the final offer WPI sent to the applicant on 3 September 2024 was affected by errors of law.

33. The critical provision of the MAI Act for the determination of an applicant's WPI where a second WPI report has been obtained is section 160, which reads as follows:

> *(1) This section applies if the relevant insurer for a motor accident receives a second WPI report about an injured person.*
>
> *(2) The relevant insurer must decide a WPI to determine the final offer to make to the injured person (the* **final offer WPI***).*
>
> *(3) The final offer WPI must be not less than—*
>
> *(a) if the insurer has not requested the IME provider to arrange a review of the first WPI report under section 159—the WPI assessed in the first WPI report; or*
>
> *(b) if the insurer has requested the IME provider to arrange a review of the first WPI report under section 159—the affirmed or increased assessment of WPI stated in the notice of affirmation or increase.*

34. It is apparent that in this process an insurer, in making a final offer WPI to an applicant, is entirely reliant on the assessments by the IME and the private medical examiner. The assessment reports are therefore of central importance in the process, and subsection 160(2) throws on the insurer the choice of one WPI over the competing figure.

35. The applicant was critical, in submissions and at the hearing, of Dr Tomlinson's reports. The major points of criticism were that the reports were not clear in some respects, that they lacked explanation and reasoning for some of the conclusions drawn, and that because Dr Tomlinson did not put some points to the applicant at the time of the initial examination, he was denied procedural fairness.

36. It is certainly true that Dr Tomlinson at times writes in a kind of code that makes the reports difficult to understand. In the sentence "Findings are excessive when

[33] *Williams v GIO* [2021] ACAT 100 at [94]-[95], *Neish v NRMA* [2022] ACAT 24 at [19]-[20], *Montgomery v NRMA* [2024] ACAT 60 at [10]

compared to the symptoms and imaging findings", the use of "findings" to refer to two different data sets being compared is unhelpful to the reader. But, after giving her three reports a careful reading, I have concluded that her intent can be understood with reasonable certainty. Dr Tomlinson sought to correlate the range of motion outcomes she obtained, the symptoms reported by the applicant and otherwise obtained on examination, and the pathology visible and identified in the imaging. In the sentence quoted above, the first "findings" referred, I think, to the range of motion results; "symptoms" referred to what Dr Tomlinson was able to glean from the applicant and his history; and "imaging findings" referred to the various X-Ray and MRI reports made available to her. The quoted sentence reflects that she was unable to make the correlation that would have enabled her to arrive at a diagnosis and WPI figure about which she could be confident. In particular, the range of motion outcomes, in which there was no movement in five of the six planes, were "excessive" in that the numbers – zero in five planes – were too low, given the examination and the imaging (a higher range of motion outcome signals less hindrance to movement, and so a lower figure than expected is "excessive").

37. When it came to the time for Dr Tomlinson to consider Dr Ridhalgh's report and either accept its increase or affirm her own report, perhaps because of the vast gap between her range of motion outcomes and that obtained by Dr Ridhalgh, she stood by the result she had obtained herself. One can understand that the process in which doctors are asked to choose between the outcome of a test they themselves performed, and a test performed by another doctor, at a different time, when they were not present, may often encourage doctors to stand by their own results. Indeed Dr Tomlinson's Notice of affirmation or increase states that her assessment "does not relate to any clinical evaluation of the subject of the material subsequent to my assessment of 7 February 2024", seemingly implying that she does not intend to accept or even take into account Dr Ridhalgh's evaluation. I note that the only criticism of Dr Ridhalghg's report offered by Dr Tomlinson is with respect to the contralateral left shoulder restriction (i.e. a reported constraint in movement of the uninjured shoulder).

