

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1363/20  
**Applicant:** Nicholas James Taylor  
**Respondent:** Coles Supermarkets Pty Ltd  
**Date of Determination:** 20 May 2020  
**Citation:** [2020] NSWCC 166

The Commission determines:

1. Respondent's application that the Commission does not have jurisdiction and is estopped from hearing and determining the disputed liability issues of injury and whether the employment concerned was a substantial contributing factor to the injury is dismissed pursuant to section 354(7A)(b) of the *Workplace Injury Management and Workers Compensation Act 1998*.
2. Registrar to list the matter on a date to be fixed for conciliation conference/arbitration hearing of the disputed issues raised by the respondent in its notice dated 19 August 2019 issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998*.

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

Grahame Edwards  
**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 GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*L Golic*

Lucy Golic  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Mr Nicholas James Taylor (the applicant) alleges he suffered injury to his right chest wall and ribs in the course of his employment as a delivery driver with Coles Supermarkets Pty Ltd (the respondent) on 5 June 2019.
2. On 19 August 2019, the respondent issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability; alleging Mr Taylor did not suffer injury within the meaning of s 4(a) of the *Workers Compensation Act 1987* (the 1987 Act); and that the employment concerned was not a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act for reasons given in the notice.
3. The respondent also disputed liability in regard to any claim for weekly payments of compensation pursuant to s 33; and medical and related treatment expenses pursuant to ss 59 and 60 of the 1987 Act.
4. On 10 December 2019, Mr Taylor lodged an Application for Expedited Assessment in Matter No. 6540/2019 seeking an interim payment direction of weekly payments of compensation for a closed period from 6 June 2019 to 27 August 2019 as result of his alleged injury.
5. On 13 December 2019, the respondent lodged its Reply to Application for Expedited Assessment.
6. The Application for Expedited Assessment was dealt with by the Registrar under Pt 5 of the 1998 Act. The Registrar delegated his functions under Pt 5 to Ms Belinda Gamble, a legal officer employed by the Commission, pursuant to s 371(2) of the 1998 Act.
7. On 13 January 2020, the Registrar's delegate conducted a telephone conference with the applicant and the respondent. Mr Kreveld, solicitor, represented the applicant and Mr Dolan, solicitor, represented the respondent. The parties made submissions, and the decision was reserved, however there is no indication in the delegate's written reasons as to the nature of the submissions.
8. On 24 January 2020, the Commission published the reasons of the Registrar's delegate for declining to make an interim payment direction against the respondent.
9. On 10 March 2020, Mr Taylor lodged an Application to Resolve a Dispute (the application) claiming weekly payments of compensation and medical expenses against the respondent as a result of the alleged injury.
10. On 16 March 2020, the respondent lodged its Reply to the Application to Resolve a Dispute (the Reply).
11. The respondent, in its Reply, put the following matters in dispute:
  - “1. The applicant is estopped from bring [sic] the proceedings. The claim was determined by [sic – the] Workers Compensation Commission on 24/01/2020.
  2. The Workers Compensation Commission has no jurisdiction to hear and determine matter no 1363/20.
  3. If the Applicant is not estopped from bring [sic] the claim and the Workers Compensation Commission has jurisdiction to determine the claim (which are disputed) the respondent objects to the Applicant relying on evidence that was not attached to matter No 6540/2019”.

12. On 8 April 2020, I conducted a telephone conference with the same legal representatives who represented the applicant and the respondent in the Application for Expedited Assessment before the Registrar's delegate. The jurisdiction and estoppel issues raised by the respondent in its Reply were discussed. The matter could not be resolved, requiring it to be set down for a conciliation conference/arbitration hearing via telephone conference.

### **ISSUES FOR DETERMINATION**

13. The parties agree that the following issues remain in dispute:
  - (a) injury;
  - (b) employment concerned was a substantial contributing factor;
  - (c) jurisdiction, and
  - (d) estoppel

### **Matters previously notified as disputed**

14. Injury, and whether the employment concerned was a substantial contributing factor to the injury, were raised as issues in dispute in the respondent's s 78 notice.

