WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6434/18**
Applicant: **Timothy Kennaway**
Respondent: **Secretary, Department of Education & Communities**
Date of Determination: **27 February 2020**
Citation: **[2020] NSWWCC 54**

The Commission determines:

1. The applicant's application pursuant to section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* for reconsideration of the orders made in the Certificate of Determination dated 15 July 2019 and the application for the Registrar to exercise his powers under ss 329 and 378 of the *Workplace Injury Management and Workers Compensation Act 1998* is declined.

2. The orders in the Certificate of Determination dated 15 July 2019 are confirmed.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Timothy Kennaway (the applicant) is 55 years old and was employed by the Secretary, Department of Education (the respondent) as a teacher on 29 April 2002.

2. During the course of the claims, the applicant or the respondent has identified four dates of injury, namely 10 March 2014 (deemed), 7 April 2014 (deemed), 30 June 2017 (deemed) and 3 January 2018 (deemed). This causes some confusion in the review of the evidence as at times the doctors refer to different dates of injury, but the focus of this application relates to the relates to the injury sustained on 7 April 2014 (deemed) and 3 January 2018 (deemed).

3. On 2 May 2014, the applicant's solicitor served a notice of claim for weekly compensation from 10 March 2014 to date and continuing pursuant to ss 36 and 37 of the *Workers Compensation Act 1987* (the 1987 Act) due to a psychological injury sustained on 10 March 2014 (deemed).

4. On 6 May 2014, Allianz Australia Workers Compensation (NSW) Ltd (the insurer) issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant was entitled to weekly compensation and the payment of medical expenses because his psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and discipline.

5. Proceedings were commenced in the Workers Compensation Commission (the Commission) in 2014 in matter no. 5881/14. At a conciliation conference on 19 February 2015, the parties agreed to resolve the claim by the payment of voluntary weekly compensation from 10 March 2014 to 18 March 2014. The applicant was awarded weekly compensation from 7 April 2014 to 12 February 2015, and thereafter there was an award for the respondent. The respondent also agreed to pay medical expenses up to $4,500, with an award for the respondent thereafter.

6. On 8 February 2018, the applicant's solicitor served a notice of claim in respect of weekly compensation from 3 January 2018 to date and continuing pursuant to ss 36 and 37 of the 1987 Act due to a psychological injury sustained on 3 January 2018 (deemed).

7. On 3 March 2018, the insurer issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant had sustained an injury and that his employment was a substantial contributing factor to his condition primarily because he was not working on 3 January 2018. It disputed that he was entitled to weekly compensation and the payment of medical expenses. It cited ss 4, 9A, 33 and 60 of the 1987 Act.

8. On 13 August 2018, the applicant's solicitor served a notice of claim in respect of weekly compensation from 3 April 2014 to date and continuing pursuant to ss 36 and 37 of the 1987 Act, medical expenses pursuant to s 60 of the 1987 Act and lump sum compensation in respect of 17% whole person impairment pursuant to s 66 of the 1987 Act due to a psychological injury sustained on 3 January 2018 (deemed).

9. On 12 November 2018, the insurer issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant had any entitlement to weekly compensation, medical expenses and lump sum compensation in respect of the injury on 7 April 2014 (deemed) due to the terms of the previous award entered on 19 February 2015 and because the issue of apportionment between different psychological injuries had not been addressed by the applicant's independent medical specialist, Dr Teoh.

10. The insurer also disputed that the applicant had sustained an injury on 30 June 2017 (deemed) and 3 January 2018 (deemed) and that his employment was a substantial contributing factor to his injury because he was not working on 3 January 2018. It disputed that he was entitled to weekly compensation and the payment of medical expenses. It cited ss 4, 9A, 33. 59, 60, 65A and 66 of the 1987 Act.

11. The applicant lodged an Application to Resolve a Dispute (the Application) in the Commission on 10 December 2018. At a conciliation conference on 13 March 2019, the parties agreed to resolve the claim with the insurer to make voluntary payments from 3 January 2018 to date and continuing, together with the payment of medical expenses.

12. The applicant's lump sum claim was referred to an Approved Medical Specialist (AMS), Dr Bradley Ng on 13 March 2019. The parties subsequently agreed that the report of Dr Teoh would be withdrawn from the Application to Resolve a Dispute and this was confirmed in further consent orders issued on 18 March 2019.

13. The AMS was requested to assess the degree of whole person impairment due to a psychological injury sustained on 7 April 2014 (deemed) and 3 January 2018 (deemed). The AMS provided a Medical Assessment Certificate (MAC) on 8 April 2019. The AMS assessed 9% whole person impairment due to a psychological injury sustained on 7 April 2014 (deemed) and 3 January 2018 (deemed). The applicant lodged an appeal against the MAC, but he failed to pass through the "gatekeeper".

14. Ms Kathryn Camp, the delegate of the Registrar, issued a decision on 20 November 2019. Ms Camp noted that the applicant sought leave to rely on fresh evidence, namely two statements dated 26 April 2019 and a statement from his sister dated 26 April 2019. The Delegate noted:

> "These statements were created after the medical assessment conducted by Dr Ng and MAC issued on 8 April 2019. The statements largely complain about the conduct of Dr Ng during the medical assessment and complain that he did not take a full and proper history of the worker.
>
> The appellant submits that in the statements there is evidence of demonstrable error in the examination process conducted by Dr Ng. The appellant submits that '… for the reasons in the attached Statements that [sic] the AMS did not conduct a fair or accurate assessment and the Applicant should be re-examined by a Member of the Appeal Panel.'"[1]

15. The Delegate considered the principles discussed in *Petrovic v BC Serv No 14 Pty Limited and Ors*[2] regarding the interpretation of s 327(3)(b) of the 1998 Act, where Hoeben J stated:

> "In my opinion, the words 'availability of additional relevant information' qualify the words in parentheses in s 327(3)(b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327(2) which identifies the matters which are appealable. They are restricted to the matters referred to in s 326 as to which a MAC is conclusively taken to be correct. In other words, 'additional relevant information' for the purposes of s 327(3)(b) is information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by s 327(3)(c) and (d) but they do not come within subs 327(3)(b).

[1] Decision M1-6434/18 4 July 2019, [10] - [11].
[2] [2007] NSWSC 1156 (*Petrovic*).

> It follows that the statutory declarations which related to the way in which the AMS carried out his examination and the way in which questions and answers were interpreted during the examination were not 'additional relevant information' for the purposes of subs 327(3)(b) and should not have been treated as such by the Registrar……
>
> There is another consideration which I have taken into account. If the function of the Registrar under s327 is to be in reality that of a gatekeeper, then statutory declarations such as were sworn in this case should not be regarded as 'additional relevant information' for the purposes of s327(3)(b). If they are, it would be open to every dissatisfied party to challenge the assessment process of an AMS in the same way thereby gaining automatic access to an appeal."[3]

16. The Delegate cited *Pitsonis v Registrar of the Workers Compensation Commission*[4], *Summerfield v The Registrar of the WCC & Anor*[5] and *Lukacevic v Coates Hire Operations Pty Limited*[6], and stated:

> "I make the following observations. Fresh evidence may be admitted on appeal under s 328(3) of the 1998. However, the exercise of the discretion to admit fresh evidence resides in the Medical Appeal Panel. That is, it is a matter to be determined by the Medical Appeal Panel, if the appeal proceeds through the gatekeeper pursuant to s 327(4) of the 1998 Act. Even if the statements were admitted as fresh evidence before the Medical Appeal Panel, the factors or assertions within it have no probative value as they have no 'particularity, plausibility and/or independent support.' Indeed, many of the factors or assertions contained in those statements, that Dr Ng has allegedly failed to consider, were not factors or assertions recorded in the forensic medical reports or lay statements relied on in the substantive proceedings.
>
> The appeal has been brought on the basis of an alleged demonstrable error. A demonstrable error cannot be established by statements which merely seek to dispute the history taking of the AMS. For demonstrable error to be established, the appellant needs to demonstrate that there is an arguable case of error appearing on the face of the MAC. For the reasons discussed below, it was open to Dr Ng to conclude the class identified for each PIRS Category was applicable to the worker."[7]

17. The Delegate was not satisfied that a ground for appeal pursuant to s 327(3) of the 1988 Act had been made out, so the appeal against the MAC did not proceed.

18. A Certificate of Determination (COD) was issued on 15 July 2019 in the following terms:

> "The Commission determines:
>
> 1. The applicant suffers 9% permanent impairment resulting from psychological injury deemed to have happened on 7 April 2014 and 3 January 2018.
>
> 2. The applicant has no entitlement to lumps sum compensation resulting from psychological injury deemed to have happened on 7 April 2014 and 3 January 2018.

[3] *Petrovic,* [31]-[34].
[4] [2008] NSWCA 88 (*Pitsonis No. 2*).
[5] [2006] NSWSC 515.
[6] [2011] NSWCA 112.
[7] Decision M1-6434/18 4 July 2019, [17] - [18].

Brief statement of reasons

3. The Certificate of Determination is issued in accordance with the Medical Assessment Certificate issued under Part 7 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998*.

