SUPREME COURT OF QUEENSLAND

CITATION:	*MBR v Parker* [2012] QCA 271
PARTIES:	**MBR** (appellant) **v** **DAVID PARKER** (respondent)
FILE NO/S:	Appeal No 11839 of 2011 SC No 166 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	5 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2012
JUDGES:	Margaret McMurdo P and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the orders of the primary judge.** **3. Instead, order that the decision of the respondent set out in the Health Assessment Report dated 16 March 2011, that the appellant is not fit to undertake his current position because of the restriction that he is unfit to operate due to a significant and foreseeable risk of sudden incapacity; that the duration of the appellant's restriction is permanent; and that no further review is necessary, be set aside.** **4. The respondent pay the appellant's costs of the appeal and the primary hearing.** **5. The appellant's name be anonymised in the Court's reasons for judgment and in the transcript of the appeal hearing provided to those other than the parties.** **6. No-one other than the parties be provided with court file copies of material relating or referring to the appellant's medical records without an order of a Supreme Court judge.**

CATCHWORDS: STATUTES – BY-LAWS AND REGULATIONS – CONSTRUCTION – PARTICULAR WORDS – where the respondent carried out a Health Assessment of the appellant on a form approved under the *Coal Mining Safety and Health Regulation* 2001 (Qld) ('the Regulation') made under the *Coal Mining Safety and Health Act* 1999 (Qld) – where the respondent found the appellant was permanently unfit to undertake his current position and no further review was necessary because of the appellant's body mass index (BMI) and neck circumference – where the appellant unsuccessfully sought judicial review of the respondent's decision – whether the respondent failed to comply with the requirements of s 46(3)(a) of the Regulation – whether there was evidence to support the respondent's decision – whether the names of the parties should be anonymised

Coal Mining Safety and Health Act 1999 (Qld)
Coal Mining Safety and Health Regulation 2001 (Qld), s 46, s 47, s 52
Judicial Review Act 1991 (Qld), s 20, s 24

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited
M v P [2011] QSC 350, related

COUNSEL: M Hinson SC, with C Hartigan, for the appellant
D O'Gorman SC for the respondent

SOLICITORS: Maurice Blackburn Lawyers for the appellant
Avant Law Pty Ltd for the respondent

[1] **MARGARET McMURDO P:** On 16 March 2011, the appellant was a 47 year old operator of heavy machinery at the Curragh coal mine. The respondent, Dr David Parker, carried out a Health Assessment of the appellant and completed a Health Assessment Report on 16 March 2011 on a form approved under the *Coal Mining Safety and Health Regulation* 2001 ("the Regulation") made under the *Coal Mining Safety and Health Act* 1999 (Qld) ("the Act").[1] The appellant applied for judicial review of Dr Parker's decision that the appellant was permanently unfit to undertake his current position and no further review was necessary. These are my reasons for allowing the appeal from the primary judge's order dismissing that application with costs.

[2] Although there are seven grounds of appeal, the appellant put forward only two alternate contentions. First, he contended the judge erred in not finding that Dr Parker failed to comply with s 46(3)(a) of the Regulation in that the Health Assessment was not carried out in accordance with the approved form. His second contention was that the judge erred in not concluding there was no probative evidence to support Dr Parker's decision. On either basis he contended that the appeal must be allowed, the primary judge's order set aside and instead an order setting aside Dr Parker's decision should be made.

[3] Before returning to discuss these grounds, I will deal first with a preliminary application. I will then set out relevant aspects of the legislative scheme under the

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1 It is common ground that the relevant reprint is Reprint 3E.

Act and Regulation; the approved form; the facts; and the competing contentions of the parties.

A preliminary application in this appeal

[4] Senior counsel for the appellant applied to have the names of the parties in this case anonymised in the manner adopted by the primary judge.[2] Portions of the appellant's medical records were in evidence both at the primary hearing and in this appeal. Counsel based his application primarily on s 52(1) of the Regulation which provides that a person must not disclose to anyone other than under this section the contents of a coal miner's medical record obtained under this division.

[5] To succeed in this application, the appellant must overcome the fundamental principle of our justice system that court proceedings are heard in public and the names of parties are not anonymised unless required by statute or where, in all the circumstances, the interests of justice so clearly favour anonymisation as to outweigh the public interest in open justice.

[6] Section 52 of the Regulation has no application to litigation before the Supreme Court or to the court's publication of its reasons for judgment. It follows that there is no statutory requirement to anonymise the parties' names in this case. It is clear, however, that the intent of s 52 is to protect the privacy of coal workers' personal medical records unless they are needed to treat a worker who is unable to consent to their disclosure (s 52(5)). Against this must be weighed the powerful public interest in open justice.

[7] I consider that the requirements for open justice and the desirability of protecting the privacy of the appellant's medical records are best balanced in this way. The law list on the hearing day of the appeal contained the names of the parties. The appeal was heard in open court where the parties' names were used throughout the hearing. When the Court's order in this appeal and the reasons for it are published, the law list will again contain the names of the parties. The parties will be provided with orders and reasons for judgment containing their names. But the Court's judgments are published on the internet, accessible to all who use the worldwide web, now and into the foreseeable future. They are electronically searchable so that countless people, if inclined, could access the appellant's medical records discussed in the reasons for judgment, something clearly contrary to the spirit of s 52 of the Regulation.

[8] After carefully considering the competing contentions, I would order that the appellant's name be anonymised in the Court's reasons for judgment and in any transcript of the appeal hearing provided to those other than the parties. I would also order that no-one other than the parties be provided with court file copies of material relating to or referring to the appellant's medical records without an order of a Supreme Court judge.

The relevant legislative framework

(a) The Act

[9] The Act's long title is "An Act to regulate the operation of coal mines, to protect the safety and health of persons at coal mines[3] and persons who may be affected by

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2 *M v P* [2011] QSC 350.

