WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1340/20**
Applicant:	**Ida Lee**
Respondent:	**University of New South Wales**
Date of Determination:	**15 September 2020**
Citation:	**[2020] NSWWCC 325**

The Commission determines:

1. The applicant was not required to submit herself for examination by a medical practitioner, provided and paid by the respondent pursuant to s 119(1) of the *Workplace Injury Management and Workers Compensation Act 1998*.

2. The respondent was not entitled to suspend the applicant's provisional weekly payments of compensation as from 18 March 2020 because of the applicant's failure to submit herself for examination by a medical practitioner, provided and paid by the respondent.

3. The respondent is to reinstate the provisional weekly payments of compensation to the applicant which were suspended as from 18 March 2020 to the maximum period of 12 weeks that such payments are payable to a worker pursuant to s 269 of the *Workplace Injury Management and Workers Compensation Act 1998*.

4. Interest is not payable on the amount of provisional weekly payments of compensation payable to the applicant as from 18 March 2020 pursuant to s 110 of the *Workplace Injury Management and Workers Compensation Act 1998*.

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 Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ida Lee (the applicant/Ms Lee) was employed by the respondent, the University of New South Wales (the respondent/UNSW) when she sustained an alleged psychological injury in the course of her employment, deemed to have occurred on 8 January 2020.

2. The applicant received weekly benefits from the respondent until 18 March 2020. She is claiming the reinstatement of those benefits from that date. On 23 March 2020 the respondent wrote to the applicant suspending the weekly benefits, effective 18 March 2020, pursuant to s 119(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) as a result of the alleged refusal by the applicant to submit herself for examination by a medical practitioner, provided for and paid by UNSW[1].

3. In that letter, the respondent advised that a further appointment had been scheduled with the medical practitioner, Dr Deepender Miller, psychiatrist, for Thursday 7 May 2020 at 9.00 am. The applicant did not attend that appointment. In an email dated 23 March 2020 at 4.56 pm from the applicant's solicitor to the author of the letter from UNSW dated 23 March 2020[2], the contents of earlier emails dated 10, 18 and 19 March 2020 in relation to the proposed independent medical examination (IME) on 7 May 2020 were repeated. Attention was drawn to "Part 7.7 of the Workers Compensation Guidelines." The applicant's solicitor also advised that:

   (a) the appointment with Dr Miller did not comply with the 1998 Act or Guidelines;

   (b) the suspension of weekly payments was unreasonable;

   (c) weekly payments (should) be reinstated from the date of suspension, and

   (d) interest (should) be paid on the suspended payments pursuant to s 110 of the 1998 Act.

4. The matter comes back before the Commission pursuant to a Certificate of Determination issued by Arbitrator Rimmer on 3 June 2020[3] granting the respondent's application that she recuse herself from further hearing of the matter. That decision followed the determination of an appeal by Deputy President Elizabeth Wood on 28 May 2020 against an earlier decision of Arbitrator Rimmer dated 8 April 2020[4]. At [70] of that decision, the Deputy President referred the matter back to Arbitrator Rimmer for determination of the dispute.

5. The full history of the applicant's claim and the proceedings is set out at [1]-[14] of the appeal decision and at [1]-[18] of the recusal decision. I will not repeat it.

ISSUE FOR DETERMINATION

6. The issue for determination which remains in dispute is referred to at [31] of the appeal decision, namely, "…whether UNSW was entitled to suspend Ms Lee's compensation payments which she was receiving in respect of her psychological condition."

7. At the arbitration hearing referred to hereunder, the respondent also submitted that the Commission did not have jurisdiction to determine the relief sought in the Miscellaneous Application dated 9 March 2020 (the Application), lodged by the applicant to commence the proceedings.

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[1] Application to Admit Late Documents (AALD) 23.03.20 p 3.
[2] AALD 23.03.20 p 7.
[3] [2020] NSWWCC 184 (the recusal decision).
[4] [2020] NSWWCCPD 33 (the appeal decision).

PROCEDURE BEFORE THE COMMISSION

8. 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.

9. The parties attended an arbitration hearing on 19 August 2020 conducted via telephone. Mr R Brennan, solicitor, appeared for the applicant who attended on a separate line. Mr D Saul of counsel appeared for the respondent briefed by Mr P Macken.

EVIDENCE

Documentary Evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) the Application and attached documents;

    (b) Reply to Application to Resolve a Dispute dated 30 March 2020 and attached documents;

    (c) Application to Admit Late Documents (AALD) dated 30 March 2020 lodged by the applicant and attached documents;

    (d) applicant's submissions dated 15 April 2020 (the applicant's submissions);

    (e) respondent's submissions dated 22 April 2020 (the respondent's submissions), and

    (f) AALD dated 24 June 2020 lodged by the respondent with "A workers compensation guide for medical practitioners" (undated) (the medical practitioners' guide) attached.

Oral Evidence

11. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

12. The solicitor for the applicant and counsel for the respondent made further oral submissions in support of those noted above at [9(d) and (e)]. They are recorded in the transcript of 19 August 2020 (T), a copy of which can be obtained on request. In summary they are as follows.

