WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**154/20**
Applicant:	**Huseyin Bakir**
Respondent:	**Littore Packers Pty Ltd**
Date of Determination:	**7 September 2020**
Citation:	**[2020] NSWWCC 303**

The Commission determines:

1. The applicant suffered a psychological injury arising out of or in the course of his employment on 3 September 2002.

2. The applicant's employment was a substantial contributing factor to his injury.

3. The claim for lump sum compensation that was served by the applicant on 29 October 2009 did not constitute a valid claim.

4. The applicant was entitled to make one further claim after 19 June 2012 and did so on 17 September 2018.

5. The applicant was assessed by an Approved Medical Specialist on 15 June 2020, and he was awarded $42,500 in respect of 26% whole person impairment due to a psychological injury sustained on 3 September 2002 pursuant to section 66 of the *Workers Compensation Act 1987*.

6. The applicant is not entitled to lump sum compensation for pain and suffering arising from the psychological injury sustained on 3 September 2002.

The Commission orders:

7. There will be an award for the respondent in respect of the applicant's claim for pain and suffering pursuant to section 67 of the *Workers Compensation Act 1987.*

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 Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Huseyin Bakir (the applicant) is 57 years old and was employed by Littore Packers Pty Ltd (the respondent) as a forklift driver. Precise details of his employment are unknown.

2. There is no dispute that the applicant sustained a psychological injury as a result of an incident that occurred on 3 September 2002 when his head was crushed between a forklift mast and the roof.

3. Liability was accepted by QBE Workers Compensation (NSW) Ltd (QBE) and payments of weekly compensation and medical expenses were made beyond the second entitlement period. Precise details are unknown. The claim was later transferred to AAI Ltd t/as GIO.

4. The applicant was initially examined by an Independent Medical Examiner (IME), Dr Akkerman, on behalf of QBE on 9 March 2004. This report is not in evidence.

5. Dr Akkerman reviewed the applicant on 11 January 2005 and he confirmed that the applicant had developed a Post-Traumatic Stress Disorder and Major Depression as a result of the incident on 3 September 2002. He did not provide an assessment of whole person impairment.

6. On 7 December 2006, the applicant's solicitor, John Zigouras, advised QBE that the applicant intended to make a claim for lump sum compensation and medical expenses pursuant to ss 60, 66 and 67 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of physical and psychological injuries sustained on 3 September 2002. The lump sum claim was not particularised and there was no medical evidence quantifying any such claim.

7. On 26 August 2009, the applicant's solicitor served a report of Dr J Pollock dated 12 August 2009 on QBE, and indicated that a lump sum claim would be made pursuant to ss 66 and 67 of the 1987 Act. Dr Pollock diagnosed chronic Post-Traumatic Syndrome and chronic Pain Syndrome. She stated that the applicant had no current work capacity, but she did not provide an assessment of whole person impairment.

8. On 8 September 2009, the solicitor requested details of medical reports that QBE held on its file.

9. Dr Pollock provided a further report on 11 September 2009. She assessed 22% whole person impairment due to a psychological injury sustained on 3 September 2002. This report was served on QBE on 29 October 2009, but no claim for lump sum compensation was particularised.

10. On 31 December 2009, QBE advised the applicant's solicitor that Dr Pollock was a treating specialist and he had not indicated whether she was a NSW WorkCover Approved Assessor of Permanent Impairment.

11. On 10 May 2010, QBE advised the applicant of details regarding a re-examination with Dr Akkerman "in order to update your medical condition and need". QBE made travel arrangements for the applicant to fly to Sydney from Mildura on 27 May 2020.

12. Dr Akkerman provided a report on 1 June 2010. He confirmed his previous diagnosis and he assessed 10% whole person impairment due to a psychological injury sustained on 3 September 2002.

13. QBE arranged for the applicant to be examined by another IME, Dr Lee, who reported on 20 March 2012. He diagnosed paranoid schizophrenia and a possible developmental disorder, and he was not satisfied that the applicant's psychological condition was related to his work injury. He stated that there was no permanent impairment.

14. On 6 May 2014, the applicant's solicitor sent a copy of a tax invoice together with the report of Dr Rose dated 1 April 2014. Dr Rose assessed 38 % whole person impairment, but no claim was particularised. The solicitor merely requested payment for the doctor's report fee.

15. Dr Lee re-examined the applicant for QBE on 24 June 2014. He diagnosed an abnormal illness behaviour that was not associated with the applicant's work, and he confirmed that there was no permanent impairment.

16. On 15 August 2014, QBE issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). QBE advised the applicant's solicitor that its own IME, Dr Lee, had examined the applicant on 24 June 2014 and he had indicated that the applicant had no permanent psychiatric impairment. The IME also advised that Dr Rose had not complied with the *WorkCover Guidelines for the Assessment of Permanent Impairment* (the Guidelines). Accordingly, QBE declined to make any offer to the applicant.

17. On 12 September 2014, the applicant's solicitor sought a review of QBE's decision after obtaining a revised report from Dr Rose dated 4 September 2014. Dr Rose diagnosed a Post-Traumatic Stress Disorder and he assessed 22% whole person impairment.

18. On 30 September 2014, QBE advised the applicant's solicitor that it had reviewed its position pursuant to s 287A of the 1998 Act and it had decided to maintain its decision. QBE acknowledged that Dr Rose had now assessed the applicant in accordance with the Guidelines.

19. On 3 October 2014, QBE issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant's psychological symptoms were related to his injury. It denied that he was incapacitated and that he required medical treatment. Finally, it disputed that the applicant was entitled to lump sum compensation. It cited ss 4, 9A, 11A(3), 33, 59, and 60 of the 1987 Act.

20. On 21 September 2018, the applicant's solicitor served a permanent impairment claim form on the insurer for lump sum compensation together with a report of Dr Athey dated 29 May 2018. The doctor assessed 24% whole person impairment.

21. On 27 September 2018, the insurer advised the applicant that it maintained the decisions set out in its previous dispute notices.

22. By an Application to Resolve a Dispute (the Application) which was registered in the Workers Compensation Commission (the Commission) on 15 January 2020, the applicant claimed weekly payments from 2 September 2015 to 6 November 2019 and lump sum compensation pursuant to ss 66 and 67 of the 1987 Act due to a psychological injury sustained on 3 September 2002, when his head was crushed between a forklift mast and the roof.

23. At a telephone conference on 13 February 2020, the applicant's claim was referred to an Approved Medical Specialist (AMS), Dr Baker, who provided a Medical Assessment Certificate (MAC) on 15 June 2020. The AMS assessed 26% whole person impairment due to a psychological injury sustained on 3 September 2002.

24. The MAC was the subject of an appeal to a Medical Appel Panel (MAP). In an amended decision dated 31 January 2020, the MAP revoked the Medical Assessment Certificate (MAC) and issued its own certificate for 20% permanent impairment of the back and 17% loss of use of the right leg at or above the knee including any loss below the knee in respect of the injury sustained on 29 March 2000, and 13% whole person impairment of the applicant's left lower extremity due to injury sustained on 21 September 2005.

