WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: **2107/19**
APPLICANT: **Wayne King**
RESPONDENT: **Metalcorp Steel Pty Ltd**
DATE OF DETERMINATION: **1 July 2019**
CITATION: **[2019] NSWWCC 229**

The Commission determines:

1. The applicant sustained an injury to his back arising out of or in the course of his employment on 21 October 2005 and 24 February 2006.

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

3. The insurer ceased payments of weekly compensation on 25 December 2017 pursuant to section 39 of the *Workers Compensation Act 1987*.

4. The applicant complied with Clause 28C(a) of Part 2A of Schedule 8 of the *Workers Compensation Regulation 2016* on 25 October 2018.

5. The insurer reinstated payments of weekly compensation on 25 October 2018 pursuant to section 38 of of the *Workers Compensation Act 1987*.

6. The applicant is not entitled to weekly compensation in the period from 26 December 2017 to 24 October 2018.

The Commission orders:

7. There will be an award for the respondent.

8. No order as to costs.

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

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Wayne King (the applicant) is 57 years old and was employed by Metalcorp Steel Pty Ltd (the respondent) as a yardman.

2. There is no dispute that the applicant injured his lumbar spine arising out of or in the course of his employment with the respondent on 21 October 2005 and 24 February 2006.

3. Liability was accepted by the prior insurer, CGU Workers Compensation (NSW) Ltd (CGU), and weekly compensation and medical expenses were paid until 25 December 2017. In 2010, the claim was transferred to Allianz Australia Workers Compensation (NSW) Ltd (Allianz) and finally to AAI Ltd t/as GIO (the insurer) on 1 October 2018.

4. The applicant was examined by an Approved Medical Specialist (AMS), Dr Meachin, on 24 May 2007. In his Medical Assessment Certificate (MAC) dated 7 June 2007, the AMS assessed 4% whole person impairment of the applicant's lumbar spine due to injury sustained on 21 October 2005 and 8% whole person impairment of the applicant's lumbar spine due to injury sustained on 24 February 2006.

5. On 14 February 2017, the applicant was examined by Dr Bosanquet on behalf of Allianz. He was satisfied that the applicant had reached maximum medical improvement and he assessed 4% whole person impairment of the lumbar spine.

6. On 6 March 2017, Allianz advised the applicant that his payments would cease when he reached the 260-week limit in December 2017 as his whole person impairment did not exceed 21%.

7. On 7 June 2017 and 9 June 2017, the applicant's solicitor requested that Allianz arrange for the applicant to be assessed by an Independent Medical Examiner (IME) to determine the degree of whole person impairment in his lumbar spine, given that Dr Bosanquet had reduced his assessment without having regard to his previous assessment. The doctor's earlier reports dated 16 February 2007 and 23 November 2012 are not in evidence.

8. On 16 August 2017, Allianz advised that it preferred the assessment of Dr Meachin and as this was less than 21% whole person impairment, it intended to cease payments effective as from 26 December 2017.

9. On 21 November 2017, Allianz responded to a request for an optional review and advised that it proposed to arrange for the applicant to be examined by another IME. The appointment was eventually scheduled for 12 December 2017 with Dr Bentivoglio.

10. In a report dated 12 December 2017, Dr Bentivoglio indicated that the applicant had reached maximum medical improvement and he assessed 7% whole person impairment due to injury sustained on 25 February 2006. He did not comment on the injury sustained on 21 October 2005 presumably because the applicant did not mention that injury.

11. On 27 December 2017, Allianz responded to a request for an optional review and advised that it intended to maintain its decision dated 6 March 2017, because, based on the assessment of Dr Bentivoglio, the degree of whole person impairment was less than 21%. Accordingly, liability was declined pursuant to s 39 of the *Workers Compensation Act 1987* (the 1987 Act) and payments were made until 25 December 2017.

12. On 27 August 2018, the applicant's solicitor advised Allianz that he was in the process of filing proceedings in the Workers Compensation Commission (the Commission) and he sought its advice as to whether it would pay the arrears of compensation to the applicant in the event that he was found not to have reached maximum medical improvement by an AMS. Allianz responded that it would review its position when a further assessment was available.

13. On 10 October 2018, the applicant's treating neurosurgeon, Dr Mobbs, submitted a request to the insurer to approve surgery in the form of an L5/S1 anterior lumbar internal fusion.