Applicant

13. The applicant notes the "Workers Compensation Guidelines" issued by the State Insurance Regulatory Authority (SIRA) to take effect from 17 April 2020 (the 2020 Guidelines) contain nothing in relation to medical practitioners, in contrast to the medical practitioners' guide relied upon by the respondent. This last mentioned document, according to the applicant, is not a guideline, but just an information sheet. It simply contains the entry on p 17 thereof:

    > "Prepayment (in whole or part) cannot be made for reports".

In this case the respondent did not ask for a report; it simply asked for the clinical notes of the applicant's treating general practitioner, Dr J Cosgriff.

14. The applicant relies on her written submissions, emphasising the email sent at 4.56 pm on 23 March 2020 to UNSW (see [3] above). That sets out the applicant's position and the further orders sought at the current hearing.

15. The applicant submits that there is no doubt that the Commission has jurisdiction to determine the matter, as it did in the matter of *Taylor*[5] , referred to by Arbitrator Rimmer at [22] of the recusal decision. The applicant submits that that decision is almost identical to the decision in *John Grant v Department of Lands – Land and Property*[6]*,* a copy of which is attached to AALD dated 30 March 2020.

16. Returning to the 2020 Guidelines, the applicant notes that Part 7.1 thereof requires the employer to discuss the problem of the apparent inadequacy, unavailability or inconsistency of information from the treating medical practitioner(s) directly with the nominated treating practitioner, and that all the respondent had to do in this case was to contact the doctor and say, if it relied on the medical practitioners' guide, "We're not allowed to pay you for a report", or do whatever was required to try and resolve that problem with the doctor. There is no evidence whatever that this happened.

17. The applicant's submission therefore is that the 2020 Guidelines have not been complied with, and that therefore s 119(4) of the 1998 Act applies. The applicant is not therefore required to submit herself for examination by the medical practitioner nominated by the respondent.

Respondent

18. The respondent draws attention to the (Generic Form) Application, and the application therein under the heading "Miscellaneous Application" for "Direction for provision of a medical report." The particulars of the "Matters in Dispute", the "Claim Details and/or Orders Sought" and the "Submissions in Support" in the form are referred to, together with the particulars of the worker, the employer, and the injury (psychological).

19. The respondent refers to the letter from Dr Cosgriff dated 3 March 2020[7] and the two medical certificates dated 9 and 10 January 2020[8] in support of its submission that the Commission does not have jurisdiction to determine the relief sought by the applicant. What the applicant is seeking, according to the respondent, is declaratory relief, and this is before any determination has been made about injury, main contributing factor to injury, capacity for work and medical expenses. In short, the respondent submits that there is nothing for the Commission to order.

20. The respondent submits that the situation would be different if for example, the applicant had made a claim for weekly payments which were suspended because the applicant did not attend a medical examination arranged by the respondent. In that situation the applicant could file an Application to Resolve a Dispute to have matters in dispute between the parties resolved. That would include removal of the suspension of weekly payments, but only once primary issues such as injury and the like had been determined. However in the current proceedings the respondent submits that the Commission has no jurisdiction because the applicant is no seeking anything other than declaratory relief.

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[5] *Taylor v State of New South Wales,* 1353/20; [2020] NSWCCR 5.
[6] 001136/09, 20 April 2009 (*Grant*).
[7] Application p 14.
[8] Reply pp 3/4.

21. The respondent draws an analogy with the situation in which applicants found themselves before the insertion into section 60 of the *Workers Compensation Act 1987* (the 1987 Act) of subsection (5), operative from 1 February 2011. Until that time, the Commission had no power to make an order in respect of future medical expenses in accordance with the finding of the then President of the Commission, Justice Terry Sheahan, in *Water Taxis Combined Pty Limited and Harbour Taxi Boats Pty Limited v Wells*[9]. The Commission is not a court, but a tribunal, and does not have declaratory powers.

22. If the Commission does not accept that it lacks jurisdiction in the proceedings, the respondent relies on s 119(1) of the 1998 Act to submit that where a worker has given notice of injury, as the applicant must have in this case since some provisional payments of compensation were made before being stopped, if required by the employer the worker must submit himself or herself for examination by a medical practitioner, provided and paid by the employer.

23. In respect of s 119(4), the respondent submits that the Workers Compensation Guidelines (the Guidelines) themselves are not legislation, in accordance with the finding of the Court of Appeal in cases such as *Fletchers International Exports Pty Ltd v Barrow*[10]*,* which dealt with s 260 of the 1998 Act, and *Ali v AAI Limited*[11], which dealt with guidelines under the *Motor Accidents Act*. Those cases held that guidelines are not delegated legislation, and they do not have the same power, impact or force of the legislation itself, and in this case, s 119 of the 1998 Act.

24. The respondent submits that s 119 talks of the requirement of a worker to submit if so required by the employer, whereas Part 7 of the Guidelines refer to management of referrals between a worker and an insurer. This distinction is, according to the respondent, important in this case as UNSW is the employer and it is requiring the applicant to submit to a medical examination. The respondent submits that the Guidelines are silent in relation to an employer's request pursuant to s 119 as opposed to an insurer.