38. When unable to reconcile the range of motion outcomes and the other information

available to her, Dr Tomlinson hypothesised that the applicant was affected by a pain condition. Mr Jones, for the applicant, argued that Dr Tomlinson had denied his client procedural fairness by not putting this point to him and allowing him to contest it. I do not agree. Mr Hernandez is not a doctor, and could not have responded in an informed way, if confronted with Dr Tomlinson's hypothesis. Procedural fairness is provided to the applicant in these circumstances by the WPI process – section 158 of the MAI Act allows an applicant to challenge a WPI report by an IME by engaging a private medical examiner to undertake a separate assessment and prepare a second WPI report. That is exactly the process that was followed.

39. Dr Tomlinson's reports are not always easy to follow, but some points are abundantly clear. Above all, she was unwilling to assign a WPI figure. In her first report she said that "I am unable to provide a Whole Person Impairment (WPI) as a diagnosis is difficult to make …". In her second report Dr Tomlinson said "I am unable to provide a whole person impairment. I consider that Mr Hernandez's symptoms and findings are related to a pain condition with only a minor contribution from organic pathology." When pressed by the respondent to confirm that a 0% WPI was intended, Dr Tomlinson provided a brief third clarification report, in which the operative sentence reads: "I have been unable to identify any organic pathology in Mr Hernandez's presentation and as such there is no rateable impairment for a shoulder injury."

40. It is plain from the above that Dr Tomlinson was completely unwilling to assign a figure for the applicant's WPI. Yet on 9 May 2024 the respondent sent a letter to the applicant with a final offer WPI of 0%. That letter offered no explanation for how the 0% WPI had been arrived at.

41. It may be doubted whether the refusal of Dr Tomlinson to assign a WPI to the applicant provided an adequate evidentiary basis for the respondent to make an offer of 0% WPI; it may seem like some form of common sense to regard "no rateable impairment" as equivalent to, or in effect defaulting to, a WPI of 0%, but I can find nothing in the statute or the Assessment Guidelines that justifies that step. After all, Dr Tomlinson did not say that the applicant had no impairment; on a fair reading of her three reports, she appears to have taken the view that the

applicant had some element of organic pathology, and some impairment, if minor, but she was unable to determine a WPI figure. A WPI figure for that minor impairment, therefore, needed to be assigned, and there is no reason I can see why it was necessarily 0%.

42. If the 0% WPI was, therefore, dubious in its evidentiary basis when the respondent wrote to the applicant on 9 May 2024, Dr Ridhalgh's report of 22 July 2024 removed any credibility it might have had to that time. It was established that the applicant now had a significantly greater range of motion than he had displayed when examined by Dr Tomlinson, and a zero outcome in five of six planes of motion could no longer provide a basis for determining his WPI. In my view the respondent now had only two courses of action available: either to accept Dr Ridhalgh's higher WPI or to send the applicant for further testing, either with Dr Tomlinson or with another IME. Although it was still possible that the IME might determine the WPI to be 0%, that outcome would need to be derived from a new set of range of motion results, as the applicant was now able to move his arm far more freely, for whatever reason.

43. A number of reasons might be advanced, all somewhat hypothetical, for the difference in range of motion outcomes. In the first place, Dr Ridhalgh's numbers might be in error; there is no evidence of that, however, so far as I can see, and no submissions have been made to me along those lines. Dr Tomlinson's hypothesis was that there was a pain condition, either involuntary or voluntary; on that hypothesis the condition must have eased (if involuntary) or been abandoned, entirely or partly (if voluntary), when Dr Ridhalgh did his tests six months later. That leaves Dr Ridhalgh's theory, that the condition had not fully stabilised in January 2024, being affected by bursitis and post-operative joint stiffness, both of which had eased by July 2024. On any of these hypotheses, except the first, Dr Tomlinson's range of motion outcomes could not be relied on, on the balance of probabilities. In my view, the respondent did not have a satisfactory evidentiary basis for a final offer WPI of 0% on 3 September 2024.

