WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4244/19**
Applicant: **Geoffrey Wayne Weate**
Respondent: **Racing NSW**
Date of Determination: **11 December 2019**
Citation: **[2019] NSWWCC 397**

The Commission determines:

1. The applicant has not made a claim for compensation such as to give the Commission jurisdiction to refer the matter to an Approved Medical Specialist for assessment as to whether the degree of permanent impairment is fully ascertainable because maximum medical improvement has not been reached.

2. The Application for Assessment by an Approved Medical Specialist is dismissed.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Geoffrey Wayne Weate (the applicant/Mr Weate) rode as a thoroughbred jockey for a period of 37 years until 15 January 2008, employed by Racing NSW (formerly the Australian Jockey Club (the respondent). He sustained multiple injuries during this time, culminating in a fall on 15 January 2008 when he was riding in a barrier trial. His horse's leg snapped, and he fell to the ground on his right side, fracturing ribs and injuring his right shoulder.

2. Following this injury the applicant was never cleared to return to riding. He has returned to work as a part-time cleaner for 16 hours a week.

3. Mr Weate was examined by Approved Medical Specialist (AMS) Dr James G Bodel on 6 October 2009. Dr Bodel issued a Medical Assessment Certificate (MAC) dated 17 November 2009 containing:

    (a) in Table 1 assessments in accordance with the Table of Disabilities for injuries received before 1 January 2002, and

    (b) in Table 2 assessment in accordance with the *American Medical Association's Guides to the Evaluation of Permanent Impairment* fifth edition (AMA 5) and WorkCover Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002.

4. Included in the Table 2 was Dr Bodel's assessment of 6% whole person impairment (WPI) in respect of injury to the right upper extremity (shoulder) on 15 January 2008. Dr Bodel also assessed the applicant as having sustained 7% WPI as a result of injury to the lumbar spine due to the nature and conditions of his employment, with a deemed date of injury of 15 January 2008.

5. Immediately prior to 1 October 2012 the applicant was an "existing recipient of weekly payments" within the meaning of that term in cl 1 of Div 1, Pt 19H of Sch 6 of the *Workers Compensation Act 1987* (the 1987 Act).

6. On 17 August 2017 the respondent wrote to the applicant in respect of the date of injury of 15 January 2008 advising of "Cessation of weekly benefits after 260 weeks of weeks of payments"[1]. Included in that letter was the following:

    > "**Whole Person Impairment**
    > Your whole person impairment was assessed by Approved Medical Specialist Dr James Bodel on 6/10/2009 at 7% WPI. A copy of the Medical Assessment certificate is attached for your information.
    >
    > **Reaching your entitlement limit**
    > As you were an existing recipient of weekly compensation immediately prior to 1 October 2012, the 260 week count commenced on 1 January 2013. As of today, you have received an aggregate period of approximately 241 weeks of weekly payments. It is anticipated that you will reach a total period of 260 weeks of weekly payments on 26 December 2017 and your entitlement will cease at this point. A list of weekly compensation payments made to date is enclosed for your information."

7. The applicant was seen by Dr Robert Sharp, orthopaedic surgeon, on referral by his general practitioner, Dr E LePrince, to whom Dr Sharp reported on 22 January 2018[2]. An MRI scan of the right shoulder was organised. On receipt of that scan Dr Sharp again wrote to

[1] Application for Assessment by an Approved Medical Specialist (the Application) p 7.
[2] Application p 18.

Dr LePrince on 29 January 2018[3]. He diagnosed what appeared to be a fracture of the acromion and marked osteoarthritis including bone cysts and osteophytes and displacement of the joint. The rotator cuff fortunately looked to be perfectly intact which was good news to the doctor. Dr Sharp said that with the arthritis of the right shoulder any movements would be painful and restricted giving Mr Weate both a painful right shoulder and right hand.

8. Dr Sharp wrote to the respondent on 19 April 2018 requesting permission to address the applicant's right shoulder by way of surgery[4].

9. The applicant was assessed by Dr Anthony Smith, orthopaedic surgeon, at the request of the respondent on 12 June 2018. A report was provided that day[5]. Dr Smith found no relationship between the applicant's shoulder joint arthritis, the glenohumeral joint arthritis and the fall of 15 January 2008.