3 The term "[a] person's safety and health" is defined in s 11 of the Act as meaning a "person's ***safety and health***, to the extent it is or may be affected by coal mining operations or other activities at a coal mine".

coal mining operations, [4] and for other purposes". Part 1 of the Act (Preliminary) deals with the operation of the Act, its objects and some interpretation issues. The Act applies to everyone who may affect the safety or health of persons at a coal mine;[5] and as a result of coal mining operations.[6]

[10] The objects of the Act include to protect the safety and health of those to whom the Act applies; and to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level.[7] Those objects are to be achieved by, relevantly, imposing safety and health obligations on persons who operate coal mines or who may affect the safety or health of others at coal mines;[8] providing for safety and health management systems at coal mines to manage risk effectively;[9] making regulations for the coal mining industry to require and promote risk management and control;[10] and providing for the health assessment of coal mine workers.[11]

[11] The term "risk" is defined in s 18 of the Act as meaning "the risk of injury or illness to a person arising out of a hazard"[12] and is measured in terms of consequences and likelihood.[13] The term "hazard" is defined in s 19 of the Act as meaning "a thing or a situation with potential to cause injury or illness to a person".

[12] Part 2 of the Act deals with "The control and management of risk and other basic concepts". Part 2 div 1 deals with control and management of risk. Section 29 provides as follows:

> "**29 What is an acceptable level of risk**
>
> (1) For risk to a person from coal mining operations to be at an ***acceptable level***, the operations must be carried out so that the level of risk from the operations is—
>
> (a) within acceptable limits; and
>
> (b) as low as reasonably achievable.
>
> (2) To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to—
>
> (a) the likelihood of injury or illness to a person arising out of the risk; and
>
> (b) the severity of the injury or illness."

[13] Management and operating systems must be put in place for each coal mine to achieve an acceptable level of risk by providing systems to incorporate risk

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4 The term "coal mining operations" is defined in Sch 3 of the Act as: "activities, including on-site activities, carried out at a coal mine that are associated with the following in relation to coal or coal seam gas –
(a) exploration;
(b) extracting;
(c) the processing and treatment;
(d) installing and maintaining equipment used for extraction, processing and treatment".

5 The Act, s 5(a).

6 The Act, s 5(b).

7 The Act, s 6(b).

8 The Act, s 7(a).

9 The Act, s 7(b).

10 The Act, s 7(c).

11 The Act, s 7(k).

12 The Act, s 18(1).

13 The Act, s 18(2).

management elements and practices appropriate to identify, analyse and assess risk; and avoid or remove unacceptable risk; and monitor levels of risk and the adverse consequences of retained residual risk; and mitigate the potential adverse effects arising from residual risk.[14] If there is an unacceptable level of risk to persons at a coal mine, action must be taken to reduce the risk to an acceptable level.[15]

[14] Part 2 div 2 requires that coal operators, site senior executives and coal workers cooperate to achieve the objects of the Act.

[15] Part 3 div 1 of the Act imposes safety and health obligations on persons including the holder of an exploration permit, licence or lease for the coal mine, and coal mining operations.[16] Failure to discharge obligations is an offence.[17] Obligations in relation to risk can be discharged by complying with a relevant regulation or standard.[18] Part 3 div 2 lists the general obligations of persons at a coal mine.[19] Part 3 div 4 deals with defences in respect of obligations under pt 3 div 2 and 3.

[16] Part 4 (Provisions about the operation of coal mines) div 3 deals with the safety and health management systems for a coal mine, that is, a system which incorporates risk management elements and practices that ensure safety and health of persons who may be affected by coal mining operations.[20] Other parts of the Act deal with recognised standards for safety and health which state ways to achieve an acceptable level of risk to persons arising out of coal mining operations;[21] the Commissioner for Mine Safety and Health;[22] industry consultative arrangements;[23] site safety and health representatives;[24] industry safety and health representatives;[25] inspectors and other officers and directives;[26] a board of examiners as to certificates of competency under the Act;[27] accidents and incidents at a coal mine;[28] boards of inquiry;[29] mines rescue;[30] appeals against decisions under the Act;[31] legal proceedings;[32] offences;[33] and general safety and miscellaneous matters.[34] I mention these only to flesh out the scheme of the Act; none has particular relevance to this appeal.

[17] Part 18 (Administration) includes s 281 under which the chief inspector of coalmines may approve forms for use under the Act.

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14 The Act, s 30(1) and (2)(a)–(c) and (f).
15 The Act, s 31(1)(b).
16 The Act, s 33.
17 The Act, s 34.
18 The Act, s 37.
19 The Act, s 39.
20 The Act, s 62.
21 The Act, pt 5, esp s 71.
22 The Act, pt 5A.
23 The Act, pt 6.
24 The Act, pt 7.
25 The Act, pt 8.
26 The Act, pt 9.
27 The Act, pt 10.
28 The Act, pt 11.
29 The Act, pt 12.
30 The Act, pt 13.
31 The Act, pt 14.
32 The Act, pt 15.
33 The Act, pt 16.
34 The Act, pt 17.

[18] Part 19 (Regulations) is comprised only of s 282 which provides for the Governor-in-Council to make regulations in respect of those matters listed in sch 2 including:

> "2 Prohibiting anything or, prescribing anything, to achieve an acceptable level of risk.
> *Example of item 2 –*
> prescribing the level of respirable dust that is acceptable at a coal mine."

(b) The Regulation

[19] Chapter 1 of the Regulation deals with preliminary matters of no present relevance. Chapter 2 (All coal mines) contains s 5 which relevantly provides:

> "**5 Ways of achieving an acceptable level of risk**
> (1) This chapter, other than sections 47(3) and 52(1), prescribes ways of achieving an acceptable level of risk at a coal mine in the circumstances mentioned in the chapter.
> …
> (3) A person may discharge the person's safety and health obligation in the circumstances mentioned in this chapter only by following the prescribed ways."