44. The determination of an applicant's WPI is a finding of fact. In *Montgomery v*

NRMA[34] I noted that when this Tribunal is reviewing a decision under the MAI Act:

> *… for questions of fact the enquiry that must be made is not whether the finding was right, or whether an alternative finding was available, or ought to have been preferred, but simply whether the finding was available or open to the decision-maker, on the evidence – whether it was arrived at by a lawful fact-finding process.*

45. In the present matter the choice of Dr Tomlinson's WPI outcome was not supported by the evidence, as explained above; and the process by which it came to be adopted is completely obscure. Just as the letter from the insurer to the applicant of 9 July 2024 provided no explanation for the 0% WPI, the final offer WPI letter of 3 September 2024 provides no explanation why Dr Tomlinson's reports had been preferred; there is no fact-finding process, lawful or otherwise, set out in the letter to the applicant. The determination of a WPI of 0% by the insurer in the final offer WPI is an error of law.

46. The failure to provide reasons for the decision is a second reason why the final WPI offer was affected by error of law. This was a focus of competing contentions at the hearing. For the applicant, Mr Jones pointed to the statutory requirement for reasons, but also advanced, in the alternative, a closely argued case that the duty to provide reasons also arose at common law. Mr Crowe for the respondent contended that any obligation to provide reasons had been met by the provision of information to the applicant throughout the WPI process, and by making Dr Tomlinson's reports available to the applicant.

47. The MAI Act is absolutely explicit about the need for insurers to keep applicants and claimants fully informed on their application or claim. Section 20 of that Act is the section dealing with the requirement that insurers, claimants and applicants act in good faith in an MAI matter. Subsection 20(4) deals with what is required, specifically, of insurers; and paragraph 20(4)(d) provides that an insurer has "a duty to give the applicant or claimant written reasons for all decisions having a material effect on an entitlement to defined benefits or damages". A final WPI offer decides whether an applicant will receive quality of life benefits and whether the applicant can make a common law claim; it therefore has a material effect on

[34] [2024] ACAT 60, at [10]

an applicant's entitlements.

48. The good faith requirements in section 20 of the MAI Act are in my view central to the operation of the scheme set out in the Act. Critical in that scheme is the obligation on the insurer to be utterly open, honest and transparent in all dealings with applicants and claimants. That includes the requirement to provide written reasons that affect the interests of applicant or claimant. I am satisfied that the respondent was obliged to provide written reasons. I do not need to turn my mind to the common law authorities cited by Mr Jones, given the clarity of the obligation in the statute.

49. Mr Jones cited *Wingfoot Australia Partners Pty Ltd v Kocak*[35] (*Wingfoot*) as authority for the standard that written reasons must meet. In that case the High Court, considering reasons given by a Medical Panel under Victorian legislation, concluded that "… the statement must explain the actual process of reasoning by which the Medical Panel in fact formed its opinion and must do so in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law".[36] That statement is clearly relevant to the present context. Mr Jones further pointed to section 179 of the *Legislation Act 2001*. Subsection 179(2) provides that reasons required under legislation "must also set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based". In fact, the statutory requirement for transparency and disclosure set by section 20(4)(d) of the MAI Act probably goes beyond the standard set by *Wingfoot*. And as the decision taken under section 160 is externally reviewable, the giving of reasons sufficient to allow an applicant to decide whether to appeal, and to allow this tribunal to discern whether an error of law has occurred, would be needed to meet the *Wingfoot* standard (and would also be necessary to meet the requirements of section 20(4) of the MAI Act, and to meet section 179 of the *Legislation Act 2001*).

50. Mr Crowe's argument was that the obligation to give reasons was constructively met by the reports and communications provided over a period of months. That argument cannot stand. I need only point to two matters on which no explanation

[35] [2013] HCA 43
[36] *Wingfoot* at [65]

whatsoever was ever provided. First, no reasons were given why Dr Tomlinson's refusal to determine a WPI came to be equated with 0% WPI; and second, no explanation or justification was offered for the insurer's having chosen Dr Tomlinson's WPI reports over that put forward by Dr Ridhalgh. There can be no doubt that the omission to explain these points was a failure to meet the standard set out in the previous paragraph: the insurer had failed to meet its obligation under section 20(4)(d) of the MAI Act; that failure was an error of law. I do not need to engage in the question whether this was jurisdictional error or an error of law on the face of the record, arguments on which were put to me by Mr Jones; this decision involved a finding of fact made other than by a lawful fact-finding process, and a failure to give reasons under a statutory obligation to do so. Sections 193 and 197, taken together, provide me with the power to set aside the decision without recourse to common law remedies such as certiorari.

