

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3870/19
Applicant: Meredith Kato
Respondent: City of Sydney
Date of Determination: 2 September 2019
Citation: [2019] NSWCC 288

The Commission determines:

1. The respondent to pay the applicant lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* for 16% whole person impairment of the lumbar spine and skin (TEMSKI) resulting from injury on 14 February 2016 (deemed), in the sum of \$38,992.81 inclusive of 5% uplift for the spine.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian
Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Meredith Kato (the applicant) was employed by City of Sydney (the respondent) as a Machine Operator (Truck Driver).
2. The applicant claims that her duties included shovelling soil, sand and rubbish using manual tools; climbing in and out of trucks; driving trucks; cleaning the washing bay area; tying tarps to bins; manually handling bins and bin liners; and general council work duties.
3. The applicant experienced a gradual onset of pain through her back, which culminated on 14 February 2016 in a significant flare up of pain when bending down to dislodge a piece of cardboard from a street sweeper.
4. On 23 January 2019, the applicant through her solicitors, made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) relying on a report of Dr Min Fee Lai, dated 11 September 2018. Dr Lai assessed the applicant as having 16% whole person impairment (WPI) of the lumbar spine and skin as a result of injury arising from the nature and conditions of the applicant's employment.
5. On 5 March 2019, the respondent wrote to the applicant acknowledging receipt of the claim and advising that a WPI assessment had been requested from Dr Balsam Darwish (Neurosurgeon), accredited WPI assessor and the applicant's treating specialist.
6. No further response to the claim is apparent. On 1 August 2019, the applicant filed an Application to Resolve a Dispute (ARD) in the Commission seeking lump sum compensation of \$38,922.81 in respect of 16% WPI of the lumbar spine and skin inclusive of 5% uplift for the lumbar spine.
7. A Reply was filed by the respondent on 26 August 2019, the only document attached to which was a copy of the letter to the applicant dated 5 March 2019.
8. At teleconference on 30 August 2019, the respondent confirmed that the only matter in dispute was the degree of permanent impairment. The respondent requested that the matter be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to provide an assessment of WPI for the purposes of determining this question. The applicant objected to this course and requested that the matter be determined by the Commission on the basis of the assessment of Dr Lai without a referral to an AMS. The parties were invited to make submissions as to how the Commission's discretion ought to be exercised, at the conclusion of which, I informed the parties of my intention to determine the matter in writing based on the material before me.

ISSUES FOR DETERMINATION

9. The following issues remain in dispute and require determination:
 - (a) Whether the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act should be determined by the Commission without a referral to an AMS;
 - (b) The degree of permanent impairment resulting from the injury to the applicant's lumbar spine deemed to have occurred on 14 February 2019, and
 - (c) The quantum of the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents, and
 - (b) Reply and attached documents;

FINDINGS AND REASONS

11. Section 65(3) of the 1987 Act previously provided that,

“If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist”.

12. Section 65(3) was repealed by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) in schedule 2, clause 2. This schedule commenced on the date of proclamation which was 1 January 2019. Savings and transitional provisions were added by the 2018 amending act and appear in the 1987 Act in Schedule 6, Part 19L and clause 2 provides that an amendment made by the 2018 amending Act extends to an injury received before the commencement of the amendment, and a claim for compensation made before the commencement of the amendment. The repeal of s 65(3) applies to the present case.

13. In the second reading speech in relation to the Bill relating to the 2018 amending Act it was stated:

“Schedule 2 to the bill provides for the Workers Compensation Commission to award permanent impairment compensation without referral to an approved medical specialist.

This amendment recognises that, in certain circumstances, the requirement to refer all permanent impairment disputes to an approved medical specialist was unduly delaying proceedings in the Workers Compensation Commission. The amendment will allow arbitrators to make determinations of permanent impairment by removing section 65 (3) from the 1987 Act, which requires all permanent impairment disputes to be referred to an approved medical specialist prior to the Workers Compensation Commission awarding permanent impairment compensation.¹”

14. In many cases where there is a dispute as to the degree of permanent impairment it will still be appropriate for an arbitrator to remit the matter for referral for an assessment by an AMS. I have considered whether this is the appropriate course in the present case in light of the parties’ submissions at teleconference. I have decided that it is not, for the reasons that follow.
15. There is in this case no dispute that the applicant sustained an injury to her lumbar spine as a result of the nature and conditions of her employment. As a result of that injury, the applicant underwent surgery leaving scarring to the skin. The injury, being one of gradual onset is deemed to have occurred when the applicant first became incapacitated on 14 February 2016.