10. The applicant brought proceedings in the Commission number 349/19 which were, by consent, discontinued on 11 April 2019. In the Certificate of Determination – Consent Orders dated 11 April 2019[6] the following notation appears:

> "Without prejudice and without admission of liability, pursuant to s 41A and s50(2) of *the Workplace Injury Management and Workers Compensation Act* 1998, the respondent agrees to pay the costs of and incidental to right shoulder surgery proposed by nominated treating specialist Dr Robert Sharp."

11. Dr Sharp operated on the applicant's right shoulder on 22 May 2019[7].

12. On 1 July 2019 Dr Sharp reported to the applicant's solicitors that maximum medical improvement had not been reached following surgery on 22 May 2019[8].

13. On 17 July 2019 the applicant's solicitors wrote to the Claims Manager of the respondent's Insurance Fund enclosing Dr Sharp's report on 1 July 2019[9]. The author of the letter requested it be treated "…as a claim for resumption of weekly payments and reconsideration by the insurer in relation to resumption of such weekly payments based on the worker not having not reached maximum medical improvement as it is not ascertainable directly after surgery." In the letter an application to the Commission was foreshadowed in the absence of a response within seven days.

14. The Application dated 7 August 2019 was registered in the Commission. The applicant claimed assessment as to whether the degree of permanent impairment is fully ascertainable (s 319(g) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)).

15. On 23 August 2019 the solicitor for the respondent wrote to the applicant's solicitors confirming "…that there is no dispute that maximum medical improvement is not ascertainable as at the date of Dr Sharp's report dated 1 July 2019."[10] The solicitor advised that in the circumstances, as there was no dispute concerning that issue, there was no requirement for referral to the Commission.

16. The Response dated 2 September 2019 was lodged in the Commission, Part 1 of which contained the following assertion in response to the request of body parts to be assessed:

---

[3] Application p 22.
[4] Application p 25.
[5] Response to the Application (the Response) p 7.
[6] Application p 36.
[7] See Operation Report, Application p 39.
[8] Application p 48.
[9] Application p 49.
[10] Response p 17.

"N/K, no claim made on the Respondent."

17. The matter was the subject of a telephone conference on 1 October 2019 at which a direction was issued to the parties setting the following issues for determination:

    (a) Is the letter dated 17 July 2019 from the applicant's solicitors to The Claims Manager, Racing NSW Insurance Fund (p 49 in the Commission's electronic file of the Application for Assessment by an Approved Medical Specialist – "the Application") a claim that maximum medical improvement has been reached for the purpose of payment of weekly compensation?

    (b) Was the surgery carried out on 22 May 2019 on the applicant's right shoulder by Dr R Sharp reasonably necessary as a result of the date of injury claimed in Part 4 of the Application, 15 January 2008?

    (c) Is there a dispute under s 319(g) of the 1998 Act such as to confer jurisdiction on the Commission?

ISSUES FOR DETERMINATION

18. The parties agree that the following issues remain in dispute:

    (a) Has a claim for compensation of any kind been made such as to give the Commission jurisdiction in the matter?

    (b) Is there a valid claim to be sent to the AMS in response to the Application?

    (c) Does the Act allow for the claim to be referred to an AMS based on the applicant not having reached maximum medical improvement?

    It is assumed that reference to "the Act" by the respondent in articulating the issues at the arbitration hearing referred to hereunder is to the 1998 Act.

19. Having regard to the issues outlined by the respondent at the arbitration hearing, the reasonable necessity of the surgery carried out by Dr Sharp on 22 May 2019 referred to above at [17(b)], is not an issue for determination.

PROCEDURE BEFORE THE COMMISSION

20. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

21. Mr S Hickey of counsel appeared for the applicant at the arbitration hearing on 19 November 2019 briefed by Ms L Campbell. The applicant was present. Mr D Saul of counsel appeared for the respondent briefed by Mr P Macken.