4. The claim for compensation was made on or after 19 June 2012. The applicant did not reach the threshold for lump sum compensation, as required by section 66(1) of the *Workers Compensation Act 1987*.

5. The proceedings commenced after 2 April 2013 and therefore no order is made as to costs."

19. On 4 October 2019, the applicant's solicitor wrote to the solicitor for the respondent and advised that the applicant would be seeking a reconsideration of the COD dated 15 July 2019 pursuant to s 350(3) of the 1998 Act, so that the applicant's claim could be referred to another AMS pursuant to s 329(1) of the1998 Act, to ensure that fairness and justice could be done and seen to be done.

20. The matter was listed for a telephone conference before Arbitrator Young on 20 November 2019. He issued consent orders in which he granted the respondent leave to issue a Direction on Dr Ng to give evidence and be cross-examined at a conciliation and arbitration hearing to be appointed before another arbitrator in Sydney.

PROCEDURE BEFORE THE COMMISSION

21. The matter was listed for a telephone conference before me on 29 November 2019. I raised the provisions in s 325(4) of 1998 Act which provides:

> "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."

22. In light of this provision and the current procedure of the Commission, which does not allow for oral evidence by an AMS at an arbitration hearing, the respondent's solicitor, Mr Tuxford, advised that he did not intend to issue a Direction on the AMS to give evidence.

23. Given the nature of the application, I am satisfied that there is sufficient material before me to determine the matter. At the telephone conference, the parties were advised of my intention to determine the dispute on the papers without holding a conciliation conference or arbitration hearing. I directed that further written submissions be filed.

24. Written submissions were filed by the applicant on 11 December 2019 and by the respondent on 13 January 2020.

25. On 15 January 2020, I directed that further submissions be filed. Written submissions were filed by the applicant on 3 February 2020 and by the respondent on 7 February 2020.

ISSUES FOR DETERMINATION

26. The following issue remains in dispute:

(a) Whether the COD dated 15 July 2019 should be rescinded to allow the matter to be referred to an AMS - ss 350(3), 329(1) and 378 of the 1998 Act.

EVIDENCE

Documentary evidence

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

    (a) The Application and attached documents, excluding the report of Dr Teoh;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents and attached documents received on 23 January 2019;
    (d) COD dated 13 March 2019;
    (e) Amended COD dated 18 March 2019;
    (f) MAC of Dr Ng dated 8 April 2019;
    (g) Application to Appeal against Decision of Approved Medical Specialist (M1-6434/18);
    (h) Notice of Opposition to Appeal Against Decision of Approved Medical Specialist (M1-6434/18);
    (i) Decision of Delegate of the Registrar dated 20 November 2019 (M1-6434/18);
    (j) Statements of the applicant dated 26 April 2019 (x 2), and
    (k) Statement of Leanne Rudder dated 26 April 2019.

REVIEW OF EVIDENCE

Applicant's statements

28. The applicant provided statements on 23 May 2014, 5 January 2018, 12 March 2018 and 16 March 2018. These largely deal with the circumstances of his injury, subsequent work issues and the failure by the respondent to provide him with suitable duties following the resolution of his earlier claim. They do not describe in any detail the nature of his symptoms and how his injury had impacted on him.

29. In the statement dated 26 April 2019, the applicant claimed that the AMS did not take a full and proper history about his personal care and hygiene, but discussed take away food and details about his mother.

30. The applicant claimed that he had ceased all exercise, put on weight, infrequently washed his clothes and rarely washed his sheets. He relied on café, take-away and comfort food. The applicant took issue with the doctor's finding of mild impairment.

31. The applicant stated that the AMS did not take a full and proper history about his social and recreational activities. He took issue with the doctor's finding of mild impairment, because he did not engage in any activities. He claimed that an interest in stamp collecting and photography did not constitute a social or recreational activity, and his only social interaction outside of the family was at church. He was socially withdrawn and inactive, and he had lost contact with friends.

32. The applicant stated that before his injury, he had a normal social and recreational life, with a wide range of friends. He played soccer and was a player and President of a cricket club. He played competition squash, was an active bushwalker and was Chairman of the strata committee where he lived.

33. The applicant stated that the AMS did not take a full and proper history about his travel. He stated that he could only travel for about 10 minutes by himself and he did not use public transport.

34. The applicant stated that the AMS did not take a full and proper history about his social functioning. He claimed that the AMS mis-stated and drew improper conclusions that were not factually correct. He stated that he was previously independent had left home when he was 18 years old. He had been dependent on his family since his injury and this had placed a strain on his relationships. He no longer had contact with friends associated with his leisure activities and his work colleagues. He denied that he had maintained contact with his ex-girlfriend. He had not spoken to her for over a year and had not seen her for 30 years.

35. The applicant stated that he had impaired cognitive issues that were identified in Dr Teoh's report, whilst Dr Anand stated that he had moderate impairment. He claimed that the AMS made assumptions about his concentration, persistence and pace, and he did not make a full and accurate assessment. The applicant stated that he told the AMS about the issues and disputes at work, so he was incorrect when he reported that there were no other disputes.

36. The applicant stated that he had significant difficulty understanding the AMS and explaining matters to him. He also failed to mention key details, such as the paedophile discussion with the Principal at Gosford High School. The AMS questioned him about this and the applicant claimed that he became extremely anxious and distressed. He felt that he was the subject of an inquisition and he considered that the doctor was inappropriately interacting with him, particularly with his preoccupation with his religious beliefs and his mother.

37. In his second statement dated 26 April 2019, the applicant indicated that AMS spent a significant amount of time critically analysing and expressing his personal views about irrelevant personal facts concerning his family and religion.

38. The applicant explained that the AMS only allowed his sister to sit in on the appointment. The doctor was concerned that they were waiting for his sister to come back from the toilet and when she entered the room, she was instructed not to talk. He stated that the AMS was concerned that their mother was left in the car and the doctor said that if it was his mother, he would not have left her there. He then spent about five minutes questioning him about this issue of this alleged poor elder care.

39. The applicant explained that his mother was happy to stay in the car as she could not walk far. He claimed that the AMS made him feel bad without knowing the full circumstances and the AMS gave him the impression that he thought that his family was unusual and dysfunctional.

40. The applicant stated that the AMS asked about the cause of his psychological problems and then he ridiculed his religious beliefs in a sneering, demeaning and derogatory fashion. The AMS kept challenging him about whether he was a Jehovah's Witness and later questioned why he had not already become a Jehovah's Witness. The doctor then proceeded to conduct the examination in an aggressive manner.

41. The applicant identified some inaccuracies in the history recorded by the AMS relating to his job applications before April 2002. The AMS expressed his "horror" that he had declined a fulltime position in Forbes and questioned why he had not resigned from his position at Erina High School. The applicant viewed this as bullying and outside of his role as an AMS. The doctor also ignored his answers. The applicant claimed that the AMS bullied and inappropriately accused him. He was unprofessional and his behaviour was illegal.

Statements of Leah Rudder

42. Leah Rudder, the applicant's sister, provided statements on 22 April 2014 and 26 April 2019. In her first statement, she described how her brother's psychological state had deteriorated, particularly in the previous six months.

43. In her recent statement, Ms Rudder advised that she accompanied her brother to the examination by the AMS. She confirmed that her mother insisted on staying in the car. When she reached the surgery, she went to the bathroom. Dr Ng was waiting for her and said that she had taken a while.

44. Ms Rudder stated that the AMS was abrupt and very direct when he questioned her brother about the whereabouts of their mother. He stated that he would never leave his own mother in a carpark and he thought that this behaviour was not normal. The applicant tried to explain, but the AMS would not allow him to do so. Ms Rudder felt that the AMS was far too opinionated with something that had nothing to do with him or the assessment.

45. Ms Rudder stated that the AMS questioned her brother about his religious beliefs and why he was studying to be a Jehovah's Witness. The AMS was preoccupied with the applicant's explanation and he not satisfied that he was not a Jehovah's Witness. She stated that this line of questioning made her brother feel obligated to explain and justify why he was studying to be a Jehovah's Witness. She considered that this had nothing to do with his medical assessment.

46. Ms Rudder stated that the AMS's manner of questioning the applicant's history, by saying "So?" or "So what?", was inappropriate. He questioned the applicant inappropriately as to whether he thought he was the best teacher at the school and persisted with the line of questioning until he received the answer that he wanted to hear.

47. Ms Rudder stated that she was disappointed with the way that the AMS had conducted the examination. She could not believe some of his responses and personal comments about her brother's lifestyle, family and work. She felt that he was preoccupied and judgmental concerning their mother and religion, when it was not his place to do so. She considered that her brother was not afforded a fair and ethical assessment by the AMS. He was not impartial and was too personal and opiniated.

Medical certificates

48. According to the medical certificates from the Valentine Family Medical Practice, the applicant had no current work capacity from 3 January 2018 to 1 April 2019 due to reactive depression as a result of an injury sustained on 10 March 2014.

Reports of Dr Anand

49. Dr Anand reported on 16 October 2018, 29 October 2018 and 12 November 2018. He noted that the applicant was injured on 7 April 2014 after he was ambushed by a student. He had attempted to return to work in two occasions but had been unable to continue. In 2015, he was bullied when he was working at the Narara Valley High School. When he worked at Gosford High School, he was called a paedophile by a staff member. The applicant ceased work on 30 July 2017.

