

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 764/20
Applicant: Sean Thompson
Respondent: Bernipave Pty Ltd
Date of Determination: 21 May 2020
Citation: [2020] NSWCC 169

The Commission determines:

1. The respondent is to pay the applicant the sum of \$33,120 for lump sum compensation pursuant to section 66 of the *Workers Compensation Act 1987 Act* for 14% whole person impairment in relation to the bilateral inguinal hernia injury with deemed date of injury 12 September 2018.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Sean Thompson, the applicant, was employed by the respondent, Bernipave Pty Ltd, as a truck driver. His job involved him securing loads on to the prime mover of the work truck, which he says involved him exerting significant down force on a metal pole used to tighten the chain. This action had to be performed several times in the morning and at the end of the shift.
2. Mr Thompson alleges in September 2018, he noticed lumps in his lower abdomen, and he was diagnosed with bilateral inguinal hernia. On 3 October 2018, he underwent double hernia repair surgery, performed by Dr Adrian Cohen.
3. On 12 December 2019, Mr Thompson's solicitors made a claim pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) for lump compensation, setting out the particulars of the injury and serving the report of Associate Professor Cyril Wong dated 6 December 2019¹. The claim was for \$33,120 for 14% whole person impairment (WPI).
4. This letter of claim also attached an earlier report of Associate Professor Wong dated 2 August 2019 together with the following treating medical documentation:
 - (a) Consultation Record of Wallarah Bay Medical Centre between 11 September 2018 to 27 May 2019;
 - (b) ultrasound bilateral groin report dated 20 September 2018;
 - (c) ultrasound both inguinal areas report dated 18 December 2018;
 - (d) Report of Dr Adrian Cohen dated 25 September 2018, and
 - (e) Operation Report of Dr Cohen dated 4 October 2018.
5. On 8 January 2020, Mr Thompson's solicitor forwarded an email to several people at the respondent's workers compensation insurer, EML, asking if the claim made on 12 December 2019 was being looked at². A copy of the earlier letter and enclosures was attached to this email.
6. On 13 February 2020, Mr Thompson, through his solicitors, filed his Application to Resolve a Dispute (ARD) in the Commission. He indicated in the ARD form that the insurer had failed to determine his claim³.
7. On 5 March 2020, the respondent's solicitors filed a Reply indicating the insurer had failed to determine Mr Thompson's claim. It was noted there were no liability issues. The respondent sought leave to the extent necessary to dispute the extent and quantum of the impairment and submitted it was appropriate the matter proceed to an Approved Medical Specialist (AMS) for assessment. The respondent consented to an assessment by a general surgeon.
8. On 6 March 2020, the Commission streamed the matter to be assessed by an AMS. However, due to the COVID-19 virus such AMS appointments were cancelled and matters are being held in a pending list.

¹ ARD p 17.

² ARD p 18.

³ ARD form p 2.

9. On 21 April 2020, the Commission allocated this matter for telephone conference before an Arbitrator for conciliation. The matter was duly allocated to me and the telephone conference was held on 5 May 2020.
10. At the telephone conference Mr Kye Bruce, solicitor, appeared on behalf of Mr Thompson and Mr Doyle Myles, solicitor, on behalf of the respondent instructed by Mr Karl Maakasa from icare.
11. 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.

EVIDENCE

Documentary evidence

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

Oral evidence

13. There was no oral evidence. Both parties made oral submissions, which were sound recorded, and a copy is available to the parties.

FINDINGS AND REASONS

14. Section 65(3) provided that “If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist”.
15. However, section 65(3) was repealed by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) in schedule 2, clause 2. This schedule commenced on the date of proclamation which was 1 January 2019. Savings and transitional provisions were added by the 2018 amending Act and appear in the 1987 Act in Schedule 6, Part 19L and clause 2 provides that an amendment made by the 2018 amending Act extends to an injury received before the commencement of the amendment, and a claim for compensation made before the commencement of the amendment. Therefore, the repeal of section 65(3) applies to Mr Thompson’s case.
16. In many such cases, it will still be appropriate for an Arbitrator to remit the matter for an assessment by an AMS. The respondent argued this was such a case.
17. In the second reading speech in relation to the Bill relating to the 2018 amending Act it was stated:

“Schedule 2 to the bill provides for the Workers Compensation Commission to award permanent impairment compensation without referral to an approved medical specialist.