25. Finally in respect of s 119, the respondent submits that if there is inconsistency between the section and the Guidelines, as the Guidelines are not delegated legislation the requirements of s 119 must be complied with and the Guidelines are not to be considered.

26. Dealing with the requirements of Part 7.1 of the Guidelines "Reasons for referral", the respondent submits that in this case the information from the treating medical practitioner, Dr Cosgriff, was inadequate, unavailable or inconsistent. All that was available to the respondent were two non-WorkCover medical certificates and a letter from the doctor.

27. The respondent submits that the non-WorkCover medical certificates are inconsistent with a compensable injury, and that Dr Cosgriff refused to supply the material requested, irrespective of the reason, even if it was for payment for what was asked of him. In this circumstance the respondent submits that the material was unavailable and that there was nothing for it to resolve with the doctor. The fact that the doctor was not providing the material requested by the respondent was the "end of story."[12] One need go no further than that, and the respondent was therefore entitled to refer the applicant to a psychiatrist for an opinion on the claim.

28. The respondent submits that s 119 of the 1998 Act is consistent with the way in which the workers compensation system has worked for years; that is, if there is a claim and some dispute as to how the injury occurred and how it is alleged to be a work injury, an employer is entitled to have that investigated by an IME.

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[9] [2004] NSWWCCPD 30 (Water *Taxis*).
[10] [2007] NSWCA 244 (*Barrow*).
[11] [2016] NSWCA 110 (*Ali*).
[12] T p17.10.

29. The respondent submits that the medical practitioners' guide appears as a link on the SIRA website and is a guide to medical practitioners who are subject to SIRA practices. That guide contains the statement "Prepayment (in whole or in part) cannot be made for reports." That is justification for the respondent not paying for the material requested from Dr Cosgriff, who could have sent an invoice with the requested documents.

Applicant in response

30. The applicant submits that it is quite clear that the Commission has jurisdiction in this matter, and that the legislation, s 119 of the 1998 Act, is quite clear.

31. The applicant rejects the distinction that the respondent seeks to draw between an employer and an insurer, pointing to the letter from the respondent to her dated 10 February 2020[13] from the respondent and signed by "Andrea Flood Claims Officer Workers Compensation." The respondent is a licensed self-insurer. In this jurisdiction the applicant submits that the employer and the insurer "…are essentially the same,…"[14]. In this case it is the UNSW, as self-insurer which is making the appointment for the applicant to be medically examined.

32. The applicant submits that it is important to note that, at the time of suspension of weekly payments, she was being paid. Whether that was on the basis of WorkCover of non-WorkCover certificates is completely irrelevant.

33. The applicant confirms that she seeks a specific order for the reinstatement of weekly payments and interest thereon as claimed in the email of 23 March 2020. The applicant also submits that, if the suspension of weekly payments was found to be unreasonable, UNSW as a model litigant would, or should, reinstate the weekly payments.

34. The applicant submits that the respondent has an obligation under the Guidelines to attempt to sort out any problem with the doctor from whom it requested information or notes; in this case contact the doctor and discuss it. There is no evidence in this case that the respondent did this.

35. The applicant submits that the 2020 Guidelines "have status" under s 119(4) of the 1998 Act. The applicant further submits that s 119, with its reference to the Guidelines, was inserted into the legislation to reduce the number of medical examinations of injured workers, and that the object of these provisions is for the insurer to try and get the answers to any questions it has from the treating doctors before it is entitled to an IME.

36. This last submission of the applicant is denied by the respondent, which submits that regulation 44 of the Workers Compensation Regulation 2016 (the 2016 Regulation) deals with the restriction on the number of medical reports able to be tendered by the parties. The respondent emphasises again the mandatory nature of the obligation placed on an injured worker by the provisions of s 119 to submit himself or herself to a medical examination if required by an employer.

FINDINGS AND REASONS

Jurisdiction

37. The matters of *Grant* and *Taylor*, referred to above at [15] were both decisions of Arbitrator Rimmer.

38. In *Grant*, proceedings were commenced by way of an Application to Resolve a Dispute after suspension of weekly payments by the insurer to the applicant in accordance with ss 47, 57 and 119 of the 1998 Act. The applicant made a claim for weekly payments following suspension of his payments.

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[13] Application p 4.
[14] T p 24.30.

39. The issues for determination in that case were:

    (a) Was the Insurer's request that the Applicant submit himself for an independent medical examination a request that was in accordance with the WorkCover Guidelines on Independent Medical Examinations and Reports?

    (b) Did the Commission have jurisdiction to determine the matter (s 71 of the 1998 Act)?

40. The Arbitrator determined that the insurer's request that the applicant submit himself for an independent medical examination was not made in accordance with the WorkCover Guidelines on Independent Medical Examinations and Reports, and that it was therefore unnecessary for her to consider whether the Commission had jurisdiction to determine that matter, given the provisions of s 71 of the 1998 Act. That section sets out the duty of a claimant (a person who makes or is entitled to make a claim) to co-operate fully in respect of the claim with the insurer liable under the claim.