### **Matters not previously notified**

15. Jurisdiction and estoppel were raised by the respondent when it lodged its Reply.

### **PROCEDURE BEFORE THE COMMISSION**

16. 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.
17. The parties attended a conciliation conference/arbitration hearing conducted via telephone on 6 May 2020.
18. Mr Carney of counsel, instructed by Mr Kreveld, represented Mr Taylor who was also in attendance.
19. Mr Baker of counsel, instructed by Mr Dolan, represented the respondent.
20. I granted the respondent leave pursuant to s 289A(4) of the 1998 Act to put in issue the previously unnotified issues of jurisdiction and estoppel because the applicant conceded he was not prejudiced by the application, which was a question of law to be dealt with as an interlocutory application before determining the substantive issues of injury and whether the employment concerned was a substantial contributing factor to the injury.
21. Counsel agreed the submissions on the issues of jurisdiction and estoppel could be made together.
22. The arbitration hearing was sound recorded.

## **EVIDENCE**

### **Documentary evidence**

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

### **Oral evidence**

24. No application was made by either party to adduce oral evidence. No application was made by the respondent to cross-examine the applicant.

## **FINDINGS AND REASONS**

### **Issue 1 – jurisdiction and estoppel**

#### **Submissions**

##### ***Respondent***

25. The respondent's submissions are summarised as follows:
- (a) This is a matter which the applicant sought relief under Pt 5 of the 1998 Act by filing an Application for Expedited Assessment.
  - (b) The Registrar delegated his functions under Pt 5 to his delegate, Ms Gamble, to determine the claim for weekly payments of compensation.
  - (c) Prior to making the application under Pt 5 of the 1998 Act, the respondent issued a notice pursuant to s 78 of the 1998 Act setting out the basis upon which liability for injury was disputed.
  - (d) The parties made submissions to Ms Gamble on the disputed issue of injury.
  - (e) Ms Gamble found the applicant had not discharged his onus that he suffered injury arising out of or in the course of employment on 5 June 2019 as alleged.
  - (f) As a result of that finding, the Registrar declined to make an interim weekly payments direction.
  - (g) What remedies are available to the applicant?
  - (h) Section 296(2): "Except as provided by this Part, the exercise of any function of the Registrar under Division 2 or 3 of this Part is not subject to appeal or review."
  - (i) Disputes concerning past weekly payments are dealt with by Div 2A: s 304A: "(1) This Division applies in respect of a dispute that concerns weekly payments of compensation if the payments are for a period (not exceeding 12 weeks) before the dispute is referred to the Commission, being a period in respect of which an interim payment direction under this Part may not be made."

- (j) Section 304B empowers the Registrar to determine the dispute instead of the Commission because the Registrar has all the functions of the Commission constituted by an Arbitrator under the Workers Compensation Acts; and any determination of the Registrar is taken to be the determination of the Commission constituted by an Arbitrator.
- (k) Section 371 sets out the functions of the Registrar: “(1) the Registrar has and may exercise all the functions of an Arbitrator”.
- (l) Sub-section (2) of s 371 provides the power for the Registrar to delegate any of his functions to any member or member of staff of the Commission under the Workers Compensation Acts, except the power of delegation.
- (m) Sub-section (3) of s 371 confirms the Registrar may exercise any of the functions of the Commission constituted by an Arbitrator to dismiss proceedings before the Commission.
- (n) Division 2A was inserted by Act 113 of 2005 and became operative on 1 November 2006.
- (o) A decision under s 304B is a final determination and if a party is dissatisfied with the decision, they may appeal to a Presidential member of the Commission under s 352 of the 1998 Act: *Hobden v South East Illawarra Area Health Service (Hobden)*<sup>1</sup> and *Kohlrusch v Macquarie Education Group Australia Pty Ltd (Kohlrusch)*<sup>2</sup>.
- (p) Deputy President Roche in *Kohlrusch* approved of President Keating’s reasoning in *Hobden* that the insertion of Div 2A provided a right of appeal against a determination by the Registrar or the Registrar’s delegate under Div 2A of Pt 5 to a Presidential member of the Commission pursuant to s 352 of the 1998 Act.
- (q) The Registrar has all the functions of the Commission constituted by an Arbitrator under the Workers Compensation Acts and any determination of the Registrar is taken to be the determination of the Commission constituted by an Arbitrator: s 304B(2).
- (r) The Registrar’s delegate had the power of an Arbitrator to determine the disputed issue of liability.
- (s) The Registrar’s delegate found the applicant had not discharged his onus of establishing on the balance of probabilities that he suffered an injury arising out of or in the course of employment as alleged.
- (t) The Registrar’s delegate found against the applicant on the question of liability.
- (u) The applicant’s right of appeal against the decision of the Registrar’s delegate’s is provided by s 352 of the 1998 Act.
- (v) This application is misconceived and should be dismissed.
- (w) The applicant is estopped because the Registrar’s delegate determined the issue of liability against him.