25. At a telephone conference on 20 July 2020, I issued a Certificate of Determination – Consent Orders (COD). An amended COD was issued on 30 July 2020 as follows:

> "By and with the consent of the parties, the determination of the Commission in this matter is as follows:
>
> 1. Claim for weekly compensation from 2 September 2015 to 6 November 2019 discontinued. I dispense with the requirement to file an Election to Discontinue.
>
> 2. The respondent to pay the applicant weekly compensation pursuant to s 37 of the *Workers Compensation Act 1987* on the basis of a single worker with two dependent children as follows:
>
>   (a) $659.90 per week from 12 November 2014 to 31 March 2015, and
>
>   (b) $668.30 per week from 1 April 2015 to 1 September 2015.
>
> 3. The respondent to pay the applicant $42,500 in respect of 26% whole person impairment due to a psychological injury sustained on 3 September 2002 pursuant to s 66 of the *Workers Compensation Act 1987.*
>
> By direction:
>
> 4. In the event that the applicant intends to proceed with the claim for pain and suffering pursuant to s 67 of the *Workers Compensation Act 1987*, the applicant is to file and serve by 3 August 2020:
>
>   (a) a copy of the notice of claim for lump sum compensation served on the insurer prior to 19 June 2012;
>   (b) evidence to confirm that Dr Pollock was a WorkCover Approved Assessor of Permanent Impairment as at 11 September 2009, and
>   (c) written submissions in respect of the claim.
>
> 5. The respondent is to file written submissions by 10 August 2020.
>
> 6. Any written submissions in reply are to be filed by 17 August 2020.
>
> 7. In the event that the applicant does not intend to proceed with the claim for pain and suffering, the applicant is to file and serve an Election to Discontinue the claim by 3 August 2020."

PROCEDURE BEFORE THE COMMISSION

26. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

27. Given the nature of the application and the submissions filed on behalf of the applicant and the respondent, I am satisfied that there is sufficient material before me to determine the matter on the papers.

28. At the telephone conference on 20 July 2020, the parties were advised of my intention to determine the dispute without holding a further conciliation conference or arbitration hearing.

29. Written submissions were filed by the applicant on 4 August 2020. I was not satisfied that the submissions adequately dealt with the issues in dispute, so at a telephone conference on 17 August 2020, I directed the applicant to file and serve further documents and written submissions.

30. The applicant filed the documents and written submissions on 21 August 2020 and 4 September 2020. The respondent filed written submissions on 28 August 2020.

ISSUES FOR DETERMINATION

31. The following issues remain in dispute:

    (a) whether the applicant is entitled to received lump sum compensation for pain and suffering pursuant to s 67 of the 1987 Act following the 2012 amendments – s 67 of the 1987 Act (in existence prior to the *Workers Compensation Amendment Act 2012*) (the 2012 amending Act), and

    (a) quantification of the applicant's entitlement to lump sum compensation for pain and suffering – s 67 of the 1987 Act (in existence prior to the 2012 amending Act).

EVIDENCE

Documentary evidence

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

    (a) the Application and attached documents;

    (b) Reply and attached documents;

    (c) COD dated 24 April 2020;

    (d) Application to Admit Late Documents and attachments received on 7 May 2020;

    (e) Application to Admit Late Documents and attachments received on 7 May 2020;

    (f) MAC of Dr Baker dated 15 June 2020;

    (g) Amended COD dated 30 July 2020;

    (h) letters from the applicant's solicitor to QBE dated 26 August 2009, 8 September 2009, 29 October 2009, 6 May 2014, 12 September 2014, and 21 September 2018;

    (i) letters from QBE to the applicant's solicitor dated 31 December 2009 and 10 May 2010,

(j) Permanent Impairment Claim Form dated 17 September 2018, and

(k) reports of Dr Pollock dated 14 April 2008 and 12 August 2009.

Legislation

Workers Compensation Act 1987

33. Section 65A of the 1987 Act provides:

> "**65A Special provisions for psychological and psychiatric injury**
>
> (1) No compensation is payable under this Division in respect of permanent impairment that results from a secondary psychological injury.
>
> (2) In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury.
>
> (3) No compensation is payable under this Division in respect of permanent impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%..."

34. Section 66 of the 1987 Act provides:

> "**66 Entitlement to compensation for permanent impairment**
>
> (1) A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.
>
> **Note.**
>
> No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less.
>
> (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…"

35. Section 67 of the 1987 Act, in existence prior to the 2012 amending Act, provided:

> "**67 Compensation for pain and suffering**
>
> (1) A worker who receives an injury that results in a degree of permanent impairment of 10% or more is entitled to receive from the worker's employer as compensation for pain and suffering resulting from the permanent impairment an amount not exceeding $50,000. Pain and suffering compensation is in addition to any other compensation under this Act.

Note.

Section 65A provides that pain and suffering compensation for permanent impairment arising from psychological injury is not payable unless the injury is a primary psychological injury (as defined in that section) and the degree of permanent impairment arising from the injury is 15% or more.

(1A) (Repealed)

(2) Because there is a distinction between injury and impairment resulting from an injury (and compensation is payable under this section only for pain and suffering resulting from impairment), the pain and suffering for which compensation is payable does not include pain and suffering that results from the injury but not from the impairment.

(3) The maximum amount of compensation under this section is payable only in a most extreme case and the amount payable in any other case shall be reasonably proportionate to that maximum amount having regard to the degree and duration of pain and suffering and the severity of the permanent impairment.

(3A) (Repealed)

(4) The amount of compensation payable under this section in any particular case shall, in default of agreement, be determined by the Commission.

(4A) (Repealed)

(5) Compensation under this section is not payable after the death of the worker concerned.

(6) If an amount mentioned in this section at any time after the commencement of this Act:

(a) is adjusted by the operation of Division 6, or

(b) is adjusted by an amendment of this section,

the compensation payable under this section is to be calculated by reference to the amount in force at the date of injury.

(7) In this section:

pain and suffering means:

(a) actual pain, or

(b) distress or anxiety,

suffered or likely to be suffered by the injured worker, whether resulting from the permanent impairment concerned or from any necessary treatment.

36. Schedule 2 of the 2012 amending Act repealed s 67 of the 1987 Act in these terms:

"**[13] Section 67 Compensation for pain and suffering**

Omit the section"

37. The relevant transitional provisions introduced by the 2012 amending Act are cl 3 and cl 15 of Pt 19H of Sch 6 of the 1987 Act and cl 10 and cl 11 of Sch 8 of the 2016 Regulation. I will refer to the 2016 Regulation later.

38. Clause 13 and cl 15 of Pt 19H of Sch 6 of the 1987 Act provide:

> “**3 Application of amendments generally**
>
> (1) Except as provided by this Part or the regulations, an amendment made by the 2012 amending Act extends to:
>
> (a) an injury received before the commencement of the amendment, and
>
> (b) a claim for compensation made before the commencement of the amendment, and
>
> (c) proceedings pending in the Commission or a court immediately before the commencement of the amendment.
>
> (2) An amendment made by the 2012 amending Act does not apply to compensation paid or payable in respect of any period before the commencement of the amendment, except as otherwise provided by this Part.”
>
> “**15 Lump sum compensation**
>
> An amendment made by Schedule 2 to the 2012 amending Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date.”

