WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **660/12**
Applicant: **Dimity Maree Blackie**
Respondent: **Australian Jockey Club**
Date of Determination: **13 August 2019**
Citation: **[2019] NSWWCC 273**

The Commission determines:

1. The application to reconsider the Certificate of Determination dated 14 June 2012 is declined.

A statement is attached setting out the Commission's reasons for the determination.

Catherine McDonald
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CATHERINE McDONALD , ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Dimity Maree Blackie suffered hernia injuries as a result of her employment between 1 July 2003 and 30 December 2005 in the course of her employment with the Australian Jockey Club at Randwick Racecourse.

2. Ms Blackie's permanent impairment claim was the subject of a Medical Assessment Certificate (MAC) dated 19 November 2010 in which the Approved Medical Specialist (AMS) assessed 0% whole person impairment (WPI). That MAC was the subject of a medical appeal which was determined on 19 November 2010. The Appeal Panel assessed 10% WPI, being 9% as a result of recurrent hernias and 1% for ilioinguinal neuralgia.

3. In 2012, Ms Blackie commenced the current proceedings seeking further compensation. She was assessed by a second AMS, Dr J Dixon-Hughes who assessed 11% WPI – 9% in respect of recurrent hernias, 1% in respect of left ilioinguinal nerve damage and 1% in respect of right ilioinguinal nerve damage. The second AMS issued a MAC dated 1 May 2012.

4. A Certificate of Determination (COD) was issued on 14 June 2012 reflecting an agreement reached at a telephone conference that Ms Blackie would receive compensation for a further 1% WPI together with compensation for pain and suffering.

5. Ms Blackie was referred to a third AMS, Dr J Garvey, who prepared a MAC dated 3 September 2013. The purpose of the referral was to determine whether further surgery was reasonably necessary medical treatment. Though he was not asked to do so, the third AMS assessed WPI of 23%. An amended MAC was issued, deleting the assessment of WPI.

6. On 25 June 2019, Ms Blackie's current solicitor wrote to the Commission seeking reconsideration of the MAC dated 1 May 2012. That request was listed for telephone conference on 23 July 2019 when Ms Blackie was represented by Mr D Epstein of counsel. Counsel acknowledged that the application which was in fact made was for reconsideration of the COD dated 14 June 2012. The application is opposed by the Australian Jockey Club (the Club).

7. Directions for the filing of evidence and submissions with respect to the application for reconsideration of the COD were made. The parties were informed that a decision would be made on the papers when those documents had been filed.

SUBMISSIONS AND FURTHER EVIDENCE

8. The letter dated 25 June 2019 applied for reconsideration of the MAC dated 1 May 2012. Ms Blackie submitted, through her solicitor, that the second AMS was in error to assess

> "Bilateral inguinal and femoral hernias with more than one recurrence, now satisfactorily repaired with permanent restriction of activity (lifting):- 9%."

9. Ms Blackie submitted that she should have been assessed as having 9% WPI for each of the left and right hernias, relying on paragraph 16.6 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th edition 2016, (the 4th edition Guidelines) which provides:

> "A person who has suffered more than one work related hernia recurrence at the same site and who has limitation of activities of daily living should be assessed as herniation class 1, Table 6 – 9 p136."

10. She made this submission on the basis that the AMS found bilateral inguinal hernias, each of which had more than one recurrence. She was then represented by different solicitors and submitted that it is not known why the consent orders were entered into and why an appeal in respect of the MAC was not considered.

11. By way of explanation for the delay, Ms Blackie noted that she had been referred to the third AMS who had assessed permanent impairment at 9% in respect of each of the bilateral hernias. She submitted that this assessment should have alerted her former solicitors to the possible error in the 2012 MAC.

12. Ms Blackie's former solicitors then referred her to Dr D P Kumar who prepared a report dated 2 February 2018. Dr Kumar said that using "AMA5 and the WorkCover guidelines 4th edition. April 2016…I have found a greater amount of permanent impairment." He assessed 9% WPI under paragraph 16.6 of the 4th edition Guidelines in respect of her recurrent left and right hernias. He said that the second AMS had erred in assessing her impairment as a single hernia. He assessed 1% in respect of the left and right ilioinguinal nerve and 1% under for scarring under the table for the evaluation of minor skin impairment (TEMSKI). He assessed 21% WPI.