51. Section 20(5) of the MAI Act states that in a dispute under the Act, this Tribunal, or a court, may take into account a duty imposed under section 20, and may make an order in relation to the exercise of that duty. In another case, this might mean that if, for example, an insurer had arrived at a final WPI offer by a sound and well evidenced process, but had neglected to provide written reasons, the Tribunal might leave the decision untouched but order that reasons be provided. But this is not such a case: the WPI decision was in error because the WPI figure offered had not been arrived at by a lawful fact-finding process, and also because no reasons for determining the WPI figure were provided. It could not be remedied simply by the provision of reasons.

52. The final WPI offer made by the respondent on 3 September 2024 is affected by error of law. The MAI Act in section 197(1) requires that on reviewing an externally reviewable decision, this Tribunal must affirm the decision, or amend it, or set it aside and either substitute its own decision, or else remit the matter to the insurer for reconsideration, with or without directions. On the basis of the errors identified above, the decision is set aside. This decision deals later with the question of whether substitution or remittal is the appropriate remedy.

**Should Dr Ridhalgh's supplementary report be admitted into evidence?**

53. On 10 October 2024 Mr Hernandez made an application to submit as evidence an

additional report by Dr Ridhalgh, dated 30 September 2024. The MAI Act limits this Tribunal, in reviewing an externally reviewable decision, to the evidence that was available to the insurer when the decision under review was taken;[37] but the Tribunal may, on application, admit further evidence that was not "reasonably available" at the time of the decision.[38]

54. At the hearing the applicant conceded that the report should not be admitted if the decision under review were to be affirmed, as it had not been written at the time of that decision, but submitted that if the decision were to be set aside, the report should be admitted into evidence. The respondent saw the report as of limited evidentiary value, but accepted that if the decision under review were set aside it could be admitted into evidence.

55. In this supplementary report Dr Ridhalgh corrects the issue pointed out by Dr Tomlinson in her Notice of affirmation or increase, identifying it as having arisen from a typographical error, and then applies the WPI derivation process to his corrected figures, arriving at a WPI of 11% (as opposed to the 12% in his earlier report). He then goes on to comment on the differences between his findings and those made by Dr Tomlinson, noting that his own assessment was four months after hers. He comments that Dr Tomlinson appeared to have been influenced by the applicant's 2015 shoulder injury, and that in his opinion she understated his symptoms, which were consistent with the comments made by the applicant's orthopaedic surgeon, Dr Vrancic, in her report on shoulder surgery in 2022. Dr Ridhalgh suggests that the applicant might have been affected by bursitis after the accident, and that the surgery might have caused joint stiffness, which has now moderated or disappeared.

56. I am satisfied that the supplementary report of Dr Ridhalgh is relevant, and was not available to the decision-maker at the time the decision was taken. I order that it be admitted as evidence.

**What remedy should be ordered?**

57. Having set aside the decision under review, I must either remit the matter to the

[37] MAI Act, section 197(2)
[38] MAI Act, section 197(3)

respondent (with or without directions) or substitute my own decision for that of the insurer. The MAI Act provides direction on how a review is to be conducted[39] but little general guidance is offered on the choices available once a decision has been set aside. There was some discussion about the question at the hearing, with the parties broadly in agreement that the Tribunal now finds itself in the shoes of the decision-maker, weighing up the options in a way that resembles merits review, but on the basis of the available evidence, which is limited to that available to the decision-maker, along with any evidence subsequently admitted. The applicant submitted that I should follow Dr Ridhalgh's two reports, remitting the matter to the insurer for a revised final offer WPI, with directions that the WPI should be set at 11%; the respondent submitted that I should remit the matter to the insurer with directions that further investigation be undertaken, by Dr Tomlinson or another IME.