EVIDENCE

Documentary evidence

22. The following documents were in evidence before the Commission and taken into account in making this determination:
    (a) the Application and attached documents;

(b) the Response and attached documents;

(c) Application to Admit Late Documents lodged by the applicant dated 23 September 2019 and attachments;

(d) Application to Admit Late Documents lodged by the applicant dated 4 November 2019 and attachments, and

(e) Application to Admit Late documents dated 1 October 2019 tendered by the applicant at the arbitration hearing, not objected to by the respondent, admitted and marked exhibit "A" in the applicant's case.

Oral evidence

23. There was no application to call oral evidence or to cross-examine the applicant.

SUBMISSIONS

24. The submissions of the parties have been recorded and a transcript of the hearing of 19 November 2019 (T) is available. They will not be repeated in full; in summary, they are as follows:

Applicant

25. The applicant notes the respondent's concession that as at 1 July 2019 (the date of Dr Sharp's report) there was no dispute that maximum medical improvement was not ascertainable. Therefore it submits that, having regard to ss 39 and 32A of the 1987 Act, the respondent was under an obligation to recommence payment of weekly benefits.

26. The applicant submits that s 39 is to be read with s 32A, and that in terms of the definitions of a worker with high needs and a worker with highest needs, either of those definitions are fulfilled if an assessment of permanent impairment is pending and has not been made because an AMS has declined to make an assessment on the basis that maximum medical improvement has not been reached, and the degree of impairment is not fully ascertainable.

27. Focussing on the word "pending", it is incumbent on either the applicant or the respondent to refer the question of whether maximum medical improvement is ascertainable to an AMS, recognising that an AMS must determine that question.

28. The applicant notes that Dr Bodel in his 2009 assessment determined that the injury to the right shoulder on 15 January 2008 resulted in permanent impairment. The doctor assessed 6% WPI as a result of this injury. This fulfils the requirement in the two definitions of a worker with high or highest needs that the applicant is a worker whose injury has resulted in permanent impairment.

29. The term "pending" assumes that the matter has been referred to an AMS and that an assessment cannot be made. The matter remains pending until an assessment of permanent impairment is made.

30. The applicant then submits that it is incumbent upon the respondent, as a model litigant, to invoke the requirement of s 32A because there must be an assessment by an AMS as to maximum medical improvement not having been reached before a worker can be classed as one with high or highest needs. The applicant submits that there does not need to be a dispute for the requirements of the section to be satisfied, but if a dispute is required, there is sufficient dispute resolution mechanism in the 1987 Act and the 1998 Act to resolve such a dispute.

31. The applicant submits that there is in fact a dispute within the meaning of the definition of "medical dispute" in s 319 of the 1998 Act, and in this case in sub-paragraph (g). There is a dispute "in connection with a claim … whether the degree of permanent impairment is fully ascertainable."

32. The applicant submits that, pursuant to s 321(1) of the 1998 Act either party to the dispute can refer a medical dispute concerning permanent impairment of an injured worker for assessment under Part 7 (of the 1998 Act) – Medical Assessment.

33. The applicant submits that the letter from his solicitors to the respondent dated 17 July 2019 enclosing Dr Sharp's report dated 1 July 2019 is a letter of claim. It is that he is a worker with high or highest needs in terms of s 32A of the 1987 Act and thus entitled to recommencement of weekly payments, which were terminated on 26 December 2017, as contemplated by s 39.

34. The applicant refers to his statement evidence, and the restrictions upon him as a result of his right shoulder injury and the surgery thereon.

35. The applicant notes the form of the Application, and the specific claim pursuant to s 319(g) of the 1998 Act rather than just a claim for compensation. The applicant submits that the respondent should not "just sit on its hands"[11] when faced with a claim such as the applicant's when it has before it the first step of an entitlement, that is, an admission that as at a certain date the applicant has not reached maximum medical improvement. The respondent should refer the claim for assessment itself.

36. The applicant submits that until such time as he is assessed as being a worker with either high needs (meaning he is a worker with a degree of permanent impairment assessed to be more than 20%), or with highest needs (a worker assessed at more than 30%), he should be classed as a worker with the highest needs. This is because any such assessment is pending because an AMS has declined to make an assessment on the basis that maximum medical assessment has not been reached and the degree of permanent impairment is not fully ascertainable,

37. The applicant notes that once he is assessed as a worker with highest needs, he would then be entitled to the special provision for workers with highest needs provided for in s 38A of the 1987 Act.