14. In a report dated 15 November 2018, Dr Mobbs indicated that the applicant had not reached maximum medical improvement and the doctor expected that he would achieve a significant reduction in his low back pain following surgery. The applicant needed to lose 10 kg to 15kg before the procedure could be undertaken.

15. Proceedings were filed in the Commission in 2018 and the applicant was examined by an AMS, Dr Anderson, on 15 October 2018. In his MAC dated 25 October 2018, the AMS noted that Dr Mobbs had recommend surgery and this would be undertaken within eight weeks. In the circumstances, the AMS advised that the degree of permanent impairment in the applicant's lumbar spine was not fully ascertainable in accordance with s 319(g) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

16. On 29 October 2018, the applicant's solicitor served a copy of the MAC on the insurer and requested that it reinstate weekly payments of compensation as from the date of termination of those benefits. On 13 November 2018, a similar request was forwarded to the insurer's solicitor. It seems that the insurer failed to respond to these requests. No explanation was provided for this failure on the insurer's part.

17. On 13 March 2019, the applicant's solicitor again requested that payments be re-instated from 25 October 2018, in addition to the payment of arrears from 26 December 2017 to 24 October 2018. Eventually in March 2019, the insurer's solicitor advised that payments would be made as from the date of the MAC dated 25 October 2018. The surgery was also approved by the insurer on 14 March 2019.

18. By an Application to Resolve a Dispute (the Application) registered in the Commission on 2 May 2019, the applicant claims weekly compensation from 26 December 2017 to 24 October 2018 pursuant to s 38 of the 1987 Act due to injury sustained to his lumbar spine on 21 October 2005 and 24 February 2006.

PROCEDURE BEFORE THE COMMISSION

19. 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.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant is entitled be paid weekly compensation after 260 weeks and before an AMS confirmed that he had not reached maximum medical improvement and his whole person impairment was not fully ascertainable – s 39 of the 1987 Act and cl 28C of Pt 2A of Sch 8 of the *Workers Compensation Regulation 2016* (the 2016 Regulation), and

(b) quantification of the applicant's entitlement to weekly compensation – s 38 of the 1987 Act.

Documentary evidence

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

    (a) Application and attached documents, and
    (b) Reply.

Oral evidence

22. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

APPLICANT'S SUBMISSIONS

23. The applicant's counsel, Mr Barter, submits that cl 28C of Pt 2A of Sch 8 of the 2016 Regulation has a different applicant to s 39 of the 1987 Act, because the clause relies on uncertainty, whereas s 39 of the 1987 Act relies on certainty.

24. Mr Barter submits that in *RSM Building Services Pty Ltd v Hochbaum*[1], President Phillips could have dealt with cl 28C of Pt 2A of Sch 8 of the 2016 Regulation, which was raised in argument, but he did not do so. There was some conflict in paragraphs 68 and 82 of his decision, although it seems that he was merely reciting the submissions of counsel.

25. Mr Barter submits that this shows that cl 28C of Pt 2A of Sch 8 of the 2016 Regulation is different to s 39 of the 1987 Act and the clause should be dealt with differently due to uncertainty. That uncertainty relates to the degree of permanent impairment. This situation would not have arisen had the insurer referred the applicant to an AMS prior to December 2017, rather than to an IME.

26. Mr Barter submits that there is an expectation that payments will continue until s 39 of the 1987 Act comes into effect and this can only be remedied by obtaining an assessment greater than 20% whole person impairment. An insurer will take advantage of the period between the cessation of payments and the assessment of permanent impairment. The certainty of an impairment can be addressed by an IME or an AMS at an earlier stage.

27. Mr Barter submits that this shows that cl 28C of Pt 2A of Sch 8 of the 2016 Regulation provides that s 39 of the 1987 Act does not apply once the requirements in the clause are met and an assessment has been made by an AMS. Once that happens, the limitation disappears and the workers' entailment depends on s 38 of the 1987 Act.

28. In reply, Mr Barter submits that Arbitrator Sweeney dealt with cl 28C of Pt 2A of Sch 8 of the 2016 Regulation in *Kennewell v ISS Facility Services Australia Ltd t/as Sontic Pty Ltd*[2], and he maintained his opinion in *Strooisma v Coastwide Fabrications and Erections Pty Ltd*[3] in respect of the beneficial nature of the legislation. He submits that the transitional provisions establish uncertainty and the applicant should have the benefit until such a time as there is certainty. So long as there is uncertainty, s 39 of the 1987 Act cannot apply. This is consistent with *Kennewell*.

