WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5261/19**
Applicant: **Patricia Theoret**
Respondent: **Aces Incorporated**
Date of Determination: **6 November 2019**
Citation: **[2019] NSWWCC 359**

The Commission determines:

Finding

1. The respondent has not erred in the calculation of the indexation the applicant's pre-injury average weekly earnings as provided by s 82A of the *Workers Compensation Act, 1987*.

Order

2. The applicant's claim is refused.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Patricia Theoret (the applicant) was employed by Aces Incorporated (the respondent) and suffered a number of accepted compensable injuries.

2. The present dispute is restricted to the interpretation of s 82A of the *Workers Compensation Act 1987* (the 1987 Act).

3. The applicant appears to have sustained a number of injuries in the employ of the respondent. The present dispute relates to an injury occurring on 23 December 2002. It is unclear when compensation was paid in respect of this injury although a letter from the respondent's insurer dated 19 April 2018 indicates that the applicant was not in receipt of "weekly payments for the period 5 November 2004 until 13 December 2013."[1]

4. The applicant initially disputed the respondent's calculation of her pre-injury average weekly earnings (PIAWE). That dispute was concluded when a claims assessor determined that the applicant's PIAWE was $407.42.[2]

5. By letter dated 3 April 2019 the respondent served a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).[3] The letter specified that the applicant had been paid 116 weeks of weekly compensation and that the applicant had no current work capacity. The letter also advised that the "indexed PIAWE is $466".[4]

6. By letter dated 24 July 2019 the applicant's solicitors took issue with the respondent's calculation of the indexation of the PIAWE pursuant to s 82A of the 1987 Act. That letter purported to index the PAIWE of $466 from December 2002 and arrived at a figure of $690.19.

PROCEEDINGS BEFORE THE COMMISSION

7. The present dispute was registered with the Commission on 4 October 2019.

8. This matter was listed for telephone conference on 25 October 2019. The parties were legally represented.

9. At the telephone conference the legal representatives agreed that the dispute was limited to the question of whether the PIAWE should be indexed pursuant to s 82A of the 1987 Act from the date of injury or whether the indexation only applied from 1 April 2013. I was advised that the applicant is being paid weekly payments of compensation in accordance with the letter dated 3 April 2019.

10. The documentation admitted into evidence was:

    (a) Application to Resolve a Dispute (Application), and
    (b) Reply;

11. There was no objection to any document.

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[1] Reply, p 20
[2] Decision of Merit Review Service dated 14 August 2018, Reply p 18
[3] Application, p 18
[4] Application, p 20

12. At the telephone conference I advised the parties that I had considered the issue of the construction of s 82A of the 1987 Act in *Thompson v ATN Channel 7 (No 2)* (*Thompson (No 2)*).[5]

13. The legal representatives had not considered the decision prior to the telephone conference. Accordingly, I allowed a short timetable for the provision of written submissions. The applicant was to file and serve written submissions by 30 October 2019 and the respondent was to file and serve by 1 November 2019 (the Direction).

14. The Direction issued in the matter recorded that the matter has been transferred from my role as a Registrar's Delegate to my position as an Arbitrator. The Direction was made as the issue is one of general importance.

15. Written submissions were filed in accordance with the Direction.

LEGISLATION

16. Following the introduction of amendments made pursuant to the *Workers Compensation Legislation Amendment Act 2018* (2018 Amendment Act) the Commission has power to determine work capacity disputes made on or after 1 January 2019.

17. Part 5 of the 1998 Act is headed "Expedited Assessment". Pursuant to s 295 of the 1998 Act the Part applied to "a dispute referred to the Commission that concerns "weekly payments compensation".

18. The functions under Part 5 are exercised by the Registrar (s 296 of the 1998 Act). These functions were delegated to me under the Registrar's powers.

19. Work capacity decisions are defined in s 43 of the 1987 Act and include a decision about the worker's PIAWE.

20. Section 82A of the 1987 Act provides:

> (1) The amount of a weekly payment to a worker under Division 2 in respect of an injury is to be varied on each review date after the day on which the worker became entitled to weekly payments in respect of that injury, by varying the amount of the worker's pre-injury average weekly earnings for the purposes of the calculation of the amount of the weekly payment in accordance with the formula--
>
> $$A \times \frac{B}{C}$$
>
> where--
>
> **"A"** is the amount of the worker's pre-injury average weekly earnings within the meaning of Division 2 or, if that amount has been varied in accordance with this section, that amount as last so varied.
>
> **"B"** is--
>
> (a) the CPI for the December quarter immediately prior to the review date when the review date is 1 April, or
> (b) the CPI for the June quarter immediately prior to the review date when the review date is 1 October.
>
> **"C"** is--

[5] [2017] NSWWCC 269

(a) the CPI for the June quarter immediately prior to the review date when the review date is 1 April, or
(b) the CPI for the December quarter immediately prior to the review date when the review date is 1 October.