41. That decision does not assist in resolution of the jurisdictional issue raised by the respondent in these proceedings.

42. In *Taylor,* the Arbitrator issued an Interim Payment Direction ordering the respondent employer to pay the applicant weekly benefits pursuant to s 37 of the 1987 Act. Such directions are dealt with in Division 2 of Part 5 of Chapter 7 of the 1998 Act, which includes s 297 dealing with directions for interim payment of weekly payments or medical expenses compensation. Rule 9.2 of the Workers Compensation Commission Rules 2011 provides for proceedings under s 297 to be commenced by way of application for an interim payment direction. The form for commencement of such an application is Form 1 - Application tor Expedited Assessment.

43. In *Taylor,* the Arbitrator considered s 119(4) of the 1998 Act and Part 7 of the SIRA Workers Compensation Guidelines (commencement date October 2019) (the 2019 Guidelines). She held that the insurer had not complied with the 2019 Guidelines when notifying the applicant of an IME referral, and for that reason the applicant was not prevented from recovering compensation because of her failure to attend the examination. Arbitrator Rimmer did not therefore deal with other issues raised in the proceedings, including the reasonableness of the request to attend the IME.

44. That decision does not assist in resolution of the jurisdictional issue raised by the respondent in these proceedings.

45. The respondent asserts that what is sought by the applicant in the Application (a "Generic Form" of "Miscellaneous Application") is a declaratory order which the Commission has no jurisdiction to make.

46. In the form of the Application, the application is for "Direction for provision of a medical report"[15]. The details of the claim and/or the orders being sought are as follows:

    > "An Order that the proposed IME with Dr. Miller on 18th March, 2020 does not comply with Workplace Injury Management and Workers Compensation Act 1998 Section 119 or the Guidelines and thus the provisions of Section 119(4) apply."

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[15] Application form p 1.

47. The “Submissions in Support” refer to s 119(4) of the 1998 Act, Part 7.1 of the Guidelines, the claim of the insurer that Dr Cosgriff’s notes had not been received, the reason, according to Dr Cosgriff being that the insurer had not paid the tax invoice, and that thus the relevant information was neither inadequate, unavailable or inconsistent. In addition the insurer had made no effort to resolve the problem with Dr Cosgriff.

48. In the email dated 23 March 2020 from the applicant’s solicitor to the respondent, referred to above at [3], notice was given that the applicant would claim at the hearing that weekly payments be reinstated from the date of suspension and interest thereon would be claimed pursuant to s 110 of the 1998 Act.

49. In *Water Taxis* Justice Sheahan held at [95] that:

> “An Arbitrator, therefore, does not have the power to make an order for the specified payment of medical expenses based upon an estimate of the likely future costs. An Arbitrator is entitled to find that an employer is liable to pay a worker for medical or related treatment, including future medical or related treatment, in accordance with section 60 of the 1987 Act. An employer, however, will not be liable to pay the worker’s section 60 expenses until they have been incurred and properly verified.”

At [96] his Honour said:

> “The Arbitrator in this case has erred in making an order for a fixed sum for the payment of medical expenses not yet incurred and properly verified.”

50. In *Widdup v Hamilton*[16] Justice Sheahan found at [42] that:

> “I am satisfied, based on *Manning* and the wording of section 60, together with the relevant provisions of section 289(2) of the 1998 Act and the definitions of ‘claim’ and ‘compensation’, that the Commission’s jurisdiction to award compensation pursuant to section 60 is limited by the express provisions of the legislation. There is no express or incidental power to make ‘declaratory orders’ pursuant to section 60.”

51. The reference to *Manning* was to *New South Wales Sugar Milling Co-op Ltd v Manning*[17] in which the Court of Appeal held that s 60 is an indemnity provision. If a worker incurs a “cost” in respect of the matters referred to in s 60 it empowers the court to order an employer to pay the cost.

52. *Manning*, *Water Taxis* and *Widdup* all dealt with orders sought under s 60 of the 1987 Act. The latter two cases were in respect of medical expenses not yet incurred by the worker. The applicant in this case is seeking the order referred to in [46] above. The Application is dated 9 March 2020 and was registered with the Commission on 10 March 2020. It thus seeks an order about something that was to occur in the future as at the date of commencement of the proceedings but was the subject of correspondence between the solicitor for the applicant and the respondent, and from Dr Cosgriff, dating from 10 February 2020[18]. The respondent advised the applicant of date for the IME with Dr Miller in the letter dated 10 February 2020. In that sense, the issue as to whether the applicant should attend the IME with Dr Miller was crystallised by 6 March 2020 when the applicant’s solicitor advised the respondent’s Claims Officer in an email that “It seems that we agree to disagree.” He also stated that as the Guidelines had not been complied with and thus s 119 had been breached, the respondent was not entitled to suspend weekly payments.

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[16] [2006] NSWWCCPD 258 (*Widdup*).
[17] (1998) 44 NSWLR 443.
[18] See correspondence attached to the Application pp 2-14, summarised at [3]-[6] of the recusal decision.

