WORKERS COMPENSATION COMMISSION

Decision

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

Matter No:	**5784/17**
Applicant:	**Sjaan Martin**
Respondent:	**Insurance Australia Group Services**
Date of Decision:	**1 July 2019**
Citation:	**[2019] NSWWCCR 3**

1. Ms Martin suffered an injury on 28 May 2009 to her left ankle. As a result of the operation of section 39 of the 1987 Act, Ms Martin's entitlement to weekly compensation benefits was due to expire towards the end of 2017. She brought proceedings in the Commission seeking a determination under section 319(g) of the 1998 Act that she had not reached maximum medical improvement. On 15 December 2017, Dr Tommasino Mastroianni, an AMS, issued a MAC certifying that Ms Martin had not reached maximum medical improvement and that he expected her condition to stabilise and reach maximum medical improvement in "the next 6 to 9 months". As a result, Ms Martin was subject to the exemption to the operation of section 39 of the *Workers Compensation Act 1987* (the 1987 Act) contained in cl 28C of Sch 8 to the *Workers Compensation Regulation 2016* (the 2016 Regulation).

2. On 11 April 2019, Insurance Australia Group Services (IAG), Ms Martin's employer, sought a reconsideration of the MAC on the basis of evidence that suggested that Ms Martin had now reached maximum medical improvement. On 1 and 2 May 2019, Ms Martin's legal representatives filed submissions opposing that reconsideration.

3. On 24 April 2019 Ms Martin sought to discontinue the proceedings by lodging an Election to Discontinue Proceedings. This was rejected by the Registrar on 26 April 2019.

4. The matter has now been remitted to me, as delegate of the Registrar, to determine IAG's application for reconsideration. I am satisfied, for the reasons below, that the matter should be referred to the AMS for reconsideration. Ms Martin's legal representatives have provided extensive submissions opposing the application that I will discuss under separate headings below.

The reconsideration power

5. According to the heading of the letter dated 11 April 2019, IAG's application is made pursuant to section 329(1)(a) of the 1998 Act. As Ms Martin points out, this section applies "as an alternative an appeal". IAG have not lodged an appeal in this matter an accordingly this section is not applicable. In his email of 26 April 2019, the Registrar dealt with this and pointed out that the application should have been brought under section 329(1A), but nothing turned on this. I am satisfied, taking substance over form, that this is the case. The Commission is not bound by technicalities (section 354 of the 1998 Act) and IAG have clearly sought "reconsideration", a power available and exercisable under section 329(1A) of the 1998 Act.

The exercise of the reconsideration power

6. Ms Martin refers to *Milosavljevic v Medina Property Services Pty Ltd* [2008] NSWWCCPD 56 (*Milosavljevic*), and submits section 329 is not unfettered and is not available to maintain a medical dispute that has been concluded.

7. The context of IAG's application must be considered. As outlined above, the original proceedings in this matter were commenced by Ms Martin. They were finalised by a MAC issued on 15 December 2017, but no Certificate was issued in that matter, as is appropriate. The only issue before the Commission was a medical dispute.

8. Given the above context, *Milosavljevic* is distinguishable. In that case, an AMS issued a MAC which was appealed and revoked by a medical appeal panel. The Commission issued a Certificate finalising the proceedings. Mr Milosavljevic sought reconsideration of the MAC under section 329 of the 1998 Act. The reasons quoted by Ms Martin from *Milosavljevic* make it clear that of paramount importance in that case was the existence of a Certificate finalising the proceedings. Mr Milosavljevic was in effect attempting to circumvent the binding nature of that determination to re-agitate rights he had already pursued.

9. *Milosavljevic* is also distinguishable on the basis of what was sought by Mr Milosavljevic and why it was sought. Mr Milosavljevic was attempting to "maintain" a medical dispute through repeated assertions of error. He was attempting to circumvent the conclusive effect of the decision of a medical appeal panel and the issue of a certificate of determination by asserting that invoking section 329 maintained a medical dispute.

