

WORKERS COMPENSATION COMMISSION

DECISION OF THE REGISTRAR

This Decision is issued pursuant to s 329 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter No: 3156/19
Claimant: Fayroz Boctor
Defendant: O'Brien Glass Industries Limited
Date of Decision: 2 July 2020
Citation: [2020] NSWCCCR 2

Decision

1. The proceedings in this matter are restored.
2. The matter is referred back to the AMS for reconsideration pursuant to section 329(1A) of the 1998 Act.

Background

3. Ms Boctor first commenced proceedings in the Commission claiming lump sum compensation just over one year ago, on 27 June 2019. Ms Boctor was assessed by an Approved Medical Specialist (AMS), and on 20 December 2020, a Medical Assessment Certificate (MAC) was issued.
4. In that MAC, the AMS determined that Ms Boctor had not reached maximum medical improvement. In general terms, the AMS was concerned that Ms Boctor had an "incipient cognitive decline or dementia". He also opined that more assertive treatment was required.
5. Ms Boctor appealed against that assessment. I issued a decision on 6 March 2020, referring the matter back to the AMS for reconsideration, on the basis of additional relevant information provided by Ms Boctor.
6. The AMS considered that further information and issued a new MAC on 6 April 2020. In that report, he notes that the possibility of incipient cognitive decline or dementia had been ruled out by the new evidence. He was, however, still of the opinion that Ms Boctor had not reached maximum medical improvement. He states:

"The observed improvement in her clinical state by Dr St George and her consultant psychiatrist's assertion that she is continuing to stabilise would indicate that she has not yet reached maximum medical improvement. As such I still cannot state that her impairment is permanent and that she needs to be reassessed, i.e. the degree of permanent impairment would be ascertainable in the middle of 2020."
7. A Certificate of Determination was issued on 11 May 2020. It relevantly provides:
 - "1. The degree of permanent impairment resulting from injury to the applicant deemed to have happened on 28 May 2018 is not fully ascertainable.
 2. The proceedings may be restored when the applicant has attained maximum medical improvement."

The present application and submissions

8. On 22 June 2020, Ms Boctor lodged and served correspondence seeking a reconsideration of the MAC of 6 April 2020. The applicant relies on a further report of treating psychiatrist Dr Khan, who confirms that Ms Boctor has now reached maximum medical improvement. In his report, dated 6 June 2020, Dr Khan provides commentary on Ms Boctor's two most recent psychiatric consultations, occurring on 4 May 2020 and 3 June 2020. In respect of the latter, he states:

“Ms Boctor attended a follow-up psychiatric assessment on 3 June 2020. Her mental state had stabilised with regard to her depressive, anxious and cognitive symptoms. Ms Boctor's psychosocial functioning remained stable. She had no intention to change her current mental health treatment plan given her stability.”
9. He goes on to state:

“In this light, Ms Boctor has reached maximum medical improvement as her condition is unlikely to change significantly in the next year with or without medical treatment.”
10. The applicant submits that because a neurological cause has been excluded for the applicant's symptoms, and it is now the middle of 2020, it is appropriate that the decision be reconsidered and the worker re-examined.
11. In response, the respondent opposes the application. The respondent submits that given the applicant did not seek to appeal the second MAC, and the orders made in the Certificate of Determination, this matter is not appropriate for reconsideration.
12. The respondent submits:
 - (a) the report of Dr Khan does not provide an assessment of whole person impairment;
 - (b) the report of Dr Rastogi, who assessed 17% whole person impairment and on which the proceedings are based, assessed the worker nearly 18 months ago;
 - (c) whilst the applicant has leave to restore proceedings once she has reached maximum medical improvement, it would be appropriate for the applicant to obtain an updated medical assessment addressing whole person impairment, given that should the worker be assessed below the threshold of 15%, then there would be no need to restore the proceedings;
 - (d) should the applicant reach the threshold, the respondent would be in a position to properly determine the claim and potential accept liability for lump sum compensation;
 - (e) the applicant chose not to appeal the decision of the AMS;
 - (f) pursuant to section 350(1) of the 1998 Act, the decision of the Commission is final and binding on the parties, and
 - (g) instead of this application, the applicant should in due course seek to restore the proceedings, and there is no need for the reconsideration given the scope of the orders made.

Decision

13. I do not accept the respondent's submissions.
14. The respondent points to no authority requiring the applicant to obtain an updated assessment of whole person impairment for the purposes of reconsideration in the context where the assessment of the AMS was based on maximum medical improvement. The evidence provided by Ms Boctor addresses the reasons of the AMS for choosing not to perform an assessment of whole person impairment. It also supports the contention that Ms Boctor has now reached maximum medical improvement and is in a position to be assessed by an AMS.
15. Likewise, the age of Dr Rastogi's report is no impediment to the current application brought by Ms Boctor. As the respondent's solicitor is no doubt aware, being an experienced practitioner in this jurisdiction, parties often rely on reports of similar age in proceedings in the Commission. No legislative or case law basis is suggested prohibiting the application made on the basis of the age of the report. It is, after all, the applicant's decision how to run their own case. It is a matter for the AMS to consider the evidence provided.
16. The suggestion that the applicant obtain new evidence, which could then be considered by the respondent (who would no doubt want to obtain further evidence in response) would delay the resolution of the proceedings unnecessarily, and would be inconsistent with the objectives of the scheme and the Commission as outlined in the 1998 Act. Neither the Commission nor the respondent can dictate how and on what terms the applicant brings proceedings. The respondent's role is to consider and respond to claims made. The Commission's role is to determine dispute. The applicant has brought a medical dispute to the Commission that remains to be finally determined.
17. The respondent also suggests that an updated report would put the respondent "in a position to properly determine the claim and accept liability for lump sum compensation". The respondent has determined the claim by denying it. It is always open for the respondent to accept the claim at any point, and the respondent is invited to do so now. If the respondent wishes to accept the report of Dr Rastogi assessing 17% whole person impairment, the Commission can make such an order.
18. The respondent also takes issue with the applicant choosing not to appeal the second MAC issued. There was and is no requirement for the applicant to lodge an appeal. Again, the applicant has chosen to run their case in a specific way and that does not prevent the current application being made.
19. The respondent relies on the binding nature of the Certificate of Determination. I accept that the Certificate is binding on the parties. However, order 2 of the Certificate specifically grants the applicant the opportunity to restore the proceedings.
20. Whilst no separate application to restore proceedings has been made, I am of the view that it is implicit in the correspondence seeking reconsideration. The applicant has attached evidence that she has reached maximum medical improvement, satisfying (on a prima facie basis) the issues raised by the AMS. The Certificate does not determine whole person impairment and cannot be said to finally resolve the medical dispute between the parties. That cannot occur until an assessment of permanent impairment is made, and a Certificate issued reflecting that assessment, which will be final and binding.
21. Accordingly, I restore the proceedings in matter 3156/19.

22. The matter is referred back to the AMS pursuant to section 329(1A) of the 1998 Act. The AMS is to be provided with the following documents:
- (a) the Application and attached documents;
 - (b) the Reply and attached documents;
 - (c) the Application to Admit Late Documents and attached documents dated 29 July 2019;
 - (d) the Application to Admit Late Documents and attached documents dated 22 August 2019;
 - (e) the Application to Admit Late Documents and attached documents dated 4 October 2019;
 - (f) the Application for reconsideration and attached documents, and
 - (g) the respondent's submissions in response to that application.

Parnel McAdam
Principal Lawyer

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE DECISION ISSUED BY PARNEL McADAM, REGISTRAR'S DELEGATE, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