13. The submissions state that Ms Blackie instructed her current solicitors on 13 February 2018 who took over conduct of the file on 15 March 2019. The latter date appears to be an error because Ms Blackie said that she commenced further proceedings (the 2018 proceedings) seeking further permanent impairment compensation which were part heard by a Commission arbitrator on 17 December 2018 and stood over to 6 February 2019. On that date, counsel briefed for Ms Blackie "became aware of the possible error" in the MAC issued by Dr Dixon-Hughes. The matter was again stood over to attempt settlement of the claim and to ask the Registrar to correct an "obvious error" in the MAC issued by Dr Dixon-Hughes under s 325(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

14. That request was made on 3 April 2019 and on 30 May 2019, the Registrar informed Ms Blackie that the MAC did not contain an obvious error and that she should seek a reconsideration of the MAC.

15. The 2018 proceedings were again listed before the arbitrator on 3 June 2019 and discontinued. Because Ms Blackie is "out of time" to bring an appeal in respect of the MAC issued by Dr Dixon-Hughes, she sought that the matter be referred to "an AMS" under s 329 of the 1998 Act for reconsideration.

16. The submissions attached four MACs and the Medical Appeal Panel decision and Dr Kumar's report. None of the other correspondence or documents referred to were attached.

17. In accordance with the directions I made on 23 July 2019, Ms Blackie prepared a statement in the form of a statutory declaration in support of the application for reconsideration. She set out the history of the MACs and said that she recalled being sent a copy of the MAC prepared by Dr Dixon-Hughes in 2011 but said she was not given any advice about the possibility or prospects of an appeal. She "vaguely" recalled attending the telephone conference on 14 June 2012 and that there were negotiations about how much additional compensation she should receive for pain and suffering. Though her recollection was vague, she said there was definitely no discussion about appealing the decision of the AMS. She also recalled advice that she had not exceeded the threshold to bring common law proceedings.

18. After attending an examination by Dr Garvey in 2013, Ms Blackie received a copy of the original MAC but not the amended MAC. She recalled being advised that the assessment made by Dr Garvey was rejected because he had not been asked to assess WPI. She said she is "certain" that she was not advised that the MAC issued by Dr Dixon-Hughes might be wrong. Her solicitors informed her that she was not able to make a further claim because of a change in the law. She heard nothing for a few years then in about March 2015 she was told that the law had changed again and she could make a further lump sum claim. Her solicitors "then arranged for me to see Dr Kumar" whom she saw in February 2018.

19. Ms Blackie said that it was not until the second hearing date of the 2018 proceedings that she was told that there was an error in the MAC prepared by Dr Dixon-Hughes and that an appeal should have been lodged. Efforts to settle the claim were unsuccessful. She said that she understood that part of the reason the 2018 proceedings did not proceed was so that she could seek a reconsideration of Dr Dixon-Hughes' MAC.

20. Ms Blackie's solicitors prepared further submissions in support of the application. They noted that Dr Dixon-Hughes observed that Ms Blackie suffered left and right inguinal hernias and that there is considerable medical evidence to show that she had suffered recurrences. Ms Blackie submitted that she was not made aware of the possible error in Dr Dixon-Hughes' MAC until February 2019.

21. Ms Blackie's submissions referred to the decision in Roche DP in *Samuel v Sebel Furniture Limited*[1]*(Samuel)* discussed below. She submitted that while the delay was long, it was due to her legal advisers and not to her. She referred to the decision in *Hurst v Goodyear Tyre and Rubber Co (Australia) Ltd* [2] (*Hurst*) as the source of the principle that a mistake or oversight by a legal adviser will not provide a ground for reconsideration and said:

> "However, it is submitted that this case has been distinguished in **Atomic Steel Constructions P/L v Tedeschi [2013] NSWCCPD 33** [*Tedeschi*] where at para 53 Roche DP stated that **Hurst** 'concerned a failure in the preparation and presentation of a case, and a lengthy delay in bringing subsequent proceedings for relief'.
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> Whilst it is conceded that the circumstances regarding the legal advisors error in this case differ from **Tedeschi**, it is submitted that the case of **Tedeschi** does demonstrate that a legal advisor's error does not prevent an injustice being corrected where it is in the interests of justice.
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> In **Tedeschi,** it involved the overpayment of a worker in a Consent Award for weekly payments. It is submitted that in this matter, the injustice involved if the application for Reconsideration is refused, is a worker being denied her correct entitlements for lump sum compensation (including pain and suffering) and the ability to bring a Work Injury Damages claim."