Workplace Injury Management and Workers Compensation Act 1998

39. The meaning of a “claim” will be of relevance in this matter. Section 4 of the 1998 Act defines the term “claim” as follows:

> “**4 Definitions**
>
> (1) In this Act:
>
> **claim** means a claim for compensation or work injury damages that a person has made or is entitled to make…”.

40. The manner of making a claim is set out in s 260 of the 1998 Act. It provides:

> **“260 How a claim is made**
>
> (1) A claim must be made in accordance with the applicable requirements of the Workers Compensation Guidelines.
>
> (2) The Workers Compensation Guidelines may make provision for or with respect to the following matters in connection with the making of a claim:
>
> (a) the form in which a claim is to be made,
> (b) the manner in which a claim is to be made,
> (c) the means by which a claim may be made,

(d) the information that a claim is to contain,
(e) requiring specified documents and other material to accompany or form part of a claim,
(f) such other matters as may be prescribed by the regulations.

(3) Without limiting this section, the Workers Compensation Guidelines can require that a claim be accompanied by a form of authority signed by the claimant and authorising a provider of medical or related treatment, hospital treatment or workplace rehabilitation services to the claimant in connection with the injury to which the claim relates to give the insurer concerned information regarding the treatment or service provided or the worker's medical condition or treatment relevant to the claim.

(4) The Workers Compensation Guidelines can also provide for any of the following matters in connection with the making of a claim:
(a) waiving the requirement for the making of a claim in specified cases (such as cases in which notice of injury has been given or provisional weekly payments of compensation have commenced),
(b) providing for the time at which a claim is taken to have been made in any case in which the requirement for the making of a claim has been waived,
(c) providing for the time when a claim is taken to have been made in a case in which requirements of the Guidelines with respect to the making of the claim have been complied with at different times.

(5) The failure to make a claim as required by this section is not a bar to the recovery of compensation or work injury damages if it is found that the failure was occasioned by ignorance, mistake or other reasonable cause or because of a minor defect in form or style.

(6) Except to the extent that the Workers Compensation Guidelines otherwise provide, an insurer can waive a requirement of those Guidelines with respect to the making of a claim on the insurer.

(7) The Workers Compensation Guidelines can require an insurer to notify a worker of any failure by the worker to comply with a requirement of those Guidelines with respect to the making of a claim, and can provide for the waiver of any such failure by the worker if the insurer fails to give the required notification."

41. Section 282 of the 1998 Act sets out what constitutes relevant particulars about a claim. It provides:

"282 Relevant particulars about a claim

(1) The ***relevant particulars about a claim*** are full details of the following, sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement on the claim:

(a) the injury received by the claimant,
(b) all impairments arising from the injury,
(c) any previous injury, or any pre-existing condition or abnormality, to which any proportion of an impairment is or may be due (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act),

(d) in the case of a claim for work injury damages, details of the economic losses that are being claimed as damages and details of the alleged negligence or other tort of the employer,

(e) information relevant to a determination as to whether or not the degree of permanent impairment resulting from the injury will change,

(f) in addition, in the case of a claim for lump sum compensation, details of all previous employment to the nature of which the injury is or may be due,

(g) such other matters as the Workers Compensation Guidelines may require.

(2) If the employer requires the claimant to submit himself or herself for examination by a medical practitioner provided and paid for by the employer, the claimant is not considered to have provided all relevant particulars about the claim until the worker has complied with that requirement.

(3) The insurer is not entitled to delay the determination of a claim under this Division on the ground that any particulars about the claim are insufficient unless the insurer requested further relevant particulars within 2 weeks after the claimant provided particulars."

42. Section 322 (1) deals with the assessment of impairment. It provides:

"**322 Assessment of impairment**

(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with the Workers Compensation Guideline (as in force at the time of the assessment is made) issued for that purpose."

Workers Compensation Regulation 2016

43. Clauses 10 and11 of Sch 8 of the 2016 Regulation provide:

"**10 Lump sum compensation**

(1) The amendments made by Schedule 2 to the 2012 amending Act extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act.

(2) Clause 15 of Part 19H of Schedule 6 to the 1987 Act is to be read subject to subclause (1).

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."

***WorkCover Guides for the Evaluation of Permanent Impairment* (3rd edit 6 February 2009)**

44. The *WorkCover Guides for the Evaluation of Permanent Impairment* (3rd edit 6 February 2009) (the Guides) were in operation at the time that the report of Dr Pollock was served on QBE on 29 October 2009. They provide some guidance as to the qualifications of assessors of permanent impairment.

45. Part 1 of the Guides provides:

"**Medical assessors**

1.27 An assessor will be a medical specialist with qualifications, training and experience in a medical speciality relevant to the body system being assessed who has undertaken the requisite training in use of the *WorkCover Guides* and who is listed as a trained assessor of permanent impairment on the WorkCover website (www.workcover.nsw.gov.au).

1.28 Assessors may be one of the claimant's treating specialists or an assessor engaged on behalf of the employer/insurer/Scheme Agent/claimant to conduct an assessment for the purposes of assessing the level of permanent impairment.

1.29 Assessors of levels of permanent impairment are required to use the *WorkCover Guides* current at the time of the assessment."

WorkCover Guidelines for Claiming Compensation Benefits (27 October 2006) **(the 2006 Guidelines)**

46. Part 5 of the 2006 Guidelines that came into effect from 1 November 2006 give some guidance as to a worker's obligations and the manner in which an insurer is to deal with a lump sum claim. It provides:

"**PART 5 MAKING AND HANDLING A CLAIM FOR LUMP SUM COMPENSATION (PERMANENT IMPAIRMENT AND PAIN AND SUFFERING)**

To claim lump sum compensation, a worker must have sustained an injury, as defined in section 4 of the 1998 Act, that resulted in permanent impairment, as referred to in section 66 of the 1987 Act, and made a claim related to that injury. If the insurer is satisfied that an injury that has resulted in permanent impairment has reached maximum medical improvement, the insurer may initiate an assessment of permanent impairment which may lead to a subsequent payment pursuant to a complying agreement.

1. Minimum Information Required to Make a Claim
To make a claim a worker must complete a permanent impairment claim form which is available from the employers' insurer for workers compensation purposes. The claim form must be completed fully. In making a claim, the worker must provide all reports and documents that they rely upon, as soon as possible after that information is received, in making the claim to either:

- the employer from whom they are claiming workers compensation benefits,
- the insurer responsible for providing the employer's workers compensation insurance."

47. Clause 2 of the Part 5 of the 2006 Guidelines provides that a claim must include relevant particulars about the claim. In respect of injuries sustained after 1 January 2002, the Guidelines provide:

"**2. Relevant Particulars about a Claim**
The claim must include relevant particulars about the claim.