[20] Chapter 2 pt 2 (Safety and health management system) div 1 (General) s 6 provides:

> "**6 Basic elements**
> A coal mine's safety and health management system must provide for the following basic elements—
> (a) risk identification and assessment;
> (b) hazard analysis;
> (c) hazard management and control;
> (d) reporting and recording relevant safety and health information and data."

[21] The remainder of ch 2, pts 2 to 5, deals with various mine safety matters which are of no present relevance.

[22] Chapter 2 pt 6 (Fitness for work) div 1 (General) deals with consumption of alcohol at a coal mine;[35] carrying out an activity at a coal mine or entering a part of the mine whilst under the influence of alcohol;[36] and a coal mine's safety and health management system for alcohol.[37] Section 42 relevantly provides:

> "**42 Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs**
> (1) A coal mine's safety and health management system must provide for controlling risks at the mine associated with the following—
> (a) personal fatigue;
> (b) other physical or psychological impairment;
> *Example of other physical or psychological impairment—*
> an impairment caused by stress or illness

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35 The Regulation, s 39.
36 The Regulation, s 40.
37 The Regulation, s 41.

(c) the improper use of drugs.

(2) The system must provide for the following about personal fatigue for persons at the mine—

(a) an education program;

(b) an employee assistance program;

(c) the maximum number of hours for a working shift;

(d) the number and length of rest breaks in a shift;

(e) the maximum number of hours to be worked in a week or roster cycle.

(3) The system must provide for protocols for other physical and psychological impairment for persons at the mine.

(4) The system must provide for the following about drug consumption or ingestion for persons at the mine—

(a) an education program;

(b) an employee assistance program;

(c) an obligation of a person to notify the site senior executive for the mine of the person's current use of medication that could impair the person's ability to carry out the person's duties at the mine;

(d) an obligation of the site senior executive to keep a record of a notification given to the site senior executive under paragraph (c);

(e) the following assessments to decide a person's fitness for work—

(i) voluntary self-testing;

(ii) random testing before starting, or during, work;

(iii) testing the person if someone else reasonably suspects the person's ability to carry out the person's duties at the mine is impaired because the person is under the influence of drugs.

(5) The site senior executive must consult with a cross-section of workers at the mine in developing the fitness provisions.

...

(8) In this section—

fitness provisions means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4)."

[23] Chapter 2 pt 6 div 2 (Coal mine workers' health scheme) sub-div 1 (Preliminary) applies div 2 to all coal mine workers other than those carrying out low risk tasks.[38] Chapter 2 pt 6 div 2 sub-div 2 (Nominated medical adviser) contains only s 45:

"**45 Appointment of nominated medical adviser**

(1) Each employer must—

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38 The Regulation, s 44.

(a) appoint, in writing, a doctor (the ***nominated medical adviser***) to carry out, supervise, and report on, health assessments under this division for the employer's coal mine workers; and

(b) as soon as practicable after making the appointment, give the chief executive a notice stating the nominated medical adviser's name and contact details; and

(c) as soon as practicable after the appointment ends, give the chief executive a notice stating when the appointment ended.

(2) The employer must include in the contract appointing the nominated medical adviser an obligation on the adviser to discuss, and give advice about, appropriate duties for the worker, under subsection (3).

(3) The discussions must be held with, and the advice given to, the employer and coal mine worker or the worker's representative.

(4) The employer must also include in the contract an obligation on the nominated medical adviser, if asked by a coal mine worker, to discuss the worker's health assessment with another doctor nominated by the worker."

[24] Chapter 2 pt 6 div 2 sub-div 3 (Health assessments and health monitoring) relevantly provides:

"**46 Health assessment**

(1) The employer must ensure a health assessment is carried out for each person who is to be employed, or is employed, by the employer as a coal mine worker for a task other than a low risk task.

(2) An assessment must be carried out—

…

(c) … periodically, as decided by the nominated medical adviser, but at least once every 5 years.

(3) An assessment must be carried out—

(a) in accordance with the instructions, and covering the matters, in the approved form; and

(b) by, or under the supervision of, the nominated medical adviser.

…

47 Employer's responsibility for health assessment

(1) The employer must—

(a) arrange for the health assessment or medical examination mentioned in section 46; and

(b) ask the nominated medical adviser to give—

(i) a health assessment report to the employer; and

(ii) a copy and explanation of the report to the person to whom it relates; and

(c) ensure, before an explanation of the report from the nominated medical adviser is given to the employer, the person to whom the health assessment report relates agrees to the giving of the explanation and is present.

(2) The nominated medical adviser must comply with a request under subsection (1)(b).

(3) The employer must pay for the following—

(a) the health assessment or medical examination;

(b) a copy of a report about the medical examination.

…

(4) Subsection (3) is not a safety and health obligation for the Act.

(5) Nothing in this division makes the employer responsible for the treatment of any physical or medical condition of the person.

48 Reviewing health assessment report

(1) This section applies if the employer is given a health assessment report (the ***original health assessment report***) about a coal mine worker showing the worker is unable to carry out the worker's tasks at the mine without creating an unacceptable level of risk.

(2) Before taking action to terminate the worker's employment or demote the worker, the employer must give—

(a) the worker a reasonable opportunity to undergo a further health assessment from another nominated medical adviser or relevant medical specialist chosen by the worker; and

(b) the nominated medical adviser or medical specialist details of the worker's tasks.

(3) Subsection (4) applies if the worker—

(a) undergoes the further health assessment; and

(b) gives the employer a report about the assessment (the ***further health assessment report***), signed by the nominated medical adviser or medical specialist who carried out the assessment.

(4) The employer must—

(a) give the nominated medical adviser who gave the employer the original health assessment report a copy of the further health assessment report; and

(b) ask the nominated medical adviser to—

(i) review the original health assessment report having regard to the further health assessment report; and

(ii) give both the employer and worker a report about the review.

(5) The worker must pay for the further health assessment."

