

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 2848/19  
**Applicant:** Tony Mouawad  
**Respondent:** Sydney Metro Formwork Pty Ltd  
**Date of Determination:** 5 December 2019  
**Citation:** [2019] NSWCC 390

The Commission determines:

1. There is an award in favour of the respondent for the claim regarding injury to the right and left upper extremities.
2. I refer this matter to the Registrar for referral to an Approved Medical Specialist on the following basis:
  - (a) Date of injury: 31 July 2012;
  - (b) Matters for assessment: left lower extremity (ankle), cervical spine, lumbar spine (consequential), scarring;
  - (c) Evidence:
    - (i) ARD and attached documents;
    - (ii) Reply and attached documents.

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

John Wynyard  
**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 JOHN WYNYARD ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. On 26 September 2019 I found in an ex tempore decision that Mr Mouawad had suffered injury to his left lower extremity and that the condition of the applicant's lumbar spine was consequential to that injury. I also indicated that I would remit to the Registrar for referral to an Approved Medical Specialist (AMS) the claim for scarring.
2. I also found that the applicant had not established that he had suffered a consequential condition in either his right or left upper extremities.
3. At the conclusion of proceedings the claim for injury to the cervical spine had yet to be determined. Dr Bodel found that injury had been caused, in the form of a soft tissue injury, but counsel was unable to advise whether the injury could be referred for assessment where Dr Bodel had found 0% WPI. I indicated that there was clear authority that if an injury had been found, then the assessment of the WPI caused by it was a matter for an AMS. However, I was aware that a determination regarding the adequacy of assessments by medico-legal experts had been recently considered. I accordingly sought the assistance of counsel by way of written submissions.
4. Mr Campbell's submissions regrettably assumed that I had made an order in favour of his client in respect of the cervical spine. He made submissions as to the interpretation of s 65(2) of the *Workers Compensation Act 1987* (the 1987 Act) which were uncontroversial.
5. Mr Perry for the respondent in his submissions identified Mr Campbell's error in submitting that I had found that the cervical spine had been injured or was a consequential condition. He referred to the reports of Dr Minter and Dr Bodel, saying that Dr Minter gave no WPI assessment as he found that the cervical spine had not been injured, and Dr Bodel had found no assessable WPI. This meant that there was no permanent impairment dispute regarding the cervical spine and, as I understood Mr Perry, it accordingly could not be referred to an AMS.
6. I do not accept that submission, with respect. The finding of a nil WPI does not equate with a finding of no injury. A nil WPI assessment simply means that, although there had been an injury, it could only be assessed within DRE cervical category I, as defined in Table 15-5, American Medical Association Guides to the Evaluation of Permanent Impairment, commonly known as "AMA5".<sup>1</sup> This category accepts that an injury had occurred, but a claimant could not satisfy the criteria necessary to establish an entitlement pursuant to the four higher categories, which provide for different levels of WPI. It does not mean that no injury has occurred.
7. The question of whether a medico-legal expert's opinion can prevent an injury being referred to an AMS was recently considered in *Etherton v ISS Property Services Pty Ltd* [2019] NSW WCC PD 53. However, that decision was concerned with the 2018 amendments and the assessment considered did not reach the 10% threshold set out in s 66 of the 1987 Act. In the present case of course there are other assessments that clear that threshold in any event.

---

<sup>1</sup> AMA 5 392

8. Mr Perry submitted however that, in effect, the Commission has no jurisdiction to deal with the alleged injury to the cervical spine, or whether it is a consequential condition, because no claim has ever been made in that regard. This submission must also be rejected. I was not referred to any claim made in this matter that had excluded the cervical spine. Moreover, the permanent impairment claim at ARD 215 not only mentioned "the spine" generally, but relied also upon the report of Dr Bodel dated 26 September 2017, which report found that the injury to the cervical spine in the form of a soft tissue injury had been caused by the subject injury. This opinion I accepted.

## **Decision**

9. Further to the reasons given in my ex tempore decision of 25 September 2019:
- (a) There is an award in favour of the respondent for the claim regarding injury to the right and left upper extremities.
  - (b) I refer this matter to the Registrar for referral to an AMS on the following bases:
    - (i) Date of injury: 31 July 2012
    - (ii) Matters for assessment: left lower extremity (ankle), cervical spine, lumbar spine (consequential), scarring.
  - (c) Evidence:
    - (i) ARD and attached documents
    - (ii) Reply and attached documents