"…***For injuries from 1 January 2002:***

2.8 the injury received, as identified in claim for workers compensation. If no claim for compensation has been made, it will be necessary to separately make such a claim

2.9 all impairments arising from the injury

2.10 whether the condition has reached maximum medical improvement

2.11 the amount of whole person impairment assessed in accordance with the *WorkCover Guides for the Evaluation of Whole Person Impairment*

2.12 a medical report completed in accordance with the *WorkCover Guides for the Evaluation of Whole Person Impairment* by a medical specialist with qualifications and training relevant to the body system being assessed who has been trained in the WorkCover Guides.
If there is more than one impairment that requires assessment by different medical specialists, one specialist must be nominated as lead assessor and determine the final amount of whole person impairment

2.13 if the claim is for permanent impairment of hearing, a copy of the audiogram used by the medical specialist in preparing the report that accompanies the claim."

48. Clause 3 of Part 5 of the 2006 Guidelines deal with claims for pain and suffering. It provides:

> **"3. Claim for Pain and Suffering**
> *Reference section 67 of the 1987 Act.*
>
> To make a claim for pain and suffering the worker must provide relevant particulars about a claim:
>
> - a claim for permanent loss or whole person impairment completed on the permanent impairment claim form
> - evidence that the loss according to the Table of Disabilities is at least 10% of the maximum that can be awarded, or the level of whole person impairment is 10% or above
> - a description of the effect the impairment has on their work, domestic and leisure activities
> - the proportion of the maximum amount of compensation under section 67 claimed for the pain and suffering."

49. The insurer's obligations are set out in Clause 5 of Part 5 of the 2006 Guidelines with reference to s 281 of the 1998 Act. It provides:

> **"5. Insurer Action on Receipt of a Claim for Permanent Impairment**
> *Reference section 281 of the 1998 Act.*
>
> When an insurer is served with a claim for permanent impairment the insurer must determine the claim by the latest date of either:
>
> - within 1 month after the degree of permanent impairment first becomes fully ascertainable, as agreed by the parties or as determined by an approved medical specialist; or
> - within 2 months after the claimant has provided to the insurer all relevant particulars about the claim. An insurer is not entitled to delay the determination of a claim on the ground that the particulars are insufficient unless the insurer has requested additional particulars and/or referred a worker for a medical examination within 2 weeks of receiving the claim."

***WorkCover Guidelines for Claiming Compensation Benefits (17 April 2009)* (the 2009 Guidelines)**

50. The 2009 Guidelines are largely similar to the 2006 Guidelines. Part 5 of the 2009 Guidelines that were in existence at the time of the report of Dr Pollock was served on QBE on 29 October 2009 give some guidance as to a worker's obligations and the manner in which an insurer is to deal with a lump sum claim. It provides:

> "**PART 5 MAKING AND HANDLING A CLAIM FOR LUMP SUM COMPENSATION (PERMANENT IMPAIRMENT AND PAIN AND SUFFERING)**
>
> To be eligible for lump sum compensation under section 66 of the 1987 Act, a worker must have sustained an injury, as defined in section 4 of the 1998 Act, that resulted in permanent impairment. If the insurer is satisfied that an injury has resulted in permanent impairment and has reached maximum medical improvement, the insurer must initiate an assessment of permanent impairment to determine the lump sum compensation payable. This information is to first be requested from the treating specialist (refer to *Guidelines on independent medical examinations and reports* for protocols regarding this).
>
> **1. Minimum Information Required for a Worker to Initiate a Claim**
>
> If a claim is already in progress for the injury and the insurer has sufficient information regarding the injury sustained and is satisfied that the injury has resulted in permanent impairment and that it has reached maximum medical improvement, then the permanent impairment claim form is not required. If this claim proceeds as a dispute to the Workers Compensation Commission, a claim form is not to be required. A permanent impairment claim form is required if a worker is initiating a claim for permanent impairment and pain and suffering (if applicable) related to an injury and has not previously made a claim in respect of the injury or if the insurer does not have sufficient information about the injury for which the claim is being made."

51. Clause 2 of the Part 5 of the 2009 Guidelines provides that a claim must include relevant particulars about the claim and describes the requirements with reference to s 282 of the 1998 Act.

52. In respect of injuries sustained after 1 January 2002, the Guidelines provide:

> "**2.2 *For injuries from 1 January 2002:***
>
> - the injury received (as identified in claim for workers compensation. If no claim for compensation has been made, it will be necessary to separately make such a claim)
> - all impairments arising from the injury
> - whether the condition has reached maximum medical improvement
> - the amount of whole person impairment assessed in accordance with the WorkCover *Guides for the evaluation of permanent impairment* a medical report completed in accordance with the WorkCover *Guides for the evaluation of permanent impairment* by a medical specialist with qualifications and training relevant to the body system being assessed who has been trained in the WorkCover Guides

- If there is more than one impairment that requires assessment by different medical specialists, one specialist must be nominated as lead assessor and determine the final amount of whole person impairment

- if the claim is for permanent impairment of hearing, a copy of the audiogram used by the medical specialist in preparing the report that accompanies the claim."

53. Clause 3 of Part 5 of the Guidelines deal with claims for pain and suffering. It provides:

    "3. Claim for Pain and Suffering
    Reference section 67 of the 1987 Act.

    To make a claim for pain and suffering the worker must provide relevant particulars about a claim:

    - a claim for permanent loss or whole person impairment completed on the permanent impairment claim form

    - evidence that the loss according to the Table of Disabilities is at least 10% of the maximum that can be awarded, or the level of whole person impairment is 10% or above

    - a description of the effect the impairment has on their work, domestic and leisure activities

    - the proportion of the maximum amount of compensation under section 67 claimed for the pain and suffering."

54. The insurer's obligations are set out in Clause 5 of Part 5 of the Guidelines with reference to s 281 of the 1998 Act. It provides:

    "Insurer Action on Receipt of a Claim for Permanent Impairment
    Reference section 281 of the 1998 Act.

    When an insurer receives a claim for permanent impairment the insurer must determine the claim by the latest date of either:

    (a) within 1 month after the degree of permanent impairment first becomes fully ascertainable, as agreed by the parties or as determined by an approved medical specialist; or

    (b) within 2 months after the claimant has provided to the insurer all relevant particulars about the claim

    For (a) above, 'fully ascertainable as agreed by the parties' means that

    - the claimant has reached maximum medical improvement

    - the medical report has been prepared by a WorkCover trained assessor of permanent impairment in accordance with the WorkCover *Guides for the evaluation of permanent impairment*

    - the medical report has been provided to the insurer

- the level of permanent impairment (as per the medical report) is agreed by the insurer.

Claim to be determined within 1 month from the receipt of the report.

For (b) above the following applies:

- If the insurer considers the report is not in accordance with the WorkCover Guides the insurer advises the injured worker within 2 weeks of receipt of the claim that further information is required and seeks clarification from the author, with a copy of the request sent to the injured worker's legal representative. If the required information is not forthcoming within 10 working days the insurer arranges an independent medical examination.

- The insurer will determine the worker's entitlements and advise the worker within 2 months from the date of the examination of the worker or within 1 month of receiving that report, whichever is the earlier.