53. In the form of the Application, the applicant certifies that she is entitled to lodge that Application because it satisfies the statutory procedural requirements under s 289 or s 289A of the 1998 Act and clauses 49, 50 and 51 of the Workers Compensation Regulation 2010. That Regulation has now been replaced by the 2016 Regulation which commenced on 1 September 2016. Clauses 49, 50 and 51 of the 2010 Regulation are replicated in clauses 44, 45 and 46 of the 2016 Regulation. They deal with restriction on the number of medical reports that can be admitted, the admissibility of supplementary reports and restriction on the disclosure of forensic medical reports to approved medical specialists.

54. Section 105(1) of the 1998 Act provides that subject to that Act, the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under that Act and the 1987 Act.

55. Section 289(1) of the 1998 Act is as follows:

> "(1) A dispute about a claim for weekly payments (other than a dispute based on a work capacity decision) cannot be referred for determination by the Commission unless the person on whom the claim is made—
> (a) disputes liability for the claim (wholly or in part), or
> (b) fails to determine the claim as and when required by this Act."

56. Section 289A of the 1998 Act sets out further restrictions as to when a dispute can be referred to the Commission and is as follows:

> "(1) A dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed.
> (2) A matter is taken to have been previously notified as disputed if—
> (a) it was notified in a notice of dispute under this Act or the 1987 Act after a claim was made or a claim was reviewed, or
> (b) it concerns matters, raised in writing between the parties before the dispute is referred to the Registrar for determination by the Commission, concerning an offer of settlement of a claim for lump sum compensation.
> (3) The Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission. However, the Commission may hear or otherwise deal with a matter subsequently arising out of such a dispute.
> (4) Despite subsection (3), a dispute relating to previously unnotified matters may be heard or otherwise dealt with by the Commission if the Commission is of the opinion that it is in the interests of justice to do so."

57. Section 287 of the 1987 Act states that Part 4 of the 1998 Act (which contains ss 289 and 289A) applies to a dispute in connection with a claim for compensation between:

> "(a) the person who makes the claim and a person on whom the claim is made,…"

58. In this case it is conceded by the respondent that the applicant had made a claim for weekly benefits as she was in receipt of provisional payments of weekly compensation pursuant to letter dated 22 January 2020 from the respondent to the applicant[19].

59. The respondent in its written submissions asserts that the applicant has not satisfied the procedural requirements of ss 289 and 289A of the 1998 Act. No further details of this alleged failure to satisfy these requirements are provided.

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[19] Application p 2.

60. Section 289(1) refers to a dispute about a claim for weekly payments (other than a dispute based on a work capacity decision). In my view, when one reads the letter from the respondent to the applicant dated 10 February 2020, the email from Mr Brennan to Andrea Flood dated 10 February 2020 and the email from Andrea Flood to Mr Brennan dated 17 February 2020[20], it is clear that there is a dispute between the parties about a claim for weekly payments. The letter from the respondent to the applicant dated 10 February 2020 advising Ms Lee of the appointment with Dr Miller on 18 March 2020 contains the following:

> "Non-attendance
>
> If you fail to attend or obstruct the independent medical examination this may lead to a suspension of your weekly compensation or the right to recover compensation under the 1987 Act"

61. Mr Brennan's email of 10 February 2020 asserts that the requirement for Ms Lee to attend the appointment was unreasonable for the reasons set out therein, and noting that the observations in the email and comments were made pursuant to s 119 of the 1998 Act and the guidelines referred to in s 119(4). Angela Flood's email to Mr Brennan of 17 February 2020 asserts that the arrangement for the IME was in accordance with "…the guidelines", and:

> "You should insure [sic] that your client attends the IME, failing which, payments will be suspended in accordance with S.119(3)"

62. In the three subsequent emails between Mr Brennan and Andrea Flood dated 6 March 2020[21] the parties maintain their position. It is clear from this exchange that the applicant would not be attending the IME appointment with Dr Miller on 8 March 2020. On 23 March 2020, the respondent wrote to the applicant in a letter headed

> "**RE: NOTICE SUSPENSION WEEKLY PAYMENTS"**

containing the following advice:

> "This notice is to advise that payment of weekly benefits will be suspended effective 18 March 2020 as you have refused to submit yourself for examination by a medical practitioner, provided and paid for by your employer UNSW."[22]

63. The respondent was disputing its liability to pay the applicant's claim for weekly benefits because of the failure on the part of the applicant to attend the IME with Dr Miller on 18 March 2020. Pursuant to s 289(1) of the 1998 Act, the applicant is therefore entitled to refer the dispute for determination by the Commission.

64. Section 289A(2)(a) states that a matter is taken to have been previously notified as disputed if it was notified in a notice of dispute under the 1998 Act or the 1987 Act after a claim was made or a claim was reviewed. Section 78 of the 1998 Act replaced s 74 as from 1 January 2019; s 78(1) provides that an insurer must give notice in accordance with Division 3 of Part 2 of Chapter 4 of the 1998 Act of any decision to dispute liability in respect of a claim or any aspect of a claim. Section 79 sets out how such notice is given, and s 80 sets out the required period of notice that an insurer must give when discontinuing payment to a worker of weekly payments or reducing the amount of compensation. Regulation 38 of the 2016 Regulation sets out the information which must be contained in a notice under s 78 of an insurer's decision to dispute liability in respect of a claim or any aspect of a claim.