22. Ms Blackie submitted that the Commission was required to perform a "balancing act" between her rights and those of the respondent. As workers compensation is beneficial legislation and as she has been deprived of her rights to lump sum compensation and common law damages, Ms Blackie submitted that the Commission's discretion should be exercised in her favour.

[1] [2006] NSWWCCPD 141 at [58] (omitting citations)
[2] [1953] WCR 29

23. The Club, through its solicitor, said that it does not agree that the second MAC is incorrect but, if it is incorrect, it overstates the level of impairment. In any event, the Club submitted, a reconsideration is inappropriate because of the length of the delay and the public interest that litigation should not continue indefinitely. It submitted that Ms Blackie's submissions failed to take account of the fact that she had been in receipt of a consent award for seven years and that there was no offer to repay that award if the reconsideration was to be granted. While conceding that reconsideration is not appropriate simply by reason of a mistake of her legal advisers, Ms Blackie sought to rely on such a mistake in support of her application.

24. The Club noted the prejudice it had incurred by way of costs for the telephone conferences and arbitrations in the 2018 proceedings which were discontinue, including the cost of an independent medical examination.

FINDINGS AND REASONS

25. The Commission's power to reconsider a decision and to rescind, alter or amend it is found in s 350(3) of the 1998 Act, which provides

> "The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission."

26. The use of "may" indicates that the power is discretionary. The principles applicable to the exercise of its discretion to do so were distilled from relevant authorities and summarised in *Samuel*:

> "1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include "an award, order, determination, ruling and direction". In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
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> 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');
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> 4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');
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> 5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*');
>
> 6. …;

7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger'* and section 354(3) of the 1998 Act)."

27. The sixth factor was based on a section which has been amended and is not relevant for this reconsideration.

28. As that summary makes clear, the discretion is a wide one. All relevant factors should be considered.

29. The procedure is set out in the Commission's guideline for Requests for Reconsiderations under Sections 329(1A), 350(3) and 378 of the Workplace Injury Management and Workers Compensation Act 1998, which is found on the Commission's website.

Delay

30. The decision which Ms Blackie seeks that the Commission reconsider was made more than seven years ago. The explanation provided for the delay is that Ms Blackie's former solicitors failed to advise her that she could seek to lodge a medical appeal in respect of the MAC issued by Dr Dixon-Hughes. It is usually the case that where a court or tribunal is asked to exercise a discretion to extend time to bring a claim, that there must be a detailed explanation for the delay.

31. The evidence in this matter suggests that there are other factors relevant to the issue of delay beside the delay occasioned by Ms Blackie's former solicitors. No explanation has been provided for those other delays.

32. Considering the matter only in respect of the question of delay, it was probably reasonable for Ms Blackie to accept the advice of her former solicitors at the telephone conference in 2012. However, it is surprising that the question of the time period to lodge an appeal was not raised when there had already been a successful medical appeal in respect of the first MAC. It was probably also reasonable for her to accept advice when Dr Garvey's MAC and amended MAC were issued that the law had changed preventing a further claim.

33. Ms Blackie said that she was told in 2015 that it might be possible to bring a further claim for permanent impairment compensation but she did not explain why she did not attend an appointment with Dr Kumar for another three years. There is no evidence that she sought advice from her former solicitors or any other solicitors in that period.

34. Ms Blackie sought advice from her current solicitors in March 2018. They commenced proceedings which were listed for hearing in December 2018. The time frames under which the Commission operates provide for a telephone conference to occur four weeks after filing an Application to Resolve a Dispute (ARD) and a conciliation conference and arbitration hearing generally three weeks after the telephone conference. On this timing, the ARD would have been filed in about October 2018. The ARD is not attached to the application for reconsideration. The submissions filed for Ms Blackie suggest it was an application for "further WPI" but the basis of the application is not disclosed.

35. No evidence is offered to explain the delay in filing that ARD and there is no suggestion that advice was sought from counsel.

36. The first time it was recognised that there might be an error in the MAC was at the conciliation conference and arbitration hearing on 6 February 2019. The matter was stood over to allow an application to be made to correct an obvious error. That application was not made for another two months and the correspondence between Ms Blackie's solicitors and the Commission was not provided on the application for reconsideration.

37. The 2018 proceedings were discontinued on 13 June 2019. An application for reconsideration of the MAC issued by Dr Dixon-Hughes was made about 10 days later. The matter was listed for telephone conference.