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[1] [2019] NSWWCCPD 15, (*Hochbaum*).
[2] [2018] NSWWCC 216 (*Kennewell*).
[3] [2019] NSWWCC 173, (*Strooisma*).

RESPONDENT'S SUBMISSIONS

29. The respondent's counsel, Ms Warren, submits that the respondent relies upon the decisions of President Phillips in *Hochbaum* and *Technical and Further Education Commission t/as TAFE NSW v Whitton*[4], as well as the decision of Arbitrator Sweeney in *Strooisma*. She submits that Arbitrator Sweeney dealt with cl 28C of Pt 2A of Sch 8 of the 2016 Regulation and he followed the reasoning in *Hochbaum*. Therefore, the clause should be treated in the same fashion as s 39 of the 1987 Act.

30. Ms Warren submits that until Dr Anderson provided his MAC in October 2018, the MAC issued by Dr Meachin in 2007 was conclusive as to the degree of whole person impairment in the applicant's lumbar spine. That assessment was less than 20% whole person impairment and it was fully ascertainable.

31. Ms Warren submits that it was not until 15 November 2018 that Dr Mobbs indicated that the applicant had not reached maximum medical improvement. The insurer qualified Dr Bentivoglio, who assessed 7% whole person impairment, which was less than the 20% threshold as at 26 December 2017 when payments ceased. Therefore, s 39 of the 1987 Act applied and the applicant had no entitlement after 260 weeks until Dr Anderson issued his MAC.

32. Ms Warren submits that *Hochbaum* and *Whitton* confirm that s 39 of the 1987 Act and cl 28C of Pt 2A of Sch 8 of the 2016 Regulation create exceptions and these should be treated in the same fashion. The acceptance of the present tense in the interpretation of s 39 of the 1987 Act supplies the necessary temporal connection and the same should apply to the interpretation of the clause.

33. Ms Warren submits that cl 28C of Pt 2A of Sch 8 of the 2016 Regulation will only operate when the relevant criteria are satisfied. It is only when there is an impairment in excess of 20% that the exception in s 39(3) of the 1987 Act operates. There is no retrospective operation and the clause is not a beneficial provision.

34. Ms Warren concedes that President Phillips did not deal with cl 28C of Pt 2A of Sch 8 of the 2016 Regulation in *Hochbaum* and *Whitton*. In *Whitton*, he suggested that the construction of the clause would be similar. The reasoning of Arbitrator Sweeney in *Strooisma* is also persuasive. Once the clause applies, the entitlement to weekly compensation arises from that date and is not retrospective.

Legislation

35. Section 39 of the 1987 Act sets out the provisions relating to the cessation of weekly benefits after five years. It provides:

> "**39 Cessation of weekly payments after 5 years**
>
> (1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.
>
> (2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

[4] [2019] NSWWCCPD 27, (*Whitton*).

Note.
For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

(3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

36. The transitional provisions are contained in cl 28 of Pt 2A of Sch 8 of the 2016 Regulation. They provide:

"**28C 5-year limit on weekly payments**

Section 39 of the 1987 Act (as substituted by the 2012 amending Act) does not apply to an injured worker if the worker's injury has resulted in permanent impairment and:

(a) an assessment of the degree of permanent impairment for the purposes of the Workers Compensation Acts is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or

(b) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20% (whether or not the degree of permanent impairment has previously been assessed)."

REASONS

Is the applicant entitled be paid weekly compensation after 260 weeks and before an AMS confirmed that he had not reached maximum medical improvement and his whole person impairment was not fully ascertainable?

37. 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[5]. The authorities are also important.

38. Section 39 of the 1987 Act removes the entitlement of a worker to weekly compensation after 260 weeks, unless the degree of permanent impairment resulting from the relevant injury is assessed as more than 20%. However, the section has to be read subject to cl 28C of Pt 2A of Sch 8 of the 2016 Regulation, which only applies to "existing recipients", such as the applicant.