¹ Legislative Council 19 September 2018, Second Reading Speech of the Hon. David Clarke

16. In order to address the applicant's claim, the respondent appears to have requested an assessment of WPI from her treating surgeon Dr Darwish. I was advised by the respondent at teleconference that no assessment had been obtained although the reasons why remain unclear. The only evidence of the degree of WPI resulting from the accepted injury before me is that of Dr Lai.
17. At teleconference, I invited the respondent to make submissions as to why the degree of permanent impairment and thus the quantum of the applicant's entitlement to lump sum compensation should not be determined by me based on the assessment of Dr Lai. The respondent made no submissions other than to request that the matter be referred to an AMS for assessment.
18. I informed the respondent that my preliminary view was that there did not appear to be any indication that Dr Lai's assessment was not an appropriate or reliable assessment of WPI. Given the additional cost and delay associated with a referral to an AMS and in the absence of any evidence to contradict Dr Lai's assessment, I was minded to exercise my discretion by determining the matter myself on the basis of Dr Lai's assessment. The respondent was asked whether any additional time was required to make submissions on the issue.
19. The respondent declined the opportunity to make further submissions but asked whether time could be allowed to enable the respondent to arrange an Independent Medical Examination (IME) for the purposes of assessing WPI. I indicated that I would be disinclined to adjourn the proceedings to enable an IME given that the claim was made some eight months ago. It was not apparent that the respondent had taken any steps to arrange an IME at any time other than the approach to Dr Darwish in March. This failure was not explained and the statutory timeframe for determining the claim had expired. In the circumstances, to allow additional time for purpose of arranging an IME would appear to result in an unreasonable and unjustifiable delay in the proceedings. The respondent declined to make any further submissions and the application for adjournment was declined.
20. Dr Lai is a general surgeon and WorkCover Approved Assessor of Permanent Impairment. In his report of 11 September 2018, Dr Lai took a history of the injury consistent with the applicant's written statement. Dr Lai considered a number of investigations of the lumbar spine and recorded his findings on physical examination.
21. Dr Lai gave an opinion that the applicant's condition had stabilised and indicated that impairment of the applicant's spine was assessed according to "guidelines provided in chapter 4 of WCG4 and chapter 15 of AMA5." The DRE model for assessment of spinal impairment was used.
22. Dr Lai found the applicant had surgical decompression for spinal stenosis and was therefore classified as DRE category III with a base impairment of 10% WPI. The applicant's activities of daily living had been affected, being unable carry out her recreational activities and domestic chores. An additional 2% WPI was added to the base impairment of 10% (clause 4.35, second bullet point, page 28, of the Guidelines).
23. Dr Lai's physical examination showed muscle weakness of the applicant's right big toe dorsiflexion, the muscle responsible being the extensor hallucis longus which was innervated by the L5 spinal nerve root. The applicant also had impairment of sensation of both lateral thighs and big toes in the distribution of the L5 dermatome. The applicant also had positive nerve root tension bilaterally. Dr Lai concluded that the applicant had residual radiculopathy, having satisfied the conditions of the definition of radiculopathy as per clause 4.27 on page 27 of the Guidelines. An additional 3% WPI was combined with the DRE III impairment of 12% WPI giving a final impairment of 15% WPI.

24. Dr Lai found a 7 cm long x 5 mm wide scar in the midline of the back which was slightly pigmented and depressed. Dr Lai found 1% WPI to be the best fit according to the according to the TEMSKI table on page 74 of the Guidelines. Dr Lai concluded,
- “The total whole person impairment of your client from the work injury on 14 February 2016 is a combination of the above figures of 15% + 1% = 15% whole person impairment (Combined Values Chart, page 604, AMA5).”
25. It has not been suggested by the respondent that the report of Dr Lai fails to comply with the Guidelines for assessment of permanent impairment or that there is anything other than a fair climate for the acceptance of Dr Lai’s assessment.
26. In the circumstances, and where there is no evidence as to the degree of permanent impairment to contradict the assessment of Dr Lai, I am satisfied that this assessment provides an appropriate and reliable basis on which to determine the applicant’s entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.
27. I consider that this is an appropriate case for an award of compensation to be made without a referral to an AMS. I am not persuaded that the further delay and costs associated with a referral to an AMS are warranted in this case.
28. Accordingly, I order the respondent to pay the applicant lump sum compensation pursuant to s 66 of the 1987 Act for 16% WPI of the lumbar spine and skin (TEMSKI) resulting from injury on 14 February 2016 (deemed), in the sum of \$38,992.81, inclusive of 5% uplift for the spine.