38. In conclusion, the applicant submits that it is not the intention of the Act to discriminate against workers with high or the highest needs while they are waiting to attain maximum medical improvement, compared with workers who have attained that state. Once there is an assessment that a worker has not reached maximum medical improvement, that worker escapes the constraints imposed by s 39 and is entitled to weekly benefits after an aggregate period of 260 weeks.

39. The terms of any referral to an AMS were articulated by counsel for the applicant.

Respondent

40. The respondent submits that the applicant's submissions are misguided in the sense that there is no provision on the legislation that says that if an injured worker has not reached maximum medical improvement and that is communicated to an insurer, there is any requirement to pay compensation because of the definitions in s 32A of the 1987 Act. The applicant's submissions ignore the object of s 32A.

[11] T-16.20.

41. Section 32A, according to the respondent, is a definition section only. It does not create an entitlement to any form of compensation. A worker with high needs, as defined in the section, does coincide with s 39(2) in the sense that the cessation of weekly payments after five years does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment is more than 20%.

42. There is nothing is s 39 that refers to "maximum medical improvement" or reaching that state. The respondent submits that[12] the introduction of that section, along with other amendments in 2012, meant that instead of an injured worker being entitled to weekly benefits until retirement, such compensation was limited firstly to 130 weeks and only in certain circumstances to continue to 260 weeks. Further, the respondent submits that Parliament made it "crystal clear" that it does not want workers to receive weekly compensation for more that five years unless, in accordance with the definition on s 32A, they are workers with high needs, that is more than 20% permanent impairment.

43. The respondent submits that "pending" means that a matter has already been referred to an AMS, and the assessment has not concluded because the AMS has declined to make an assessment on the basis that maximum medical improvement has not been reached. In that circumstance the respondent submits that the definitions of a worker with high needs or the highest needs will have been met.

44. The respondent gives as an example of the situation which would occur if the applicant's argument as to the entitlement of a worker to obtain weekly payments by simply having an AMS assessing that the worker had not reached maximum medical improvement. That is, a worker with a very minor injury (a paper cut is given as an example) resulting in either no or very minimal impairment, could succeed in being classed as a worker with highest needs on the basis of an AMS declining to make an assessment because maximum medical improvement had not been reached.

45. The respondent submits that, in accordance with s 319 of the 1998 Act, a "medical dispute" must be a dispute between a claimant and a person on whom a claim is made about the matters listed in that section. "[C]laim" is defined in s 4 and s 131 of the 1998 Act as a claim for compensation for work injury damages that a person has made or is entitled to make. The respondent submits that the applicant has not made a claim for compensation. The claim that the applicant has made is to see whether there can be compensation sometime in the future.

46. The respondent submits that the applicant's "claim" is not a claim under s 39, which section ends the entitlement to compensation, subject to the exclusion referred to therein.

47. The respondent submits that there must be a claim for compensation, such as for permanent impairment compensation pursuant to s 66 of the 1987 Act, before a matter can be referred to an AMS for assessment. If on referral, that AMS declines to make an assessment because maximum medical improvement has not been reached, the definitions of workers with high or highest needs then become relevant. According to the note to sub-paragraph (b) in the definitions of workers with high or highest needs, at such time as the AMS assesses permanent impairment, that sub-paragraph no longer applies. That is, an assessment is no longer pending because the AMS has assessed permanent impairment.

48. With reference to the case of *Clarke v State of New South Wales (Greystanes Disability Services) (Clarke)*[13] (to which the parties' attention was drawn) the respondent submits that case is completely different, whilst conceding that a threshold dispute can be referred to an AMS, but that would be where there are different levels of compensation put forward by the parties to the dispute.

[12] T 25.05.
[13] [2019] NSWCC 11.

49. The respondent submits that there is no claim in this matter because there is no dispute. The respondent submits that all the applicant is asking for is whether the degree of permanent impairment is fully ascertainable, and that can only occur if there is a medical dispute in respect of a claim, and the claim must be for compensation. Compensation must be some form of monetary compensation.