58. The applicant pointed out that remittal with directions for further investigation risks the matter becoming yet again the subject of an application for external review once a new final offer WPI has been made. I do not give any weight to that argument: the risk of a further review application following remittal is part of the decision-making process, and should not be a consideration in coming to a new decision. Rather, the task for me now is to stand in the shoes of the insurer, and, in the first instance, consider the competing reports of Dr Tomlinson and Dr Ridhalgh. For the reasons explored above, Dr Tomlinson's WPI figure cannot be adopted, given the range of motion outcomes Dr Ridhalgh was able to obtain. Following the decision-making process set out in section 160 of the MAI Act, I should adopt Dr Ridhalgh's WPI outcome unless there is reason to believe that it was not properly arrived at – not in accordance with the MAI Guidelines, or otherwise unsound, for example the WPI was not properly supported by the evidence, or not properly calculated from the raw data, or the conclusions were not adequately explained.

59. It is instructive therefore to look at the criticisms of Dr Ridhalgh's report put forward by the respondent. First, Dr Ridhalgh, when asked whether Mr Hernandez's condition had stabilised, and whether he had reached Maximum

[39] MAI Act, section 197

Medical Improvement, responded "His condition has stabilised", without adding anything on Maximum Medical Improvement. Second, his report appears to have been written without the benefit of some of the imaging available to Dr Tomlinson, in particular the MRI of 22 March 2024. These were the only criticisms levelled at the report by the respondent. There was no suggestion that the range of motion outcomes obtained by Dr Ridhalgh was somehow wrong or mistaken.

60. The introductory section of the Assessment Guidelines sets out some prescriptive guidance on what is expected of an IME (or private medical examiner) in undertaking an assessment. Clause 1.6(a) reads as follows:

> *Assessing permanent impairment involves clinical assessment of the applicant as they present on the day of assessment taking account of the applicant's relevant medical history and all available relevant medical information in order to determine:*
>
> - *Whether the condition has reached Maximum Medical Improvement;*
> - *Whether the applicant's compensable injury/condition has resulted in an impairment;*
> - *Whether the resultant impairment is permanent;*
> - *The degree of permanent impairment that results from the injury; and*
> - *The proportion of permanent impairment due to any previous injury, pre-existing condition or abnormality, if any, in accordance with diagnostic and other objective criteria as outlined in the WPI Assessment Guidelines.*

61. The concept of an impairment relates to the person's capacity to perform normal activities of daily living (**ADLs**).[40] An assessment of the upper extremity will include a diagnosis of the condition or injury,[41] and there is detailed guidance on the assessment of range of motion[42] and of considerations relating specifically to shoulder conditions and injuries.[43]

62. There is a body of judicial opinion on what is required of an expert report if it is

[40] MAI (WPI Assessment) Guidelines, clause 1.24
[41] MAI (WPI Assessment) Guidelines, clause 2.3
[42] MAI (WPI Assessment) Guidelines, clause 2.5
[43] MAI (WPI Assessment) Guidelines, clauses 2.14-2.16

to be relied on by the courts.[44] The essence of that opinion is replicated in requirements in the Assessment Guidelines for a written report, with detail regarding its contents, completeness and matters that are to be documented.[45]

63. Clause 1.57 of the Assessment Guidelines, which is focused on avoiding or reducing disputes over WPI assessments, provides that "An insurer must accept an initial WPI assessment that is completed in accordance with the WPI Assessment Guidelines." The applicant has criticised Dr Tomlinson's reports, but no submission was made to me that they were inconsistent with the Assessment Guidelines; and I read the insurer's letter pressing Dr Tomlinson to identify a WPI figure as an attempt to obtain a more complete conformance with those Guidelines.