Referrals for an independent medical examination are only to be made when one or more of the questions outlined in "reasons for referral" on page 5 of the *Guidelines on Independent Medical Examinations and Reports* cannot be obtained from the treating medical practitioner or from the assessor who completed a report on level of permanent impairment.

The offer of payment to the injured worker must be in accordance with a properly completed report by a trained assessor of permanent impairment. If there is more than one way to assess the level of impairment the more beneficial result is to be chosen. (See paragraph 3.5 in the WorkCover *Guides for the evaluation of permanent impairment*).

When an offer is made it should be accompanied by the medical report on which this offer is based…"

APPLICANT'S SUBMISSIONS

55. The applicant's solicitor, Ms Zigouras, concedes that whilst Dr Pollock may not have been a WorkCover Approved Assessor of Permanent Impairment as at the time of his assessment on 11 September 2009, the applicant had been examined by Dr Akkerman who was such an assessor.

56. Ms Zigouras submits that QBE had offered to have the applicant assessed, and the offer was accepted. A notice of claim was served prior to 19 June 2012, and the applicant was assessed by a WorkCover Approved Assessor of Permanent Impairment. Accordingly, he is entitled to compensation for pain and suffering.

57. The applicant's counsel, Mr Barter, submits that the applicant made a claim for lump sum compensation on QBE by letter on 26 August 2009, and whilst the correspondence was not in accordance with the Guidelines, as required by s 260 of the 1998 Act, the inexperience of the applicant's solicitor in New South Wales and the provision of otherwise adequate details to assess the claim provided in the report of Dr Pollock, coupled with the subsequent claims handling by QBE, enlivened the exceptions provided in ss 260(5) and 260(6) of the 1998 Act.

58. Mr Barter submits that the letter of 26 August 2009 referred to ss 66 and 67 of the 1987 Act, and the report of Dr Pollock was enclosed, which referred to an earlier more detailed report. This provided adequate information to be considered a valid claim, albeit one that would require amendment when properly quantified. By reason of its referral to Dr Akkerman on 10 May 2010, QBE had accepted that a valid claim for permanent impairment had been made prior to that date, or alternatively, it had waived compliance with the Guidelines.

59. Mr Barter submits that the assessment of less than 10% whole person impairment by Dr Akkerman does not go to the question of a claim being made, but to the question of whether that claim gives rise to an entitlement to compensation. The assessment of 26% whole person impairment in the MAC validated the claim for impairment previously made in accordance with the Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW*[1].

RESPONDENT'S SUBMISSIONS

60. The respondent's solicitor, Mr Murphy, submits that when one has regard to the principles discussed in *Woolworths Ltd v Stafford*[2], the applicant did not make a claim for lump sum compensation pursuant to s 66 or s 67 of the 1987 Act and s 322(1) of the 1998 Act before 19 June 2012. Accordingly, he is caught by the amending provisions effective from that date and he has no entitlement to lump sum compensation for pain and suffering pursuant to s 67, consistent with the High Court reasoning in *ADCO Constructions Pty Ltd v Goudappel*[3].

61. Mr Murphy submits that the purported claim made in October 2009 was deficient because Dr Pollock was not trained in the WorkCover Guides, her report dated 11 September 2009 did not state that the applicant had reached maximum medical improvement, the claim was not made on a permanent impairment claim form, details of all previous employment to the nature of which the injury was or may have been due were not provided, and there was no description of the effect that the impairment had on the applicant's work, domestic and leisure activities.

APLICANT'S SUBMISSIONS IN REPLY

62. In reply, Mr Barter submits that it is accepted by the applicant that the letters sent to QBE on 26 August 2009 and on 29 October 2009 did not comply with the Guidelines that commenced on 1 May 2009, however, the applicant's solicitor gave notice of a claim, albeit unquantified, pursuant to ss 66 and 67 of the1987 Act on 7 December 2006, which predated those Guidelines. A claim was made in accordance with the definition of a "claim" in s 4 of the 1998 Act prior to the 2012 amendments.

63. Mr Barter submits that any deficiencies as to form were at all times capable of remedy, and QBE remedied this by offering and having the applicant examined in New South Wales. The applicant was examined by Dr Akkerman, a qualified and approved IME, and he provided a binding assessment of 8% whole person impairment prior to 19 June 2012. His report resulted in a claim for lump sum compensation and one that was duly made.

64. Mr Barter submits that there was adequate information contained in the served medical reports for QBE to make a proper assessment of the applicant's full entitlement or to seek further particulars. The letter from QBE dated 31 December 2009 may be properly regarded as acceptance of a claim pursuant to ss 66 and 67, and requiring further information for an appropriate assessment. The delay in providing an assessment in the correct form did not void the claim. In the circumstances, the applicant is not caught by the amending provisions and he has full entitlement to compensation under s 67 in accordance with *Goudappel No.2*.

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[1] [2020] NSWCA 113 (*Hochbaum and Whitton*).
[2] [2015] NSWWCCPD 36 (*Stafford*).
[3] [2014] HCA 18 (*Goudappel No.2*).

65. Mr Barter submits that the purported claim was duly made because Dr Akkerman was trained in the Guides and he indicated that the applicant had reached maximum medical improvement. The claim was made on a permanent impairment claim form and details of all previous employment to the nature of which the injury was or might have been due were provided. There was a description of the effect of the impairment on the applicant's work, domestic and leisure activities, and the proportion of the maximum amount of compensation claimed for pain and suffering pursuant to s 67 of the 1987 Act was provided.

REASONS

66. Given the discrete nature of the dispute, I propose to deal firstly with the issue as to whether the applicant is entitled to receive lump sum compensation for pain and suffering pursuant to s 67 of the 1987 Act following the 2012 amendments. If the applicant is successful, then I will direct that submissions be filed with respect to quantum.

Did the applicant make a valid claim for lump sum compensation prior to 19 June 2012?

67. The issue that I need to determine concerns 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[4]. This requires an analysis of the transitional provisions following the 2012 amendments and how they apply to the present matter.

68. The 1987 and 1998 Acts were amended in 2012 with the intention of delivering urgent reforms to the workers compensation scheme "to ensure better protection for injured workers, save businesses from unnecessary premium hikes and get the scheme back into surplus".[5] The reforms included the removal of compensation for pain and suffering, the introduction of a minimal threshold of greater than 10% and a limit of only one claim in order to "to reduce disputes and reduce administration costs while allowing the scheme to focus on the more seriously injured workers."[6] So the historical context and legislative intentions are clear. One then needs to consider the text, language and structure of the legislation. Of course, the threshold referred to in s 65A(3) of the 1987 Act was not altered by the 2012 amending Act.

69. Section 4 of the 1998 Act defines the term "claim" as a "claim for compensation or work injury damages that a person has made or is entitled to make" and the term "compensation" means "compensation under the Workers Compensation Acts, and includes any monetary benefit under those Acts".