50. The respondent submits that an injured worker can be classed as a worker with high or the highest needs when:

    (a) the parties are in dispute as to the degree of permanent impairment suffered by the worker based on medical assessments held by each of them;

    (b) this dispute is referred to an AMS, and

    (c) the AMS declines to make an assessment because in his or her opinion, maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable.

51. The respondent draws attention to s 38 of the 1987 Act where the term "high needs" is referred to, noting that there is no such reference in s 39. Attention is also drawn to s 59A, which excludes a worker with high needs from the operation of that section.

52. In conclusion, the respondent submits that s 319 of the 1998 Act requires firstly that there is a medical dispute, the existence of which the respondent denies; secondly it requires the medical dispute to be on a claim or in connection with a claim, and there is no claim[14]. The respondent submits that what the applicant is attempting to do in this case amounts to an abuse of process, as "pretty much every worker" could do it[15], even one day after having surgery when the surgeon would obviously assess that maximum medical improvement had not been reached, then go to an AMS to get that same finding and thereby be assessed as a worker with high or highest needs. Having regard to this submission, the respondent refutes the applicant's submission that it is not a model litigant.

FINDINGS AND REASONS

Has the applicant made a claim for compensation?

53. "***[C]laim***" is defined in s 4 of the 1998 Act as meaning "a claim for compensation or work injury damages that a person has made or is entitled to make." "***[C]ompensation***" means compensation under the Workers Compensation Acts and includes any monetary benefit under those Acts. "Workers Compensation Acts" means the 1998 Act and the 1987 Act.

54. Dr Sharp in his report to the applicant's solicitor dated 1 July 2019 said in response to two questions put to him that:

    (a) the applicant had not reached maximum medical improvement at the date of surgery – 22 May 2019, noting that he had undergone the surgery that would lead to maximum medical improvement but was not there yet, and

    (b) the applicant would probably reach maximum medical improvement probably in two or three months, although that could be longer.

55. The applicant's solicitor served that report on the respondent on 17 July 2019, with a covering letter, the second paragraph of which noted Dr Sharp's advice that the applicant had not reached maximum medical improvement. The author of the letter then stated:

[14] T-34.15.
[15] T 38.15.

"We note that you ought treat this as a claim for resumption of weekly payments and reconsideration by the insurer in relation to resumption of such weekly payments based on the worker having not reached maximum medical improvement as it is not ascertainable directly after surgery.

Please determine our request for reconsideration and commencement of weeklies per force of section 32A of the *Workers Compensation Act 1987* definition of injured worker with high and highest needs as in forms the operation of section 39 of the *Workers Compensation Act 1987.*

In the event that you confirm maximum medical improvement is not ascertainable we note the Act requires a Commission appointed Approved Medical Specialist to so determine for the purposes of recommencement of weekly payments as contemplated within section 39 perforce of definition section 32A relating to workers with high or highest needs."

56. The respondent concedes that as at 1 July 2019 there is no dispute that maximum medical improvement is not ascertainable. In that circumstance, the respondent says that there is no dispute concerning the issue and there is no requirement for any referral to the Commission.

57. The respondent has not resumed making weekly payments to the applicant in accordance with the applicant's request. The applicant therefore says the letter of 17 July 2019 is a claim for compensation. Reference is made to ss 32A and 39 of the 1987 Act in respect of the claim for commencement of weekly benefits.

58. The definitions of workers with high or highest in s 32A needs is as follows:

"***worker with high needs*** means a worker whose injury has resulted in permanent impairment and—

(a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 20%, or

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or

Note.

Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%

and includes a worker with highest needs.

worker with highest needs means a worker whose injury has resulted in permanent impairment and—

(a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 30%, or

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or

Note.

Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 30%."

59. Section 39 is as follows:

"(1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.

