WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**691/19**
Applicant:	**Nuray Ozcan**
Respondent:	**Macarthur Disability Services**
Date of Determination:	**23 September 2019**
Citation:	**[2019] NSWWCC 310**

The Commission determines:

1. There will be an award in favour of the respondent regarding the claim for lump sum compensation.

2. The respondent will pay the applicant's section 60 expenses upon production of accounts receipts and/or HIC documentation.

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.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Nuray Ozcan, the applicant, brought an action against Macarthur Disability Services, the respondent. Part 4 of the Application to Resolve a Dispute (ARD) alleged that she had suffered three injuries dated:

    (a) 14 November 2011
    (b) 3 May 2012
    (c) 26 September 2012

2. Injury was alleged to the lumbar spine, cervical spine, right upper extremity, consequential gastrointestinal disorder, secondary psychological condition and pain syndrome.

3. The claim was for lump sum compensation. At Part 5.6 of the ARD compensation was claimed in respect of injury to the lumbar spine, cervical spine, right upper extremity and upper digestive system. The date of injury was claimed to be 14 January 2011 only.

4. A section 74 notice issued on 15 May 2013 relating to the claim for compensation for injury to the cervical and lumbar spine with an indicated date of 3 May 2012, and 21 July 2016. A further section 74 notice of 21 July 2016 related to a claim for injury to the back on 3 May 2012.

5. A section 78 notice issued on 12 February 2019 denying that injury to the cervical spine, lumbar spine, thoracic spine and right upper extremity (shoulder) occurred on either of the dates of injury, 14 November 2011 and 3 May 2012. In the body of the s 78 notice, however, the further date of 26 September 2012 was also mentioned. The notice also denied that assessments of whole person impairment (WPI) in relation to the three dates - 14 November 2011, 3 May 2012 and 26 September 2012 could be aggregated in accordance with s 322 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

6. The matter came before an Arbitrator on 17 April 2019 as a result of which the matter was referred to an AMS, Dr Neil Berry, who reported on 7 June 2019. The dispute concerns the interpretation of the Medical Assessment Certificate (MAC) and whether the applicant is entitled to the combined value total of 15% assessment certified by the AMS.

ISSUES FOR DETERMINATION

7. The parties agree that the following issue remains in dispute:

    (a) Is the applicant entitled to the combined value total of 15% WPI as certified by the AMS?

PROCEDURE BEFORE THE COMMISSION

8. This matter was heard on 2 August 2019 and 19 August 2019. The applicant was represented by Mr Bruce McManamey of Counsel and the respondent by Mr Stuart Grant of Counsel. 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.

EVIDENCE

Documentary Evidence

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

    (a) ARD and attached documents;

    (b) Application to Admit Late Documents (ALD) signed 25 July 2019 from the applicant;

    (c) Reply and attached documents;

    (d) Certificate of Determination of Arbitrator Burge dated 17 April 2019;

    (e) ALD dated 29 August 2019 containing the referral to the AMS;

    (f) Medical Assessment Certificate of Dr Berry dated 7 June 2019;

    (g) Wages Schedules filed by both parties;

    (h) Payroll advice from the respondent.

Oral evidence

10. No application was made in relation to oral evidence.

FINDINGS AND REASONS

11. On 17 April 2019, Arbitrator Burge made the following Consent Orders:

> "By and with the consent of the parties, the determination of the Commission in this matter is as follows:
>
> 1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment, if any, arising from the following:
>
> a. Date of Injury: 14 November 2011;
> Body systems: lumbar spine, thoracic spine, cervical spine, right upper extremity (shoulder), upper digestive tract;
> Method of assessment: whole person impairment.
>
> b. Date of injury: 3 May 2012.
> Body systems: lumbar spine, thoracic spine, upper digestive tract;
> Method of assessment: whole person impairment.
>
> c. Date of injury: 26 September 2012
> Body systems: lumbar spine, thoracic spine, upper digestive tract.
> Method of assessment: whole person impairment.
>
> 2. The AMS is to be directed to apportion the impairment suffered by the applicant to the lumbar spine, thoracic spine and upper digestive tract resulting from the three separate dates of injury.

3. The AMS is to be advised that the referral of the upper digestive tract is on the basis that the parties agree that there are symptoms causally related to the accepted injuries, but that the AMS should determine what pathology, if any, relates to the accepted injuries.

4. The documents to be referred to the AMS for consideration are:

   a. This Certificate of Determination;
   b. The Application to resolve a Dispute and attached documents;
   c. The Reply and attached documents.

5. The matter is to be listed for a further telephone conference when the Medical Assessment Certificate becomes available."