[25] Where there are conflicting Health Assessment Reports the chief executive must appoint a relevant medical specialist to prepare a final report after reviewing the existing reports and, if necessary, carry out another assessment of the worker's health or a medical examination of the worker to resolve the conflict.[39] The employer may take action to terminate the worker's employment or demote the worker only if the worker does not undergo a requested assessment or examination when given a reasonable opportunity to do so, or the final report shows the worker is unable to carry out the worker's tasks at the mine without creating an unacceptable level of risk.[40]

(c) The approved form

[26] The relevant Health Assessment form was the seven page version dated 19 November 2010. Page 1 of the form comprised the appellant's name and date of birth, a statement of privacy obligations and guidance notes to the employer, the worker, the Examining Medical Officer (EMO) and the Nominated Medical Advisor (NMA) as to how to complete their respective Sections of the Health Assessment. The employer must arrange for the Health Assessment and complete Section 1 on p 2 of the form. The worker must bring photo identification for checking by the EMO and complete Section 2 on pp 2-3 of the form in which, relevantly, workers must set out their work history since their last Health Assessment. The EMO must check the photo identification provided by the worker, review Sections 1 and 2 with the worker, comment on any abnormality and then complete Section 3 on pp 4-6 of the form. The EMO, if not also appointed as the NMA, must not complete Section 4. The EMO must forward the completed Health Assessment to the NMA.

[27] The form provides that the NMA:

"Must review Sections 1, 2 and 3.
Must assess whether the Health Assessment provides adequate information to make a report on the fitness for duty of the coal mine worker.
If the coal mine worker has an abnormal colour vision and/or hearing result affecting fitness for duty, a practical test should be arranged.
Must complete 'Section 4 Health Assessment Report'.
Must provide an explanation of 'Section 4 Health Assessment Report' to the Coal Mine Worker and, where practical, secure the signature of the Coal Mine Worker on the Health Assessment Report.
Must provide a copy of 'Section 4 Health Assessment Report' to:
- the Coal Mine Worker at the address shown on page 2; and
- the employer.
Must forward a copy of the complete 'Health Assessment Form' (all 7 pages) to the Health Surveillance Unit of the Department of Employment, Economic Development and Innovation.
Must maintain secure records of the Health Assessment and associated documentation."

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39 The Regulation, s 48A(2).
40 The Regulation, s 48A(6).

[28] Section 4 on p 7 of the form relevantly provided:

> "As at the date of this examination, the coal mine worker:
> ℃ is fit to undertake any position
> ℃ is fit to undertake the proposed/current position
> ℃ is fit to undertake the proposed/current position subject to the following restriction(s) (if necessary, outline a management program)
> ……
> ℃ is not fit to undertake the proposed/current position because of the following restrictions(s):
> ……
> The duration of the restriction is:
> Is a further review necessary? Yes ℃ Date / / No ℃
> …
> As Nominated Medical Adviser I have explained the restriction/additional assessment to the worker Yes ℃ No ℃
> As Nominated Medical Adviser I have provided a copy of Section 4 to the worker … Yes ℃
> …"

Relevant factual background

[29] The following facts are not in dispute. The appellant is a coal miner for the purposes of s 46(1) Regulation.[41] His position as a heavy machinery operator is not a "low risk task". Accordingly, his employer was required to ensure he had a periodic Health Assessment and could act on that assessment to terminate his employment under ch 2 pt 6 div 2 of the Regulation.[42] His employer appointed Dr Parker as NMA to carry out the appellant's Health Assessment under s 46(1)(c) Regulation.

[30] The appellant in Section 2 of the form stated that his last medical examination of this kind was in August 2006; he had never had an illness, operation or injury preventing him from undertaking his normal duties for more than two weeks; and he was not taking medication. He wore hearing protection whilst in noisy areas and smoked five cigarettes a day. He had never had heart disease or heart surgery; chest pain, angina or tightness in the chest; high blood pressure; asthma, bronchitis or other lung diseases; abnormal shortness of breath or wheezing; deafness, loss of hearing or ear problems; ringing noises in ears; other hearing difficulties; disease or disorder of the nervous system; episodes of numbness or weakness; psychiatric illness; blackouts, fits or epilepsy; RSI tenosynovitis, overuse syndrome or wrist strain. He did not have diabetes, sciatica, lumbago, slipped disc, knee problems, cartilage injury, fractures or dislocations; shoulder, knee or other joint injury, hernia, arthritis or rheumatism, dermatitis, eczema or skin problems, allergies, allergic reaction or reaction to chemicals or dust. He had, however, previously suffered from back or neck pain preventing him from undertaking full duties and a neck injury or whiplash. This occurred when in February 2011 he suffered a soft tissue injury to his neck which required physiotherapy and about 10 days off work. He was assessed as fully fit from 10 March 2011.

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41 Set out at [24] of these reasons.

42 Set out at [24]–[25] of these reasons.

[31] Dr Parker's report to the employer was based on the EMO's (Dr Huda's) examination of the appellant. The appellant had been Dr Huda's patient since August 2006 when he examined him as NMA for a Health Assessment Report. He concluded that the appellant was then fit to undertake his work. On 15 March 2011, Dr Huda undertook a Health Assessment as EMO and completed Section 3 of the form.

[32] Under the heading "Clinical Findings" he noted the appellant was 179 cm high and weighed 163 kg. In the box headed "Comment" he noted: "BMI # 50.8".[43] (I observe that the primary judge seems to have mistakenly thought that "BMI" was part of the form.)[44] Under the heading "Examining Medical Officer's comments on Questions 3.1 to 3.7, he noted: "Has been doing regular exercise last 3/12 – good [indecipherable] – seen dietician a few times".

[33] Under Section 3.8 (Cardiovascular System) he recorded that the appellant's blood pressure systolic was 136 and diastolic 81 and his pulse rate was 83/min "Reg". His peripheral pulses were present and heart sounds normal. There was no evidence of cardiac failure, oedema or varicose veins. As he left blank the form's Section 3.8(h), "E.C.G. (if indicated by some abnormality)", it can be inferred that no ECG was conducted. Dr Huda made no notations in the space allotted for comments on Section 3.8.