70. What constitutes a "claim" was discussed by Deputy President Roche in *Stafford.* Mr Stafford suffered a serious head injury on 14 June 2010. A lump sum claim was made in April 2014 in respect of 7% whole person impairment, even though the impairment was less than the 10% threshold in s 66(1) of the 1987 Act. Following the High Court's decision in *Goudappel No.2*, the insurer denied liability. No further action was taken by Mr Stafford's solicitor at this stage.

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[4] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14, [43] – [44] (per Roche DP) and *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).
[5] New South Wales Legislative Assembly, (Hansard), *Second Reading Speech* for *Workers Compensation Legislation Amendment Bill 2012*, 19 June 2012 (*Second Reading Speech*), [1].
[6] *Second Reading Speech*, [4].

71. Mr Stafford had neuropsychological testing in September 2014 and was assessed as having 12% whole person impairment. An amended claim was made in respect of 12% whole person impairment. The insurer denied liability because Mr Stafford could not make a further claim for lump sum compensation by reason of s 66(1A) of the 1987 Act. In proceedings in the Commission, the arbitrator determined that Mr Stafford had only made one claim and was not precluded from bringing a further claim.

72. On appeal, the Deputy President held that the term “claim” in s 66(1A) of the 1987 Act imported more than a demand for payment, and it had to be capable of payment. He stated:

> “For the reasons explained below, applying the above principles in the present matter, and interpreting “claim” in its proper context, leads to only one conclusion, namely, that it was open to the Arbitrator to find that a “claim” in s 66(1A) imports more than a ‘mere demand for payment but rather is to be read as referring to a claim made in accordance with the 1987 and 1998’. Further, as the Arbitrator determined, a ‘claim for compensation’ means a claim for compensation that is capable of payment in accordance with the 1987 Act…”[7].

73. The Deputy President noted that the claim made by Mr Stafford in April 2014 was not a claim according to the principles discussed in *Goudappel No.2.* Therefore, it was not a valid claim and could not be his “one claim” for permanent impairment compensation under s 66(1A) of the 1987 Act. He stated that any other result would lead to a worker being permanently prevented from recovering compensation and there would be no justification for this. He commented that a construction that appeared “irrational and unjust” should be avoided[8].

74. The Deputy President acknowledged that the 1987 Act remained beneficial legislation and “a beneficial interpretation interprets ‘claim’ as one valid claim capable of payment in accordance with the legislation”.[9]

75. The Deputy President stated that:

> “a ‘claim’ for permanent impairment compensation is, by definition, a claim for a ‘monetary benefit under’ the legislation. A monetary benefit under the legislation is compensation that is paid or payable. If the claim cannot succeed, because it is under the s 66(1) threshold, it cannot be a ‘claim’ for a monetary benefit under the Act”.[10]

76. The Deputy President indicated that a claim could be amended prior to the resolution or determination of the claim and to suggest otherwise was “untenable and contrary to all principles of justice”[11].

77. The transitional provisions in Sch 6 of the 1987 Act are of relevance. Clause15 of Pt 19H of Sch 6 of the 1987 Act provides that the 2012 amendments apply to a claim made on or after 19 June 2012, but not to a claim before that date.

78. According to cl 10 of the 2016 Regulation, the 2012 amendments extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under ss 66 or 67 of the 1987 Act.

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[7] *Stafford,* [58].
[8] *Stafford*, [68].
[9] *Stafford*, [71].
[10] *Stafford*, [72].
[11] *Stafford*, [91].

79. Clause 11 of the 2016 Regulation confirms that only one further claim may be made in respect of an existing impairment and the threshold in s 66(1) of the 1987 Act does not apply. A further lump sum compensation claim made in respect of the existing impairment that was withdrawn or otherwise finally dealt with before the commencement of subcl (1) and in respect of which no compensation has been paid is to be disregarded.

80. Subclause 6 of cl 11 of the 2016 Regulation also provides definitions of an existing impairment (lump sum claim made before 19 June 2012), further lump sum compensation claim (lump sum claim made on or after 19 June 2012 in respect of an existing impairment) and lump sum compensation (a claim specifically seeking compensation under s 66 of the 1987 Act).

81. The effect of the 2012 amending Act was considered by the Court of Appeal in *Cram Fluid Power Pty Ltd v Green*[12] and by the High Court in *Goudappel No.2*.

82. In *Cram Fluid*, the Court of Appeal held that cl 11 of the 2010 Regulation (currently cl 10 of the 2016 Regulation) extended the 2012 amendments to claims made before 19 June 2012, except where the claim "specifically sought" lump sum compensation. It also held that s 66(1A) of the 1987 Act could not be construed as allowing one "further" claim after 19 June 2012, as such a construction provided words that were not contained in the section and it was inconsistent with the plain language and purpose of the 2012 amendments[13].

83. As Mr Green had made a claim that specially sought compensation pursuant to s 66 of the 1987 Act and this claim that was resolved prior to 19 June 2012, he was not entitled to rely on cl 11 of the 2010 Regulation (currently cl 10 of the 2016 Regulation). Accordingly, he was precluded from bringing a further claim by reason of s 66(1A) of the 1987 Act.

84. In *Goudappel No.2*, the High Court confirmed that the 2012 amendments to s 66 of the 1987 Act extended to a claim for compensation made before 19 June 2012, but not to a claim that "specifically sought" compensation under s 66 of the 1987 Act. This is consistent with cl 10 and cl 11 of the 2016 Regulation. It was also confirmed that cl 15 of Pt 19H of Sch 6 of the 1987 Act is to be read subject to cl 10 and cl 11 of the 2016 Regulation[14]. Therefore, as Mr Goudappel had not made a claim for lump sum compensation before 19 June 2012, the 2012 amendments applied and he had no lump sum entitlement because his claim was under the 10% threshold.

85. The insertion of cl 11 of the 2016 Regulation clarified the law and confirmed that a worker, who made a claim for lump sum compensation before 19 June 2012, was entitled to make one further claim.

86. Therefore, the meaning of the words in the legislation is clear and unambiguous, and their interpretation has been clarified by the High Court in *Goudappel No.2*, namely, an injured worker, who has made a concluded claim for permanent impairment prior to 19 June 2012, is not precluded from making one further claim after 19 June 2012 (cl 10 and cl 11 of the 2016 Regulation, and cl 15 of Pt 19H of the 1987 Act).

87. Further, an injured worker who made a claim before 19 June 2012, which was withdrawn or otherwise was not finally dealt with, is not precluded from bringing that claim after 19 June 2012, and will still be able to bring that claim as well as one further claim for permanent impairment. In these circumstances, s 66(1A) of the 1987 Act does not apply. I will now consider how the legislation and the authorities have been applied in other matters.

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[12] [2015] NSWCA 250 (*Cram Fluid*).
[13] *Cram Fluid*, [104] to [110] (per Gleeson JA).
[14] *Goudappel No.2,* [13] and [29] (per French CJ, Crennan, Kiefel and Keane JJ).

88. President Keating considered the effect of the transitional provisions in *Woolworths Ltd v Wagg*[15]. Ms Wagg injured her right knee in January 2008. In September 2010, she made a claim for lump sum compensation in respect of 7% whole person impairment, but that claim was not pursued because she required surgery. In January 2014, she was assessed as having 19% whole person impairment. In February 2014, she sought lump sum compensation for permanent impairment and pain and suffering pursuant to ss 66 and 67 of the 1987 Act.