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<sup>1</sup> [2010] NSWCCPD 13 at [19], [26], [32]

<sup>2</sup> [2012] NSWCCPD 15 at [26] and [40]

## ***Applicant***

26. The applicant's submissions are summarised as follows:

- (a) The Registrar's delegate's determination was not to make an interim payment direction.
- (b) The Registrar did not issue a Certificate of Determination because the interim payment direction is limited under the statutory scheme of Pt 5 of Ch 7 of the 1998 Act.
- (c) The Registrar is to presume that an interim payment direction for weekly payments of compensation is warranted: s 297(3)
- (d) The liability dispute is in respect of injury as raised by the respondent in its s 78 notice.
- (e) There may be a right of appeal from a decision of the Registrar but it is clear that s 304B(3) does not affect any jurisdiction of the Commission to determine a dispute involving weekly payments of compensation.
- (f) There is an absence of a Certificate of Determination and therefore no estoppel in that regard.
- (g) Section 310 empowers the Registrar to refer a dispute to the Commission for determination and may make orders with respect to any matter that can be the subject of a recommendation by the Registrar under this Division [Div 3].
- (h) It is clear the power of the Commission is not displaced to determine the disputed issue of liability by virtue of s 309(2) where an employer is provided with protection by evidence of an admission made at any conference or hearing before the Registrar which is not admissible in other proceedings before the Commission.
- (i) Section 304B(3) makes it clear that Div 2A does not affect any jurisdiction of the Commission to determine a dispute involving weekly payments of compensation.
- (j) The only order given by the Registrar was a direction to decline to make an interim payment direction; no Certificate of Determination was issued.
- (k) No res judicata because there was no final decision.
- (l) An interim payment direction is an interlocutory matter only.
- (m) The Registrar does not have the power or jurisdiction to delegate the power to determine liability issues.
- (n) The Registrar's delegate cannot make a final determination on liability.

## ***Respondent's submissions in reply***

27. The respondent's submissions in reply are summarised as follows:

- (a) Division 2A was inserted in 2006 – ss 304A and 304B.
- (b) Section 309 is under Div 3 which deals with disputes about non-compliance with Chapter 3 and has no bearing on Div 2A.

- (c) The Commission is comprised of by a Registrar who has all the functions of the Commission constituted by an Arbitrator under the Workers Compensation Acts: s 304B(2).
- (d) The Registrar can delegate his function to a delegate who is limited to making an award up to 12 weeks of payments: s 304A(1) and s 304B(3).
- (e) The applicant elected to commence proceedings by lodging an Application for Expedited Assessment under Pt 5 of Ch 7 of the 1998 Act.
- (f) Division 2A applies in respect of a dispute that concerns weekly payments of compensation for a period not exceeding 12 weeks: s 304A.
- (g) Section 304B(2), for the purposes of determining the dispute i.e. weekly payments of compensation for a period not exceeding 12 weeks, the Registrar has all the functions of the Commission constituted by an Arbitrator and any determination of the Registrar is taken to be the determination of the Commission constituted by an Arbitrator.
- (h) In accordance with *Hobden*, the Registrar's delegate determined the issue of liability between the parties as raised in the respondent's s 78 notice.
- (i) The applicant's right of appeal is to a Presidential member pursuant to s 352 of the 1998 Act.
- (j) The exercise of any function of the Registrar under Div 2 or Div 3 of Pt 5 is not subject to appeal or review: s 296(2).
- (k) Division 2A provides for an appeal to a Presidential member.
- (l) The delegate had the power of an Arbitrator and therefore a final determination: *Hobden*
- (m) The delegate's direction is an order and unequivocally is a Certificate of Determination determining the liability issue of injury.
- (n) The delegate's determination was a final decision and not an interlocutory one.

### ***Applicant's further submissions***

28. The applicant further submissions are summarised as follows:

- (a) There was no right of appeal to a Presidential member prior to the insertion of Div 2A, operative on 1 November 2006.
- (b) Division 2A preserves the jurisdiction of the Commission to review the decision of the Registrar or his delegate exercising the functions of an arbitrator.
- (c) The Registrar's delegate did not have jurisdiction to determine liability.
- (d) The Registrar issued no Certificate of Determination on the liability issue; the order was to decline to make an interim payment direction.