50. Dr Anand diagnosed a Chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood that was caused on 7 April 2014 and exacerbated on 30 June 2017. He stated that the applicant was totally unfit for work. Although he assessed 20% whole person impairment, he was not satisfied that the applicant had reached maximum medical improvement. He apportioned liability between the injuries as 60% due to the injury on 7 April 2014, 20% to 30 June 2017 and 20% to 3 January 2018, although he declined to attribute an individual assessment of impairment to each injury. He stated that the primary injury was in 2014 and the two subsequent events were exacerbations.

Report of Dr Bertucen

51. Dr Bertucen reported on 18 September 2014. He reported details of the 2014 injury, and he was satisfied that the applicant had an Adjustment Disorder with Depressed Mood and Anxiety. He stated that the applicant was unfit for work and he assessed 8% whole person impairment.

Report of Dr Morris

52. Dr Morris reported on 2 May 2018. He noted that the applicant sustained an injury due to bullying and harassment prior to 7 April 2014. He had attempted to return to work in 2016 and 2017, but he was unsuccessful.

53. Dr Morris considered that the applicant had an Adjustment Disorder with Mixed Anxiety and Depressed Mood, which commenced in early 2013, particularly when he was harassed by the head teacher. He stated that the applicant was unfit for work and he assessed 10% whole person impairment.

Medical Assessment Certificate

54. Dr Ng provided his MAC on 8 April 2019. He recorded that the applicant was bullied by the new head teacher from 2013 onwards. She called him a "grumpy old man, wanting to retire." She took classes off him and she gave him remedial work. He ceased work on 7 April 2014 after he was involved in an altercation with a troublesome student. He consulted his doctor and was prescribed medication.

55. The AMS noted that the applicant returned to work for six weeks in 2016 at the Narara Valley High School and he later worked at Gosford High School, but this was only a temporary assignment. He ceased work in July 2017.

56. Dr Ng reported the applicant's history, symptoms, social activities and findings on examination as follows:

> "**brief history of the incident/onset of symptoms and of subsequent related events, including treatment:**
>
> Mr Kennaway joined the Department of Education as a high school teacher on a casual basis on 3 November 1997 and worked as a high school teacher at a number of schools in the Newcastle, Maitland and Central Coast area. He applied for permanent positions while working as a casual high school teacher and estimated that he worked in approximately twenty-one different high schools before obtaining a permanent job at Erina High School on 29 April 2002. There were opportunities for a permanent job in rural New South Wales, outside of the Central Coast region, but he did not want to leave his family. He was close to family and did not want to move to rural New South Wales. He did not perform any rural service before joining Erina High School. The main subjects were Business Studies, Geography and Commerce. He also started doing history teaching in 2013. He worked full-time until 2014.
>
> Mr Kennaway stated that the head teacher, Mr Shadbolt, retired at the end of 2012, having been there for twenty-one years. He and Mr Shadbolt had a good relationship and there was a new, younger head teacher and they developed a poor relationship: 'She didn't trust me or respect me.' He claimed that he was bullied by this head teacher from 2013 onwards, leading him to cease work on 7th April 2014. When I asked him what was the most distressing event, Mr Kennaway stated that she called him a 'grumpy old man, wanting to retire.' He claimed that she took classes off him and he

believed that it was unfair. She gave him remedial work or 'homework' to improve himself as a teacher. He believed that she was targeting "older teachers" because they were highly paid. He believed that there was a plan to get rid of older teachers. He stated that there was no collegiality or team work with this new head teacher and he felt isolated. Mr Kennaway stated that he had bad classes with bad pupils. There was no physical violence. Initially there was no major dispute with the principal or administration staff. There were no complaints about him as a teacher and there were no other disputes.

Mr Kennaway stated that he had time off in October 2013. He had one week off from work: 'I was hurt.' He stated that the situation was nasty. He was feeling unwell: 'Depressed, I guess, sad.' He was referred to Jane Davenport, Psychologist, whom he saw under a Mental Health Care Plan for about one or two sessions.

Mr Kennaway then returned for the 2014 school year and at the start, the head teacher stated that this particular school year was going to be difficult: 'It's going to do a mind job on me.' He did not clarify what he meant by that, but he implied that the head teacher was unsupportive and somehow setting him up to fail. He continued seeing the psychologist on a monthly basis.

On 7 April 2014, Mr Kennaway suddenly stopped work. There had been one difficult problematic pupil who was 'out of control'. There had already been difficulties with that pupil by the end of 2013. He was verbally abusive. This pupil returned to his class for the 2014 school year and there were ongoing behaviour problems. There was some type of altercation between Mr Kennaway and this pupil and the latter accused the former of scratching him. He was accused of assaulting this pupil. The principal called Mr Kennaway and there was a meeting. He was given a teaching improvement program. Mr Kennaway stated that he was unhappy about this, but when I asked him about the details and concerns raised in the teaching improvement program, he was very vague. He stated that the principal was concerned about 'my health'. He could not clarify any more specific details of this program, apart from the above issues.

Mr Kennaway ceased work and was started on Duloxetine. The dose varied from 30-60mg and he could not tolerate the higher dose due to side effects. He had been on Duloxetine, 30mg once a day for several years now. He continued seeing the psychologist initially on a two or three weekly basis. He was never seen by a psychiatrist for treatment and never had any inpatient admissions or day programs.

Mr Kennaway was away from work for 2014 and was considered unfit for work until February 2015. He stated that he made a recovery and was ready for a return to work program, except he could not return to his substantive school. He stated that no one from the department contacted him. Not a lot happened during 2014 and 2015. He saw a psychologist. He was engaged in hobbies such as collecting stamps and photography. He attended a Jehovah's Witness convention in Melbourne with his family.

There was a graduated return to work program in term one of 2016 and Mr Kennaway was sent to Narara Valley High School. He did assistant teaching work with the aim of going back to his usual teaching duties. However he was only there for 6 weeks by mutual agreement. He had a left total hip joint replacement performed in March 2016. This graduated return to work program actually went reasonably well, according to him, and he was doing three days at the end of his time there. Mr Kennaway was then not offered any work for the remainder of the year. He believed he made full recovery from his hip joint replacement procedure, sometime during 2016 but there was no real discussion of any other return to work program.

There was a return to work program in term two of 2017 and Mr Kennaway was sent to Gosford High School. He was there for one term and worked up to 4 days per week. He was at the learning hub providing extra teaching and assistance for children. He was engaged in some sport. He began working with a commerce teacher and a business studies teacher. He stated that he was good and was starting to take classes. He appreciated that this was only a temporary return to work program. However he wanted a fresh start. The graduated return to work program came to a natural end and he was obliged to return to his substantive high school. He did not find another job within the region. He was suspicious that people from his substantive high school would influence any nearby placement. He stated that he went downhill again and never found another job.

Mr Kennaway confirmed that he stopped work in late June 2017 and had not worked as a teacher since. The department had asked him to return to his substantive school. Mr Kennaway did not want to return to his substantive school and did not want to work in any school in the region."

"present symptoms

Mr Kennaway described himself as an injured worker, 'psychologically'. He had lost confidence in himself. He had gained weight. He could not sleep at night. He had poor concentration. He was able to "get through a paper and that's it." He described himself as angry and low in mood. There were no suicidal or homicidal ideas.

Mr Kennaway had middle insomnia. When he woke during the night he would start thinking about his school problems. Sometimes he woke startled. Sometimes he felt that he was back in his substantive school.

When I asked what stopped him from resigning and then applying for a job as a teacher at another school, he stated that he had been a victim and that he had a psychological injury and that it was not right for him to resign. Mr Kennaway was not sure what to do with his life. He was hoping for a "better afterlife…If you don't have hope, you're gone."

"**social activities/ADL:**

Mr Kennaway lived with his seventy-nine-year-old mother and had been living at his mother's home since late 2010/11. He stated that he initially moved in with his mother because his father was ill and he had to help care for him. He eventually passed away. He continued living with his mother. His brother and his wife moved into Mr Kennaway's apartment to 'home-sit'. It was close by. They did not pay rent but maintained his apartment. They had been living there for two to three years.

Mr Kennaway was very close to his family and indeed his brother, sister and mother all accompanied him for this assessment from the Newcastle area. Mr Kennaway drove and recalled stopping in Parramatta before coming into the Sydney central business district for today's appointment. His brother and sister were in the waiting room and his sister came into the room as his support person. I enquired into the whereabouts of his mother. He stated that she was still in the car, in a car park. He stated that she did not mind waiting in the car and he himself was not particularly bothered by this. At the end of the assessment, Mr Kennaway's sister confirmed that they were a close family and that their mother preferred to be with her family. She did not like being alone. She was more than happy to accompany her son everywhere.

It would appear that Mr Kennaway continued living with his mother and did some housework but kept it “functional”. It would appear that he performed minimum housework. He did not cook. He ate out a lot and identified going out for Chinese food and cafes. He could prepare simple meals at home. His mother was able to do the laundry. He took her to medical appointments. He did some maintenance on the house. Mr Kennaway could use a computer, an iPad and could use his mobile phone. He did grocery shopping and his mother accompanied him in the car. She had a disability sticker.