12. On 29 April 2019, the delegate of the Registrar referred the matter to an AMS in the following terms:

WORKERS COMPENSATION COMMISSION
REFERRAL FOR ASSESSMENT OF PERMANENT IMPAIRMENT
TO APPROVED MEDICAL SPECIALIST

Matter Number: **691/19**
Applicant: **Nuray Ozcan**
Respondent: **Macarthur Disability Services**
Date of Request: **23 April 2019**

1. **MEDICAL DISPUTE REFERRED FOR ASSESSMENT** (s319 1998 Act)

- the degree of permanent impairment of the worker as a result of an injury
- (s319(c))
- whether any proportion of permanent impairment is due to any previous injury
- or pre-existing condition or abnormality, and the extent of that proportion
- (s319(d))
- whether impairment is permanent (s319(f))
- whether the degree of permanent impairment of the injured worker is fully
- ascertainable (s319(g))

Date of Injury 1: 14 November 2011

Body part/s referred: Lumbar Spine, Thoracic Spine, Cervical Spine, Right Upper Extremity (shoulder), Upper Digestive Tract

Method of assessment: Whole Person Impairment

Date of Injury 2: 3 May 2012

Body part/s referred: Lumbar Spine, Thoracic Spine, Upper Digestive Tract

Method of assessment: Whole Person Impairment

Date of Injury 3: 26 September 2012

Body part/s referred: Lumbar Spine, Thoracic Spine, Upper Digestive Tract

Method of assessment: Whole Person Impairment

The AMS is to be directed to apportion the impairment suffered by the applicant to the lumbar spine, thoracic spine and upper digestive tract resulting from the three separate dates of injury.
The AMS is to be advised that the referral of the upper digestive tract is on the basis that the parties agree that there are symptoms causally related to the accepted injuries, but that the AMS should determine what pathology, if any, relates to the accepted injuries."

13. On 7 June 2019, Dr Neil Berry, AMS issued a Medical Assessment Certificate (MAC) in response. The combined value of permanent impairment certified was 15%, and the matter was referred back to me in order to make final orders. The application also sought weekly payments and payments of s 60 expenses.

14. On 19 August 2019, I issued oral consent orders regarding weekly compensation and I was invited by the parties to make a general order for s 60 expenses which can be applied according to the outcome of the remaining issue/s in dispute.

15. The applicant now seeks an order that the respondent pay the full amount certified in the MAC of 15%. She submits that she is not seeking that the individual findings of impairment be aggregated, but rather that because each injury had been materially contributed to by the original injury of November 2011, her entitlement, on a proper reading of the MAC was independent of the principles regarding aggregation.

16. The history taken by the AMS accorded with other histories taken. Ms Ozcan was working as a Disability Support Worker with the respondent and had been working full time with it for approximately two years. The injuries were described by the AMS as follows:[1]

> "On 14 November 2011 she was escorting one the clients to the kitchen. The client had the claimant gripped by the right arm in a forceful grip and began to dance around and pulled her down. She lost her footing and fell to the ground twisting her spine. Her right shoulder dislocated and spontaneously popped back into place. She also hurt her neck and her back and her right leg. She tried to continuing working but had to be placed on light duties. She told me that she was placed on a large dose of Prednisolone and this upset her stomach. She experienced abdominal distention, reflux and quite severe pain.
>
> Due to her ongoing problems, she was subsequently moved to a group home in Campbelltown with young people and on 3 May 2012 in the course of her duties she picked up a heavy bundle of papers and experienced further pain in her back and her thoracic spine. The matter was reported and she was put placed on light duties and continued to work.
>
> On 26 September 2012, Ms Ozcan was leaning over to remove a catheter and as she straightened up, she felt a snapping sensation and experienced worsening pain in the back.
>
> Subsequently after this injury she was moved to Head Office and was required to do a significant amount of driving to take clients for work experience. She found this very difficult and at one stage she was put off work and then terminated."

[1] MAC 2-3

17. In his summary, the AMS said:

> "This is a woman who worked as a Disability Support Worker and suffered injuries to the spine on the 14 November 2011 and also to the right upper extremity (shoulder) and also suffered a digestive tract disturbance. She had a second injury affecting the thoracic and lumbar spine on 3 May 2012 and her upper digestive tract persisted and on 26 September 2012 she had further injury to the lumbar and thoracic spine."

18. The AMS found there was no impairment caused by injury to the cervical spine or to the upper digestive tract. He explained his assessment as follows:[2]

> ***"Right Upper Extremity***
> The claimant has a history of a prior dislocation of the shoulder, but on the 14 November 2011 the shoulder dislocated and spontaneously settled and was obviously unstable and surgical repair was appropriate. Ms Ozcan should be assessed under the range of movement model and I refer you to the attached worksheet for the right shoulder which is a direct consequence of the injury on 14 November 2011 which gives her a 3% Whole Person Impairment.
>
> ***Thoracic Spine***
> This is assessed under the AMA 5th Edition of the Guides to the Evaluation of Permanent Impairment and I refer you to Chapter 15, Table 15.4 on Page 389 and the claimant has evidence of tenderness and restriction of movement and I would place her in DRE Category II which is a 5% Whole Person Impairment.
>
> ***Lumbar Spine***
> This is assessed under Table 15.3 on Page 384, again the claimant has evidence of restriction of movement, tenderness to palpation with significant radiculopathy and I would place her in DRE Category II which is a 5% Whole Person Impairment.
>
> The impact of this injury on the activities of daily living is assessed using the NSW Workers Compensation Guides to the Evaluation of Permanent Impairment, 4th Edition. I refer you to Chapter 4, Paragraph 4.34 on Page 28 and the claimant can self-care but has difficulty with household duties and outside activities and I would allow a 2% Whole Person Impairment giving her a 7% Whole Person Impairment for the lumbar spine.
>
> ***In terms of the Whole Person Impairment we are combining 3%, 5% and 7% which is a 15% Total Whole Person Impairment.***
> I have been directed to apportion the impairment suffered to the thoracic and lumbar spine and upper digestive tract to the three separate dates of injury.
>
> The right shoulder injury occurred in the first accident and was not contributed to by the second two accidents which is 3% and the 12% for the two back injuries is apportioned in all three accidents giving the claimant 7% for the first injury and 4% for the second injury and 4% for the injury."