10. The facts in the present matter stand in contrast to those in Milosavljevic. No certificate has been issued. It is true that the proceedings were concluded, as pointed out by the Registrar. However, IAG are not attempting to circumvent a binding certificate and attack a decision issued behind that certificate. They are seeking reconsideration of the decision that finalised the proceedings in the Commission. Nothing stated in *Milosavljevic* prevents the application made by Ms Martin.

11. The status of the proceedings in matter 5784/17 are as follows:

    - a MAC was issued on 15 December 2017, finalising the proceedings. As a result of that MAC, Ms Martin was entitled to ongoing weekly benefits under section 39, by operation of cl 28C of Sch 8 to the 2016 Regulation, as the AMS "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";

    - IAG have obtained evidence that suggest that Ms Martin has reached maximum medical improvement;

    - IAG have now lodged an application for reconsideration of the MAC.

12. Accordingly, the matter presently before the Commission is IAG's application. It is proceeding under matter number 5784/17. This does not mean that those proceedings are still "on foot", and have been on foot since 15 December 2017, or were never finalised. Section 322(4) allows proceedings to be "adjourned" until an assessment of permanent impairment is made. This power was not exercised.

13. The file was administratively closed. An email sent to the parties on 15 December 2017 confirms this:

    > "The Application in this matter was lodged solely in relation to a dispute under s319 (g) of the Workplace Injury Management and Workers Compensation Act 1998.
    >
    > The file has been closed accordingly."

Ms Martin's election to discontinue

14. Ms Martin refers to rule 15.7 of the *Workers Compensation Commission Rules 2011* (the 2011 Rules) and submits that she has an unfettered right to discontinue proceedings at any time. The Registrar has previously rejected the election to discontinue and I will deal only briefly with this submission.

15. The current application has been brought by IAG. Ms Martin commenced proceedings in matter 5784/17. IAG lodged the present application to reconsider the MAC. Rule 15.7(1) provides that "An applicant may discontinue any proceedings, or any part of any proceedings, as against any or all of the other parties to the proceedings, at any time." Rule 1.4 provides a definition of applicant: "**"applicant"** means a person referring a dispute to the Commission for determination." Ms Martin cannot elect to discontinue the present application.

16. "Dispute" is not defined in the 2011 Rules or the workers compensation Acts. IAG have referred the present "dispute" to the Commission for determination, the dispute being an application made under section 329 of the 1998 Act. Ms Martin brought a dispute to the Commission on the basis that she had not reached MMI. IAG now bring a dispute to the Commission that Ms Martin has reached MMI.

17. I am satisfied that the applicant in the proceedings are IAG, and only IAG can discontinue the proceedings.

The question to be determined by the AMS

18. Ms Martin submits that what is now being sought is a different question to that considered by the AMS in 2017, and what is sought is a new assessment and a new MAC. I accept that there has been a change of circumstances since the original assessment of the AMS. The question asked of the AMS, and his reasons for finding that Ms Martin had not reached maximum medical improvement, made that change of circumstance an inevitability.

19. However, there is nothing in the case law referred to by Ms Martin, or a construction of section 329 of the 1998 Act, that limits or defines what can be subject of a reconsideration. This was pointed out in *Milosavljevic*, where Roche DP clarified his earlier comments concerning section 329 made in *Target Australia Pty Ltd v Mansour* [2006] NSWWCCPD 286, where he stated that "the section provides no guidance as to how or when it is to be used", and "the exact scope of section 329 must be determine on a case by case basis".

20. The context of the AMS's findings in the MAC are relevant to determining the "exact scope" of section 329 in the present case. The AMS found that Ms Martin had not reached maximum medical improvement and the degree of impairment was not fully ascertainable for the following reasons:

> "Sjaan Martin had surgery to her right shoulder one week ago. Her condition has not stabilised and MMI not reached.
>
> The degree of permanent impairment is not fully ascertainable as she has not reached MMI.
>
> I expect her condition to stabilise and MMI reached in the next 6 to 9 months.
>
> Regarding her left ankle injury, if she were not to have further surgery then the condition would have reached MMI, and the degree of permanent impairment of the injured worker's left ankle injury is fully ascertainable, however she states that surgery is proposed for June 2018 and if the surgery proceeds, then stabilisation and MMI for the ankle will not have been reached for some 9 months post-surgery."