Mr Kennaway visited his sister once a week and it was a 45 minutes’ drive: ‘Mum goes with me.’ She was very supportive and he had given her a photographic portrait of herself recently. Mr Kennaway’s brother was an elder with the Jehovah’s Witness and Mr Kennaway himself was not a fully baptised Jehovah’s Witness but was studying the religion. He attended weekly sessions and Saturday services. He noted that his brother was very supportive, especially financially. Indeed it would appear that Mr Kennaway’s family provided him with a lot of practical support and financial support. He emphasised several times during the assessment that he was without finance and relied on his mother’s pension. He stated that they helped each other. When I asked what help Mr Kennaway provided for his family, he stated that he was there emotionally.

Mr Kennaway did some recycling and made frequent trips to a recycling depot to cash in cans, bottles and other drink containers. His mother accompanied him most of the time, but not always. He enjoyed stamp collecting, photography and wildlife paintings. The family did not holiday a great deal, but he did recall going to Victoria on a road trip with everyone about a year ago. He went with his brother, sister and mother. There had been no overseas trips.

Mr Kennaway was not dating. He noted that an ex-girlfriend looked for him at his previous school and was told that he was ‘not coming back’. Mr Kennaway took this as evidence of a very poor relationship with his employer. He heard this story from his ex-girlfriend after she contacted him through other means. They were now in regular contact. Mr Kennaway otherwise did not have a lot of other friends. He did not describe having a lot of friends pre-morbidly and was very close to his family.”

“FINDINGS ON PHYSICAL EXAMINATION

Mr Kennaway presented as a middle aged man appearing older than his biological age. He was clearly aggrieved by his employer and throughout the assessment, highlighted multiple events which he interpreted as his employer bullying him or vilifying him. Our rapport was reasonable, and he was cooperative to some degree. I frequently needed to divert him to other topics and keep him on track. There was no irritability or distractibility. He described a very close relationship with his family which he did not find unusual at all. There were no speech or motor abnormalities. He described himself as depressed and anxious. His affect however was incongruent with his mood. He smiled a lot during the assessment, even when recounting distressing stories. His demeanour was very out of keeping with his account and reported mood state. There was no formal thought disorder or evidence of psychosis. There was a certain degree of paranoia but no delusions. There were no suicidal or homicidal ideas. His memory and concentration were grossly intact. Indeed, his long term memory was good. His ability to remember exact dates was readily apparent throughout the assessment. His insight appeared partial and his judgment was reasonable.”

57. Dr Ng diagnosed a chronic Adjustment Disorder with Anxiety and Depressed Mood. He thought that the applicant's history was reasonably consistent, although there were some incongruencies between his symptoms, the mental state examination and objective findings. He assessed 9% whole person impairment.

58. Dr Ng had regard to the medical reports of Drs Bertucen, Morris and Anand. He noted that there appeared to be a reasonable consistency regarding a diagnosis, and he observed that the whole person impairment assessment of Dr Anand was "a major outlier", whereas the assessments of Dr Bertucen in 2014 and Dr Morris in 2018 were remarkably similar, and they were similar to his own assessment.

59. Dr Ng's PIRS assessment comprised:

    (a) Self-Care and Personal Hygiene – class 1 (mild impairment);
    (b) Social and Recreational Activities – class 2 (mild impairment);
    (c) Travel – class 2 (mild impairment);
    (d) Social Functioning – class 1 (mild impairment);
    (e) Concentration, Persistence and Pace – 2 (mild impairment), and
    (f) Employability – class 4 (significant impairment).

APPLICANT'S SUBMISSIONS

60. The applicant's solicitor, Mr Collins, submits that the applicant seeks a reconsideration of the COD dated 15 July 2019 pursuant to ss 350(3) and 378 of the 1998 Act. The applicant has applied to set aside the COD and for him to be referred to another AMS, so that fairness and justice can be done and be seen to be done.

61. Mr Collins submits that the applicant relies on his statements and that of his sister dated 26 April 2019. He submits that the statements show a perception of an irregularity in the manner of assessment by the AMS and of unfairness. These were not matters of relevance in s 327(3) of the 1998 Act.

62. Mr Collins submits that according to *Samuel v Sebel Furniture Limited* [8], the Commission has a wide discretion to reconsider previous decisions, awards, orders or determinations of the Commission. This includes a power to revoke a COD issued following a MAC. There are a number of relevant factors to be considered. He relies on *Hobson v Port Waratah Coal Services Ltd*[9], *Ahmad v Decina Bathroomware Pty Ltd*[10], *Nguyen v Cosmopolitan Homes* (NSW) *Pty Ltd*[11], *Yucel v AAAES Pty Ltd t/as Roadtrack*[12], *Barsamian v Woolworths Ltd*[13], *Iredale v State of New South Wales*[14], *Bararcich v Commonwealth Bank of Australia*[15], *Ly v Pierlite Australia Pty Ltd*[16] and *Howell v Stringvale Pty Ltd*[17] in support of his submissions.

63. In his written submissions, Mr Collins submits that it was a basic principle of law that "not only must justice be done but it must also be seen to be done"[18], and "everyone is entitled to a fair hearing by an independent and impartial Tribunal established by law"[19]. The Tribunal or

[8] [2006] NSWWCCPD 141(*Samuel*)
[9] [2013] NSWWCC 458.
[10] [2016] NSWWCC 61.
[11] [2008] NSWCA 246.
[12] [2015] NSWWCC PD 51.
[13] [2019] NSWWCC 20.
[14] [2015] NSWWCC 273 (*Iredale*).
[15] [2010] NSWCA 314.
[16] [2017] NSWWCC 24.
[17] [2005] NSWWCC 64, (*Howell*).
[18] *R v Sussex Justices, Ex parte McCarthy* (1994) 1 KB 256, (1923) A11ER 233; *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) [475], [480].
[19] European Convention of Human Rights and Fundamental Freedoms 1950- Article 6(1).

Court must ask itself whether, having regards to the relevant circumstances, there was a real danger of bias on the part of the Tribunal member in favouring the case of one of the parties[20], and that parties are entitled to a "legitimate expectation" that natural justice and fairness will apply in the administration of justice[21].

64. Mr Collins submits that the unchallenged statements relied upon by the applicant create a reasonable perception that justice has not been afforded to him by the AMS. He submits that s 350(3) of the 1998 Act empowers the Commission to revisit and correct injustices and errors where the interests of justice require it, and s 378 of the 1998 Act gives specific power to the Commission to reconsider and review any AMS or Appeal Panel matter.

65. Mr Collins submits that whilst *Yildiz v Victoria Yeeros Pty Ltd*[22]confirms that a worker can only bring one claim in accordance with s 66(1A) of the 1987 Act, that decision can be distinguished from the present matter, because it did not deal with or consider the wide discretionary powers of s 350(3) of the 1998 Act 1998 and the express Parliamentary intention in s 378 of the 1998 Act to empower the Commission to intervene when the needs of justice required it. If Parliament had wished to limit the powers of ss 350 (3) and 378 of the 1998, it would have expressly done so.

66. Mr Collins submits that the legislation should be interpreted in such a manner as not to remove the rights of the public and in a manner that is consistent and harmonious with the legislation taken as a whole[23]. The *Requests for Reconsiderations under Sections 329(1A), 350(3) and 378 of the Workplace Injury Management and Workers Compensation Act 1998* policy dated February 2010 recognises "a wide discretion" to reconsider previous decisions that must be exercised "fairly" and a "duty to do justice between the parties according to the substantial merits of the case".

67. In his written submissions dated 3 February 2020, Mr Collins submits that the present matter can be distinguished from the Arbitral decision in *Parsons v Dell Australia Pty Ltd*[24], and the Presidential decision in *Parsons v Dell Australia Pty Ltd*[25], because this matter concerns an application to the Registrar to exercise his powers under ss 329 and 378 of the 1998 Act based on the impropriety or bias on the part of the AMS, and not any demonstrable error, whereas Mr Parsons sought a reconsideration under s 350(3) of the 1998 Act because of a deterioration in his condition.

68. Mr Collins submits that whilst the decisions in *Parsons No.1* and *Parsons No.2* confirm that the Commission is to use its discretion according to the principles discussed in *Samuel*, it does not directly relate to the present application which is made pursuant to ss 329 and 378 of the 1998 Act. He agrees that the principles regarding fresh evidence discussed in *Chep Australia Ltd v Strickland*[26]applies to appeals, but this is not an appeal against a MAC.

69. Mr Collins submits that this matter comes before the Arbitrator on referral from the Registrar to consider the exercise of powers of the Registrar under ss 329 and 378 of the 1998 Act, rather than an application for reconsideration pursuant to s 350(3) of the 1998 Act. There is no issue or allegation of delay and the factual basis of the applicant's evidence is not challenged.

---

[20] *Porter v Magill* (2002) I AIIER 465, [670].

[21] *Schmidt v Secretary of State Home Affairs* (1969) 2 Ch 149, per Lord Denning; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) HCA 22; *(*1989) 169 CLR 648.

[22] [2016] NSWWCC 108 (*Yildiz*).

[23] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (*Project Blue Sky*).