(2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

Note. For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

(3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

60. The applicant's claim to the Commission is on Form 7 – an "Application for Assessment by an Approved Medical Specialist" specifically seeking assessment as to whether the degree of permanent impairment is fully ascertainable, with reference to s 319(g) of the 1998 Act. According to the note under the heading of Form 7:

"This is the approved form to request referral for assessment of permanent impairment where there is a threshold dispute as to the degree of permanent impairment or where there is a dispute as to an employee's condition or fitness for employment."

61. The four threshold disputes listed in Form 7 for which the form can be used are a:

(a) threshold dispute for domestic assistance claim s 60AA 1987 Act);
(b) threshold dispute for commutation of liability (s 87EA 1987 Act);
(c) threshold dispute for work injury damages claim, and
(d) threshold dispute for offender in custody damages claim (s 26D *Civil Liability Act 2002*).

62. The applicant submits that, as the respondent has not resumed payment of weekly payments in accordance with his letter of claim dated 7 July 2019, there is a "medical dispute" within the definition of that term in s 319 of the 1998 Act. It is a dispute between him and the respondent about, in terms of s 319(g), "whether the degree of permanent impairment is fully ascertainable" or a question about "whether the degree of permanent impairment is fully ascertainable" … "*in connection with a claim"* (emphasis added).

63. The respondent concedes, based on the evidence of the treating surgeon Dr Sharp, that as at the date of the doctor's report, the applicant had not reached maximum medical improvement. There is therefore no dispute in respect of that matter as at that date, 1 July 2019. One course that the applicant could have followed thereafter, one that the respondent submitted was the appropriate course, was to wait the two or three months (or longer, as the doctor said that it could be longer) that Dr Sharp opined it would take for the applicant to reach maximum improvement, seek an assessment of WPI at that time and make a claim on the respondent for lump sum compensation pursuant to s 66 of the 1987 Act, assuming that the WPI assessment was greater than 10%. If the respondent disputed the quantum of the WPI claimed, the matter would then be referred to an AMS. If the AMS declined to make an assessment because he or she was of the opinion that the degree of permanent impairment was not fully ascertainable because maximum medical improvement had not been reached, the applicant could then obtain the benefit of the definitions of a worker with high or highest needs in s 32A of the 1987 Act. In that circumstance, an assessment would be "pending" as referred to in (b) of the definitions of workers with high and highest needs.

64. The applicant has chosen not to pursue that course, but to seek referral of his matter for assessment by an AMS in the absence of supporting evidence that maximum medical improvement had been reached and therefore in the absence of a claim for compensation for permanent impairment. The respondent submits that this is a "back door" approach, and an abuse of process, noting that even claims for permanent impairment resulting from the most minor of injuries would enable an injured worker to obtain, for a period, weekly and other benefits to which he or she would not be entitled once the degree of permanent impairment resulting from the injury was assessed by an AMS. I think that there is merit in this submission.

65. More importantly I do not think that the applicant's letter to the respondent dated 17 July 2019 is a claim for compensation. The definitions of "claim" and "compensation" are referred to above at [53]. I do not think that the letter, notwithstanding the claim for the resumption of weekly payments referred to in the third paragraph thereof, is a claim for compensation. The terms of the applicant's claim for the commencement of weekly compensation are fully set out at [55] above. The claim is framed in terms of the definitions of a worker with high or highest needs in s 32A, and with reference to s 39.

66. Section 39(2) states that the section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent from the injury is more than 20%. The applicant satisfies the first of these requirements but not the second. Dr Bodel assessed Mr Weate as having sustained 6% WPI as a result of injury to his right shoulder on 15 January 2008. The Note to subsection (2) states that for workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to s 38.

67. There is no reference in s 39 to a worker with high or highest needs, nor is there reference to an injured worker having reached maximum medical improvement. It is a section that was inserted in the 1987 Act in 2012 to limit the entitlement of injured workers to weekly benefits, subject to the condition referred to in subsection (2).

68. What the applicant is claiming in the letter of 17 July 2019, confirmed by his lodgement of a Form 7, is referral of the matter to an AMS for assessment as to whether the degree of permanent impairment is fully ascertainable. That course of action was adopted by the applicant in the knowledge that as at 1 July 2019 the degree of permanent impairment was not fully ascertainable because maximum medical improvement had not been reached but that it would probably be reached in two or three months, although it could be longer. There was a concession from the respondent, albeit after lodgement of the Application, that as at 1 July 2019 that maximum medical improvement was not ascertainable.