89. The insurer declined liability because maximum medical improvement had not been reached due to the proposed surgery. Ms Wagg had a total right knee replacement in August 2014. In December 2015, Ms Wagg's solicitor served an amended claim for 20% whole person impairment. A claim was also made for pain and suffering pursuant to s 67 of the 1987 Act.

90. In proceedings filed in the Commission in 2016, the parties entered into a Complying Agreement in respect of 19% whole person impairment pursuant to s 66 of the 1987 Act. The claim for compensation pursuant to s 67 of the 1987 Act was contested.

91. An arbitrator determined that Ms Wagg was entitled to compensation for pain and suffering pursuant to s 67 of the 1987 Act as her rights had been preserved by cl 11 of Sch 8 of the 2010 Regulation (currently cl 10 of the 2016 Regulation).

92. On appeal, the President determined that that the 2012 amendments did not apply to Ms Wagg because she had made a claim that "specifically sought" compensation pursuant to s 66 of the 1987 Act before 19 June 2012 and this had remained unresolved. He indicated that whether the threshold for an entitlement to compensation pursuant to s 67 of the 1987 Act was reached before or after 19 June 2012 was irrelevant. This was consistent with the reasoning of the High Court in *Goudappel No.2.*

93. His Honour stated:

> "In *Goudappel*, identifying the purpose of cl 11 (as it then was), the plurality (French CJ, Crennan, Kiefel and Keane JJ) held (at [29]):
>
> > 'The purpose of cl 11 ... was clear enough. It applied the new s 66 to entitlements to permanent impairment compensation which had not been the subject of a claim made before 19 June 2012 that specifically sought compensation under the old s 66.'
>
> Their Honours did not limit the exclusion from the operation of cl 10 (cl 11 as it then was) to one set of proceedings for s 66 compensation, but expressed the exclusion as occurring when there has been *a* claim before 19 June 2012.
>
> Having regard to the plurality's view of the purpose of cl 10, it is plain enough that, as Mrs Wagg made a claim that "specifically sought" compensation under s 66 before 19 June 2012, the amendments to ss 66 and 67 made by the amending Act do not apply to her. It follows that she is entitled to have her claim for s 67 benefits determined without the restrictions imposed on lump sum compensation by the amending Act. That conclusion is consistent with the parties' acceptance that Mrs Wagg was entitled to lump sum compensation under s 66 from the combined effects of the of the two pleaded injuries, as evidenced by the s 66A complying agreement."[16]

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[15] [2017] NSWWCCPD 13 (*Wagg*).
[16] *Wagg*, [70] - [72].

94. His Honour rejected the submission that the injury pleaded in the amended claim was a new claim, because the claim for lump sum compensation pursuant to s 66 of the 1987 Act had been validly made before 2012. The claim remained unresolved, so it was capable of being amended.

95. A similar situation arose in the recent decision of *Yildiz v Fullview Plastics Pty Ltd* [17]. Mr Yildiz made a claim a claim for lump sum compensation pursuant to s 66 of the 1987 Act in January 2007 and in April 2007, he entered into a complying agreement in the sum of $8,750 for 7% whole person impairment. The worker made a further claim for 18% whole person impairment and a claim for pain and suffering pursuant to ss 66 and 67 of the 1987 Act.

96. At first instance, the arbitrator entered an award for the respondent in respect of the claim under s 67 of the 1987 Act. The determination was upheld on appeal by President Phillips. The President stated:

> "The claim for s 67 benefits was a new and separate claim, to the original claim for s 66 benefits and further claim for s 66 benefits. The claim for s 67 benefits was materialised on 30 March 2017 when Mr Yildiz made a specific claim for lump sum compensation pursuant to s 67 of the 1987 Act. It was a claim made in respect of the same injury with the same pathology, as the original s 66 claim which was resolved by complying agreement in 2007. Mr Yildiz has not sought to argue that the original claim, which had been resolved by the 2007 complying agreement, had been amended to include the claim for s 67 benefits. It follows that the s 67 claim was made, for the purposes of cl 15 of Sch 6 of the 1987 Act, after 19 June 2012. Therefore, the amendments made by Sch 2 to the 2012 amending Act extend to that claim for compensation, unless an exemption applies.
>
> The claim for s 67 benefits is not a claim for compensation which is capable of payment in accordance with the 1987 Act. That is because at the time the original claim was made the assessment of permanent impairment resulting from injury was 7% whole person impairment, and the degree of permanent impairment did not reach the threshold of more than 10 per cent. Mr Yildiz cannot seek to attach his current assessment of impairment of 17% to the original claim for s 66 benefits, which was resolved by complying agreement, in an attempt to preserve his entitlement to s 67 benefits. If Parliament intended that entitlement to s 67 benefits extended to workers in Mr Yildiz's present position it would have expressly provided for this in the savings and transitional provisions.
>
> This construction of the savings and transitional provisions is consistent with the language and purpose of the provisions of the statute, namely the 2012 amending Act.[18] It is also consistent with the Court of Appeal's decision in *Sukkar*. This construction preserves the rights accrued before 19 June 2012 except where the legislature has clearly removed those rights, as it did with respect to a person in Mr Yildiz's position."[19](citations removed)

97. Deputy President Roche considered the effect of cl 11 of the 2010 Regulation (now cl 10 of the 2016 Regulation) in *Frick v Commonwealth Bank of Australia*[20] as follows:

> "The text of cl 11 is tolerably clear and 'there is little room for debate about' its construction (*Goudappel No 2* at [25], per French CJ, Crennan, Kiefel and Keane JJ). By operation of cl 11, the effect of which is to 'override cl 15' (*Goudappel No 2* at [42], per Gageler J), the amendments made by Sch 2 to the 2012 amending Act extend to 'a claim for compensation made before

[17] [2019] NSWWCCPD 24 (*Yildiz*)
[18] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, [69].
[19] *Yildiz*, [69]-[72].
[20] [2016] NSWWCCPD 6 (*Frick*).

19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act'. On this point, the meaning of cl 11, it does not matter that *Goudappel No 2* concerned an injury received after 1 January 2002. The fact that *Goudappel No 2* did not differentiate between the various amendments in Sch 2 does not advance Mr Frick's position. The issue of differentiating between the various amendments did not come up.

> As Mr Frick claimed compensation before 19 June 2012, but had not specifically sought compensation under s 66 or s 67 prior to that date, the amendments introduced by Sch 2 to the 2012 amending Act apply to him, unless there is a sound reason why they should not. The critical amendment is the repeal of s 67. Mr Frick therefore has no entitlement to compensation under that section because, by the time he made his claim for that compensation, the section had been repealed and he does not come within any of the applicable exemptions."