19. The formal Medical Assessment Certificate was that there had been 3% WPI caused by injury to the right shoulder, 5% WPI to the thoracic spine and 7% WPI in relation to the lumbar spine.

20. In relation to the spinal injuries, the AMS divided the impairment equally between the three dates of injury, so that 4% was ascribed to the injury of 14 November 2011, 4% to the injury of 3 May 2012 and 4% to 26 September 2012.[3]

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[2] MAC 7
[3] MAC 9

21. In view of the nature of the dispute, it is not necessary to analyse the evidence that was before the AMS. As will be seen, Mr Grant made a number of references to that evidence. I accept that there was no contemporaneous evidence regarding the exact nature of the spinal injuries sustained on 14 November 2011, and I accept that the AMS himself did not indicate that the thoracic spine was implicated in that injury, save for his unexplained apportionment[4], reproduced above. I also accept that the history given on 23 October 2012 to Dr Balsam Darwish, to whom Ms Ozcan was referred by her GP, Dr Dong, was only of lower back pain caused by the injury of 14 November 2011.[5]

22. The probative value of such evidence has been overtaken, however, by the agreement reached between the parties on 17 April 2019 which resulted in the Consent Orders reproduced above. As indicated, it is the interpretation of the MAC that is the subject of this dispute.

SUBMISSIONS

The applicant

23. Mr McManamey submitted that the MAC conclusively presumed Ms Ozcan to be suffering from a combined value 15% WPI as, when the provisions of s 322 were properly applied, the degree of permanent impairment could be seen to have resulted from the injury of 14 November 2011.

24. Mr McManamey submitted that the referral asked the AMS to consider the three injurious events to which the AMS's attention was directed by the arbitrator, that is to say, 14 November 2011, 3 May 2012 and 26 September 2012.

25. Mr McManamey referred to s 66 of the 1987 Act, saying that the entitlement that it gave to a worker was for compensation to a worker who received "an injury" that resulted in the relevant whole person impairment.

26. Mr McManamey referred to s 322(2) of the 1998 Act, noting that impairments could be assessed together when they resulted from the same injury whereas s 322 (3) provided for impairments that resulted from more than one injury to be assessed together where the injuries arise out of the same incident.

27. Mr McManamey submitted that the injurious event occurred on 14 November 2011, affecting the thoracic spine, the lumbar spine and the right upper extremity.

28. Mr McManamey submitted that "the same incident" could also be determined as meaning "the injurious event".

29. He submitted that the subsequent incidents also contributed to the injury. He submitted that the starting point dealing with the issue was well known dicta in *Kooragang Cement Pty Ltd v Bates*[6] which required a common sense evaluation of the causal chain. He submitted the fact that the AMS had been invited to apportion the injuries confirmed that it was agreed between the parties that the injuries (or injurious events, or incidents) were interconnected, in that they resulted from the 14 November 2011 injury. It accordingly could not be asserted that either of the later injuries were novus actus interveniens.

[4] At MAC 7
[5] ARD 99
[6] *(1994) 35 NSWLR 452 (Kooragang)*

30. Mr McManamey referred to *Murphy v Allity Management Services Pty Ltd*[7] in which DP Roche was dealing with a claim in which there was an argument as to whether, prior to a non-work-related fall, the applicant had established on the evidence that proposed surgery was reasonably necessary. In considering the matter DP Roche said:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary "as a result of" the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman*[2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

31. Applying the test whether the subsequent injuries/injurious events/incidents materially contributed to the impairment found by the AMS, Mr McManamey also referred to *Johnson v NSW Workers Compensation*[8] and *Nicol v Macquarie University*[9], which were further illustrations of the principle.

32. Both cases were appeals from Medical Appeal Panels and both cases involved similar situations whereby a worker had contracted a psychiatric condition with one employer, and had gone on to work for a second employer, with whom the worker suffered a significant deterioration in his condition. In both cases the first employer only had been sued and the Appeal Panels in each case had made a deduction for the contribution made by the second employer to the degree of whole person impairment. In each case Garling J in *Johnson* and Harrison AsJ in *Nicol* found that the subsequent deterioration had a material connection to the first injury, and that there was no suggestion that the subsequent deterioration was as a result of a novus actus interveniens. The employer on risk at the time of the first injury was accordingly liable for the total WPI found by the AMS.