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[20] Application pp 5, 8 and 10.
[21] Application pp 11-13.
[22] AALD dated 30.03.20 p 3.

65. The former section 74 of the 1998 Act, repealed as from 1 January 2019, set out the matters in respect of which insurers were required to give notice and reasons when liability was disputed. It was included in Division 2 of Part 2 of Chapter 4 of the 1998 Act. The definition section in that Division, s 70, includes a definition of **insurer** as meaning "a licensed insurer, former licensed insurer or a self-insurer." Division 3, containing s 78, does not contain a definition of insurer.

66. It may be that s 78 of the 1998 Act does not apply to a self-insurer such as the respondent. However, without deciding that, it is clear that Angela Flood's email of 17 February 2020, referred to above at [61], could not be a notice to the applicant under s 78. Notwithstanding that, it is also clear that UNSW in that email, and in the other communications between it and the applicant and Mr Brennan referred to above at [60]-[62], was disputing liability for the applicant's claim for weekly benefits. Therefore, pursuant to s 289(1) of the 1998 Act, the applicant was entitled to have that dispute referred to the Commission for determination.

67. I find that the Commission has jurisdiction to determine this dispute between the applicant and the respondent.

Section 119

68. Section 119(1) of the 1998 Act refers to the requirement by an employer for a worker to submit himself or herself for examination by a medical examiner, provided and paid for by the employer. Subsection (4) provides:

> "(4) A worker must not be required to submit himself or herself for examination by a medical practitioner under this section otherwise than in accordance with the Workers Compensation Guidelines or at more frequent intervals than may be prescribed by the Workers Compensation Guidelines."

69. Subsections (5) states that the regulations may make provision for or with respect to requiring an employer or insurer to provide a worker, a worker's legal representative or any other person, within the period required by the regulations, with a copy of any medical opinion or report furnished to the employer or insurer by a medical practitioner in connection with an examination of the worker pursuant to the requirement under that section. Subsection (6) sets out the consequences of an employer or insurer failing to provide a copy of an opinion or report as required by the regulations under subsection (5).

70. The current Workers Compensation Guidelines referred to in subsection (4) are the 2020 Guidelines, referred to by the applicant in submissions at [13] above, which replaced the Workers Compensation Guidelines issued by SIRA in October 2019 (the 2019 Guidelines). The 2020 Guidelines took effect and applied to all claims from 17 April 2020. Therefore it is the 2019 Guidelines that must be considered in this case. Part 7 of both Guidelines, "Independent medical examinations and reports", is identical.

71. The respondent's submission is that once a worker has given notice of injury, conceding that the applicant in this case has done so, he or she must submit to a medical examination in accordance with s 119(1). This is irrespective of the requirement of subsection (4), which the respondent submits does not bind it as a self-insurer[23]. The Guidelines refer only to "insurer". This distinction is important according to the respondent as it is the respondent, as employer, that required the applicant to submit herself to a medical examination.

72. The respondent also submits that the Guidelines are not delegated legislation and therefore lack "the same power, impact or force of the legislation itself"[24], and that if there is any inconsistency between the Guidelines and the legislation, s 119 in this case, the legislation must prevail.

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[23] T p14.15.
[24] T p 13.20.

73. The applicant submits that, in this case the employer and insurer are essentially the same, and that it is UNSW as insurer which is making the appointment for the applicant to attend an IME.

74. At [99] in *Ali*, Leeming JA said at [99]:

> "In short, I cannot agree that the Guidelines are 'delegated legislation' in the sense that they bind of their own force. Instead, if judicial review is sought of a decision of an assessor based upon guidelines, it will be necessary to address the provisions of statute which make the guidelines applicable, and it will be necessary to address the particular clauses relied on, because both the Act and guidelines made pursuant to it proceed on the basis that they are not all of the same legal force."

His Honour was referring to the Medical Assessment Guidelines and Permanent Impairment Guidelines made pursuant to the *Motor Accidents Compensation Act 1999*.

75. In *Barrow* the Court of Appeal was considering the Workers Compensation Guidelines referred to in s 260 of the 1998 Act, subsection (1) of which stated that a claim must be made in accordance with the applicable requirements of those Guidelines. At [41]-[43] Mason P said:

> "41 Nothing in the statute appears to provide support for the proposition that the **Guidelines** operate to qualify or restrict the statutory scheme or the Commission's duties and powers referable to investigating disputes that arise.
>
> 42 The Explanatory Note to the **Guidelines** states that they set out the procedures for the initial notification of an injury, making provisional liability payments and the making and handling of claims under Pt 3 of the **WIM Act**. The **Guidelines** are said to be *'primarily intended to assist WorkCover NSW Licensed Insurers'*. Nowhere is it suggested that the **Guidelines** touch upon the Commission's jurisdiction or powers as regards a later dispute.
>
> 43 In addition, the word 'guidelines' is usually encountered with reference to a non-binding indication of policy. The **Macquarie Dictionary** relevantly defines the term to mean *'a statement which defines policy or the area in which a policy is operative'"*
>
> (emphasis in original)

76. At [46] his Honour said, referring to obligations imposed by the Guidelines:

> "It is very difficult to see how strict compliance with these obligations could go to the *'jurisdiction'* of the Commission to involve itself in a dispute later arising relating to a claim."