39. In *Kennewell*, Arbitrator Sweeney indicated that cl 28C(a) of Pt 2A of Sch 8 of the 2016 Regulation was intended to be a beneficial provision and once the preconditions that resulted in the exclusion of s 39 of the 1987 Act were satisfied, the section did not apply and weekly compensation payments were payable in accordance with s 38 of the 1987 Act from

[5] *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).

the date of the termination of payments. This reasoning was followed by me in *Gillard v G and H Harris and M E Jarret*[6], but it was rejected by the President in *Hochbaum* and *Whitton.*

40. In *Hochbaum* and *Whitton*, the President did not have to deal with cl 28 of Pt 2A of Sch 8 of the 2016 Regulation. In both decisions, His Honour confirmed that s 39 of the 1987 Act was expressed in the present tense and therefore compensation could not be awarded in respect of the period before the relevant criteria in the section were satisfied. He also indicated that the section was not a beneficial provision. He summarised the effect of s 39 of the 1987 Act as follows:

> "Where the worker ceases to be paid weekly payments of compensation due to s 39(1), it is only if a worker has been assessed, for the purpose of s 65, to have a degree of permanent impairment of greater than 20%, that s 39(2) is engaged to determine whether the worker's entitlement to weekly payments of compensation may be restored. The worker having undertaken the process of an assessment of permanent impairment as defined in s 39(3) and having achieved the criterion set out in s 39(2) is then relieved of the bar provided for in s 39(1). The bar is lifted at the point in time of the assessment of permanent impairment of greater than 20%. The phrase '[t]his section shall not apply' set out in s 39(2) is dependent upon the completion of this process and the achievement of the criterion. The operation of s 39(2) is subject to the existence of an assessment of the degree of permanent impairment, as set out in s 39(2) when read with s 39(3). A worker's entitlement to weekly compensation, beyond the aggregate period of 260 weeks remains dependent on satisfying the preconditions for payment of weekly compensation pursuant to s 38 of the 1987 Act. This is confirmed by the note to s 39(2)."[7]

41. In *Strooisma,* Arbitrator Sweeney observed that the language used in cl 28 of Pt 2A of Sch 8 of the 2016 Regulation, namely "does not apply", was similar to that used in s 39(2) of the 1987 Act. In other words, the terms referred to the present tense, consistent with the reasoning in *Hochbaum* and *Whitton*. The Arbitrator commented:

> "Certainly, there are contextual differences between the two provisions. It is much easier, for example, to characterise Cl 28C as a beneficial provision for the reasons which I gave in *Kennewell*. Ultimately, however, both provisions address different aspects of the same statutory purpose; to establish the circumstances in which compensation is payable beyond the period limited by s39(1).
>
> To hold that they operate differently would give rise to anomalous outcomes. A worker who had been certified as having more than 20% permanent impairment would not be entitled to compensation between the expiration of 260 weeks and the date of certification, but a worker whose impairment was not fully ascertainable would be entitled to compensation during this period. The legislature cannot have intended such a capricious result."[8]

42. It is true that the provisions relate to different circumstances as Mr Barter submits, namely certainty and uncertainty, but there is no valid reason why they should be treated differently, otherwise it would lead to the "anomalous outcomes" identified by Arbitrator Sweeney. Clearly that would not have been the intention of the legislators.

43. I agree that an insurer could benefit from a delay in assessment of whole person impairment following the cessation of payments pursuant to s 39 of the 1987 Act. However, a worker could equally take advantage of cl 28 of Pt 2A of Sch 8 of the 2016 Regulation, for example, by postponing proposed surgery to ensure that the weekly payments continue.

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6 [2019] NSWWCC 22
7 *Hochbaum*, [147].
8 *Strooisma*, [27] to [28].

44. In the circumstances, I see no reason not to adopt the reasoning in *Hochbaum*, *Whitton* and *Strooisma* and apply it to the present matter. The applicant is not entitled to weekly compensation in the period from 25 December 2017 to 25 October 2018 before the AMS certified that the degree of permanent impairment in his lumbar spine was not fully ascertainable. Accordingly, there will be an award for the respondent.

Costs

45. There will be no order as to costs.

FINDINGS

46. The applicant sustained an injury to his back arising out of or in the course of his employment on 21 October 2005 and 24 February 2006.

47. The applicant's employment was a substantial contributing factor to his injuries.

48. The insurer ceased payments of weekly compensation on 25 December 2017 pursuant s 39 of the 1987 Act.

49. The applicant complied with cl 28C(a) of Pt 2A of Sch 8 of the 2016 Regulation on 25 October 2018.

50. The insurer reinstated payments of weekly compensation on 25 October 2018 pursuant s 38 of the 1987 Act.

51. The applicant is not entitled to weekly compensation in the period from 26 December 2017 to 24 October 2018.

ORDERS

52. There will be an award for the respondent.

53. No order as to costs.