33. Reference was also made to *Government Insurance Office of NSW v Aboushadi* [1999] NSWCA 396. At [22] Mason P with whom Maher JA and Barr AJA agreed, said:

> "22. His Honour correctly applied ***Fishlock v Plumber***, a case which (with others cited) was said by Malcolm CJ in ***State Government Insurance Commission v Oakley*** (1990) Aust Torts Rep 81-003 at 67,577 to be authority for the first two of the following three propositions:
>
> *(1) where the further injury results from a subsequent accident, which would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by that negligence;*

[7] [2015] NSWWCCPD 49 (*Murphy*)
[8] [2019] NSWSC 347 (*Johnson*)
[9] [2018] NSWSC 530 (*Nicol*)

(2) where the further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the defendant's negligence; and

(3) where the further injury results from a subsequent accident which would have occurred had the plaintiff been in normal health and the damage sustained include no element of aggravation of the earlier injury, the subsequent accident and further injury should be regarded as causally independent of the first.

See also ***Faulkner v Keffalinos*** (1971) 45 ALJR 80 at 85, ***Neall v Watson*** (1960) 34 ALJR 364 at 367, ***Jefferies v Roads and Traffic Authority of NSW*** (28 November 1997, NSW Court of Appeal, unreported), ***Bridge Printery Pty Ltd v Mestre*** [1999] NSWCA 342 at [16].

23 The appellant submitted that these principles do not apply to a situation (like the present) where the second incident (here, the 1991 accident) was itself tortious. It was submitted that, in those circumstances, the second tortfeasor takes the victim as he or she is found. So be it. But the question at issue is the extent of liability of the first tortfeasor in a situation where the continuing adverse impact of the first tort is discernible. It is not the law that the commission of a second tort, affecting an already vulnerable plaintiff, by itself puts an end to the liability of the defendant responsible for the first tort. In ***Faulkner***, Windeyer J said (at 85):

There is I think a critical distinction between a supervening happening that prevents a particular damage occurring as a result of the tort and a supervening happening that causes the harm caused by the tort to have added gravity. In the first class of case the supervening event diminishes the damages which flow from the tort: in the second class it merely adds to them, so that the tortfeasor responsible for the first accident remains liable for the harm he caused, which is not merged in the combined result of his wrongdoing and the later event. The distinction is not always either easily made or preserved.

See also ***Jobling v Associated Dairies Ltd*** [1981] UKHL 3; [1982] AC 794 at 815."

34. Mr McManamey equated the three types of cases described in paragraph 22 as being a consequential condition in the first example, an unrelated event which however causes an increase in the impairment caused by the first accident as a second, and a novus actus interveniens as constituting the third example.

35. During submissions I discussed with Mr McManamey whether this interpretation was consistent with the dicta in *Department of Juvenile Justice v Edmed*[10] . Mr McManamey submitted that there was no conflict with the principles concerning aggregation in *Edmed* because they applied in circumstances to which s 322 (2) was directed, whereas the circumstances that pertained in the present case were akin to the second example in *Aboushadi* and were governed by the provisions of s 322(3).

36. Mr McManamey referred to the provisions of s 323 of the 1998 Act. He submitted that prior to 1996 with the advent of s 68A of the 1987 Act (the precursor to s 323), there was no deduction for a prior injury, pre-existing condition or abnormality in conformance with the decision in *Rodios v Trefle*[11]. Approaching a series of injuries on the basis that the first in time materially contributed to the later aggravations would also limit the work s 323 had to do, he submitted.

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[10] [2008] NSWWCCPD (*Edmed)*

[11] (1937) 54 WN(NSW) 197; [1937] WCR(NSW) 290

37. When asked therefore would it not be wiser for a worker to seek compensation related to the first of the series of injuries and thus avoid the application of s 323, Mr McManamey submitted that in practice it would not usually be done because earlier injuries would not entitle the worker to as much compensation as a later injury. Accordingly, whilst a later injury might incur a deduction under s 323, it was generally still more desirable to frame a claim based on the last injury.

The respondent

38. Mr Grant submitted that the causation test set out in *Kooragang* and *Baltica* were correct, but submitted that the present case was not a causation case. He submitted that an examination of the evidence showed that there was no injury to the spine in the right shoulder injury of 2011, so that combining subsequent incidents with that injurious event was not possible. He submitted that the AMS was asked to assess three different injuries. It was clear from the s 74 notices that the respondent did not accept that the injuries involved the same pathology. He said that pathology was put in issue and whilst it was clear that there were two injuries to the lumbar spine which gave rise to impairment, they were not in regard to the same pathology.

39. Mr Grant referred to *Edmed*, submitting that there was no evidence that the pathology was the same. If for instance the original injury had been to the L1 disc and the subsequently to the L5 disc, there could be no aggravation because the pathologies differed.

40. Mr Grant also submitted that the AMS was not asked to combine the impairments arising from each separate injury. His doing so was beyond power, and the AMS should have simply certified in relation to each separate injury rather than continuing on to combine the totals. He said therefore the provisions of s 326 do not apply to that combined total of 15% WPI.

