

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6197/19
Applicant: Anthony Venetsanos
Respondent: Paok Group Pty Ltd as Trustee for the Pavlidis Family Trust
Date of Determination: 10 February 2020
Citation: [2020] NSWCC 39

The Commission determines:

1. By reason of the operation of section 66(1A) *Workers Compensation Act 1987* and section 322A the *Workplace Injury Management and Workers Compensation Act 1998*, the applicant is prevented from bringing a further claim for permanent impairment compensation arising from any injury which took place on 25 January 2017.
2. Award for the respondent.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Anthony Venetsanos (the applicant) was injured in the course of his employment with the respondent on 25 January 2017. He completed a claim form in respect of a left shoulder injury which took place on that date.
2. On 7 July 2018, Dr Costa, treating occupational physician, provided a report to the applicant's solicitors assessing a 23% whole person impairment, which claim included 15% whole person impairment of the cervical spine. On 16 July 2018, the applicant's solicitor made a claim for permanent impairment compensation based on that assessment.
3. On 28 September 2018, the respondent's insurer issued a notice declining liability for the right shoulder and neck on the basis of there being no injury. The applicant later commenced proceedings in respect of the lump sum claim, including the claim for the cervical spine.
4. On 25 September 2019, consent orders were entered in Commission proceedings number 3123/19 which deleted all reference to claims in respect of the applicant's neck and right shoulder and referred the applicant's left upper extremity for assessment by an Approved Medical Specialist (AMS). On 20 August 2019, Dr McGrowder AMS provided an assessment in respect of the applicant's left upper extremity (shoulder) for injury dated 25 January 2017 and assessed a 7% whole person impairment. On 24 September 2019, a Certificate of Determination was issued by the Commission in accordance with the Medical Assessment Certificate (MAC) of the AMS.
5. On 23 October 2019, the applicant provided by email through his solicitors an "amended claim form" which included a claim for the cervical spine. On 26 November 2019, the Application to Resolve a Dispute (the Application) in these proceedings was registered with the Commission.
6. At a telephone conference held before me, the applicant was directed to file and serve an amended Reply in which they were to plead defences pursuant to section 66(1A) of the *Workers Compensation Act 1987* (the 1987 Act) and section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). That direction was issued without objection by the applicant. Additionally, the respondent declined the applicant's claim on the basis that there was no injury suffered by the applicant.

ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant is precluded from bringing a further claim for permanent impairment compensation by virtue of the operation of section 66(1A) of the 1987 Act and section 322A of the 1998 Act;
 - (b) In the event the applicant is not precluded from bringing a further claim, has he established that he suffered an injury to his cervical spine on 25 January 2017?

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a hearing on 5 February 2020. 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. At the hearing, Mr P Livers, solicitor, appeared for the applicant and Mr A Combe of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute and attached documents;
 - (b) Amended Reply and attached documents;
 - (c) A supplementary statement of the applicant dated 13 January 2019, admitted without objection and marked exhibit A.

Oral evidence

11. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Issue 1 – Standing to Bring a Further Claim for Permanent Impairment Compensation

12. In my opinion, the operation of section 66(1A) and section 322A preclude the applicant from bringing this claim in relation to his alleged cervical spine injury.
13. Mr Livers submitted that at the time of assessment by the AMS, the applicant could not have had his cervical spine assessed, as it had not been claimed. He took the Commission to the original claim form, which only raised the left shoulder. He submitted that when applying the wording of section 322A, the “injury concerned” which is the subject of these proceedings (namely the cervical spine) is not the same injury or medical matter which was referred to the AMS in the previous proceedings.
14. I reject that submission. The applicant’s claim in respect of permanent impairment for the injury sustained on 25 January 2017 was made on 16 July 2018 by his attorneys. I accept Mr Combe’s submission to the effect it is immaterial that the applicant may have withdrawn, discontinued or abandoned any claim made for the neck and right shoulder when the previous proceedings were brought and referred to the AMS. As he noted, in the absence of a claim made for lump-sum compensation prior to 19 June 2012, only one claim may be made for permanent impairment which results from an injury, and that claim has been made (see *Singh v B & E Poultry Holdings Pty Ltd* [2018] NSWCC 178 at [45]). Moreover, the Certificate of Determination issued by the Commission on 24 September 2019 related to the injury which took place on 25 January 2017 and which is the subject of these proceedings. As such, the operation of section 66(1A) of the 1987 Act also prevents the applicant from making a claim for further compensation.
15. For the above reasons, I find the applicant is prevented from bringing this claim for permanent impairment compensation as a result of the operation of the section 66(1A) of the 1987 Act and section 322A of the 1998 Act.

Issue 2 – Injury to the Cervical Spine

16. Given my findings in relation to the operation of the relevant statutory provisions, it is not necessary to determine whether the applicant has made out his claim for injury pursuant to

sections 4 and 9A of the 1987 Act. Nevertheless, for abundant caution I provide the following reasons as to why, in my view, that injury has not been made out.

17. It is trite to say the applicant bears the onus of proving he suffered an injury to his cervical spine. I do not believe he has established this is the case. I note Dr Costa has provided an opinion to the effect that the applicant suffered cervical spine strain and injury as a result of the incident at issue, however, as Mr Combe noted that diagnosis is precisely consistent with that provided by Dr Costa in relation to the applicant's neck as a result of a prior injury which took place in 1989.
18. Additionally, the applicant's original claim form related only to an injury to his left upper extremity (shoulder) and a number of WorkCover NSW Medical Certificates provided by Dr Costa only related to the applicant's left shoulder. As Mr Combe noted, there were significant pre-existing problems with the applicant's neck, as set out in pages 120 to 123 of the Reply. Dr Costa does not provide any explanation as to how the alleged neck strain which the applicant suffered came about from the injury at issue, and his previous diagnosis of an almost identical condition from 1989 is not sufficiently explained such as to set it aside.
19. The first time any injury to the applicant's cervical spine was suggested was on 13 April 2018 in a medical certificate, in which the applicant's neck condition is described as "chronic. I accept that description does not accord with a frank injury in 2017 and is more suggestive of a long-standing neck condition over many years. The latter is in turn consistent with the documentation before the Commission in these proceedings which demonstrates a long-standing history of cervical spine injury before the incident on 25 January 2017.
20. In the circumstances, I am not satisfied that, even if my interpretation of the operation of section 66(1A) and section 322A is incorrect, that the applicant has made out any claim for injury.

SUMMARY

21. For the above reasons, there will be an award for the respondent in relation to this matter.