## Discussion and findings

29. The jurisdictional issue is whether the relevant provisions of the 1998 Act permit the Registrar to delegate his functions of an Arbitrator under Pt 5 of Ch 7 to determine an Application for Expedited Assessment of a claim for weekly payments for a period that does not exceed 12 weeks.
30. All references are to the 1998 Act except for the *Workers Compensation Regulation 2016* (the 2016 Regulation) and the 1987 Act.
31. Section 371 sets out the functions of the Registrar as follows:
- “(1) The Registrar has and may exercise all the functions of an Arbitrator.
  - (2) The Registrar can delegate to any member or member of staff of the Commission and of the Registrar’s functions under the Workers Compensation Act, except this power of delegation.
  - (3) The Registrar may exercise any of the functions of the Commission constituted by an Arbitrator to dismiss proceedings before the Commission.”
32. The Registrar does not constitute, and does not exercise functions as, the Commission (except when acting as an Arbitrator pursuant to the Registrar’s power (s 371(2)) to exercise the functions of an Arbitrator): s 375(4).
33. An Arbitrator is a member of the Commission appointed by the Minister: s 368(1).
34. An Arbitrator as a member of the Commission has and may exercise the functions conferred or imposed on the member by or under the 1998 Act or any other Act: s 370.
35. Section 350 provides for an appeal to a Presidential member against a decision of the Commission constituted by an Arbitrator.
36. Section 375 (1) provides for the constitution of the Commission by an Arbitrator for the purpose of any proceedings, and sub-s (3) provides for the purposes of any proceedings on an appeal against a decision of the Commission constituted by an Arbitrator, the Commission is to be constituted by a Presidential member.
37. The general provision concerning jurisdiction of the Commission is to be found in s 105(1) which provides:
- “(1) Subject to this Act, the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under this Act and the 1987 Act.”
38. Deputy President O’Grady in *Peric v Chul Lee Hyuang Ho Shin Jong Lee & Mi Ran t/as Pure and Delicious Healthy and Anor*<sup>3</sup> (*Peric*) summarised the relevant provisions vesting jurisdiction in the Commission by s 105 of the 1998 Act.
39. The term “liability” is not defined in the workers compensation legislation. It was observed by Acting Deputy President Roche (as he then was) in *Connor v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*<sup>4</sup> (*Connor*) that:
- “... to decide liability the Commission must decide, among other things:
  - (1) whether the worker sustained an ‘injury’ within the meaning of section 4 of the 1987 and 1998 Act;

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<sup>3</sup> [2009] NSWCCPD 47 at [58] – [66]

<sup>4</sup> [2006] NSWCCPD 124 at [46]



(2) does the injury satisfy the conditions in section 9A of the 1987 Act, and

(3) what are the consequences of the injury, that is, what pathology is said to result from the injury.”

40. Questions of jurisdiction in respect of the roles of an Arbitrator and that of an Approved Medical Specialist were addressed by the Court of Appeal in *Haroun v Rail Corporation of New South Wales & Ors*<sup>5</sup> (*Haroun*).

41. Handley AJA in the leading judgment in *Haroun* (McColl JA and McDougall J agreeing) at [16] said:

“The scheme for the settlement of compensation disputes established by the 1998 Act read with the Workers Compensation Act 1987 (the 1987 Act) is to have factual and legal issues resolved by an Arbitrator subject to an appeal to a President or Deputy President, and to have certain medical issues decided by an AMS subject to appeal to a Panel.”

42. While the decisions of the Presidential members in *Gane v Dubbo City Council*<sup>6</sup>[2007] NSWCCPD 140; *Connor, Peric*, and the Court of Appeal in *Haroun* are in respect of permanent impairment claims and the provisions in Pt 7 of the 1998 Act, I am of the view that the same ratio decidendi applies to the Commission’s jurisdiction constituted by an Arbitrator with respect to liability of injury; whether the employment concerned was a substantial contributing factor to the injury; medical and treatment expenses, and capacity for work as a result of injury are matters for determination by the Commission constituted by an Arbitrator.

43. Part 5 of Ch 7 is headed “Expedited Assessment”.

44. Pursuant to s 295, Pt 5 applies to a dispute referred to the Commission that concerns “weekly payments of compensation”.

45. The functions under Pt 5 are exercised by the Registrar: s 296(1).

46. Except as provided by Pt 5, the exercise of any function of the Registrar under Div 2 or 3 of Pt 5 is not subject to appeal or review: s 296(2).