This amendment recognises that, in certain circumstances, the requirement to refer all permanent impairment disputes to an approved medical specialist was unduly delaying proceedings in the Workers Compensation Commission. The amendment will allow arbitrators to make determinations of permanent impairment by removing section 65 (3) from the 1987 Act, which requires all permanent impairment disputes to be referred to an approved medical specialist prior to the Workers Compensation Commission awarding permanent impairment compensation.⁴

18. The respondent has not provided any evidence as to why the claim was not responded to on 12 December 2019 or on 8 January 2020.
19. The treating medical material forwarded to the insurer was comprehensive, including two reports from the treating surgeon Dr Adrian Cohen dated 25 September 2018⁵ and 4 October 2018⁶. On both of these reports the doctor has noted the insurer's claim number and that a copy was sent to the insurer.
20. Also enclosed were the clinical records from Wallarah Bay Medical Centre where Mr Thompson attended and was treated by Dr Vinay Kudumula⁷, that doctor's referral to Dr Cohen dated 21 September 2018⁸ and the ultrasound report dated 11 September 2018 and the post-operative ultrasound report dated 18 December 2019⁹.
21. Mr Thompson has provided a statement with the ARD in which he sets out his work duties. The respondent has not filed any evidence to challenge his description of those duties. Mr Thompson also relates his discovery of the lumps in his abdomen and sets out the medical treatment undertaken by him. He says after the operation on 4 October 2018, he still had ongoing pain and he was certified unfit for work. He returned to work with the respondent on light duties in early January 2019 and full duties a month later. He states that he now works for a different company as he was made redundant about six months after returning to work. He says he now drives a roller or bobcat which are quite sedentary roles¹⁰.
22. Mr Thompson describes his ongoing symptoms such as numbness at the top of his left thigh extending down to just above his knee, and pain which fluctuates with posture and activity. He also relates the effect the injury has had on his marriage, including him feeling depressed.
23. Associate Professor Wong in his report dated 2 August 2019 sets out, in my view, comprehensive details about Mr Thompson's history, treatment and complaints at that time. These are consistent with Ms Thompson's statement. Under his examination findings he states:

"There was significant tenderness at the groins with no signs of acute inflammation. The symptoms of pain and tenderness at the groin are caused by the fibrosis induced by the mesh inserted at the pre-peritoneal layer of the abdominal wall at the time of surgery. There was no numbness at the groins but there was significant paraesthesia with loss of sensation at the anterolateral aspect of the left thigh consistent with Meralgia Paraesthetica."

⁴ Legislative Council 19 September 2018, Second Reading Speech of the Hon. David Clarke.

⁵ ARD p 31.

⁶ ARD p 32.

⁷ ARD p 20.

⁸ ARD p 28.

⁹ ARD p 30.

¹⁰ ARD p 2.

24. Associate Professor Wong explains in that report why he felt Mr Thompson had not reached maximum medical improvement. In doing so he referenced the following:
- “SIRA4 section 6.4 states that where, following repair of a hernia of the abdominal wall, there is residual persistent excessive induration; this should be assessed as a class 1 herniation (AMA5 Table 6 -9, p 136). This assessment should not be made unless symptoms have persisted for 12 months. Induration can be defined as an increase in the fibrous elements in tissue commonly associated with inflammation and marked by loss of tissue elasticity and pliability.”
25. The doctor then sets out his finding that there has been an increase in the fibrous elements in tissue and loss of elasticity and pliability from the mesh inserted behind the abdominal wall.
26. Associate Professor Wong’s approach shows, in my view, the care he has taken with this assessment. He has taken a considered approach and been mindful of the of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment Fourth Edition* (Guidelines Fourth Edition) and the *American Medical Association Guides to the Evaluation of Permanent Impairment Fifth Edition* (AMA 5).
27. Consistent with his careful approach Associate Professor Wong performed a further examination and report dated 6 December 2019. He assessed Mr Thompson as having 7% WPI for each inguinal hernia, which combined to 14% WPI. He gives a statement of his reasons as follows:
- “The right inguinal hernia was assessed as a class 1 herniation according to SIRA4 section 16.4 for the persistent excessive residual induration at the operation site associated with significant discomfort for more than 12 months. The impairment was rated at 7% WPI (AMA5 Table 6 -9, p 136). The left inguinal hernia was also rated at 7% WPI for the same reasons. The induration from fibrosis induced by the mesh at the groins was not clinically palpable as the pieces of mesh were inserted behind the muscle layers. Nevertheless, the fibrotic process is causing persistent discomfort at both groins. The left thigh Meralgia Paraesthetica impairment cannot be combined with induration impairment (SIRA4 16.5). It was not chosen for its lower value.”
28. Submissions were made by both parties’ solicitors as to whether I should determine this matter without referral to an AMS, noting the repeal of section 65(3) of the 1987 Act. The respondent does not dispute that it failed to determine the lump sum claim. It was submitted prior to the ARD being filed in the Commission there had been contact with Mr Thompson’s solicitor who was of the view that it was likely the matter would be referred to an AMS and so the respondent’s solicitor says they filed a Reply consenting to the referral to the AMS and they did not take steps to arrange a medical examination.
29. The respondent relies on the clinical records to support its submission that the matter should be referred to an AMS for assessment. In particular, it refers to the clinical entry on 24 December 2018 which refers to improvement in Mr Thompson’s pain post the bilateral inguinal hernia repair and to the entry on 21 January 2019 which noted that Mr Thompson was “under gradual return to work, feels better, still uncomfortable with certain movements but feels he is getting there...”¹¹. Attention was then drawn to the entries on 18 February 2019 that Mr Thompson felt back to his normal self and that the medical certificate issued on the same date certified him fit for pre-injury duties¹². The respondent referred to the clinical entry on 18 March 2019 that he felt fine and managed with preinjury duties with no issues and examination was “nad”, which is the abbreviation

¹¹ ARD p22.