(2) In this section—

"**CPI"** means the consumer price index (All Groups Index) for Sydney issued by the Australian Statistician.

"review date" means 1 April and 1 October in each year.

(3) (Repealed)

(4) The Authority is to declare, by order published on the NSW legislation website on or before each review date, the number that equates to the factor $\frac{B}{C}$ for the purposes of the variation required for that review date under this section.

(5) A declaration made by an order published on the NSW legislation website after a review date for the purposes of the variation required for that review date under this section has effect as if the order were published before that review date.

21. Section 82A was introduced by the amendments made in 2012 by the *Workers Compensation Legislation Amendment Act 2012* (the 2012 Amendment Act). The section was amended by the 2018 Amendment Act.

22. The amendments to s 82A made by the 2018 Amendment Act included the repeal of s 82A(3)[6] and a change to the wording of the various subsections whereby the "Authority" was substituted for the "Minister" in s 82A(4) and that the Authority is to declare, by order published on the NSW legislation website, the number that equates to the factor B/C. A similar change was made to the wording in s 82A(5).

THE DECISION IN *THOMPSON (NO 2)*

23. In order to understand the submissions, it is necessary to refer to my previous decision in *Thompson (No 2).* In that decision I declined to index the PIAWE from the date of injury (March 2000) and indexed the PIAWE from 1 April 2013.

24. In the course of the reasons I stated:

> 11. As the plurality stated in *Military Rehabilitation Commission* v *May*[7], the "question of construction is determined by reference to the text, context and purpose of the Act"; citing *Project Blue Sky Inc v Australian Broadcasting Authority*[8] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[9].
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> 12. In *Grain Growers Limited v Chief Commissioner of State Revenue (NSW)*[10] Beazley P stated[11] that "the starting point and end point is with the text of the provision". Her Honour cited the comments of the High Court in *Alcan* when the plurality stated[12]:

[6] See 2018 Amendment Act, Sch 3
[7] [2016] HCA 19 at [10]
[8] [1998] HCA 28 [69]-[71]
[9] [2009] HCA 41 (*Alcan*)
[10] [2016] NSWCA 359
[11] at [108], Bathurst CJ and Leeming JA agreeing
[12] at [47]

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Footnotes omitted)
>
> See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].'

13. I do not accept the applicant's submissions and respectfully disagree with the decision of *Edwards* in relation to the finding that the PIAWE can be indexed prior to 2013 in accordance with the formula contained in s 82A(2).

14. Section 82A is part of Division 6A of the 1987 Act. The section was inserted into the 1987 Act by the *Workers Compensation Legislation Amendment Act 2012* (2012 amendment Act).

15. Section 82A(1) provides that the amount of weekly payments is varied "on each review date after the day on which the worker became entitled to weekly payments". "Review date" is defined in s 82A(2) to mean 1 April and 1 October in each year. Section 82A(4) provides that "before each review date" the Minister notifies by order on the NSW legislation website the number that equates to the factor B/C.

16. The applicant in this case is seeking an indexation of the pre-injury average weekly earnings in accordance with its calculation of the factor B/C. Whilst the figure provided by the applicant may be the same calculation as set out in s 82A(1), it is not in accordance with the requirement set out in s 82A(4) that the Minister notify the number that equates to the factor B/C by order published in the NSW legislation website.

17. As the respondent correctly submitted, the Minister has not notified a number that equates to the factor B/C for any period prior to 1 April 2013.[13]

18. Section 82A is operational from 1 October 2012. It was passed as part of a scheme of amendments for entitlements to weekly payments of compensation. These amendments included the entitlement to weekly payments in the first entitlement period of 13 weeks (s 36) and the second entitlement period (s 37), all of which are also operational from 1 October 2012.

19. The submission that the average weekly earnings can only be indexed during a period after the commencement of the operation of the section is more consistent with the context of the amendments to weekly payments that are operative from 1 October 2012.

20. The applicant's submission is that the critical words in s 82A(1), that the figure is indexed "on each review date after the date on which the worker became entitled to weekly payments" is without reference to a starting commencement year. That submission ignores the context of the section, reads the words "review date" in isolation and otherwise ignores the clear words of s 82A(4) of the Act.