21. Here, the AMS provided an estimate of when Ms Martin would reach maximum medical improvement – in relation to her shoulder, in "6 to 9 months" after the MAC was issued, being June to September 2018. In relation to her left ankle, with surgery proposed for June 2018, she would reach maximum medical improvement "9 months post-surgery", being March 2019. By both measures the worker has now potentially reached maximum medical improvement.

22. It was inherent in the question asked to the AMS and the reasons he provided in the MAC that at some point circumstances may change and the degree of permanent impairment of Ms Martin would be fully ascertainable. IAG assert that those circumstances exist now, and have made an application for reconsideration of the MAC. Whether maximum medical improvement has now been reached is a matter for the AMS to determine, but it was always envisioned when the MAC was issued in December 2017 that at some point the MAC may need to be reviewed.

Section 322A

23. Ms Martin refers to section 322A and the cases of *Singh v B & E Poultry Holding Pty Ltd* [2018] NSWWCCPD 52.

24. These submissions are not relevant. The matter was not referred for an assessment of the degree of permanent impairment. Section 322A does not apply to the MAC issued in December 2017, and any reconsideration of that decision will also not be caught by section 322A. The AMS cannot assess permanent impairment, but only answer the question asked in section 319(g) of the 1998 Act and Cl 28C of Sch 8 to the 2016 Regulation, that is whether the degree of permanent impairment of the injury worker is fully ascertainable.

Only the worker can bring a dispute to the Commission

25. The application made by IAG is under section 329 of the 1998 Act. There is nothing in that section that suggests only the worker can bring such an application. As previously indicated, the only question the AMS was asked to answer in December 2017 (and the question he will be asked to reconsider) is whether the worker has reached maximum medical improvement. Section 288(1) provides that "any party to a dispute about a claim may refer the dispute to the Registrar for determination by the Commission. However, if the dispute is about lump sum compensation, only the claimant can refer the dispute." This is not a dispute for lump sum compensation. It was not in the original proceedings and the application under section 329 does not change that. As previously indicated, the AMS will not assess the degree of permanent impairment of the worker. IAG is not attempting to do indirectly what is not permitted directly. It is attempting to exercise a power directly that I accept is available in the present circumstances.

The application is futile

26. This submission was made in further submissions lodged on 2 May 2019. The appellant submits that the consequence of the MAC is that Ms Martin is a worker with highest needs, as the definition includes the criteria that:

> "(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."

27. This submission is misconceived. The application was not brought for a determination that Ms Martin was worker with highest needs under section 32A of the 1987 Act. Ms Martin, on page 1 of the Form 7 application, ticked the box "assessment as to whether the degree of permanent impairment is fully ascertainable". The evidence within the file indicates that the purpose of the application was for ongoing weekly benefits under section 39, pursuant to cl 28C of Sch 8 to the 2016 Regulation. Attached to the application is correspondence from QBE dated 22 March 2017 that indicates that Ms Martin will likely reach the 260-week limit for weekly payments "early in 2018". That is the limit provided for in section 39 of the 1987 Act.

28. Section 39(2) provides an exemption where the injury results in permanent impairment of more than 20%. There is no exemption for a worker with highest needs, although a worker assessed as highest needs, with an assessment of over 30% whole person impairment, will be entitled to the exemption in cl 28C of Sch 8 to the 2016 Regulation.

29. Clause 28C of Sch 8 to the 2016 Regulation provides a specific exemption to the application of section 39 of the 1987 Act, and that was the ultimate subject of Ms Martin's application and the result of the MAC issued.

30. However, I will consider Ms Martin's submissions as if they were a reference to Cl 28C of Sch 8 to the 2016 Regulation.