[24] [2019] NSWWCC 210 (*Parsons No.1*).

[25] [2020] NSWWCCPD 2 (*Parsons No.2*)

[26] [2013] NSWCA 351

RESPONDENT'S SUBMISSIONS

70. The respondent's solicitor, Mr Tuxford, submits that the applicant raised similar issues in his appeal against the MAC and the Registrar's Delegate rejected the appeal. Accordingly, the issues were previously the subject of an unsuccessful appeal by the applicant.

71. Mr Tuxford submits that s 329(1)(a) of the 1998 Act provides that the Registrar may only refer a matter for further assessment as an alternative to an appeal. However, the applicant has already failed in his appeal and so the Registrar has no jurisdiction to refer the matter for further assessment by an AMS.

72. Mr Tuxford submits that the applicant has not made any submissions in support of a further referral to an AMS other than suggesting that this is appropriate "such that fairness and justice can be done and be seen to be done". He has not explained how fairness and justice have not already been done. The applicant has failed to discharge his evidentiary onus.

73. Mr Tuxford submits that the applicant relies upon a number of authorities that concern statutory interpretation, the relevance of which is not immediately apparent. Some of the authorities concern the issue of deterioration being a basis for a reconsideration. There is no such allegation in the current matter.

74. Mr Tuxford submits that the crux of the applicant's request for reconsideration relates to the apparent manner in which the assessment of the AMS was conducted. The applicant sought to rely on his statements and the statement of his sister in an effort to establish that Dr Ng provided a biased assessment because of the applicant's religious beliefs and family relationships.

75. Mr Tuxford submits that the AMS assessed the applicant on 2 April 2019, but it was not until 30 April 2019, when the applicant filed his appeal, that any issue was raised about the conduct of the AMS. The respondent is not aware of any complaint having been made by the applicant, his sister or any other person to the Australian Health Practitioner Regulation Agency or to the Healthcare Complaints Commission. This was raised by the respondent in its submissions for the appeal, and as far as he is aware, no action has been taken by the applicant or anyone on his behalf.

76. Mr Tuxford submits that these allegations against the AMS are significant and have the potential to cause reputational damage. He submits that s 326 of the 1998 Act provides that a MAC is conclusively presumed to be correct and it can be inferred that a substantial amount of trust is placed by the Commission in the appointed AMS to undertake an impartial and fair assessment. To allow a reconsideration and an assessment by another AMS would amount to an acceptance by the Commission of the applicant's account of the examination by the AMS without proper enquiry and without providing the AMS with the opportunity to respond to the serious allegations levelled against him.

77. Mr Tuxford submits that a reconsideration pursuant to s 329 of the 1998 Act is not an appropriate means of dealing with the applicant's concerns about the conduct of the AMS. He submits that the applicant's request for reconsideration of the COD dated 15 July 2019 should be dismissed and the MAC should be confirmed.

78. In the alternative, Mr Tuxford submits that in the event that a reconsideration is allowed, the matter should be referred back to Dr Ng pursuant to s 329(1A) of the 1998 Act, so he can deal with the question of apportionment in respect of the injuries sustained on 7 April 2014 (deemed) and 3 January 2018 (deemed), being two separate and distinct injuries, which resulted from different mechanisms of injury. This is consistent with the terms of the referral in the COD dated 18 March 2019.

79. Mr Tuxford submits that s 22 of the 1987 Act provides for apportionment where the impairment results from more than one injury. He submits that the AMS did not consider the issue of apportionment where there were two dates of injury.

80. In his written submissions dated 13 January 2020, Mr Tuxford submits that the applicant relies on case law and paragraphs from articles, but no substantive and/or relevant submissions have been made. The applicant's witness statements are challenged, because these were capable of being provided before the assessment (presumably the COD).

81. Mr Tuxford submits that there has been a mere assertion that "justice has not been afforded" to the applicant, but there is no basis to support this assertion, other than the fact that the applicant was unhappy with the findings of the AMS and this was only expressed after the MAC was issued.

82. Mr Tuxford submits that whilst s 350(3) of the 1998 Act gives the Commission the power to reconsider any matter that has been dealt with by the Commission, the relevant decision was not that of the Commission. The appeal failed to proceed past the Registrar's Delegate.

83. Mr Tuxford submits that this is consistent with the reasoning in *Mahal v State of New South Wales*[27], where President Keating confirmed that, "The decisions of the Registrar and his Delegate are not decisions of the Commission constituted by an Arbitrator" [28], and "the Registrar role is that of a 'gatekeeper'. This is an administrative function"[29]. The President determined that there was no jurisdiction for an Arbitrator, or Presidential Member, to set aside or determine the decision of the Registrar's Delegate. This decision was confirmed in *Mahal v State of New South Wales No. 2* [30].

84. Mr Tuxford submits that the Registrar's satisfaction as to the matters in s 327(3) of the 1998 Act is an essential precondition to the referral to a Medical Appeal Panel (MAP), and there is no jurisdiction for an Arbitrator, or Presidential Member, to set aside or determine the decision of the Registrar's Delegate.

85. Mr Tuxford submits that it is unclear what injustice or error has been made, and the applicant has failed to identify who served this injustice. He submits that Practice Direction No 17 (Reconsideration Applications) (Practice Direction 17) of the Commission replaces the *Requests for Reconsiderations under Sections 329(1A), 350(3) and 378 of the Workplace Injury Management and Workers Compensation Act 1998* policy dated February 2010.

86. Mr Tuxford submits that para. 6 of the Practice Direction 17 refers to the Commission's power in s 350(3) of the 1998 Act to rescind, alter or amend any decision by a Presidential member or an Arbitrator. No decision has been made by a Presidential member or an Arbitrator, and therefore there are no grounds for the applicant to pursue this course of action in accordance with s 350(3) of the 1998 Act.

87. Mr Tuxford submits that para 7 of the Practice Direction 17 confirms that s 378 of the 1998 Act provides that the Registrar or a MAP may rescind, alter or amend any decision it has previously made, so there is no jurisdiction for the Commission to adjudicate on a decision made by the Registrar. Further, there has been no decision made by a MAP. The correct course of appeal was to the Administrative Law List in the Supreme Court. In the circumstances, the applicant's reliance on ss 350(3) and 378 is misguided and should be rejected. Further, the applicant's submissions do not address the findings of the Registrar's Delegate.

---

[27] [2017] NSWWCCPD 41, (*Mahal*).
[28] *Mahal*, [33].
[29] *Mahal*, [41].
[30] [2017] NSWWCCPD 46

88. Mr Tuxford submits that facts in the present matter differ to those in *Parsons No.1,* where the worker sought to have a COD set aside so that the claim could be referred to another AMS after the matter had already progressed to a MAP.

89. In *Parsons No.1*, it was determined that a MAP was not subject to a reconsideration under s350(3) of the 1998 Act, however the COD issued following the decision of the MAP could be reconsidered by the Commission.

90. Mr Tuxford submits that consistent with *Parsons No.1*, if the COD is reconsidered, the question as to whether the matter should be referred back to Dr Ng or another AMS, will be a question for the Registrar. However, in this matter, the Registrar's Delegate has already refused to allow the applicant's appeal to proceed. In circumstances where the applicant has identified no errors in the Delegate's decision, nor made any substantive submissions pertaining to this decision, any referral back to the Registrar would be an exercise in futility and prolong the litigation unnecessarily.

91. Mr Tuxford submits that s 66(1A) of the 1987 Act provides that only one claim can be made for permanent impairment compensation. The applicant has already made this claim and a COD has issued. He submits that the applicant is attempting to make a further claim for whole person impairment even though he has been afforded his one claim, and this has been determined. If the applicant was dissatisfied with the Delegate's decision, the appropriate course of appeal was to the Supreme Court of NSW.

92. Mr Tuxford submits that the applicant is merely attempting to cavil with the findings of the AMS. He seeks to raise matters that were previously ventilated as part of the unsuccessful appeal. The current application is not an alternative to an appeal, such that there is no jurisdiction for the Registrar to refer the matter for further assessment, whether with Dr Ng or another AMS.

93. Mr Tuxford submits that the application for reconsideration should be dismissed. In the alternative, the claim should be referred back to Dr Ng for reconsideration pursuant to s329 of the 1998 Act with respect to apportionment between the two separate dates of injury of 7 April 2014 (deemed) and 3 January 2018 (deemed).

94. In his written submissions dated 7 February 2020, Mr Tuxford submits that the applicant's submission that the present matter can be distinguished from *Parsons No.1*, because here he seeks that the Commission exercise its power under ss 329 and 378 of the 1998 Act and not a reconsideration pursuant to s 350(3) of the 1998 Act, is misleading.

95. Mr Tuxford submits that in the initial request for reconsideration dated 4 October 2019, Mr Collins sought to have the COD set aside pursuant to s 350(3) of the 1998 Act to enable the applicant to be referred to another AMS so that fairness and justice could be done and be seen to be done. The applicant only identified only s350(3) of the 1998 Act as being the relevant matter for consideration by the Commission. Further, in his written submissions dated 10 December 2019, Mr Collins only referred to s 350(3) of the 1998. Therefore, the assertion at this stage that the applicant has not sought a reconsideration pursuant to s350(3) of the 1998 Act is incorrect and he has failed to differentiate the present matter from that of *Parsons*.