¹² Reply p5.

for no abnormalities detected¹³. It noted a further certificate was issued certifying fitness for pre-injury duties¹⁴. The respondent submitted that there is no treating medical material beyond this time to support the complaints made by Mr Thompson in his statement or the findings made by Associate Professor Wong.

30. However, it needs to be borne in mind the clinical notes from Wallarah Bay Medical Centre state they were printed on 9 July 2019¹⁵. This was before Mr Thompson saw Associate Professor Wong.
31. The respondent states the guides, when referring to residual persistent excessive induration, requires there to be significant discomfort for 12 months and that the assessment should not be made unless symptoms have persisted for 12 months.
32. This submission is a reference to chapter 16.4 of the Guidelines Fourth Edition which states:

“Where, following repair of a hernia of the abdominal wall, there is residual persistent excessive induration at the site, which is associated with significant discomfort, this should be assessed as a class 1 herniation (AA5 Table 6-9, p 136). This assessment should not be made unless symptoms have persisted for 12 months.”
33. Mr Thompson’s case is, and Associate Professor Wong found, that the symptoms have persisted for more than 12 months since the surgery on 4 October 2018. Chapter 16.4 does not require that the symptoms had to have been present every day for 12 months. So, the fact that the general practitioner did not record complaints does not mean they have not persisted for 12 months.
34. Associate Professor Wong was aware of the fact that Mr Thompson had returned to work. He had the advantage of examining Mr Thompson twice and on both occasions found the same clinical situation existed. He regarded Mr Thomson as having significant discomfort for more than 12 months. He also applied chapter 16.5 of the Guidelines Fourth Edition and did not also make an allowance for the nerve injury, meralgia paraesthetica, together with the induration as he noted the Guidelines Fourth Edition prevent this.
35. The respondent argued an AMS assessment was also required because in the AMA 5 Guides Table 6-9 Class 1 has a wide range of WPI being from 0% to 9% and that would warrant expert assessment.
36. Mr Thompson’s submissions refer to his statement and his current complaints as at 31 January 2020 and argues his statement is in his own words and it is comprehensive, compared to brief notes by the general practitioner. He points out that the complaints are consistent with the findings of Associate Professor Wong. He submits that Associate Professor Wong was entitled to find 7% WPI for each hernia and that the respondent has not pointed to any error in his assessment of Mr Thompson. It was submitted that the respondent’s insurer should follow the model litigant policy, and where it did not respond to the claim twice, it should not take a position that causes more delay to Mr Thompson.
37. I consider that this is an appropriate case for an Arbitrator to determine. The respondent’s insurer has not complied with its obligations under section 281 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to determine the matter. Under that section the insurer has two months to determine the claim after all relevant particulars have been provided to it by the worker. The respondent has not asserted that the particulars forwarded to them on 12 December 2019 were lacking. I also accept the submission made by Mr Thompson regarding the need for the insurer to adopt a model

¹³ ARD p23.

¹⁴ Reply p8.

¹⁵ ARD p 20.

litigant policy. I also find it would be wasteful of costs and cause undue delay for the matter to wait for an AMS assessment. However, while the above are factors have been taken into account they are not the main reasons why I consider this is an appropriate case for an Arbitrator to determine.

38. The reason I find this is an appropriate matter to determine goes to the substantive merits of the claim. Associate Professor Wong has not demonstrated any error of reasoning, and he has not misapplied the criteria used to assess permanent impairment. He has not rushed to a decision. He has conducted a second examination where he made similar findings to the first. He has taken a detailed history from Mr Thompson and conducted thorough examinations. Furthermore, he has explained how he arrived at his assessment. The fact that he chose 7%, in the Class 1 range of 0% to 9% I find does not disclose error and does not necessitate a referral to an AMS.
39. Associate Professor Wong is a consultant general surgeon and so is appropriately qualified to undertake the assessment. I accept the opinion of Associate Professor Wong for the foregoing reasons.
40. Furthermore, the evidence provided by Mr Thompson also is accepted by me. He impresses me as a witness of truth. He has obtained other work notwithstanding having been made redundant. He explains what is involved in that work and how he copes and the effect the work-related injury has had on him. The fact that the records, that are available from the general practitioner, do not record the symptoms complained of by Mr Thompson has been taken into account by me. However, Mr Thompson's ongoing physical complaints have been considered by Associate Professor Wong, who did not find they lacked credibility.
41. For all of the above-mentioned reasons, I find there really is no basis for the respondent to argue that there is a medical dispute that requires a determination by an AMS.
42. Accordingly, I propose to determine the claim. Having accepted Associate Professor Wong's assessment, I order that the respondent pay Mr Thompson the sum of \$33,120 for lump sum compensation pursuant to section 66 of the 1987 Act for 14% WPI in relation to the bilateral inguinal hernia injuries.