77. In this case it is not suggested by the respondent that compliance or non-compliance with the 2019 Guidelines goes to the jurisdiction of the Commission to deal with the dispute between the applicant and respondent. The respondent submits that the Commission does not have jurisdiction because of the way in which the matters in dispute and claim details and/or orders sought are framed in the Application. I have addressed that above. The respondent submits that the 2019 Guidelines do not apply to it, and that it is not bound to comply with the provisions thereof.

78. Section 119(4) makes the Workers Compensation Guidelines (in this case the 2019 Guidelines) applicable to the requirement of a worker to attend an IME if so required by the employer in accordance with subsection (1). I do not see any inconsistency between those Guidelines and s 119 of the 1998 Act, apart from the lack of reference in the 2019 Guidelines to "employer". Subsections (5) and (6) refer to obligations placed on an employer or insurer to do certain things if the regulations so provide. It is the same obligation placed on both.

79. I do not accept the respondent's submission that because the word "employer" is not referred to in the 2019 Guidelines, they should not apply to the respondent as a self-insurer. The introductory paragraphs of Part 7 of the 2019 Guidelines are as follows:

> "An independent medical examination (IME) is an assessment conducted by an appropriately qualified and experienced medical practitioner to help resolve an issue in injury or claims management.
>
> An insurer may direct a worker who has given notice of an injury or is receiving weekly payments of compensation to attend an IME.
>
> Section 119(4) of the 1998 Act allows the Guidelines to specify the requirements for arranging independent medical examinations.
>
> The mandatory obligations for insurers when they require a worker to attend an IME are outlined below."

80. In this case, the respondent employer, a self-insurer, directed the applicant to attend an IME. In that circumstance and having regard to the provisions of s 119, and the mandatory obligations placed on insurers by s 119(4) and Part 7 of the 2019 Guidelines, I find that the respondent is obliged to comply with the 2019 Guidelines.

81. I also note that, although this is not determinative of the issue, Andrea Flood in her email dated 17 February 2020 to Mr Brennan, asserted that the arrangement for the IME was in accordance with "the guidelines", although she said in a later email at 3.46 pm on 6 March 2020[25] that "In any event we are not bound by guidelines, with which we are in compliance with. If your client does not attend the IME compensation will be suspended."

82. It follows that I do not accept the respondent's submission that, pursuant to s 119(1), an employer has an entitlement to immediately request a medical examination of a worker once notice of injury has been furnished to the employer, irrespective of whether or not the employer wants information from the general practitioner.[26]

Part 7 of the 2019 Guidelines

83. The request from the respondent for Dr Cosgriff's clinical notes was dated 24 January 2020[27] but not received by Dr Cosgriff until 5 February 2020. The request enclosed a consent signed by the applicant and included advice as to the fee that could be charged for the provision of the clinical notes. The doctor responded on 10 February 2020 by forwarding a tax invoice to UNSW for prepayment of his fee[28]. On that same day UNSW wrote to the applicant advising of the appointment for the IME with Dr Miller on 18 March 2020, giving as the reason for the IME that the clinical notes requested from Dr Cosgriff had not been received[29]. The respondent did not pay the doctor's invoice, nor did it make any attempt to resolve the issue of the non-receipt, or alleged unavailability of the clinical notes, with Dr Cosgriff.

84. The introductory paragraphs to Part 7.1 of the 2019 Guidelines are as follows:

> "Referral for an IME is appropriate when information from the treating medical practitioner(s) is inadequate, unavailable or inconsistent, and the referrer is unable to resolve the problem directly with the practitioners.

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[25] Application p 12.
[26] T p19.10.
[27] Reply p 2.
[28] Application p 14.
[29] Application p 5.

Evidence of contact (or multiple attempts to contact) to try to resolve these issues with the nominated treating practitioner must be documented in the claim file."

85. The clinical notes were not unavailable; all the respondent had to do was to pay the invoice. It could then have determined if the information was inadequate or inconsistent. Until the clinical notes were received, the respondent could not, in accordance with Part 7.5, explain to the applicant why the information from the Dr Cosgriff was inadequate, inconsistent or unavailable.

86. I do not accept that the respondent was prevented by the medical practitioners' guide (see [10](f) above) from prepaying for the clinical notes of Dr Cosgriff. The last dot point on page 17 of that document states that "Prepayment (in whole of in part) cannot be made for reports". The respondent was not seeking a report from the doctor; it was seeking clinical notes.

87. The respondent did not comply with Part 7.7 of the 2019 Guidelines. Whilst it may have considered the objection of the applicant, made through her solicitor, to attend the IME, it did not include in the advice of its decision following any consideration that it may have given to the objection, the contact information for the Workers Compensation Independent Review Office (WIRO).