41. Mr Grant submitted that the task of the AMS was to apportion impairment, not pathology. He said that whilst there was a commonality in the three injuries, the AMS was required to identify which impairment related to each injury.

42. As to Mr McManamey's reliance on *Johnson*, he submitted that firstly *Johnson* was on appeal, secondly that there was agreement in *Johnson* that the pathology (a psychiatric condition) was common to both employments by the worker. Thirdly, that the AMS and the Medical Appeal Panel had clearly erred by making a deduction for the added impairment caused by employment by the second employer when there was no suggestion that the impairment had been caused by a novus actus interveniens. Fourthly, he submitted that *Johnson* was not a case about different pathologies, and therefore irrelevant to the question of aggregation. Fifthly, Mr Grant submitted that *Johnson* was a case about causation.

43. Mr Grant referred to *Warwar v Speedy Courier (Australia) Pty Ltd*[12] as an illustration of the principle that the pathologies must be identical. *Warwar* involved the application of s 322(2) of the 1998 Act where the worker had injured his lower back and then, in a subsequent incident, his neck. DP Roche upheld the Arbitrator's decision that no aggregation was possible, as the pathologies were different. Mr Grant said that similarly there was no justification for regarding an injury to the lumbar spine and the thoracic spine as involving the same pathology. He accepted that the incidents involved the lumbar spine, and whilst it was possible to combine the common pathology, the additional impairment to the thoracic spine could not be included.

[12] *[2010] NSWWCCPD 92 (Warwar)*

44. Mr Grant submitted that it was not possible to combine the later incidents with the first 2011 incident. He referred to two first instance decisions of Arbitrator Snell as he then was in *Stagg v Department of Conservation*[13] and *Mordaunt v Qantas*[14] both cases being authority for the proposition that two assessments could not be combined unless the pathologies were the same.

45. Mr Grant then referred to the evidence in regard to the thoracic spine and the lumbar spine. He submitted that there was no causal link between the pathologies involved in each incident.

46. So far as the thoracic spine was concerned, the first mention had been on 14 July 2015[15]. He conceded that an MRI scan of the thoracic spine had been taken out in June 2014[16]. However, the reason for the scan was stated to be complaints of cervical spine, lumbar spine and symptoms in both legs. It appeared that the thoracic spine was scanned because the cervical and lumbar spine were being investigated. Mr Grant submitted that, in any event before 2014 there was no investigation of the thoracic spine. Mr Grant referred to the opinions of various medical practitioners. He said that Dr Darwish first referred to the thoracic spine on 1 September 2015. However, in a later report he suggested maybe the symptoms first occurred in 2014[17].

47. It was in 2018, Mr Grant submitted, that the thoracic spine started to feature as a source of complaint. Dr Powell mentioned it in December 2018[18]. The history however, was not focussed on the thoracic spine, although Dr Powell did examine it and found there was no impairment.

48. Dr Khan in February 2017 took no history of any involvement of the thoracic spine between 2011 and 2012[19].

49. Mr Grant noted that Dr Darwish suggested that the cause of the symptoms was the aggravation of degenerative changes[20] but there was no further information to identify what the pathology was. There was no evidence as to what level the thoracic spine was implicated or whether indeed different levels were implicated at different times. Although pathology was found at T7-8 in the imaging, no opinion was given as to what level was aggravated by each incident, and the results unequivocally failed to establish any causal link between each incident.

50. Mr Grant referred to Mrs Ozcan's statement of 12 July 2018[21], which neatly summarised her injuries from the vantage point of hindsight. He noted that there was no mention made of the thoracic spine in the 2011 incident, although she did mention it as being symptomatic at a later time.

51. Mr Grant referred to the MAC, saying the AMS did not take any history of injury to the thoracic spine. Whilst he found an impairment, no cause for it was suggested by the AMS, although Mr Grant conceded there was no need for him to do so as once the matter was referred to him, the AMS had to accept that causation had been established. However, Mr Grant submitted that in the current circumstances, on the issues currently raised before me, causation was an issue that I could and should consider.

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[13] [2014] NSWWCC 441 (*Stagg*)
[14] [2015] NSWWCC 143 (*Mordant*)
[15] ARD 63
[16] ARD 39
[17] ARD 49
[18] Reply 57
[19] ARD 88
[20] ARD 99
[21] ARD 2

52. Further, Mr Grant submitted that the AMS gave no diagnosis as to the thoracic symptomatology. Mr Grant also referred to Mrs Ozcan's description that the symptoms in 2012 were "high up" in her spine, which was not consistent, Mr Grant argued, with the only established pathology which was at T7/8.

53. Mr Grant submitted that a proper analysis of the evidence would demonstrate that there was no injury claimed to either the thoracic spine or the lumbar spine in the original 2011 injury.

54. In reply Mr McManamey submitted that I could infer from the Consent Orders that it was the intention of the parties that a single impairment be assessed by the AMS as a result of the three separate dates of injury.