[34] He recorded that his examination of the appellant's respiratory system did not reveal any abnormalities. He completed a "Berlin Questionnaire" concerning the appellant. The questions were designed to detect symptoms of sleep apnoea. Dr Huda noted in Section 3 of the form that the Questionnaire result for sleep apnoea was negative; the appellant's neck circumference was 52 cm; and no sleep study was required. No sugar, protein/albumin or blood was found in the appellant's urinalysis. His musculo-skeletal system was normal. Neither his dietary habits exercise routine, stress level, consumption of alcohol, unprescribed drugs or medication were likely to affect his fitness for duty. There was no reason why he was not fit for duty in relation to work as an operator of or working around heavy vehicles; underground (including use of self rescue breathing devices and escape); shift work; performing heavy manual handling; in wet, muddy or dusty conditions; at height or on ladders; in confined spaces; or while wearing safety footwear or other personal protective equipment such as ear plugs, glasses and respirators.

[35] Although Dr Huda is an appointed NMA for numerous employers, the appellant's employer appointed Dr Parker as NMA. Dr Parker relevantly completed Section 4 of the form as follows:

> "As at the date of this examination, the coal mine worker:
> ☐ is fit to undertake any position
> ☐ is fit to undertake the proposed/current position
> ☐ is fit to undertake the proposed/current position subject to the following restriction(s) (if necessary, outline a management program)
> ……
> ☑ is not fit to undertake the proposed/current position because of the following restrictions(s):

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[43] "Body Mass Index" is a figure calculated by dividing an individual's weight by the square of his or her height. It is an approximation only and does not actually measure the person's body fat.

[44] *M v P* [2011] QSC 350, [33], [71].

> Unfit to operate due to a significant and foreseeable risk of sudden incapacity
>
> The duration of the restriction is: Permanent
>
> Is a further review necessary? Yes ☐ Date / / No ☑
>
> As Nominated Medical Adviser I have explained the restriction/additional assessment to the worker Yes ☑ No ☐
>
> As Nominated Medical Adviser I have provided a copy of Section 4 to the worker … Yes ☑
>
> …"

[36] At the time of the assessment, Dr Parker had not met the appellant; his assessment was based entirely on the information provided by Dr Huda. This included the appellant's height, weight and calculated BMI as well as his neck circumference.[45] Dr Parker formed the view that the appellant's BMI and neck circumference indicated that he was obese and by reason of that condition was at significant risk of a sudden cardiac event. An operator of large machinery at a coal mine suffering a sudden cardiac event could pose serious risks to himself and fellow workers. Accordingly, he found the appellant was unfit to undertake his current position.

[37] Dr Parker explained his decision in a letter to the appellant dated 16 March 2011 as required by s 47(1)(b) and (2)[46] in these terms:

> "I have made you unfit for operating duties as I believe that there is a significant risk to you of a cardiac event due to your obesity. In order for me to pass your medical I would need you to undergo further assessment to ensure that your cardiac risk is acceptable, and also a functional assessment to ensure there is no risk to you from performing the inherent duties of an operator.
>
> I would advise you to see your medical practitioner for further assessment of your risk factors.
>
> I hope this explains the information on your Section 4.
>
> If you require further clarification, please call me on [phone number]."[47]

[38] Dr Parker wrote on 7 April 2011 in response to a letter from the appellant's trade union in terms including:

> "I accept that by describing the restriction as permanent [this] appears inconsistent as I have offered review after further assessment in my letter to [the appellant]. I am happy to adjust this restriction to temporary.
>
> However, I consider that there is a increased risk of sudden incapacity and the restriction remains in force at present. This is to prevent risk to [the appellant] and to his fellow workers.
>
> …
>
> He has opted to ask you to act on his behalf. I am therefore advising you that under s 48(2)(a) of the regulations, [the appellant] is entitled

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45 See [32] of these reasons.

46 Set out at [24] of these reasons.

47 Above, [6].

> to undergo a further assessment by another NMA or relevant medical specialist of his choice.
>
> And that (b) the NMA or medical specialist must be provided details of [the appellant's] tasks.
>
> Once I receive this assessment under s 48(4)(b) of the regulations I will review my assessment with regard to the second assessment."

[39] In his evidence before the primary judge Dr Parker agreed there was nothing in Section 3.8 of the form completed by Dr Huda as EMA, which concerned the appellant's cardiovascular system, to raise any concerns about his ability to perform his work. Nor was there anything in the Berlin Questionnaire to suggest he had an increased risk of sleep apnoea other than that his 52 cm neck circumference. Dr Parker pointed out that the appellant's recorded statements were difficult to objectively assess, apart from his neck circumference and blood pressure. But he agreed that, apart from the appellant's height, weight and neck circumference, there was nothing in the EMO's assessment that detrimentally affected the appellant's fitness for work.

[40] Since his 2006 Health Assessment, the appellant had gained 10 kg; he then weighted 153 kg, with a BMI of 48.29 and a neck circumference of 52 cm. Males with neck circumferences over 44 cm were at a higher risk of sleep apnoea, a condition which makes them at increased risk of cardio-vascular disease. As a medical professional, he relied on validated studies of others which showed that people like the appellant with malignant obesity are at a very much higher risk of sudden incapacity through stroke or cardiovascular events. If required, he could produce these studies. He took them into account when determining that the appellant was unsuitable to work in a safety-critical role in the mining industry.

[41] Although the appellant was not presently prevented from performing his tasks as an operator because of a cardiac event, he would be if he had a sudden cardiac event. The probability of this occurring heightened with increased obesity. Morbid obesity was categorised as a BMI of 40 or above. Malignant obesity was a BMI of 50 or above. The morbidly obese were more at risk of illness including cancer, diabetes, osteoarthritis and cardiovascular issues. Those within the normal weight range could also suffer from these diseases and a morbidly obese person may not. It was a question of probabilities. It was not possible to determine from someone's BMI what, if any, disease they were likely to get.