[13] Weekly Compensation (Weekly Payments Indexation) Order 2013

21. In *NSW Trustee and Guardian v Olympic Aluminium Pty Ltd*[14] Keating P analysed the various authorities, particularly with reference to the observations of the majority of the High Court in *Alphapharm Pty Ltd v H Lundbeck A/S*[15], which reiterate that the words under consideration must be viewed in context rather than in isolation.

22. The plurality in *Alphapharm*, referring to previous High Court authority[16], stated[17]:

> 'It is not always appropriate to dissect a composite legislative expression into separate parts, giving each part a meaning which the part has when used in isolation, then combine the meanings to give that composite expression a meaning at odds with the meaning it has when construed as a whole.'

23. The reference to "review date" as being any "1 April" or 1 October" ignores the requirement in s 82A(4) that the Minister must notify, by order published in the NSW legislation website, the number that equates to the factor B/C.

24. I do not accept that the applicant's submissions. The submissions are contrary to contextual aspects of s 82A and specifically contrary to the requirements in s 82A(4) that the number for B/C be published by order in the NSW legislation website.

25. The reasoning in *Edwards* supporting the applicant's position was that workers compensation legislation is beneficial legislation which should "be construed beneficially giving the fullest relief that the fair meaning of its language will allow". Arbitrator Dalley stated[18]:

> 'To apply indexation from the first review date after 18 November 2009 seems to me in accordance with the beneficial nature of the legislation as well as being in accordance with the plain words of the section. It has the effect of adding words to the section limiting indexation to the value of 'A' only on and after 1 April 2013. I accept the applicant's submission that the value of 'A' is to be indexed in accordance with the formula from the first review date after weekly payments became payable following injury on 18 November 2009.'

26. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel*[19] as having a "non-beneficial operation" and by the Court of Appeal as disclosing "a cost-savings objective": *Cram Fluid Power Pty Ltd v Green*[20].

27. Recently in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd*[21] Leeming and Payne JJA observed:[22]

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[14] [2016] NSWWCCPD 54 at [47]-[51]
[15] [2014] HCA 42 (*Alphapharm*)
[16] XYZ v The Commonwealth [2006] HCA 25 at [19] per Gleeson CJ and at [176] per Callinan and Heydon JJ
[17] [2014] HCA 42 at [61] per Crennan, Bell and Gageler JJ
[18] at [161]
[19] [2014] HCA 18 (*Goudappel*) at [29]
[20] [2015] NSWCA 250 (*Cram Fluid*) at [122].
[21] [2017] NSWCA 289
[22] At n[42]-[43], White JA agreeing

'42. The applicant repeatedly invoked in support of its construction the legislative purpose, which was to benefit subcontractors in its position. But Gleeson CJ observed in *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [6] that:

> '[T]he underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose.'

28. In *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40] it was said, by reference to *Carr*, that:

> 'Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem.'

29. Whilst the amendments to weekly compensation made by the 2012 amendment Act may not fall within the same class as the amendments to permanent impairment compensation, discussed by the High Court in *Goudappel* and the Court of Appeal in *Cram Fluid*, the 2012 amendments otherwise limited the entitlement to weekly compensation. These amendments included the restriction of the meaning of "suitable employment" by excluding the notion of whether alternative work was available in the employment market, by restricting the number of weeks to weekly compensation entitlements as set out in Division 2 of Part 3 of the 1987 Act and introducing the concept of a work capacity decision which is undertaken by the insurer managing the claim. These changes to weekly compensation introduced by the 2012 amendment Act were, in some respects, not beneficial to workers.

30. I do not agree that the s 82A should be given "the fullest relief that the fair meaning of its language will allow". In any event, read in context, I do not accept that the reference to "on each review date" in s 82A(1) means a date where the Minister has not published, in accordance with s 82A(4), the number for the factor B/C on the NSW legislation website.

31. The respondent submitted that s 82A "is not retrospective". I do not reject the applicant's entitlement based on suggestions of "retrospective operation". Section 82A clearly operates from 1 October 2012. The section does not have retrospective operation within the first sense discussed in *Goudappel*[23], that is, it does not purport to operate on entitlements existing prior to the date of commencement of the section. The section otherwise does not breach the concept of retrospective operation in the second sense discussed in *Goudappel*, that is, it does not operate "to alter rights or liabilities which have already come into existence by operation of prior law on past events"[24].