55. Mr McManamey also submitted that if it was necessary for Ms Ozcan to demonstrate the same pathology in each date of injury, it was not necessary for her to show a change in that pathology. The injuries to the thoracic and lumbar areas of the spine he submitted were in the nature of the aggravation of degenerative change. Mr McManamey referred to *Federal Broom Co Pty Ltd v Semlitch*[22] as authority for the proposition that whilst an acceleration of a disease process has to show a change in pathology, the aggravation, exacerbation or deterioration of a disease process does not.

DISCUSSION

56. Division 4 of the 1987 Act provides the mechanism for the assessment of compensation for non-economic loss. Section 65 provides:

> "65 Determination of degree of permanent impairment
>
> (1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.
>
> (2) If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division.
>
> Note: The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires the impairments that result from those injuries to be assessed together. Physical injuries and psychological/psychiatric injuries are not assessed together. See section 65A.
>
> (3) 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."

57. Section 66(1) of the 1987 Act provides:

> "(1) A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.
>
> Note. No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less."

[22] [1964] HCA 34; (1964) 110 CLR 626

58. As noted above, s 65 provides that for the purposes of Division 4 the degree of permanent impairment that results from an injury is to be assessed as provided by that section and Part 7 of Chapter 7 of the 1998 Act (Medical assessment). Part 7 of Chapter 7 relevantly comprises of the following sections:

> 319 Definitions in this Act:
>
> **"approved medical specialist"** means a medical practitioner appointed under this Part as an approved medical specialist.
>
> **"medical dispute"** means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:
>
> (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
>
> (b) the worker's fitness for employment,
>
> (c) the degree of permanent impairment of the worker as a result of an injury,
>
> (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
>
> (e) the nature and extent of loss of hearing suffered by a worker,
>
> (f) whether impairment is permanent,
>
> (g) whether the degree of permanent impairment of the injured worker is fully ascertainable.

59. Section 325 of the 1998 Act provides:

> **325 MEDICAL ASSESSMENT CERTIFICATE**
>
> (1) The approved medical specialist to whom a medical dispute is referred is to give a certificate (**"medical assessment certificate"**) as to the matters referred for assessment.
>
> (2) A medical assessment certificate is to be in a form approved by the Registrar and is to:
>
> (a) set out details of the matters referred for assessment, and
> (b) certify as to the approved medical specialist's assessment with respect to those matters, and
> (c) set out the approved medical specialist's reasons for that assessment, and
> (d) set out the facts on which that assessment is based.
>
> (3) If the Registrar is satisfied that a medical assessment certificate contains an obvious error, the Registrar may issue, or approve of the approved medical specialist issuing, a replacement medical assessment certificate to correct the error.
>
> (4) An approved medical specialist is competent to give evidence as to matters in a certificate given by the specialist under this section, but may not be compelled to give evidence.

60. Section 326 of the 1998 Act provides:

> **"326 Status of medical assessments**
>
> (1) An assessment certified in a medical assessment certificate pursuant to a medical assessment under this Part is conclusively presumed to be correct as to the following matters in any proceedings before a court or the Commission with which the certificate is concerned:
>
> (a) the degree of permanent impairment of the worker as a result of an injury,
>
> (b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,
>
> (c) the nature and extent of loss of hearing suffered by a worker,
>
> (d) whether impairment is permanent,
>
> (e) whether the degree of permanent impairment is fully ascertainable.
>
> (2) As to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings."

61. Section 322 of the 1998 Act provides as follows, relevantly:

> **"322 Assessment of impairment**
>
> (1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker. Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.
>
> (4) ……."

62. Section 323 of the 1998 provides as follows:

> **323 Deduction for previous injury or pre-existing condition or abnormality**
>
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury(whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.

(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

63. In *Edmed*[23] DP Roche examined the application of ss 322(2) and ss 322(3) of the 1998 Act.

64. *Edmed* was concerned with a case where the worker had suffered two injuries to his wrist, the first in May 2003 and the second on 25 August 2004. An AMS assessed 9% WPI for the first injury and 4% for the second, and those two figures were aggregated resulting in an award under s 67 as it then was, of the 1987 Act.

65. DP Roche revoked the decision of the Arbitrator, finding that the pathology in both injuries was not identical. From [25], DP Roche said:

> 25. "The term "injury" was not amended in the 2001 Amending Act. It is defined in section 4 of the 1987 Act as follows:
>
> **"4 Definition of 'injury'**
>
> In this Act:
>
> 'injury':
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes:
>
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942* , or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."
>
> 26. This definition is unhelpful in determining the issue before me. In *Lyons*, Judge Neilson held that "injury" refers to "both the [injurious] event and the pathology arising from it". I accept that definition as being appropriate for many purposes under the 1987 Act and the 1998 Act. That the term "injury" can have two different meanings is acknowledged in section 322(3) of the 1998 Act where reference is made to "Impairments that result from *more than one injury* arising out of the *same incident* ...." (emphasis added). This reference to "injury" can only mean the 'pathology' that has resulted from the relevant work "incident" or injurious event. For example, if a worker falls and suffers a broken leg *and* separate and distinct nerve damage in the arm, he or she has suffered

[23] For a useful recent summary of decisions that have applied *Edmed* see *Bukvic v Willoughby City Council* [2018] NSWWCC 80.

more than one "injury" (an injured leg and an injured arm) within the terms of section 322(3) resulting from the one "incident". In other words, he or she has suffered more than one pathology ("injury") as a result of the one incident or injurious event. [The impairments resulting from those 'injuries' are to be assessed together.][24] This interpretation is consistent with section 65(2) of the 1987 Act and is uncontroversial.