47. Section 297(1) provides that the Registrar can make an “interim payment direction” upon the person whom the claim is made to pay compensation concerning weekly payments of compensation or medical expenses to which Pt 5 applies.

48. Section 297(3) provides that the Registrar is to presume that an interim payment direction for weekly payments of compensation is warranted unless it appears to the Registrar that:

- “(a) the claim concerned has minimal prospects of success, or
- (b) the worker has returned to work, or
- (c) the injury was not reported by the worker as required by section 44 (Early notification of workplace injury), or
- (d) insufficient medical evidence is available concerning the period of incapacity of the worker, or
- (e) circumstances exist that are prescribed by the regulations as circumstances in which it is not to be presumed that such a direction is warranted.”

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<sup>5</sup> (2008) 7 DDCR 139; [2008] NSWCA 192

<sup>6</sup> (2007) NSWCCPD 140

49. Clause 42 of the 2016 Regulation provides:
- “For the purposes of section 297(3)(e) of the 1998 Act, it is not to be presumed that an interim payment direction for weekly payments of compensation is warranted in circumstances where the insurer has given the worker notice under section 78 of the 1998 Act (insurers to give notice of decisions and reasons when liability disputed).”
50. The effect of cl 42 of the 2016 Regulation is to remove the presumption in favour of making an interim payment direction for weekly payments of compensation where the employer has given the worker notice under s 78.
51. Section 298(1) provides that an interim payment direction (or further interim payment direction) can direct the person on whom the claim is made to pay weekly payments of compensation for a **period that does not exceed 12 weeks** [emphasis added].
52. Division 2A under Pt 5 was inserted by Act 113 of 2005 *Workers Compensation Legislation Amendment (Miscellaneous Provisions) Act 2005*, in which sections 304A and 304B are contained, operative on 1 November 2006.
53. Prior to the enactment of Div 2A, s 296(2) prohibited an appeal from the decision of the Registrar or his delegate under s 352 to a Presidential member of the Commission.
54. Division 2A is headed “Disputes concerning past weekly payments”.
55. Section 304A is headed “Disputes to which the Division applies”.
56. Section 304A is set out as follows:
- “(1) This Division applies in respect of a dispute that concerns weekly payments of compensation if the payments are for a period (not exceeding 12 weeks) before the dispute is referred to the Commission, being a period in respect of which interim payment direction under this Part may or not be made.
- (2) A dispute that also relates to medical expenses may be dealt with partly under this Division (in relation to weekly payments) and partly under Division 2 (in relation to medical expenses).”
57. Section 304B is headed “Registrar may deal with dispute”
58. Section 304B is set out as follows:
- “(1) The Registrar may determine the dispute instead of the Commission.
- (2) For the purposes of determining the dispute and subject to the regulations, the Registrar has all the functions of the Commission constituted by an Arbitrator under the Workers Compensation Acts and any determination of the Registrar is taken to be the determination of the Commission constituted by an Arbitrator.
- (3) This Division does not affect any jurisdiction of the Commission to determine a dispute involving weekly payments of compensation.
- (4) To avoid doubt, the Registrar may, under section 371, delegate the function conferred on the Registrar under subsection (1) or (2).”