[42] Dr Parker stated that in his assessment there was a significant foreseeable risk that the appellant would develop a sudden incapacity and that accordingly it was his duty as NMA to ensure that other workers were not put at risk.

[43] In his letter to the appellant of 16 March 2011 he was wanting to communicate that, although he had identified a risk and had therefore assessed him as unfit, if Dr Parker could quantify the risk with further assessment he may be able to re-assess the matter; it was not that he required further information to complete his Health Assessment Report. But on the basis of the Health Assessment completed by Dr Huda as EMO on 15 March 2011, he could not assess the appellant as fit to work in a safety-critical role. In relation to his letter of 7 April 2011, he agreed that he wrongly assessed the appellant's restriction as permanent but at the time of his Health Assessment Report he thought that the appellant would not lose sufficient

weight to alter his obesity in the foreseeable future, so that his assessment was not dependant on any further assessments. That was why he stated the appellant's restriction was permanent and that a further review was not necessary.

The appellant's contentions

[44] The appellant contended that Dr Parker was obliged under s 46(3) Regulation[48] to carry out the Health Assessment according to the instructions on the form. This required him as NMA to review Sections 1, 2 and 3 of the form; assess whether the Health Assessment in Section 3 provided adequate information for him to make a report on the appellant's fitness for duty; to then complete Section 4 of the form and to provide a copy and an explanation of Section 4 to the appellant. At the time of Dr Parker's assessment, Section 3 of the form (the clinical findings of Dr Huda as EMO) showed that the appellant was capable of performing his duties as a coal mine worker and had no current condition or impairment which restricted his ability to do so. But Dr Parker applied his knowledge of statistical studies to information in Section 3 of the form about the appellant's height, weight and neck circumference to conclude that he was unfit for duties as a coal mine worker due to a significant and foreseeable risk of sudden incapacity.

[45] The identification of such a risk was outside the scope of a Health Assessment report under s 46(3). Section 4 of the form required the NMA to identify a "restriction(s)" which make him "not fit to undertake his … current position". The term "restriction" connotes some present physical condition which impairs the ability to perform the tasks required by the position. Section 3 of the form made clear that the appellant had no such physical restriction. Section 4 was concerned only to identify restriction(s) which presently affect the fitness of an individual worker to undertake his position, not to identify potential or future health risks. The Act and Regulation are not concerned to avoid all risk, but to achieve acceptable levels of risk, having regard to the likelihood of injury or illness and the severity of injury or illness: see the definition of "risk" in s 18, and s 29 of the Act.[49] The legislative scheme is not concerned with the risk of a worker developing an illness or other condition in the future but with fitness for work in the sense of ability and capacity to perform the tasks of the relevant position at the time of the assessment.

[46] If Dr Parker was entitled to address the risk of whether the appellant might develop an illness or condition in the future, he should have concluded that the Health Assessment Form in its Sections 1, 2 and 3 did not provide adequate information for him to report on the appellant's fitness for duty.

[47] The appellant's second contention is that, as a matter of law, there was no probative evidence capable of supporting Dr Parker's decision that the appellant was unfit to undertake his current position and that the restriction was permanent. Section 47(1)(b)(ii) Regulation[50] requires an employer to ask the NMA to give a copy and explanation of the Health Assessment Report to the worker. The form reflects this. As Dr Parker conceded, his letter to the appellant of 16 March 2011 was inconsistent with his Report. The restriction was not necessarily permanent and the appellant could undergo a further Health Assessment by another NMA or relevant medical specialist of his choice, in which case Dr Parker would review his

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48 Set out at [24] of these reasons.

49 See [11]–[12] of these reasons.

50 See [24] of these reasons.

assessment. It follows, the appellant contends, that Dr Parker's letter of 16 March 2011 did not explain the Report as required by s 47(1)(b)(ii) as the Report wrongly described the condition as permanent and that no further review was required. That error requires the setting aside of Dr Parker's assessment.

The respondent's contentions

[48] Counsel for Dr Parker contended as follows. The form must be interpreted in the context of the Act and the Regulation. That context makes clear that the Health Assessment is looking not only at workers' present ability to perform their duties but whether their health poses a future risk. Dr Parker was entitled under the Act, the Regulation and the approved form to conclude on the information before him that the appellant was restricted from being able to perform his duties as he was totally unfit to work as an operator due to the significant and foreseeable risk of sudden incapacity. This followed from his neck circumference and BMI which placed him in the malignantly obese category. As a result, he had a much higher risk of illness, including sudden cardiac arrest, than those who were not obese. In explaining this to the appellant in the letter of 16 March 2011, which was confidential and not provided to the employer, Dr Parker stated that he had made him unfit for operating duties because there was a significant risk to him of a cardiac event. This was consistent with the requirements under the approved form, s 46(3)(a) Regulation and the Act.

[49] The correctness of this conclusion was not affected by Dr Parker's confidential letter of explanation of 16 March 2011 that the appellant may be able to pass his medical if he underwent "further assessment to ensure that [his] cardiac risk is acceptable, and also a functional assessment to ensure there is no risk to [him] from performing the inherent duties of an operator".[51]

Did Dr Parker fail to comply with the requirements of s 46(3)(a) of the Regulation?