69. If perchance the applicant would have been successful in having the matter referred to an AMS in response to the Application and the AMS had declined to make an assessment on the basis that the degree of permanent impairment was not fully ascertainable, that would still not entitle the applicant to weekly benefits beyond 260 weeks. In terms of s 39, he would still not be a worker whose injury resulted in permanent impairment of more than 20%. Pending assessment of the degree of permanent impairment when maximum medical improvement was reached, he would be a worker with high or (as the applicant submits in this case) highest needs. He may be entitled to other benefits under the 1987 Act, for example under s 59A, but not to weekly benefits.

70. There is reference to a worker with high needs in s 38 of the 1987 Act which specifies special requirements for continuation of weekly benefits after the second entitlement period of 130 weeks referred to in s 37. Section 38A makes special provision for workers with highest needs. However the applicant still needs to satisfy s 39(2) for him to have an entitlement to weekly payments of compensation after an aggregate period of 260 weeks.

71. My finding is that the applicant's letter to the respondent is not a claim for compensation.

Is there a medical dispute?

72. In my view there is no dispute. The applicant attempted to frame his claim as a "medical dispute" in terms of s 319(g) of the 1998 Act. He emphasised that there was a question about the degree of his permanent impairment in connection with a claim. If my finding that the applicant has not made a claim for compensation is incorrect, I will address the issue of medical dispute.

73. The respondent can only respond to the evidence of a claim presented to it. The respondent does not dispute this evidence. The respondent does not have any other evidence as to when maximum medical improvement will be reached apart from that of Dr Sharp. The doctor said in his report of 1 July 2019 that it would probably be in two or three months although that could be longer. On that basis there is no dispute.

74. Further, I do not think that there can be an extension of the meaning of "in connection with a claim" for weekly benefits based on the definitions of workers with high or highest needs in s 32A. I have found that what the applicant is claiming is referral of the matter to an AMS for assessment as to whether the degree of permanent impairment is fully ascertainable. That is what he specifies in the Application. As I have pointed out in [66] above, even if an AMS declined to make an assessment of permanent impairment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, that would not entitle the applicant to weekly benefits pursuant to s 39.

75. I find that there is no medical dispute.

76. I mention for completeness the matter of *Clarke* referred to in [48] above. That was a matter in which the applicant claimed lump sum compensation for permanent impairment which was disputed by the respondent. The dispute related to the injury to two body parts and the degree of WPI for the purposes of a threshold dispute. The proceedings were commenced by way of a Form 7 document – Application for Assessment by an Approved Medical Specialist in which he applied for

> "(a) An assessment as to whether the degree of permanent impairment is more than 20% (s 32A of the *Workers Compensation Act 1987*- worker with high needs);
>
> (b) An assessment as to whether the degree of permanent impairment is more than 30% (s 32A of the *Workers Compensation Act* 1987 - worker with highest needs), and

(c) An assessment as to whether the degree of permanent impairment is more than 20% (s 39 of the *Workers Compensation Act* 1987- cessation of weekly payments after 5 years)."

77. Notwithstanding the fact that the claim as originally made in those proceedings was one for lump sum compensation, Senior Arbitrator Capel found in that case that the true character of the "dispute" in that case was whether the applicant had more that 20% or 30% WPI. He therefore remitted the matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of WPI in respect of injury to a number of body parts for the purpose of a threshold dispute. If the resulting assessment of the AMS was found to be in excess of 20%, quite clearly the applicant would meet the qualification in s 39(2) of the 1987 Act which would exempt him from the provisions of s 39(1).

78. In this case the applicant is seeking assessment as to whether the degree of permanent impairment is fully ascertainable.

79. For the reasons outlined herein, the Application is dismissed.

SUMMARY

80. The applicant has not made a claim for compensation such as to give the Commission jurisdiction to refer the matter to an AMS for assessment as to whether the degree of permanent impairment is fully ascertainable because maximum medical improvement has not been reached.

81. The Application is dismissed.