59. The respondent's submissions were made on the basis that the Registrar delegated his functions of an Arbitrator, conferred upon him by s 304B(2) and (4), and s 371(1) and (3) to determine the Application for Expedited Assessment for an interim payment of weekly payments under Div 2A.
60. Implicit in the respondent's submission was that the Registrar did not delegate his functions to determine the application under Div 2.
61. The prohibition on an appeal or review of a decision of the Registrar referred in s 296(2) does not extend to decisions made under Div 2A<sup>7</sup>.
62. Division 2A does not affect any jurisdiction of the Commission to determine a dispute involving weekly payments of compensation: s 304B(3).
63. Section 304B(4) provides that, for the avoidance of doubt, the Registrar may under s 371 delegate the functions conferred upon him by ss (1) or (2).
64. The respondent submits s 304A and s 304B empowers the Registrar to determine a dispute under Pt 5 in respect of a dispute that concerns weekly payments of compensation if the payments are for a period not exceeding 12 weeks; and that the Registrar has the power under s 371 to delegate a function conferred on him under s 304B(1) or (2).
65. The respondent, re-enforcing its argument as to the power of the Registrar to delegate his function as an Arbitrator, submits the wording of ss (4) of s 304B is unambiguous by the use of the statutory language: "To avoid doubt, the Registrar may, under section 371, delegate a function conferred on the Registrar under subsection (1) or (2)."
66. The respondent relies upon *Hobden* where President Keating held that a Presidential member has jurisdiction to hear an appeal under s 352 of the 1998 Act to review the decision of the Registrar's delegate made under s 304A of Div 2A.
67. *Hobden* concerned a claim by a worker for weekly payments of compensation for a period less than 12 weeks as a result of psychological injury. The employer accepted the worker suffered a psychological injury but relied upon the defence provided by s 11A of the 1987 Act, which was identified in a notice issued by the employer purported to be made pursuant to s 74 [now repealed – s 78] and in the employer's Reply to the Application.
68. For reasons which are not necessary to detail, President Keating found the s 74 notice was defective and unacceptable; determined that the employer had not discharged its onus under s 11A of the 1987 Act; revoked the Arbitrator's decision and entered an award in favour of the worker.
69. The President found as a finding of fact that the Registrar sent a notice to the parties advising the matter would proceed under Div 2A of Pt 5<sup>8</sup>, and that the Registrar pursuant to s 371(2) and s 304B(4) delegated her function to an Arbitrator as her delegate. The Arbitrator dealt with the matter under Div 2A, determining the liability issue in dispute, and disposed of the matter by entering an award in favour of the employer. The entering of the award and issuing a Certificate of Determination finally disposed of the matter.
70. Deputy President Roche in *Kohlrusch* considered the Registrar's powers of delegation under Div 2 and Div 2A of Pt 5. The Deputy President said at [38] to [42]:

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<sup>7</sup> *Hobden* at [34]

<sup>8</sup> *supra* at [28]

- “38. It is clear from the above summary of the legislation and relevant guidelines that the Registrar’s powers under Div 2 of Pt 5 are limited to making of an interim payment direction in certain specific circumstances. Those circumstances do not usually extend to the situation where a s 74 notice has issued. In that situation, the usual procedure will be for the matter to be referred to an Arbitrator for final resolution after the filing of an Application to Resolve a Dispute.
39. However, in a limited number of cases, even where the insurer has issued a s 74 notice, the ‘Expedited Assessment’ process in Pt 5 is available to resolve disputes where the past weekly compensation in dispute is for up to a maximum of 12 weeks compensation. **In that event, a delegate acting as an Arbitrator may deal with the matter under Div 2A, but he or she is not required to do so. If the matter were dealt with in that way, the delegate would determine all issues in dispute and issue a Certificate of Determination. Such a result would be a final determination and, if either party were dissatisfied with the delegate’s decision, they could appeal under s 352.** [emphasis added]
40. What I have outlined above is what happened in *Hobden v South East Illawarra Area Health Service* [2010] NSWCCPD 13 (*Hobden*). In an Application for Expedited Assessment filed on 16 June 2009, later amended, the worker claimed weekly compensation for the period from 10 February 2009 to 4 May 2009. The respondent disputed liability under s 11A. The Commission listed the matter before a delegate of the Registrar (acting as an Arbitrator) ‘under section 304B’ (see *Hobden* at [10]). The delegate heard argument on all issues and made an award in favour of the respondent employer. The delegate’s orders were incorporated in a Certificate of Determination issued by the Commission on 16 July 2009 under s 294. Ms Hobden appealed under s 352.
41. On the issue of jurisdiction, the President held (at [34]) that:
- ‘in the absence of more express legislative intention to limit the parties’ rights in respect of this Division, the prohibition on appeal or review of a decision of the Registrar referred in section 296(2) does not extend to decisions made under Division 2A. I am reinforced in that view by the provision of section 304B(4) which expressly provides that, for the avoidance of doubt, the Registrar may under section 371 delegate a function conferred on the Registrar under subsection (1) or (2).’”
71. The Deputy President found in *Kohlrusch* that the application for an interim payment direction was dealt with by the Registrar’s delegate under Div 2 and not as an Arbitrator because the case was never argued as if it was an application for a final determination under Div 2A.<sup>9</sup>
72. The Deputy President said if contrary to his finding that the delegate was acting as an Arbitrator and made orders under Div 2A, his order dismissing the application for an interim payment direction did not finally dispose of the parties’ rights and therefore was interlocutory.<sup>10</sup>

<sup>9</sup> *Kohlrusch* at [43]