32. The section does not affect either of those rights as it does not affect an entitlement to weekly compensation up until 1 October 2012 when the section commenced. In that sense I do not consider that the question of "retrospectively" is relevant to the construction of the section. If I am wrong in this respect, then it is a further argument favouring the respondent's position.

[23] *Goudappel* at [44]
[24] *Goudappel* at [47]

33. For these reasons I reject the applicant's submission that the indexation applies from 2000. The indexation to s 82A applies from 1 April 2013."

SUBMISSIONS AND REASONS

25. The applicant submitted that by virtue of clause 3 of Part 19H of Schedule 6 of the 1987 Act, s 82A applies to injuries received before the commencement of the 2012 Amendment Act, but does not affect the amount of compensation payable prior to 1 January 2013.[25] I agree with that submission.

26. The applicant submitted that s 82A was retrospective because "it changes rights that had vested many years before the amendment on the happening of the injury".[26] The applicant however conceded that the 2012 Amendment Act did not change the amount of compensation that was payable prior to the commencement of those provisions but that was "the only limit on the retrospective operation". It was unclear from the submission how this impacted on the interpretation of s 82A.

27. In *Cram Fluid Power Pty Ltd v Green*[27] (*Cram Fluid*) the Court of Appeal discussed the changes made by the 2012 Amendment Act which enacted the one claim provision in section 66(1A) of the 1987 Act. Gleeson JA, with whom Beazley ACJ and Emmet JA agreed, held that the enactment of s 66(1A) was not retrospective because the amendments only extended to claims which specifically sought s 66 compensation made on or after 19 June 2012, but not to such a claim made before that date.[28]

28. Gleeson JA further stated:[29]

> "Once it is accepted, as it should be, that the new s 66 applies to Mr Green's 2013 Claim, it was an error, with respect, for Keating P to approach the question of the application of the new s 66 by reference to notions of 'prospective' or 'retrospective' operation."

29. It is difficult to accept the applicant's submission that the amendments are "retrospective" because they only applied to entitlements after the commencement of the 2012 Amendment Act. I otherwise adopt the reasoning in *Cram Fluid* which commented on the operation of s 66(1A) and that it would be an error to approach the construction on notions of retrospective operation.

30. I otherwise accept the applicant's submission that the section "should be applied in its terms".[30]

31. The applicant submitted that the meaning of s 82A(1) is that indexation of weekly payments commences on the first review after the date in which "the worker became entitled to weekly payments in respect of that injury". It was submitted that the plain meaning of indexation occurring on 1 April and 1 October each year means that the indexation in the present case commences on 1 April 2003, that is on the first review date after the date when weekly compensation was first paid to the applicant in respect of this injury. The applicant's submission is that this is based on the CPI for Sydney which has been issued by the Australian Statistician "since before 2002".[31]

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[25] Applicant's written submissions, paragraphs 9 -10
[26] Applicant's written submissions, paragraph 8
[27] [2015] NSWCA 250
[28] At [105]
[29] At [120]
[30] Applicant's written submissions, paragraph 10
[31] Applicant's written submissions, paragraph 11

32. The applicant submitted that s 82A(1) and (2) can operate "independently" of s 82A (4)[32] or otherwise stand alone[33].

33. The applicant submitted that "subsection 4 and 5 make no express provision concerning the status of the number published on the website" and the subsections do not provide that the published number is to be used or otherwise deemed to be applied. It is described by the applicant as an "easy reckoner for people applying the formula".[34]

34. Whilst I accept the applicant's submissions that the CPI was in existence throughout the period, the submission otherwise ignores the clear words of s 82A(4). Section 82A(4) provides that "the Authority is to declare by order" and, prior to the recent amendments, that the Minister is to notify.

35. I do not accept that submission as it is contrary to the plain words of s 82A(4) which provide that the Authority is to "declare" the number "that equates to the factor B/C". The legislature has used the expression "equate" which in my view is a clear expression of meaning.

36. Further, the words in s 82A(5) provides that it "has effect as if" which are words of similar meaning to what the applicant submits they don't have, that is, a deeming effect.

37. I agree with the respondent's submission that the applicant's suggested interpretation of s 82A ignores the clear words provided by s 82A(4). If the applicant's submission is correct then the wording of s 82A(4) is superfluous and has no application.

38. It is otherwise difficult to accept the applicant's submission that Parliament would enact a sub-section with a limited operation restricted to being a guide on calculation.