31. The submission is, in essence, that once a worker is assessed as not having reached maximum medical improvement and the degree of permanent impairment is not fully ascertainable, that will always be the case, regardless of what a future assessment may indicate. Ms Martin submits: "There is not provision in the Act which makes any part of the definition no longer applicable".

32. Although not expressed explicitly in these terms, this appears to be an estoppel argument. There can be no estoppel in circumstances capable of change: *Railcorp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231 at [83]. Not only is the determination of the AMS of itself capable of change implicitly, the AMS explicitly pointed out the point at which those circumstances would likely change. The *Workers compensation guidelines for the evaluation of permanent impairment, 4th edition*, also envision the potential for change when discussing maximum medical improvement:

> "1.15 Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement. This is considered to occur when the worker's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment.
>
> 1.16 If the medical assessor considers that the claimant's treatment has been inadequate and maximum medical improvement has not been achieved, the assessment should be deferred and comment made on the value of additional or different treatment and/or rehabilitation – subject to paragraph 1.34 in the Guidelines."

33. Further, by the operation of section 329(2) were the AMS to reconsider his opinion in relation to whether the worker has reached maximum medical improvement, that would be inconsistent with his earlier decision, and the reconsidered certificate would prevail.

34. Accordingly, I do not accept that the application is futile.

Other matters

35. The alternative to my decision to allow the application for reconsideration, although not raised by the parties, would be to reject IAG's request and require them to file a Form 7 medical dispute alleging that Ms Martin has now reached maximum medical improvement.

36. Section 354 of the 1887 Act provides guidance for procedure before the Commission, including that they be "conducted with as little formality and technicality as the proper consideration of the matter permits" and that "the Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms". The objectives of the Commission in section 367 include providing a fair and cost-effective system for the resolution of disputes and to reduce administrative costs.

37. I have been guided by the above in reaching my conclusion, including viewing IAG's submissions as going to section 329(1A) of the 1998 Act.

38. I do not see the utility in requiring IAG to file a new set of proceedings, seeking a further assessment under section 319(g) of the 1998 Act that Ms Martin has now reached maximum medical improvement. Any fresh application would be sent to the same AMS. That would further delay the resolution of IAG's application and would not clarify the positions of the parties or any of the issues in dispute. The interests of justice dictate that the reconsideration application proceed.

Merits of the application

39. It is relevant to briefly consider the merits of the application. IAG have attached a report of Dr Raymond Wallace that includes an opinion that Ms Martin has reached maximum medical improvement. Dr Wallace took an extensive history of Ms Martin's injury, her treatment up to the date of assessment, and the potential for an upcoming review in May 2019 (which has obviously passed). He opines that Ms Martin's right shoulder and left ankle conditions have stabilised and she has reached maximum medical improvement.

40. I am satisfied that IAG have provided sufficient and valid evidence that shows, on a prima facie basis, that Ms Martin has reached maximum medical improvement. It is ultimately a question for the AMS to determine if maximum medical improvement has been achieved, and whether the degree of permanent impairment is now fully ascertainable.

Decision

41. The matter is referred to the AMS for reconsideration pursuant to section 329(1A) of the 1998 Act.

42. The AMS is limited to reconsidering the question of whether the degree of permanent impairment of the injured worker is fully ascertainable in accordance with section 319 (g) of the 1998 Act. No assessment of permanent impairment should be undertaken.

43. Ms Martin indicates that to allow a proper opportunity to respond to the application she will need at least 3 months together with liberty to apply if there are delays. The application for reconsideration was filed and concurrently served on 11 April 2019. Three months is a generous period of time to obtain further evidence and Ms Martin has not explained what action has been taken in the period since the application was lodged to progress the proceedings.

44. Further, the MAC identified that maximum medical improvement would likely be reached at some point (either June 2018 or March 2019) and accordingly, the worker is not caught by surprise by the application. IAG is entitled to pursue their rights under the legislation. Accordingly, the matter is referred back to the AMS for reconsideration.

Parnel McAdam
Delegate of the Registrar