96. Mr Tuxford submits that the facts in *Parsons No.1* bear many similarities to the present matter, where it was held that the worker had had his one claim and that any further claims were precluded by the operation of s 66(1A) of the 1987 Act, and in the absence of an appeal pursuant to s 327 of the 1998 Act the worker was restricted to only one assessment.

97. Mr Tuxford submits that the applicant seeks a reassessment by a different AMS because he alleges that Dr Ng provided a biased assessment due to his religious beliefs and family relationships. Such allegations against Dr Ng have not been substantiated or established as a matter of fact. The MAC of Dr Ng was the subject of an unsuccessful appeal that was not the subject of judicial review.

98. Mr Tuxford submits that there is no basis to support the assertion that justice has not been afforded to the applicant. It was open to the Registrar's Delegate to refuse the applicant's appeal to a MAP in circumstances where he had not adduced any evidence to satisfy the criteria in s 327 of the 1998 Act. The appeal was formulated entirely on the basis that the AMS allegedly made comments throughout the course of the assessment that were discriminatory in nature, but no evidence has been offered as to how this translated into an inaccurate assessment by the AMS.

99. Mr Tuxford submits that the applicant was assessed by an AMS and he lodged an appeal against the MAC. Accordingly, justice has both been done and has been seen to be done. A referral to another AMS following an undisturbed MAC and COD would contravene the operation of s66(1A) of the 1987 Act and the principles discussed in *Parsons No 1 and Parsons No.2*.

100. Mr Tuxford submits that in the absence of an appeal pursuant to s 327 of the 1998 Act, the present request for reconsideration offends the operation of s 66(1A) of the 1987 Act. Further, the applicant has not made any submissions as to how discretion can be exercised to permit the Commission to exercise its discretion under ss 329 and 378 of the 1998 Act in light of the effect of s66(1A) of the 1987 Act.

101. Mr Tuxford submits that the criteria which need to be addressed when determining whether to exercise the relevant discretion under s 350(3) of the 1998 Act that were identified in *Parsons No.1* equally apply to ss 329 and 378 of the 1998 Act. None of the relevant criteria have been addressed in the applicant's submissions.

102. Mr Tuxford submits that it was confirmed in *Parsons No.1* that an Arbitrator's role was confined to a reconsideration of a COD pursuant to s 350(3) of the 1998 Act. The COD was issued on 4 July 2019 after a ground for appeal against the MAC pursuant to s 327(3) of the 1998 Act was not established. Therefore, the COD cannot be the subject of a reconsideration pursuant to ss 329, 350(3) or 378 of the 1987 Act. The decision of the Registrar's Delegate was not the subject of an application for review in the Supreme Court, and no submissions have been forthcoming as to why such a course was not adopted by the applicant.

103. Mr Tuxford submits that s 350(3) of the 1998 Act does not confer upon an Arbitrator the power to set aside a MAC of an AMS. An Arbitrator can only set aside a COD. This is consistent with the reasoning in *Parsons No.1.* Accordingly, the current request for reconsideration must fail.

Legislation

Workers Compensation Act 1987

104. A worker's entitlement to lump sum compensation is governed by s 66 of the 1987 Act. It provides:

> "**66 Entitlement to compensation for permanent impairment**
>
> (1) A worker who receives an 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.

(1A) Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury…"

Workplace Injury Management and Workers Compensation Act 1998

105. There are a number of sections in the 1998 Act which are of relevance. These are as follows:

"**322A One assessment only of degree of permanent impairment**

(1) Only one assessment may be made of the degree of permanent impairment of an injured worker.

(2) The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).

(3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of assessment and a medical assessment certificate under this Part.

(4) This section does not affect the operation of section 327 (Appeal against medical assessment)."

"**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."

"**327 Appeal against medical assessment**

(1) A party to a medical dispute may appeal against a medical assessment under this Part, but only in respect of a matter that is appealable under this section and only on the grounds for appeal under this section.

(2) A matter is appealable under this section if it is a matter as to which the assessment of an approved medical specialist certified in a medical assessment certificate under this Part is conclusively presumed to be correct in proceedings before a court or the Commission.

(3) The grounds for appeal under this section are any of the following grounds:

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

(c) the assessment was made on the basis of incorrect criteria,

(d) the medical assessment certificate contains a demonstrable error.

(4) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and any submissions made to the Registrar, at least one of the grounds for appeal specified in subsection (3) has been made out.

(5) If the appeal is on a ground referred to in subsection (3) (c) or (d), the appeal must be made within 28 days after the medical assessment appealed against, unless the Registrar is satisfied that special circumstances justify an increase in the period for an appeal.

(6) The Registrar may refer a medical assessment for further assessment under section 329 as an alternative to an appeal against the assessment (but only if the matter could otherwise have proceeded on appeal under this section).

Note.
Section 329 also allows the Registrar to refer a medical assessment back to the approved medical specialist for reconsideration (whether or not the medical assessment could be appealed under this section).

(7) There is to be no appeal against a medical assessment once the dispute concerned has been the subject of determination by a court or the Commission or agreement registered under section 66A of the 1987 Act…."

"**329 Referral of matter for further medical assessment or reconsideration**

(1) A matter referred for assessment under this Part may be referred again on one or more further occasions for assessment in accordance with this Part, but only by:

(a) the Registrar as an alternative to an appeal against the assessment as provided by section 327, or

(b) a court or the Commission.

(1A) A matter referred for assessment under this Part may be referred again on one or more further occasions by the Registrar to the approved medical specialist for reconsideration.

(2) A certificate as to a matter referred again for further assessment or reconsideration prevails over any previous certificate as to the matter to the extent of any inconsistency."

"**350 Decisions of Commission**

(1) Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is final and binding on the parties and is not subject to appeal or review.

(2) A decision of or proceeding before the Commission is not:

(a) to be vitiated because of any informality or want of form, or
(b) liable to be challenged, appealed against, reviewed, quashed or called into question by any court.

(3) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission."

"**378 Reconsideration of decisions of Registrar or Appeal Panel**

(1) The Registrar or an Appeal Panel may reconsider any matter that has been dealt with by the Registrar or an Appeal Panel, respectively, and rescind, alter or amend any decision previously made or given.

(2) Without limiting subsection (1), if the Registrar is satisfied that there is an obvious error in the text of a decision, the Registrar may alter the text of the decision to correct the error.

(3) Without limiting subsection (1), if an Appeal Panel is satisfied that its decision or any medical assessment certificate it has issued contains an obvious error, the Appeal Panel concerned may correct that error and, if necessary, issue a replacement medical assessment certificate (which is to prevail over any previous certificate).

(4) The reconsideration of a matter that is in response to an application for reconsideration must be completed within 2 months after the application is received.

(5) This section does not affect any other power under this Act or the 1987 Act to review or amend a decision."

Clause 11 of Schedule 8 of the *Workers Compensation Regulation 2016*

106. Clause 11 of Sch 8 of the *Workers Compensation Regulation 2016* provides:

"**11 Lump sum compensation: further claims**

(1) A further lump sum compensation claim may be made in respect of an existing impairment.

(2) Only one further lump sum compensation claim can be made in respect of the existing impairment.

(3) Despite section 66(1) of the 1987 Act, the degree of permanent impairment in respect of which the further lump sum compensation claim is made is not required to be greater than 10%.

(4) For the purposes of subclauses (1) and (2)—

(a) a further lump sum compensation claim made, and not withdrawn or otherwise finally dealt with, before the commencement of subclause (1) is to continue and be dealt with as if section 66(1A) of the 1987 Act had never been enacted, and

(b) no regard is to be had to any further lump sum compensation claim made in respect of the existing impairment—

(i) that was withdrawn or otherwise finally dealt with before the commencement of subclause (1), and

(ii) in respect of which no compensation has been paid, and

(c) section 322A of the 1998 Act does not operate to prevent an assessment being made under section 322 of that Act for the purposes of a further lump sum compensation claim.

(5) The following provisions are to be read subject to this clause—

(a) section 66 of, and clause 15 of Part 19H of Schedule 6 to, the 1987 Act,

(b) section 322A of the 1998 Act,

(c) clauses 10 and 19 of this Schedule.

(6) In this clause—

existing impairment means a permanent impairment resulting from an injury in respect of which a lump sum compensation claim was made before 19 June 2012.

further lump sum compensation claim means a lump sum compensation claim made on or after 19 June 2012 in respect of an existing impairment.

lump sum compensation claim means a claim specifically seeking compensation under section 66 of the 1987 Act."

107. The matters that I need to determine concern interpretation of the statutory provisions. The authorities confirm that one needs to look at the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application[31]. Reference to the authorities will obviously be of assistance.

REASONS

108. Mr Collins submits that the applicant bases his application for reconsideration of the COD pursuant to s 350(3) of the 1998 Act on the grounds that the manner in which the AMS conducted himself gave rise to the perception that he was not impartial and that his assessment was unfair. He submits that the COD dated 15 July 2019 should be set aside and that the applicant be referred to another AMS pursuant to ss 329(1) and 378 of the 1998 Act, so that fairness and justice can be done and be seen to be done.