39. I accept the applicant's submission that s 82A(5) provides that the Authority can publish a figure after the review date and that means "that the legislation allows for the publication of historical review dates."[35] However, what the submission ignores is that the Authority, and previously the Minister, did not publish "historical review figures" for the period prior to 1 April 2013. Whilst such a right clearly exists under s 82A(5), it has not been exercised. The review figures specifically provide that the indexation commences on 1 April 2013

40. In my view, that description of s 82A(5) supports the interpretation I previously reached, that is, it allows the Authority to make a declaration to be published on the website that can be backdated. If the publication had no force and was only an easy reckoner, then there would be no need to provide that the order could be backdated.

41. Given the importance of these figures I have attached the relevant order as an addendum to these reasons.

42. I otherwise do not accept the applicant's submission that my interpretation in applying the order declared under s 82A(4) is using subsequent delegated legislation to interpret the legislation. The applicant cited *Mine Subsidence Board v Wambo Coal Pty Ltd* (*Wambo*)[36] as authority for the proposition that:[37]

> "Delegated legislation in the form of regulations or publications by the minister or Authority come after the enactment of the legislation and do not accordingly disclose the intention of parliament when it passed the legislation."

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[32] Applicant's written submissions, paragraph 14
[33] Applicant's written submissions, paragraph 20
[34] Applicant's written submissions, paragraph 21
[35] Applicant's written submissions, paragraph 22
[36] [2007] NSWCA 137
[37] Applicant's written submissions, paragraph 22

43. I assume that the applicant was referring to that part of the decision in *Wambo* when Tobias JA stated:[38]

> "41. Although the appellant sought to call in aid the terms of a regulation made for the purpose of s 12A(2)(a), accepting that no such regulation had been made for the purpose of s 12A(2)(b), in my opinion it is well established that as a general rule it is impermissible to call in aid in the construction of an Act delegated legislation made under that Act: Pearce & Geddes '*Statutory Interpretation in Australia*', 6th ed. (2006), Chatswood, [3.41] pp.104-105 and the cases there cited. It was not suggested by the appellant that the regulation in question and the Act formed part of a legislative scheme which, for the purpose of ascertaining but not construing that scheme, permits of a partial exception to the general rule."

44. The decision is referred to in Pearce & Geddies, *Statutory Interpretation In Australia*, Eighth edition (Pearce & Geddies) which also refers to the observations of French CJ in *Plaintiff M47-2012 v Director-General of Security*[39] when his Honour stated:[40]

> "Generally speaking, an Act which does not provide for its own modifications by operation for regulations made under it, is not be construed by reference to those regulations: Hunter Resources Ltd v Melville (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J."

45. The applicant's submission fails to consider that s 82A(4) authorises the declaration of the factor B/C. Using the words of French CJ set out above, s 82A(4) provides for its own modification through the order made pursuant to it. Section 82A(4) is not delegated legislation and is the source of power for the declaration of the order that equates to the factor B/C is to be published on the NSW website. Accordingly, I am not using the orders made under s 82A(4) to interpret the legislation but applying it as a modification of the section.

46. Pearce & Geddies also refer to the exception to the general rule referred to above, that is where the regulations "together with the principal Act, form part of a legislative scheme".[41] Various cases are cited in support of the proposition by the authors.[42]

47. In my view, s 82A(4) provides a clear intention that the number published on the NSW legislation website is the relevant number for the purposes of the section. The applicant stressed reliance on the wording of s 82A(1). In my view, that provision must be read subject to the express provision in s 82A(4).

48. The applicant submitted that it was unnecessary to consider whether the provisions in s 82A were beneficial because the meaning was otherwise clear. However, in the event of doubt it was submitted that the purpose of the section was beneficial in that it provided for indexation of the PIAWE.

49. I note that I did not apply a purposeful approach in *Thompson (No 2)*. What I then said[43] was that I would not follow the reasoning in *Edwards*, a decision which reached the contrary conclusion, because it solely relied on a beneficial construction in construing the section. I was not prepared to give the section "the fullest relief that the fair meaning of its language will allow". I otherwise referred to various authorities[44] which cast doubt on the approach of stating the purpose of legislation to solve the problem of interpretation.

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[38] Wambo at [41], Hodgson and Santow JJA agreeing
[39] [2012] HCA 46
[40] At [56]
[41] Pearce & Geddies at p 135
[42] Pearce & Geddies at p 135
[43] *Thompson (No 2)* at [30]
[44] *Thompson (No 2)* at [27]-[28]

50. The applicant described the provision as “beneficial”. The respondent submitted that the amendments were non-beneficial and were part of a costs saving objective.