[50] It is common ground that Dr Parker's decision is reviewable under the *Judicial Review Act* 1991 (Qld) and that the appellant, as a person aggrieved by his decision, has standing to apply for review. The first question for this Court's determination is whether the primary judge erred in not finding that Dr Parker failed to comply with the requirements of s 46(3)(a) Regulation. As the primary judge recognised, there are persuasive competing contentions and the answer is not easy.[52]

[51] The relevant objects of the Act[53] under which the Regulation is made[54] and how those objects are to be achieved[55] are set out earlier, together with the Act's definition of "risk" and "hazard".[56] The risk to a person from coal mining operations must be kept at an acceptable level by carrying out the operations so that the level of risk is within acceptable limits and as low as reasonably achievable, having regard to the likelihood of injury or illness to a person arising out of the risk and the severity of the injury.[57] Each coal mine is required to achieve an acceptable

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51 Letter of 16 March 2011, AB 50.
52 *M v P* [2011] QSC 350, [64].
53 Relevantly set out at [9] of these reasons.
54 See s 282 of the Act, discussed in [18] of these reasons.
55 See [10] of these reasons.
56 See [11] of these reasons.
57 The Act, s 29, set out at [12] of these reasons.

level of risk through management and operating systems incorporating risk management elements and practices by identifying, analysing and assessing the risk; avoiding or removing unacceptable risk and monitoring levels of risk and the adverse consequences of retained residual risk.[58] Coal mines must have in place a safety and health management system which is adequate and effective to achieve an acceptable level of risk, including the coal mine operator's safety and health policy and principal hazard management plans.[59]

[52] The Regulation provides for a coal mine safety and health management system to include risk identification and assessment; hazard analysis; and management and control.[60] Its pt 6 deals with fitness for work in coal mines. Chapter 2 pt 6 div 1[61] is concerned to limit the risk of workers endangering themselves or others at coal mines whilst under the influence of alcohol or drugs or through other physical and psychological impairments. All this makes clear that the Act and the Regulation have the commendable purpose of limiting the risk of harm to those at coal mines to an acceptable level.[62] This is to be achieved by ways including health assessments of workers aimed at detecting, relevantly, workers' physical impairments[63] with the potential to cause injury to the workers or others at the coal mine.[64]

[53] It is in the Regulation's ch 2 pt 6 div 2 (Coal mine workers' health scheme) where the critical s 46 is found. Section 46(3)[65] mandated that Dr Parker, as NMA, carry out his part of the appellant's health assessment in accordance with the instructions and covering the matters in the approved form.[66] The form required him to review its completed Sections 1, 2 and 3. If the health assessment in Section 3 was adequate and the appellant's colour vision and hearing results were normal, it next required him to complete Section 4.[67] The form's Section 4 required him to assess at the date of the examination whether or not the appellant "is fit to undertake" his current position as operator and whether or not his fitness is subject to a restriction or restrictions.[68] Dr Parker ticked the box next to the words "Is not fit to undertake the proposed/current position because of the following restriction(s)". He gave as his justification for this decision in the space provided: "Unfit to operate due to a significant and foreseeable risk of sudden incapacity".[69]

[54] The term "restriction" is not defined in the approved form, the Regulation or the Act. It must be given its ordinary meaning in the text and context of the form, the Regulation and the Act, also taking into account the purpose of the Act. According to the Macquarie Dictionary it means: "1. something that restricts; a restrictive condition or regulation; a limitation. 2. the act of restricting. 3. the state of being restricted."

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58 The Act, s 30.
59 The Act, s 62, referred to in [16] of these reasons.
60 The Regulation, s 6, set out in [20] of these reasons.
61 See [21] of these reasons.
62 The Act, s 29, set out at [12] of these reasons.
63 See s 42, Regulation, set out at [22] of these reasons.
64 See the definition of "risk" under the Act in s 18 and s 19, discussed in [11] of these reasons.
65 See [24]of these reasons.
66 It is also common ground that s 46(4) and (5) Regulation have no application here.
67 See [27] of these reasons.
68 See [28] of these reasons.
69 See [27] of these reasons.

[55] It is clear from Dr Parker's subsequent correspondence with the appellant,[70] from his evidence[71] and from Section 3 of the approved form completed by the EMO, Dr Huda,[72] that, at the time Dr Parker completed Section 4, the appellant had no restrictions, in the ordinary sense of that word, on his fitness to undertake his current position. It is true, as Dr Parker appreciated, that the Act and the Regulation are sensibly intended to prevent potential injury to those at coal mines by ensuring that risks and hazards are kept to acceptable levels. It is arguable that there is some tension between s 48(1) Regulation[73] and the terms of the form with which s 46(3) Regulation requires compliance. But I consider these provisions can be construed harmoniously. The fact that the appellant had a BMI (calculated from his weight and height) and a neck circumference of 52 cm, matters which statistically placed him at greater risk of a future cardiac event than those who are not obese and have a smaller neck circumference, was not a present restriction on his capacity to work as an operator. As the primary judge noted, at the time of Dr Parker's Health Assessment, the appellant was not subject to any physical restrictions which made him unfit to undertake his current position.[74] The form did not require Dr Parker as NMA to address whether the appellant may be at risk of developing a restriction making him unfit to undertake his current work in the future. It required him to identify present restrictions which, in terms of s 48(1) Regulation, showed he "is unable to carry out [his] tasks at the mine without creating an unacceptable level of risk". If the form intended an NMA to predict whether the worker was at risk of developing future restrictions, it could be expected to have said so in terms and to have also addressed other future risk factors not amounting to present restrictions, such as family history of sleep apnoea, cardiac disease, cancer, diabetes and so forth. As Dr Parker fairly conceded in his evidence, despite the appellant's obesity and neck circumference, he may never develop cardiac disease, cancer, diabetes and so forth and may never have a sudden cardiac event.[75] It seems more likely that the information in the form as to height and weight (from which the BMI is calculated) and neck circumference is either to allow the EMO and the NMA to warn the worker of the general health dangers of obesity and the general health benefits of losing weight, or to identify where the worker's height or weight is a restriction which makes them physically unable to undertake their proposed or current position without creating an unacceptable level of risk. Examples of the latter scenario would be a short person whose legs or arms could not reach pedals or levers necessary to operate machinery or a large person who was too big to physically work in a confined work space.