64. In my view, when Dr Tomlinson refused to identify a WPI she was signalling that further investigation was needed. She determined that the applicant had reached Maximum Medical Improvement in her supplementary report, and did not resile from that view. In calling, for example, for the applicant to see a pain specialist, I think she should be understood not to be recommending further treatment, but rather further investigation and analysis, to arrive at a reliable WPI figure. Further investigation is permitted under clauses 1.37-1.39 of the Assessment Guidelines, although it is discouraged unless essential to the assessment process.

65. It follows that it was not in Dr Tomlinson's reports that fault is to be found, but rather in the respondent's move to make a WPI offer of 0%, ignoring Dr Tomlinson's recommendation (which was perhaps not as explicit as it might have been), and deriving the 0% WPI from the refusal of Dr Tomlinson to determine a WPI, without authority from the MAI Act or the Assessment Guidelines, and without any explanation of how and why the 0% figure was arrived at. As noted above, clause 1.57 required the respondent to accept Dr Tomlinson's report if consistent with the Assessment Guidelines. I do not see the WPI offer as an acceptance of Dr Tomlinson's report.

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[44] See for example *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 35, *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, *Lang v The Queen* [2023] HCA 29

[45] MAI (WPI Assessment) Guidelines, *clauses* 1.46-1.50; see also *clause* 2.1

66. Turning then to Dr Ridhalgh, in my view, his report, and more particularly his report and supplementary report taken together, meet the test set by the Guidelines. The report of 22 July 2024 gives every appearance of a professionally prepared medico-legal report, appearing on MCLOA letterhead (as I understand it, the only authority for reports of this kind). In it Dr Ridhalgh noted that his specialty was appropriate for the assessment, provided an explanation and justification for undertaking the examination remotely, recorded the reports and other information provided to him, and reported the history given him by the applicant. An account follows of the examination, including that the applicant had difficulty undressing, and the range of motion outcomes reported above. Immediately following the range of motion table is the statement "There was gross weakness of power in both internal and external rotation.". Dr Ridhalgh noted that all other aspects of the upper extremity body system (cervical spine, hands, wrists and elbows) were normal.

67. Dr Ridhalgh's conclusions were that the applicant was suffering from supraspinatus tendinitis and bicipital tendinitis, and that on the balance of probabilities, these conditions were the result of the subject accident; he was aware of the earlier accident (from 2015) but apparently felt no need to make any deductions from the impairment scores. He noted that the condition had stabilised (without explicit comment on Maximum Medical Improvement), and forecast a poor prognosis: "The condition is unlikely to change substantially in the next year with or without medical treatment.". Dr Ridhalgh then derived a WPI score of 12%, applying the tables found in AMA5.

68. In his supplementary report Dr Ridhalgh was asked to comment on whether his WPI assessment should be preferred to that of Dr Tomlinson, and whether her reports were in error. Dr Ridhalgh was cautious on that second question, as might be expected, but he first corrected his WPI assessment, identifying a "typographical error" in recording the flexion of the left (uninjured) shoulder; correcting for that error yielded a revised WPI of 11%. Dr Ridhalgh then noted that his report was more recent (he said by four months but in fact the elapsed time was five months), suggested that Mr Hernandez's range of motion had significantly improved since Dr Tomlinson's examination, and noted that the

applicant's reports of pain were consistent with the shoulder condition identified by Dr Vrancic in her surgical report. He put forward an alternative hypothesis to that of Dr Tomlinson on why the range of motion outcomes she obtained were so much lower than his, involving bursitis following the accident and joint stiffness after surgery.

69. Putting all this together, one can see that Dr Ridhalgh concluded that the range of motion outcomes he obtained were consistent with the reported pain symptoms, and he mentioned several factors that pointed in that direction – the state of the shoulder as reported by Dr Vrancic, the gross weakness in rotation of the arm, the difficulty undressing, and perhaps the pain medication prescribed by the applicant's general practitioner (Lyrica and meloxicam, noted without comment). And it appears that he saw these factors as aligning with the imaging he was given and the diagnosis he had made. He did not make any deductions for the 2015 injury, but commented that the applicant's ability to undertake ADLs was unimpeded before the 2022 accident, implying that all loss of ability in that direction resulted from the subject accident.