<sup>10</sup> *supra* at [45] and *Licul v Corney* [1976] HCA; 50 ALJR 439 at 443 – 444

73. While no submission was made by either party as to the Registrar's terms of referral whether the delegate determined the application under Div 2 or Div 2A of Pt 5, I am assisted by the delegate's reference to s 297 and cl 42 of the 2016 Regulation in her statement of reasons under the heading: "**Reasons**" [emphasis in original], declining the relief sought.<sup>11</sup> The delegate made no reference to Div 2A and ss 304A and 304B contained therein, or that the Registrar had delegated his functions as an Arbitrator to her pursuant to s 304B(4).
74. It is clear in *Hobden*, as found by the President, that the relief sought was to be determined under Div 2A, and that the Registrar had delegated her function under Pt 5 as an Arbitrator pursuant s 304B(4).
75. The delegate in *Hobden* was an Arbitrator appointed by the Minister pursuant to s 368(2), and in that capacity and as the Registrar's delegate, determined the dispute under Div 2A, disposing of the matter vesting a right of appeal to a Presidential member of the Commission pursuant to s 350 of the 1998 Act.
76. I am satisfied the delegate was not acting as an Arbitrator under Div 2A but as the Registrar's delegate under Div 2 when she determined Mr Taylor's application for expedited assessment. In any event, should there be a contrary view, the order declining to make an interim payment direction did not finally dispose of the parties' rights and therefore was interlocutory.<sup>12</sup>
77. I agree with the applicant's submission that the Commission did not issue a Certificate of Determination but issued a direction that the Registrar declined to make an interim payment direction<sup>13</sup> for the reasons given by the delegate.
78. I am unable to accept the respondent's submission the delegate determined the disputed issues of liability. The respondent's submission was made on the basis that the delegate's determination was under Div 2A. For reasons I have given, I am satisfied the delegate determined the application under Div 2; and her reasons for declining to make the interim payment direction was that she was not satisfied Mr Taylor had discharged his onus on the balance of probabilities that he suffered an injury arising out of or in the course of employment as alleged. This was not a final determination of the disputed issues of injury and whether the employment concerned was a substantial contributing factor to the injury within the meaning of ss 4 and 9A of the 1987 Act. If the matter was dealt with in that way, the delegate would determine all issues in dispute and issue a Certificate of Determination. Such a result would be a final determination and, if either party were dissatisfied with the delegate's decision, they could appeal under s 352.<sup>14</sup> It was not a final determination of all the disputed issues; it was a determination of the application for an interim payment direction under Div 2 of Pt 5.
79. I find the Registrar's delegate determined the Application for Expedited Assessment for an interim payment direction of weekly payments of compensation under Div 2 of Pt 5 of Ch 7 of the 1998 Act.
80. I find the Registrar's delegate did not determine the Application for Expedited Assessment Application for an interim payment direction of weekly payments of compensation under Div 2A of Pt 5 of Ch 7 of the 1998 Act.
81. I find the Registrar's delegate did not determine the liability issues of injury and whether the employment concerned was a substantial contributing factor to the injury within the meaning of ss 4 and 9A of the 1987 Act.

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<sup>11</sup> Reply – p 19 – Delegate's "Reasons" at [27] – [31]

<sup>12</sup> *Kohlrusch* at [43]

<sup>13</sup> *supra* – p 16

<sup>14</sup> *Kohlrusch* at [39]

82. I find the Registrar's delegate did not determine all issues in dispute.
83. I find the Registrar did not issue a Certificate of Determination.
84. I find the Registrar's delegate did not finally dispose of the matter when she declined to make an interim payment direction.
85. I find the Commission constituted by an Arbitrator has jurisdiction to determine the liability issues of injury and whether the employment concerned was a substantial contributing factor to the injury within the meaning of ss 4 and 9A of the 1987 Act raised by the respondent in its s 78 notice.
86. It is not necessary for me to consider the doctrine of estoppel of res judicata because the matter was not finally disposed of when the Registrar issued a direction dated 24 January 2020 declining to make an interim payment direction.
87. The Respondent's interlocutory application that the Commission does not have jurisdiction and is estopped from determining the liability issues is misconceived and lacking in substance.
88. The respondent's interlocutory application is dismissed pursuant to s 354(7A)(b) of the 1998 Act.
89. I propose that the Registrar list the disputed liability issues for conciliation conference/arbitration before me on a date to be fixed.