[56] The construction I take of the terms of Section 4 of the form gives "restriction" its ordinary meaning and sits harmoniously with the purpose and terms of the Act and the Regulation under which the form is made. As Dr Parker conceded in evidence, it is not possible to accurately predict from the appellant's BMI or neck circumference whether he will develop a cardiac illness or be subject to a sudden cardiac event. The Act and the Regulation are not concerned with the impossible task of avoiding all risk of injury but with keeping risk to an acceptable level. The form does that by concerning itself with present restrictions which could make the

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70 See [37] and [38] of these reasons.
71 See [39] of these reasons.
72 See [31]–[34] of these reasons.
73 See [24] of these reasons.
74 *M v P* [2011] QSC 350, [63].
75 See [41] of these reasons.

appellant unfit to undertake his current position, including restrictions which would create an unacceptable level of risk. But it does not require an NMA completing Section 4 to make predictions about whether the worker may develop such a restriction in the future. This construction is also consistent with s 42(1)(b) and (3) of the Regulation which are concerned with a safety and health management system of present physical impairment.

[57] It follows that Dr Parker as NMA did not carry out his part of the appellant's Health Assessment "in accordance with the instructions, and covering the matters, in the approved form" as s 46(3) Regulation required. The appeal must be allowed and the order of the primary judge and the decision of Dr Parker set aside.

[58] The appellant raised a further contention in his written submissions. If Dr Parker was entitled to address the appellant's future risk of developing a restriction which would make him unfit for duty, he should have concluded that Sections 1, 2 and 3 of the form did not provide adequate information for him to do so.[76] In light of the nature of judicial review of factual findings,[77] that submission is not promising. No doubt that is why the appellant's written submissions did not develop it and the appellant's counsel did not pursue it in his oral submissions. But in any case, my conclusion as to the appellant's primary contention, makes it unnecessary to determine.

[59] In case I am wrong as to the appellant's central argument and Dr Parker's assessment of the appellant's future risk of developing a restriction rendering him unfit to perform his current duties was within the scope of his task in Section 4 of the form, I should deal with the appellant's second contention.

Was there any evidence to support Dr Parker's decision that the appellant's restriction making him unfit to undertake his current position was permanent and that no further review was necessary?

[60] The appellant's alternative contention is that there was no evidence to support Dr Parker's findings that the appellant's stated "restriction(s)" (Unfit to operate due to a significant and foreseeable risk of sudden incapacity) were permanent and did not require further review. This was inconsistent with his later correspondence with the appellant which indicated that further assessments may demonstrate that his cardiac risk was acceptable and that he was not a risk when performing his duties as an operator. In fact, any restriction was temporary, as Dr Parker's letter of 7 April 2011 identified. It followed, the appellant contended, that these unsustainable factual findings tainted Dr Parker's reasons for concluding that the appellant's "restriction(s)" made him unfit to undertake his current position. The entire decision should be set aside.

[61] A judicial review of a decision-maker's factual findings will only be successful if the finding of fact, including inferences, was made with no evidence or other material to justify the making of the decision. The question whether there is any evidence of a particular fact is a question of law: *Australian Broadcasting Tribunal v Bond*.[78] Under s 20(2)(h) *Judicial Review Act* the appellant can apply for judicial

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76 Appellant's amended outline of argument, [27].

77 Discussed in [61] of these reasons.

78 (1990) 170 CLR 321, 355–356 (Mason CJ), Brennan J agreeing at 365, and Toohey and Gaudron JJ agreeing on this point at 387.

review on the basis "that there was no evidence or other material to justify the making of the decision". That ground is not made out in this case unless there was no evidence from which Dr Parker could or can reasonably be satisfied that the matter was or is established (s 24(a)(ii) *Judicial Review Act*) or Dr Parker's decision was based on the existence of a particular fact which did not or does not exist (s 24(b) *Judicial Review Act*).

[62] Dr Parker frankly conceded that he wrongly described the appellant's "restriction" as permanent.[79] In his evidence he sought to justify his assessment in Section 4 of the form that no further review was necessary on the basis that, on the appellant's present BMI and neck circumference, he was unfit to undertake his current position and he was unlikely to lose weight in the foreseeable future. But the only rational inference from his subsequent correspondence with the appellant was that a more detailed and favourable medical examination may persuade him that the appellant was fit to undertake his current position. In those circumstances, I accept the appellant's contention that there was no evidence from which Dr Parker could reasonably be satisfied that the appellant's unfitness to undertake his present position was either permanent or did not necessitate a further review. Those findings should be set aside.

[63] But Dr Parker's central conclusion, that the appellant was not fit to undertake his current position because of his "restriction(s)", namely, unfitness to operate due to a significant and foreseeable risk of sudden incapacity, was not dependent on his unsupported findings that the restriction was permanent and did not necessitate further review. Those findings were subsequent to the central findings. They do not provide any logical reason to set aside that part of Dr Parker's decision.

[64] It follows that I agree with the primary judge's reasons for rejecting the appellant's second contention.[80] If I am wrong as to the appellant's first contention, I would set aside only that part of Dr Parker's decision that the appellant was permanently restricted and did not necessitate further review. But for the reasons I have given, I would accept the appellant's first contention and allow the appeal.

ORDERS:

1. Allow the appeal.
2. Set aside the orders of the primary judge.
3. Instead, order that the decision of the respondent set out in the Health Assessment Report dated 16 March 2011, that the appellant is not fit to undertake his current position because of the restriction that he is unfit to operate due to a significant and foreseeable risk of sudden incapacity; that the duration of the appellant's restriction is permanent; and that no further review is necessary, be set aside.
4. The respondent pay the appellant's costs of the appeal and the primary hearing.
5. The appellant's name be anonymised in the Court's reasons for judgment and in the transcript of the appeal hearing provided to those other than the parties.
6. No-one other than the parties be provided with court file copies of material relating or referring to the appellant's medical records without an order of a Supreme Court judge.

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79 See [43] of these reasons.

80 *M v P* [2011] QSC 350, [16]–[18].

[65] **FRASER JA:** I have had the advantage of reading the reasons for judgment of the President. I agree with those reasons and with the orders proposed by her Honour.

[66] **WHITE JA:** I have read the President's reasons in this appeal and agree with them and the orders which her Honour proposes.