38. The first time an application was made for reconsideration of the COD dated 14 June 2012 was at the telephone conference. There was no evidence from Ms Blackie in support of the application until the directions made at the telephone conference were complied with.

Finality

39. The consideration that there should be finality in litigation is relevant. The litigation in respect of the permanent impairment claim was finalised in 2012. A further application was made in 2018 apparently without considering the extent of the powers of the Commission. In *Hilliger v Hilliger*[3], quoted in *Samuel*, Kirby P said:

> "I think there is power in the court to entertain an application for variation or rescission so long as the original order is current, and to make such order in the way of variation or rescission as to it may seem proper. It is important naturally to keep well in mind the distinction between the existence of a power and the occasion of its exercise, and the courts should not lose sight of the general rule that the public interest requires that litigation should not proceed interminably. A party who seeks or opposes an order must produce all the available evidence at the original hearing, and courts must be on their guard to refuse to allow the same matter to be litigated again and again. But at the same time it is clear that the Legislature intended to leave with the prescribed courts the power of reviewing any decision in order to see that justice is done between the parties."

40. The Commission must consider the interests of the Club as well as Ms Blackie. The submissions with respect to the costs incurred in respect of the futile 2018 proceedings are well made.

Mistake

41. A mistake by a solicitor will not usually give rise to a COD being set aside. In *Samuel* Roche DP cited *Hurst* as authority for that proposition.

42. Mr Hurst brought proceedings in 1946 to recover compensation for an injury suffered in 1940. He did not claim medical and related expenses. He brought three sets of further proceedings. In the last proceedings in 1952 Rainbow J said that the proper procedure to seek to recover those expenses was to seek to apply the original proceedings if there was sufficient reason. The only reason why the amounts were not claimed was mistake or inadvertence by his then solicitors. Rainbow J held that was insufficient reason to reopen the first proceedings.

[3] (1952) 52 SR (NSW) 105.

43. Ms Blackie's solicitors referred to the decision in *Tedeschi* as authority for the proposition that there are circumstances in which the mistake of a legal adviser might not prevent reconsideration. The reference to *Tedeschi* in those submissions does not take account of the distinction drawn by Roche DP in that case.

44. The parties had settled Mr Tedeschi's claim for compensation on terms which were outside the actual authority of counsel for the employer and in excess of the maximum potential value of the claim. A commission arbitrator had declined an application for reconsideration. On appeal from that decision, Roche DP said[4]:

> "In the present case, the Arbitrator's statement (at [14]) that a mistake or oversight by a legal adviser would not give rise to a ground for reconsideration failed to have regard to the context in which that statement was made in *Hurst*. In that case, the issue was not one concerning a settlement that went beyond counsel's instructions, but concerned a failure in the preparation and presentation of a case, and a lengthy delay in bringing subsequent proceedings for relief.
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> The Arbitrator also failed to have regard to the principles discussed in *Sorcevski*, where it was held that a party (in that case, a worker) was held not to be bound by the assent of her counsel, even though it was within his ostensible authority and the other party acted on it in good faith.
>
> It follows that, having regard to the principles in *Sorcevski*, and the context in which *Hurst* considered the relevance of a mistake by a legal adviser, the fact that counsel mistakenly signed consent orders that were beyond his instructions was not, in itself, determinative of whether relief should be granted."

45. *Sorcevski v Steggles Pty Ltd*[5] concerned an application to set aside consent orders made without the authority of counsel and is not otherwise relevant to this decision.

46. The decision in *Tedeschi* does not assist Ms Blackie. The failures to consider a medical appeal in 2012, to allow consent orders to be entered into in 2012 and to apply for reconsideration of those consent orders are all failures which are covered by the decision in *Hurst*.

The merits of the proposed medical appeal

47. This application is made because Ms Blackie seeks to file a medical appeal in respect of the MAC issued in 2012. It is relevant to consider whether the proposed medical appeal appears to have merit because it is necessary to consider if reconsideration would be futile.

48. The evidence in support of the merits of the appeal is scant. However, based on the first MAC of Dr Garvey and the report of Dr Kumar, there may be merit in the argument sought to be raised.

Conclusion

49. The Commission is required to do justice between the parties. Apart from the possibility of the merits of the appeal, all of the other relevant factors weigh strongly against Ms Blackie's application.

50. For the reasons set out above, the application for reconsideration is declined.

[4] At [53]-[55].
[5] (1991) 7 NSWCCR 315.