98. The Deputy President continued:

> "As explained in *BHP Billiton Ltd v Bailey* [2015] NSWWCCPD 48 (*Bailey*), the entitlement to compensation for pain and suffering under s 67 continues where an exception is made. Such an exception is made in cl 11 of Sch 8. However, that exception only applies where a claim was made before 19 June 2012 that specifically sought compensation under s 66 or s 67. That does not apply here. (As to the operation of the exception in cl 11 generally, see *Cram Fluid*.)"[21]

99. A claim is not validly made until relevant particulars are provided that are sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement. This was confirmed in *Goudappel v ADCO Constructions Pty Limited & Anor*[22], when President Keating stated:

> "I accept the applicant's submission that a separate claim form is not required to initiate a claim for lump sum compensation. However, that is merely a matter of form. In substance, a claim for lump sum compensation is not validly made until the requirements of s 282 of the WIM, and the particulars and supporting documents required by the Guidelines, are provided."[23]

100. The present dispute concerns the validity of the purported claim or claims made by the applicant prior to 19 June 2012. The first correspondence dated 7 December 2006 foreshadowed that a claim would be made pursuant to ss 66 and 67 of the 1987 Act. No claim was particularised, the applicant's solicitor did not attach a permanent impairment claim form, which was mandatory under the 2006 Guidelines, and there was no report attached to the correspondence.

101. Despite Mr Barter's submissions, it could not be said that the claim made by the applicant on 7 December 2006, which foreshadowed that a claim would be made, constituted a "valid claim". The same can be said about the purported claim in the letter dated 26 August 2009.

102. Whilst it is true that the applicant's claim referred to a lump sum compensation, no claim was particularised that "specifically sought" compensation pursuant to ss 66 and 67 of the 1987 Act. The report of Dr Pollock dated 12 August 2009 did not contain an assessment of permanent impairment or confirm that the applicant had reached maximum medical improvement. The applicant's solicitor advised that a claim for lump sum compensation pursuant to ss 66 and 67 would be made, suggesting that a claim would be made later.

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[21] *Frick*, [54].
[22] [2012] NSWWCCPD 60 (*Goudappel No.1*).
[23] *Goudappel No.1*, [150].

103. There is no evidence that the insurer was satisfied that the applicant's injury had resulted in a permanent impairment before Mr Zigouras wrote to QBE on 26 August 2009. Therefore, there was no obligation on it to arrange an assessment of whole person impairment in accordance with the Part 5 of the 2009 Guidelines.

104. Mr Zigouras did not particularise the claim pursuant to ss 66 and 67 of the 1987 Act in accordance with s 282 of the 1998 Act and Part 5 of the Guidelines. The letter foreshadowed that a lump sum claim would be made. This seems to have occurred on 29 October 2009, but again full particulars were not provided.

105. Mr Zigouras did not serve a permanent impairment claim form, although that is not fatal, consistent with the reasoning in *Goudappel No.1*. However, Mr Zigouras he did not advise whether the condition had reached maximum medical improvement, and he did not provide a report completed in accordance with the Guides by a medical specialist with qualifications and training relevant to the body system being assessed who had been trained in the WorkCover Guides. Dr Pollock was not a WorkCover Approved Assessor of Permanent Impairment, so her report did not comply with the Guides, Part 5 of the Guidelines and s 322 (1) of the 1998 Act.

106. Further, Mr Zigouras did not provide a description of the effect the impairment had on the applicant's work, domestic and leisure activities, or indicate the proportion of the maximum amount of compensation under s 67 of the 1987 Act claimed for the pain and suffering.

107. Mr Barter submits that the applicant's solicitor, Mr Zigouras was inexperienced, and QBE's actions enlivened the exceptions provided in ss 260(5) and 260(6) of the 1998 Act. This raises two issues.

108. Firstly, there is no evidence from Mr Zigouras that his failure to make a claim in accordance with s 260 of the 1998 was occasioned by ignorance, mistake, other reasonable cause or because of a minor defect in form or style.

109. Secondly, QBE raised issues with Dr Pollock's qualifications on 31 December 2009, and nothing was done by the applicant's solicitor to address this until Dr Rose was qualified in 2014, so it could not be said that it waived the requirements under the legislation. QBE was not obliged to determine the claim in accordance with s 281 of the 1998 until it had received a report that complied with the legislation.

110. QBE also indicated in its letter dated 10 May 2010 that it had arranged a re-examination with Dr Akkerman "in order to update your medical condition and need", not with a view to responding to any lump sum claim, although it is true that Dr Akkerman provided an assessment of whole person impairment.

111. If I am wrong and it could be inferred from QBE's actions that it had waived the applicant's compliance with the legislation, the applicant still has to overcome the fact that any claim made prior to 19 June 2012 must have been capable of being paid.

112. When one has regard to the principles discussed in *Stafford*, *Goudappel No. 1* and *Goudappel No.2*, it could not be said that the applicant's claims made on 26 August 2009 and 29 October 2009 were capable of payment in accordance with the 1987 Act. Those claims were based on the assessment of Dr Pollock, who was not a WorkCover Approved Assessor of Permanent Impairment. Such a requirement is mandatory under the Guides and the Guidelines. Mr Barter referred to the decision of *Stafford* and *Goudappel No.2*, but he chose not to make any submissions regarding the principle that a claim must be capable of payment in order to be considered a valid claim.

113. Ms Zigouras' submission that the applicant's claim made prior to 19 June 2012 was valid because he had been examined by Dr Akkerman, who assessed 8% whole person impairment, is without merit and can be rejected. The assessment provided by Dr Akkerman was less than the threshold provided in s 65A(3) of the 1987 Act, so again it was not capable of payment.

114. QBE complied organised its own medical examination, and it determined that no compensation was payable. Mr Zigouras could have easily overcome the problem associated with Dr Pollock's qualifications if he had qualified a WorkCover Approved Assessor of Permanent Impairment when QBE highlighted this in its dispute notice dated 31 December 2009, but he failed to do so until he qualified Dr Rose on 4 September 2014.

115. I am satisfied that a valid claim for lump sum compensation was not made until 12 September 2014 at the earliest, when Mr Zigouras served the report of Dr Rose dated 4 September 2014. The letter seeking a review of QBE's decision is not in evidence, but it seems that at that stage QBE had sufficient particulars to determine liability and respond to the claim on 3 October 2014.

116. Accordingly, the applicant's claim for lump sum compensation pursuant to s 67 of the 1987 Act fails and there will be an award for the respondent.

FINDINGS

117. The applicant suffered a psychological injury arising out of or in the course of his employment on 3 September 2002.

118. The applicant's employment was a substantial contributing factor to his injury.

119. The claim for lump sum compensation that was served by the applicant on 29 October 2009 did not constitute a valid claim.

120. The applicant was entitled to make one further claim after 19 June 2012 and did so on 7 September 2018.

121. The applicant was assessed by an AMS on 15 June 2020, and he was awarded $42,500 in respect of 26% whole person impairment due to a psychological injury sustained on 3 September 2002 pursuant to s 66 of the 1987 Act.

122. The applicant is not entitled to lump sum compensation for pain and suffering arising from the psychological injury sustained on 3 September 2002.

ORDERS

123. There will be an award for the respondent in respect of the applicant's claim for pain and suffering pursuant to s 67 of the 1987 Act.