88. In my view the respondent has failed to comply with the 2019 Guidelines and the applicant was not therefore required to submit herself for the IME examination arranged by the respondent for 18 March 2020.

Orders sought by the applicant

89. The order sought by the applicant in the Application is:

> "An Order that the proposed IME with Dr. Miller on 18th March, 2020 does not comply with Workplace Injury Management and Workers Compensation Act 1998 Section 119 or the Guidelines and thus the provisions of Section 119(4) apply."

90. In Mr Brennan's email dated 23 March 2020 to Andrea Flood[30] the applicant seeks further orders that weekly payments be reinstated from the date of suspension and that interest on the suspended payments be paid in accordance with s 110 of the 1998 Act. The respondent opposes the further orders sought in that email,[31] submitting that the case which the respondent had come to meet was as outlined in the Application, and that no application was made by the applicant to amend the relief being sought in the Application.

91. The applicant did note in submissions that one would assume that if the suspension of weekly payments were found to be unreasonable, the respondent as a model litigant would, or should, reinstate the weekly payments.

92. In its letter to the applicant dated 22 January 2020[32] the respondent advised the applicant that, "(A)fter careful consideration of all available information provisional liability has commenced for weekly payments for up to a maximum of 12 weeks." Section 267(1) of the 1998 Act imposes an obligation on an insurer to commence provisional weekly payments of compensation within seven days after initial notification of injury to the insurer of an injury to a worker unless the insurer has a reasonable excuse for not commencing those weekly payments. Under subsection (2):

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[30] AALD dated 30.03.20 p 7.
[31] T pp 29.00 and 31.15 - .25.
[32] Application p 2.

"A person does not have a reasonable excuse for not commencing those weekly payments unless the person has an excuse that the Workers Compensation Guidelines provide is a reasonable excuse."

93. Section 270 of the 1998 Act is as follows:

"(1) An insurer who commences weekly payments of compensation under this Division may require the worker to provide the insurer with—
(a) a medical certificate certifying as to the worker's incapacity for work, and
(b) a form of authority signed by the worker authorising a provider of medical or related treatment, hospital treatment or workplace rehabilitation services to the worker in connection with the injury to give the insurer information regarding the treatment or service provided or the worker's medical condition or treatment relevant to the injury.
(2) The insurer may discontinue weekly payments of compensation under this Division if the worker fails to comply with a requirement under this section within 7 days after it is communicated to the worker by the insurer.

Note—
This section does not limit the obligations of a worker under section 44B (Evidence as to work capacity) of the 1987 Act."

94. The respondent did not discontinue weekly payments because of the failure of the applicant to comply with s 270; it discontinued those payments because the failure of the applicant to attend the IME with Dr Miller pursuant to s 119. I have found that the applicant was not required to submit herself to an IME pursuant to that section.

95. The respondent has pointed out that the only evidence in the proceedings as to injury and incapacity is two non-WorkCover certificates (dated 9 and 10 January 2020[33]) and a letter from Dr Cosgriff dated 3 March 2020 attached to the Application. It submits that such evidence is inadequate for any kind of determination to be made for the payment of any compensation.[34] I accept that submission, but note that the respondent in commencing provisional weekly payments, which it is obliged to do in the absence of a reasonable excuse not to commence those weekly payments, did not have such a reasonable excuse. It is not apparent what information it had before it when it commenced making provisional weekly payments for up to a maximum of 12 weeks, but it gave "careful consideration" to "all of the available information" before commencing weekly payments.

96. There is no list of payments in evidence, but it is apparent that the applicant had not exhausted her entitlement to weekly payments for a period of up to 12 weeks from 22 January 2020 (the date of the letter from the respondent to the applicant granting weekly payments) by 18 March 2020 when weekly payments were suspended. That is a period of eight weeks.

97. In the circumstances I think the respondent should be ordered to reinstate any provisional weekly payments due after 18 March 2020 up to the maximum period of 12 weeks that such payments are payable to a worker pursuant to s 269 of the 1998 Act.

98. I do not think that interest should be ordered pursuant to s 110 of the 1998 Act on the unpaid provisional weekly payments. As noted above, it is not apparent what information the respondent had before it when making the decision to grant provisional weekly payments to the applicant, and the material in evidence in the current proceedings is inadequate for a determination to be made as to any entitlement the applicant may have to ongoing weekly benefits beyond the period of 12 weeks during which provisional weekly payments are payable.

[33] Reply pp 3-4.
[34] T p 14.30.

SUMMARY

99. The applicant was not required to submit herself for examination by a medical practitioner, provided and paid by the respondent pursuant to s 119(1) of the 1998 Act.

100. The respondent was not entitled to suspend the applicant’s provisional weekly payments of compensation as from 18 March 2020 because of the applicant’s failure to submit herself for examination by a medical practitioner, provided and paid by the respondent.

101. The respondent is to reinstate the provisional weekly payments to the applicant which were suspended as from 18 March 2020 to the maximum period of 12 weeks that such payments are payable to a worker pursuant to s 269 of the 1998 Act.

102. Interest is not payable on the amount of provisional weekly payments of compensation payable to the applicant as from 18 March 2020 pursuant to s 110 of the 1998 Act.