51. I do not accept that the intention of Parliament is unclear and do not accept, that the section requires a beneficial or non-beneficial interpretation.

52. My reading of the further submissions has not altered the view I expressed in *Thompson (No 2).* Indeed, the reference in submissions to s 82A(5) contextually supports my previous decision. The reasons in *Thompson (No 2)* are to be read with these reasons.

53. I mention a further submission made by the respondent that I do not accept. It was submitted that the 2018 Amendment Act was passed following the decision of *Thompson (No 2)* and no amendment was then made “contrary to the finding in”[45] that case.

54. This submission does not reflect a proper principle of statutory interpretation. The correct principle is that there is a presumption that the legislature has approved the meaning ascribed to a provision by a previous interpretation of a superior Court if it repeats certain words in an amended Act. I do not accept that this principle applies to first instance decisions of an Arbitrator of a Tribunal.

55. The principle was articulated in *Ex parte Campbell* when James LJ stated:[46]

> “Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them.”

56. Pearce and Geddes[47] referred to the principle in *Ex parte Campbell* and noted it had been has been endorsed in Australia on numerous occasions including by a unanimous bench of seven justices in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees.*[48]

57. My previous decision was otherwise not the only decision on the issue as another Arbitrator reached a contrary view. The respondent’s submission is rejected.

58. I also add that neither party made any submissions that the amendments made by the 2018 Amendment Act raised issues of construction different from what was discussed in *Thompson (No 2).* The practical effect of the 2018 amendments is that the Authority, as opposed to the Minister, now publishes the figure for the factor B/C on the NSW legislation website.

59. I do not accept that the applicant’s interpretation is open as it basically ignores the clear words contained in both s 82A(4) and (5) and the order declared by the Authority and published on the NSW legislation website.

REASONS FOR FINDING AND ORDERS

60. Whilst I accept that the respondent’s position is correct, I do not intend to make an award in its favour. Such an order may confuse the notion that the respondent is, as it accepts, validly paying weekly compensation to the applicant in respect of this injury. My finding and order are drafted so as to convey the fact that the applicant is not entitled to any additional weekly compensation than that being paid.

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[45] Respondent’s written submissions, paragraph 7
[46] (1870) LR5 Ch App 703 at 706
[47] at [3.44]
[48] (1994) 181 CLR 96 at 107

61. At the telephone conference the applicant was requested to make submissions if it asserted that the respondent had incorrectly indexed the PIAWE in accordance with its interpretation of s 82A, that is, that indexation only commenced from 1 April 2013. No such submissions were made as the applicant's submissions only addressed the indexed PIAWE based on increases from 1 April 2003.[49] I can only assume that the applicant has not contested the respondent's calculations based on indexation of the PIAWE from 1 April 2013.

62. The finding and order are contained in the Certificate of Determination.

[49] Applicant's written submissions, paragraph 25-27

ADDENDUM

Workers compensation benefits guide (October 2019) published by the State Insurance Regulatory Authority (pages 7-8)

Table of numbers equating to the factor B/C

Review date	B. All groups CPI (Sydney)	C. All groups CPI (Sydney)	Number that equates to the factor B/C
1 April 2013	102.3 (December 2012)	100.5 (June 2012)	1.0179
1 October 2013	103.1 (June 2013)	102.3 (December 2012)	1.0078
1 April 2014	105.0 (December 2013)	103.1 (June 2013)	1.0184
1 October 2014	106.0 (June 2014)	105.0 (December 2013)	1.0095
1 April 2015	106.8 (December 2014)	106.0 (June 2014)	1.0075
1 October 2015	108.3 (June 2015)	106.8 (December 2014)	1.0140
1 April 2016	108.9 (December 2015)	108.3 (June 2015)	1.0055
1 October 2016	109.3 (June 2016)	108.9 (December 2015)	1.0037
1 April 2017	110.9 (December 2016)	109.3 (June 2016)	1.0146
1 October 2017	111.7 (June 2017)	110.9 (December 2016)	1.0072
1 April 2018	113.3 (December 2017)	111.7 (June 2017)	1.0143
1 October 2018	114.0 (June 2018)	113.3 (December 2017)	1.0062
1 April 2019	115.2 (December 2018)	114.0 (June 2018)	1.0105

Review date	B. All groups CPI (Sydney)	C. All groups CPI (Sydney)	Number that equates to the factor B/C
1 October 2019	115.9 (June 2019)	115.2 (December 2018)	1.0061