109. In order to achieve the outcome that the applicant seeks, the COD dated 15 July 2019 needs to be reconsidered and if appropriate, rescinded.

[31] *Project Blue Sky*, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, [47] (per Hayne, Heydon, Crennan and Kiefel JJ).

110. Unfortunately, merely setting aside the COD does not address the problems faced by the applicant with regard to the MAC dated 8 April 2019.

111. Mr Collins correctly acknowledges that s 327(3) of the 1998 Act has no application, as that section deals with appeals against a MAC. Specific grounds need to be satisfied, such as a deterioration in the injury, additional relevant information since the MAC that was not available and could not reasonably have been obtained before the MAC, the assessment was made on the basis of incorrect criteria, and the MAC contains a demonstrable error. The Registrar's Delegate has already determined in accordance with s 327(4) of the 1998 Act that none of these grounds were established.

112. Sections 326(6) and 329 of the 1998 Act provide that the Registrar may refer a matter for further assessment as an alternative to an appeal, but only if the matter could have otherwise proceeded on appeal. In this matter, the appeal was rejected by the Registrar's Delegate, so these sections offer the applicant no comfort.

113. Section 327(7) of the 1998 Act provides that there can be no appeal against a MAC once the dispute has been determined by a court or the Commission or by a Complying Agreement. Therefore, given that the COD issued on 15 July 2019 determined the dispute, an appeal at this stage is not an option. Accordingly, the MAC issued on 8 April 2019 is conclusively presumed to be correct as to the degree of the applicant's permanent impairment by reason of s 326(1) of the 1998 Act.

114. Section 378 of the 1998 Act gives the Registrar the power to reconsider any matter and rescind, alter or amend any decision that the Registrar has dealt with. So, the Registrar has the power to reconsider the COD or a gatekeeper decision, which are decisions of the Commission, but not a MAC, which is the decision of an AMS, who is not a member of the Commission. In the absence of a successful appeal to a MAP, the MAC is conclusively presumed to be correct and is binding on the parties. The Delegate of the Registrar has already rejected the applicant's appeal as the "gatekeeper".

115. The applicant is then faced with the restrictions in s 66(1A) of the 1987 Act. The text of the section is clear and unambiguous. The section provides that only one claim can be made for permanent impairment compensation. This is consistent with the reasoning of the Court of Appeal in *Cram Fluid Power Pty Ltd v Green*[32], the interpretation of cl 11 of Sch 8 of the *Workers Compensation Regulation 2016* (the 2016 Regulation), and the analysis of what constitutes a claim in terms of s 66(1A) of the 1987 Act in *Woolworths Ltd v Stafford* [33]. The one claim, which was made after 19 June 2012, was made by the applicant on 13 August 2018.

116. A further complication arises as a result of s 322A of the 1998 Act, which provides that only one assessment of the degree of permanent impairment may be made. It prohibits the referral to an AMS for a further assessment, but this is subject to the appeal provisions in s 327 of the 1998 Act. Those provisions do not apply to the present matter.

117. The next matter to consider is how the legislation has been interpreted and applied in case law. Although the facts in the authorities differ from the present matter and concern reconsiderations following the issue of a decisions by a MAP, which is not the case here, some of the principles equally apply.

118. In *Lizdenis v Centrel Pty Ltd*[34], Arbitrator Harris was called upon to determine whether a COD, which was issued following an unsuccessful appeal against a MAP, should be reconsidered to allow Ms Lizdenis to lodge a second appeal against the MAC based on ss 327(3)(a) and 327(3)(b) of the 1998 Act due to a deterioration in her condition.

---

[32] [2015] NSWCA 250, (*Cram Fluid*).
[33] [2015] NSWWCCPD 36, (*Stafford*).
[34] [2016] NSWWCC 21 (*Lizdenis*).

119. Arbitrator Harris was satisfied that the worker had shown that there had been deterioration in her shoulder condition, but he declined to reconsider the COD. He concluded that, "Using the language of Gleeson J A in *Cram Fluid* (at [108]), I find that the limitation in s 66(1A) is taken to be the leading provision and the power in s 327(3)(a) must give way to it"[35]. The Arbitrator came to a similar conclusion in *Yildiz*.

120. I followed the Arbitrator's reasoning in *Parsons No.1.* Mr Parsons sought a reconsideration of a COD so that his claim could be referred to an AMS to assess his whole person impairment due to a psychological injury. The MAP revoked the MAC of the AMS and issued its own certificate. The COD was in respect of the determination of a MAP, not an AMS, as in the present matter.

121. I determined that Mr Parsons had made "one claim" and any further claim was precluded by s 66(1A) of the 1987 Act. Further, s 322A of the1998 Act restricted Mr Parsons to only one assessment absent an appeal in accordance with the grounds in s 327 of the 1998 Act. My determination was confirmed on appeal in *Parsons No.2*.

122. In the present matter, the applicant made a claim for lump sum compensation on 13 August 2018. This was his one claim in accordance with s 66(1A) of the 1987 Act and cl 11 of Sch 8 of the 2016 Regulation. No further claim has been made. This is consistent with the reasoning in *Cram Fluid*, *Lizdenis, Parsons No.1* and *Parsons No.2.*

123. The applicant was assessed by an AMS as having 9% whole person impairment. He lodged an appeal against the MAC pursuant to s 327 of the 1998 Act, but this was rejected by the Registrar's Delegate.

124. This determination was not the subject of a judicial review in the Supreme Court. Therefore, the MAC dated 8 April 2019 is presumed to be correct. This is his one assessment in terms of s 322A of the 1998 Act. He has not passed the threshold in s 65(A)(3) of the 1987 Act, and therefore, he has no entitlement to lump sum compensation in respect of his psychological injury.

125. In the circumstances, the applicant's application for reconsideration of the COD dated 15 July 2019 is declined.

Reconsideration

126. In the event that I might be wrong in my interpretation of the limitations imposed by s 66(1A) of the 1987 Act and s 322A of the 1998 Act, it is appropriate to consider the merits of the applicant's application for reconsideration.

127. Arbitrator Johnstone, as he then was, provided a useful summary of the principles regarding reconsideration of determinations pursuant to s 350(3) of the 1998 Act in *Howell*, where he stated:

> "The subsection and its predecessors have been considered in a number of cases. Having reviewed those cases the following summary of principles may be made as to its application:
>
> 1. The power to reconsider is unlimited: *Hilliger v Hilliger* (1952) 52 SR (NSW) 105, but discretionary: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192. However, it is important to keep in mind the distinction between the existence of the power and the occasion of its exercise: *Hilliger* at 108.

[35] *Lizdenis*, [115]

2. The general rule is that public interest requires that litigation should not proceed interminably, and courts must be on their guard to refuse to allow the same matter to be litigated again and again. Nevertheless, it is appropriate to exercise the power to remedy some manifest injustice: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26].

3. The power applies to both questions of fact and law, and is not limited to changed circumstances or fresh evidence: *Hardaker v Wright & Bruce Pty Ltd* (1960) 62 SR (NSW) 244 at 248 and 249.

4. The section overrides the common law doctrine of estoppel: *Lambidis v Commissioner of Police* (1995) 12 NSWCCR 225, but the discretion should not be exercised where the party has unreasonably refrained from raising the issue in the earlier proceedings: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]. See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

5. New evidence must be distinguished from additional evidence as opposed to fresh evidence: *Maksoudian v J Robins & Sons Pty Ltd* (1993) 9 NSWCCR 642. If the evidence was readily available at the time of the first hearing, this is a factor to be weighed in considering whether or not to exercise the discretion: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [58]. However, any new evidence must be such that it would have been a determining factor in the decision: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.

6. Other grounds for the exercise of discretion include where the original decision maker did not consider an available and possibly determinative argument: *Lasaitis v Email Ltd* (1990) 6 NSWCCR 154 at 171A. But where the Commission does not have jurisdiction to determine the particular matter asserted, the discretion should not be exercised: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.

7. Mistake or inadvertence on the part of legal advisers is an insufficient ground: *Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] 27 WCR (NSW) 29 at 30. But disposal of litigation by legal advisers on a basis contrary to their instructions has been held to be sufficient: *Sorcevski v Steggles Pty Ltd* (1991) NSWCCR 315.

8. An application must be brought without delay and the matter raised must be of such a nature that it would have affected the outcome of the original decision: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]."[36]

128. In *Samuel*, Acting Deputy President Roche, as he then was, cited with approval the Court of Appeal decision in *Schipp v Herfords Pty Ltd* [37], where the court considered the equivalent reconsideration provisions in the *Workers Compensation Act 1926*. He stated:

> "The factors relevant to the exercise of the discretion in section 36 of the 1926 Act were considered by the Court of Appeal in *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413 ('*Schipp*'). The court noted the following factors were relevant in deciding whether the discretion should be exercised in favour of the moving party:

[36] *Howell*, [27].
[37] [1975] 1 NSWLR 413 (*Schipp*).