70. The respondent contended that I could not adopt Dr Ridhalgh's reports as the basis for a WPI outcome, on review, because he had not been sent all the relevant imaging, in particular the latest MRI of 22 March 2024. It is certainly unfortunate that Dr Ridhalgh was not sent all the most recent imaging. The Assessment Guidelines require that a WPI assessment be carried out with all the relevant medical information at hand.[46] I find it hard to accept, however, that the omission of even a single report that was available at the time of an assessment would in every instance lead to an assessment being rejected, or having to be done a second time. It is apparent that Dr Ridhalgh was satisfied that the imaging he did have enabled a diagnosis, and that he did not see any problem of alignment of that diagnosis, the observed and reported symptoms, and the range of motion outcomes. When preparing his supplementary report Dr Ridhalgh had seen Dr Tomlinson's report (possibly only the first of her reports), and was therefore aware of her request for a further MRI, but he did not ask to see that imaging. I note too that Dr Tomlinson's suggestion in her initial report that a further MRI be

[46] MAI (WPI Assessment) Guidelines 2019, clause 1.6(a)

undertaken was aimed at clarifying her tentative diagnosis of adhesive capsulitis. Dr Ridhalgh arrived at a quite different diagnosis and evidently felt that he did not need further imaging in support of that diagnosis. And in her Notice of affirmation or increase, Dr Tomlinson made no criticism of the diagnosis.

71. It is true that Dr Ridhalgh did not offer an explicit opinion on Maximum Medical Improvement; but he said that the condition had stabilised and that statement, with his comments on prognosis, making exact use of the terminology in clause 1.15 of the Assessment Guidelines to explain the meaning of the concept, mean that he has in fact attested to Maximum Medical Improvement.

72. In my view, Dr Ridhalgh's reports are consistent with the Assessment Guidelines. Having determined that Dr Tomlinson's reports cannot be used to determine a WPI, and standing in the shoes of the insurer's decision-maker, I am encouraged by the logic of clause1.57 of the Assessment Guidelines to adopt the conclusions of Dr Ridhalgh's reports and set the final offer WPI at 11%.

**Conclusion**

73. The decision under review is set aside. The matter is remitted to the respondent for the making of a revised final offer WPI to the applicant, with the direction that the WPI is set at 11%.

74. It is unfortunate that the decision-maker for the decision under review did not compose written reasons for the final offer WPI. Not only is that a requirement under the good faith provisions of the MAI Act; a decision-maker drafting such reasons will be faced by a need to articulate why, in a given case, one medical conclusion should be preferred over another. In the present instance, if that step had been taken the need for the tribunal to resolve the dispute might have been avoided altogether.

**Costs**

75. Section 48 of the ACT Civil and Administrative Tribunal Act 2008 severely limits the award of costs in most matters coming before the tribunal. Section 198 of the MAI Act, however, allows the ACAT to make a costs order with regard to external review proceedings under that Act; the Act provides for a regulation

dealing with such orders,[47] and the *Motor Accident Injuries (ACAT Costs Orders) Regulation 2020* sets out the basis on which costs may be recovered.

76. In the present matter the applicant has succeeded, and costs should follow the event. I have made a costs order accordingly.

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Senior Member M Hyman

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**Amendment**

[1 August 2025] [Correcting the name referenced in paragraph 6 from Motor Accident Insurance Commission to Motor Accident Injuries Commission]

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| **Date(s) of hearing:** | 1 April 2025 |
| **Applicant:** | Mr B Jones and Mr J Treloar, authorised representatives |
| **Respondent:** | Mr D Crowe and Mr I Molenkamp, authorised representatives |

[47] MAI Act, section 198(4)