27. The difficulty arises when a worker suffers one pathology ("injury") as a result of several independent "incidents" or injurious events. This situation is partly addressed in section 322(2), which provides that "Impairments that result from *the same injury* are to be assessed together to assess the degree of permanent impairment of the injured worker" (emphasis added). The reference to "the same injury" in section 322(2) cannot be a reference to "the same incident" because that situation is dealt with in section 322(3). The expression "the same injury" is not defined but it follows that if "injury" in section 322(3) means 'pathology' (as it must), then, for the section to be logically consistent, it must mean the same in section 322(2). If "injury" in section 322(2) means 'pathology' then, for section 322(2) to be consistent with section 322(3), impairments resulting from the "same injury" (the same pathology) are to be "assessed together" regardless of whether they arise from the same "incident" or separate incidents."

66. The learned DP then consulted the Macquarie Dictionary and found that the word "the same" means "identical".

67. Mr McManamey's submissions were based upon the proposition that the circumstances of this case were not covered by the principles discussed by DP Roche in *Edmed*. He sought to distinguish *Edmed* by reference to common law principles regarding material contribution. He referred to *Murphy* as authority for a different test, that if it could be shown that the first injury (here, 4 November 2011) materially contributed to the impairment caused by subsequent injurious events, then the total whole person impairment was payable, and there was no necessity to consider the provisions of s 322.

68. This result followed, Mr McManamey argued, because the injurious event which was responsible for the subsequent aggravations was that of 4 November 2011. There was no suggestion that there had been a novus actus interveniens regarding either of the subsequent aggravations because the AMS had found them all to be causally linked, and apportioned accordingly.

69. However, whilst the principle of material contribution will establish a causal connection between two injurious events, it is not concerned with the calculation of whole person impairment itself. In both *Johnson* and *Nicol* there was no dispute as to the pathology involved, namely a psychological/psychiatric condition, so there was no need to discuss the application of s 322.

70. In *Murphy* it was assumed that if the causation question resulted in the respondent being liable for the section 60 expenses, payment would then ensue.

71. The provisions of Part 7 of Chapter 7 of the 1998 Act are concerned only with the medical assessment of whole person impairment for the purposes of the application of the 1987 Act regarding payment of lump sum. Under s 326(2) an opinion by an AMS on issues not defined under s 326 (1) is not binding.

[24] The statement in square brackets was substituted by Barrett JA (Ward JA and Tobias AJA agreeing) in *Galluzzo v Little* [2013] NSWCA 116 at [41]. The learned DP originally stated: "Those "injuries" are to be assessed together."

72. It follows that I do not agree with Mr McManamey's submission that the circumstances here under review do not conflict with the principles in *Edmed.* Mr McManamey submitted that the present case was governed by the provisions of s 322 (3), and not s 322 (2). Using DP Roche's interpretation of s 322 (2), Ms Ozcan would need to show that the impairments caused by the different injurious events resulted from the same pathology in order for them to be assessed together.

73. Mr McManamey submitted, however, using the learned Deputy President's interpretation, that all Ms Ozcan had to show in order to satisfy s 322 (3) was that more than one pathology had resulted from the same injurious event – namely, pathology to the spine and the right upper extremity on 4 November 2011. The parties had accepted that there was a causal link between the event of 4 November 2011 and subsequent aggravations to the thoracic and lumbar areas of the spine so that, as I understood Mr McManamey, it was not necessary to demonstrate that the pathologies involved in these subsequent aggravations were the same.

74. The application of this principle not only would enable Ms Ozcan to have the assessments regarding the thoracic and lumbar areas of the spine assessed together, but also the assessment for the right upper extremity.

75. There are some practical difficulties standing in the path of Mr McManamey's approach. Firstly, an AMS is bound by the terms of his referral. As can be seen, he was not asked to combine the assessments he made in respect of each matter that was referred to him. Secondly, each matter was described as an "injury." Thirdly, each matter was described as:

> "Date of Injury 1 14 November 2011
> Date of Injury 2 3 May 2012
>
> Date of Injury 3 26 September 2012"

76. Fourthly, the AMS was "directed" to apportion the impairment resulting from the "three separate dates of injury."

77. It follows that the opinion given as to the combined value was beyond the remit of the AMS. As such it was not a binding opinion and did not reflect the intention of the parties when consent orders were made on 17 April 2019.

78. I am satisfied that the Medical Assessment Certificate conclusively proves that on the date of assessment by the AMS, 21 May 2019, Ms Ozcan was suffering from the following WPI:

> 3% in respect of the injury to the right upper extremity
> 5% in respect of the thoracic spine
> 7% in respect of the lumbar spine

79. I am satisfied further that the finding by the AMS that each date of injury contributed to the WPI regarding the thoracic and lumbar spine, in the proportion of 4%, or one third, must conclusively be presumed correct.