1. delay;
2. whether the worker had a right of appeal from the first decision but failed to exercise that right;
3. waiver or estoppel issues, and
4. rescinding an earlier award will allow a worker to bring fresh proceedings."[38]

129. The Acting Deputy President continued:

> "Having regard to the above authorities and the provisions and objectives of the 1998 Act I believe that the following principles are applicable to reconsideration applications under section 350(3) of the 1998 Act:
>
> 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');
>
> 4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');
>
> 5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*');
>
> 6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;
>
> 7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');
>
> 8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and
>
> 9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act)."[39]

[38] *Samuel*, [45].
[39] *Samuel*, [58].

130. Mr Collins relies upon a number of arbitral decisions in support of his submissions. Most of the decisions are unremarkable and merely follow the principles discussed in *Samuel* and *Howell*. Most deal with applications made pursuant to s 327(3)(a) of the 1998 in circumstances where there was evidence of deterioration in the workers' condition. The facts differ from the present matter.

131. I have a wide discretion to reconsider the COD in accordance with s 350(3) of the 1998 Act, but the discretion must be exercised fairly. When one considers the matters raised in *Samuel* and *Howell*, the only relevant matters seem to relate to fresh evidence, indefinite litigation and the interests of justice. There was no major delay in bringing the present application and no issues of estoppel.

Fresh evidence

132. The statements of the applicant and his sister raise issues regarding the conduct of the AMS, who is not in a position to respond. These statements came into existence on 26 April 2019, almost three weeks after the MAC was issued to the parties. They represent fresh evidence that could not with reasonable diligence have been obtained before the MAC issued.

133. In his statements, the applicant claimed that the AMS did not record a full and proper history about his personal care and hygiene, social and recreational activities, travel, social functioning, concentration, persistence and pace and about relevant stressful events. He took issue with the way the doctor classified his PIRS categories. As the applicant is not a SIRA approved Assessor of Permanent Impairment, his views regarding the PIRS classifications carry no weight.

134. The AMS had access to the applicant's earlier statements and medical evidence. The history that he recorded was detailed and comprehensive. He had access to the histories recorded in the reports of Drs Bertucen, Morris and Anand, and these bear similarities to the history recorded by the AMS. The report of Dr Teoh was excluded from the evidence that was reviewed by the AMS and is therefore of no relevance. It is noteworthy that the applicant's statements dated 26 April 2019 contain histories that are not recorded elsewhere.

135. Both the applicant and his sister raised concerns about the AMS's personal views and his preoccupation with the applicant's religious beliefs and their mother. The applicant claimed that the AMS ridiculed his religious beliefs and conducted the examination aggressively, and yet no complaints were made to the relevant authorities or to the Commission. Ms Rudder described the AMS as opinionated and judgmental, and she questioned the manner in which he conducted himself.

136. No submissions have been made to support the allegation that the examination by the AMS was unfair or that justice was not done. The only evidence concerns a perception that the AMS was aggressive, pre-occupied with irrelevant matters and he was dismissive of the applicant's religious beliefs. How this impacted on his examination and assessment of the applicant has not been disclosed.

137. Although *Petrovic* related to an appeal pursuant to s327(3)(b) of the 1998 Act, the principles are equally applicable to this situation.

138. Hoeben J stated that evidence regarding the way in which an AMS conducted his examination and how the questions and answers were interpreted was not 'additional relevant information', otherwise every dissatisfied party could challenge the MAC and gain automatic access to an appeal. I concur with this reasoning.

139. Further, I agree with the Registrar's Delegate that the statements of the applicant and his sister are of no probative value in line with principles discussed in *Pitsonis.*

Indefinite litigation

140. The finality of litigation must be weighed against the interests of justice and the wide discretionary power of the Commission.

141. The insurer has been put to the added expense of dealing with the original lump sum proceedings, an unsuccessful appeal to a MAP, and the present application. If the COD was to be reconsidered and rescinded, the respondent would then be required to deal with a further referral to an AMS, if the Registrar was inclined to follow that course. Given that the Registrar's Delegate has already rejected an appeal based on similar grounds, a further referral would be highly unlikely.

142. In my view, it would not be in the public interest to reconsider the COD so that further litigation can be undertaken.

Fairness and justice

143. The final matter to consider is whether it is in the interests of justice that the COD should be rescinded because there is some "practical unfairness or injustice" in allowing it to stand.

144. Any reconsideration of the COD will be prejudicial to the respondent and, in my view, this outweighs the prejudice to the applicant. There is also the issue as to whether the Registrar has the power to refer the matter to another AMS, given the binding nature of the MAC and the provisions in s 322A of the 1998 Act.

145. In his statements, the applicant disputed the accuracy of the history recorded by the AMS, but he faces the same difficulty as that discussed by Malpass AJ in *Pitsonis v Registrar of the Workers Compensation Commission & Anor*[40], where he stated:

> *"*In so far as a challenge is made in this Court to his assessment on the basis that the certificate contains demonstrable error the case is maintained largely by way of the assertion of alleged error or inadequacy in the history which forms part of the certificate (there was also an apparent allegation of inconsistency between a finding that the plaintiff's memory was intact and the recorded history (she was a poor historian)). This allegation can be immediately put aside as I am not satisfied that it can be sustained.
>
> Generally speaking, in the present case, it is said that the error in, or inadequacy of, history was, inter alia, of the nature of either a failure to record or accurately record history that was given or a failure to ask relevant questions (see paragraphs 24 and 25 of the plaintiff's written submissions).
>
> In the present case, the initial problem confronting the plaintiff is the difficulty had in the demonstration of such error. There is an evidentiary hurdle which she could not overcome. All that the plaintiff can look to is competing assertion (made subsequent to the certificate) and speculation. The contents of the certificate do not support the assertion of error. In the circumstances the challenge failed at this threshold stage."[41]

146. The principles in *Pitsonis No 1* were confirmed by the Court of Appeal in *Pitsonis No.2.* Mason P (McColl JA and Bell JA agreeing) stated:

> "Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of

[40] [2007] NSWSC 50 (*Pitsonis No.1*)
[41] *Pitsonis No.1*, [28] to [30].

> the Certificate that did not translate into the decision favourable to the applicant now contended for."[42]

147. I am not satisfied that the evidence is sufficient to show that there was any unfairness to, or injustice suffered by, the applicant. The AMS recorded a detailed history and carried out a thorough examination.

148. The AMS was in no way critical of the applicant's religious beliefs in his MAC. He confirmed that the applicant's family members were very close and that they accompanied him to the appointment from Newcastle. He recorded that the applicant's mother was in the car and she did not mind waiting there. There was certainly nothing sinister or unfair in the manner that he dealt with this history.

149. The applicant was dissatisfied with the outcome of the MAC. He sought to appeal as was his right. His appeal was unsuccessful, and he chose not to seek judicial review of the Delegate's decision.

150. I am obliged to do justice between the parties according to the substantial merits of the case. One must have regard to s 354(3) of the 1998 Act, which provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case". I have a wide discretion, but I must be fair, and justice must be done between the parties.

151. On the basis of the evidence currently before me, in the interests of justice and having regard to the prejudice that the respondent will suffer, I am not satisfied that the applicant's application for reconsideration of the COD dated 15 July 2019 should be granted.

CONCLUSION

152. Due to the operation of s 66(1A) of the 1987 Act and s 322A of the 1998 Act, any reconsideration will be of no effect. This is consistent with my reasoning in *Parsons No.1.*

153. In *Parsons No.2*, the applicant's solicitor focused his submissions on the issue of delay and did not properly address the primary determination regarding the operation of s 66(1A) of the 1987 Act and s 322A of the 1998 Act.

154. Deputy President Wood noted:

> "The Senior Arbitrator firstly and primarily determined that because of the operation of s 66(1A) of the 1987 Act and s 322A of the 1998 Act, the appellant was prevented from bringing a further claim for lump sum entitlements and prevented from further assessment of his WPI. On that basis, he declined to reconsider the COD, as it would be of no effect.
>
> The Senior Arbitrator proceeded *in the alternative* to consider the factors of delay, the absence of an appeal having been brought against the MAP, the weight of the new evidence before him and the interests of the parties. That process was entered into by the Senior Arbitrator who expressly did so on the condition that his primary decision not to exercise his discretion because the further claim was precluded was wrong.
>
> There is no appeal before me that challenges the Senior Arbitrator's primary decision not to exercise his discretion because there could be no further lump sum claim. It follows that the Senior Arbitrator's decision must stand, regardless of the outcome of the grounds of appeal brought by the appellant."[43]

[42] *Pitsonis No. 2* [59].
[43] *Parsons No. 2*, [145] to [147].

155. The outcome in this matter mirrors that in *Parsons No.1* and *Parsons No.2*. The applicant's application fails due to the restrictions imposed upon him by reason of s 66(1A) of the 1987 Act and s 322A of the 1998 Act. The applicant would also fail in the alternative, if the primary determination was wrong, when one has regard to the principles discussed in *Petrovic*, *Pitsonis No.1* and *Pitsonis No.2*.

156. In the circumstances, I decline to grant the applicant's application.

ORDERS

157. The applicant's application pursuant to s 350(3) of the 1998 Act for reconsideration of the orders made in the COD dated 15 July 2019 and the application for the Registrar to exercise his powers under ss 329 and 378 of the 1998 Act is declined.

158. The orders in the COD dated 15 July 2019 are confirmed.

159. There will be no order as to costs.