80. The MAC is conclusively presumed to be correct as to the degree of permanent impairment of the worker as the result of "an injury" pursuant to s 326 (1) (a). Pursuant to the terms of the referral, the AMS was obliged to assess the degree of permanent impairment of the worker as a result of three injuries, 14 November 2011, 3 May 2012 and 26 September 2012.

81. Those are the limits of the presumption that the assessment is conclusively correct. Those then are the assessments that have to be the subject of my orders.

82. There is no conclusive evidence before me that the combined value of the three assessments is binding, as s 325(1) requires an AMS to give a MAC "as to the matters referred for assessment." The AMS was not asked in the referral to assess the combined value of the three injuries referred to him.

83. I was indebted to Mr Grant for his detailed but succinct survey of the evidence, and I noted the subtext to his submissions that liability was initially denied in the section 74 notices. However, my comments as to the difficulties confronting Ms Ozcan in relying on a non-binding part of the MAC apply in reverse to the respondent. This remittal was made as a result of consent orders being entered into on 17 April 2019. Those consent orders reflected the orders made by the Arbitrator. I note that the matter was originally pleaded in Part 4 of the ARD in reliance of the three dates of injury that have been under discussion. However, I note further that in Part 5.6 of the ARD only the date 14 November 2011 was relied upon as being the date of injury.

84. An objective appraisal of the intentions of the parties in entering into the agreement which resulted in the Consent Orders of 17 April 2019 is that the AMS was asked to assess three separate dates of injury. No evidence was tendered that would raise an intention to the contrary.[25] I infer that after discussions on 17 April 2019, it was decided not to refer the matter to the AMS with 14 November 2011 as the only date of injury.

85. Notwithstanding, the submissions made by Ms Ozcan have been directed at precisely that proposition, namely that because the injuries sustained on that date materially contributed to the subsequent aggravations, that indeed 14 November 2011 was the relevant date for assessment. In other words, she has suffered more than one pathology (injury) as a result of the one incident or injurious event.

86. The difficulty with Mr McManamey's argument that the principles of aggregation in *Edmed* were concerned only in situations where s 322(2) applied, is that in *Edmed* itself, the ratio decidendi is not that restricted.

87. Whilst the interpretation by DP Roche of section 322 (3) accepted that impairments resulting from the same injury could be assessed together regardless of whether they arose from the same incident or separate incidents, nonetheless, applying the learned DP's definition to the word "injury" of "pathology", impairments can only be assessed together that result from the same "pathology" in situations where, as in this case, they arise from separate incidents.

88. The reasons given by the AMS for the apportionment of the spinal injuries were perfunctory and without explanation. It may be that a further examination of the evidence would justify a reassessment. However, that is not a matter for me, as the provisions of section 326 (1) compel me to apply the assessment certified.

89. It follows that the assessment certified in the MAC conclusively proves to be correct the following:

    (a) For the injury of 14 November 2011 Ms Ozcan has suffered a 3% WPI in relation to the right shoulder, and 4% in relation to the thoracic and lumbar areas of the spine. These pathologies arose out of the same incident and can be assessed together pursuant to s 322(3), giving an entitlement of 7% WPI.

    (b) For the injury of 3 May 2012 Ms Ozcan has suffered a 4% WPI in relation to the thoracic and lumbar areas of the spine.

    (c) For the injury of 26 September 2012 Ms Ozcan has also suffered a 4% WPI in relation to the thoracic and lumbar areas of the spine.

[25] As to the principle of objectivity see *Warwar* @ [43] per DP Roche

90. I am not able to determine the nature of the injury to the thoracic spine of 14 November 2011, and accordingly am not able to make any determination regarding aggregation.

91. In conformance with authority, I am unable to find that the injuries to the thoracic and lumbar areas of the spine can be aggregated. The pathologies are discrete and relate to different levels of the spine. However, I accept that the three injuries to the lumbar spine can be aggregated, as the pathology is in the nature of degeneration[26]. The result is that Ms Ozcan is entitled to the amount originally assessed, 7% WPI.

92. With regard to the thoracic spine, I am satisfied that the injuries of 3 May 2012 and 26 September 2012 were aggravations of Ms Ozcan's degenerative changes in the thoracic spine. The pathology is therefore the same and s 322(3) permits the impairment arising from the two dates of injury to be aggregated, leaving Ms Ozcan with an entitlement to the amount originally assessed, 5% WPI.

93. As these entitlements cannot be assessed together it follows that Ms Ozcan fails to meet the greater than 10% threshold set by s 66 of the 1987 Act.

94. Accordingly, I make the following orders:

    (a) There will be an award in favour of the respondent regarding the claim for lump sum compensation.

    (b) The respondent will pay the applicant's section 60 expenses upon production of accounts receipts and/or HIC documentation.

WORKERS COMPENSATION COMMISSION

[26] See *Diocese of Parramatta v Barnes* [2015] NSW WCC PD 35