WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1214/19**
Applicant: **John Alphenaar**
Respondent: **Wollongong City Council**
Date of Determination: **25 September 2019**
Citation: **[2019] NSWWCC 311**

The Commission determines:

1. The respondent is to pay the applicant the sum of $40,838 pursuant to section 66 of the *Workers Compensation Act 1987* in respect of 18% whole person impairment resulting from injury to the lumbar spine in about 2003 and on 16 March 2016.

2. For the purposes of section 22 of the *Workers Compensation Act 1987* liability for payment of the award pursuant to section 66 is apportioned as to one third to the injury to the lumbar spine in or about 2003 and as to two thirds to the injury on 16 March 2016.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. John Alphenaar (Mr Alphenaar/the applicant) sustained a number of injuries to his back in the course of his employment with Wollongong City Council (the respondent). From the Notice of Settlement completed pursuant to the Health and Other Services (Compensation) Act 1995 (Cth) it appears that there are accidents prior to 1 January 2002 on 25 May 1999 and 29 April 1996. He received lump sum compensation in respect of those two injuries.

2. Mr Alphenaar suffered further injury to his back in the course of his employment with the respondent in 2003 and again on 16 March 2016. Mr Alphenaar was paid the sum of $4375 in respect of a claim pursuant to section 66 in respect of what is said to be 3.5% whole person impairment resulting from the 2003 injury to the lumbar spine.

3. On 11 November 2016, Mr Alphenaar underwent lumbosacral fusion at L5/S1. He was subsequently seen by associate Professor Nigel Hope, orthopaedic surgeon, on 28 August 2017 who assessed Mr Alphenaar as suffering 25% whole person impairment in respect of injury to the lumbar spine. After deductions in respect of impairment arising from the 1996 and 1999 injuries, Associate Professor Hope assessed 12% whole person impairment in respect of injury to the lumbar spine in 2003 and 5% whole person impairment in respect of the later injury.

4. Mr Alphenaar was examined by Dr David Wilcox, who assessed a substantially lower figure. An Application to Resolve a Dispute claiming a lump sum pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of further impairment resulting from the 2003 injury and impairment from the 2016 injury was filed in the Commission.

5. The respondent filed a Reply disputing the degree of permanent impairment and asserting that "a significant deduction" was required pursuant to section 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and also asserting that any impairment resulting would not entitle the applicant to further lump sum compensation.

6. The parties were able to reach agreement as to the terms of a referral to an Approved Medical Specialist and the following relevant consent orders were made on 15 April 2019:

    "1 The matter is remitted to the Registrar for referral to an Approved Medical Specialist to assess the degree of permanent impairment, if any, of the lumbar spine as a result of injury in around 2003 and on 16 March 2016.

    2. It is noted that the Respondent concedes that the impairment/s can be assessed together."

7. The dispute was referred to an Approved Medical Specialist (AMS), Dr Brian Noll, who assessed whole person impairment arising from injury to the lumbar spine in around 2003 and 16 March 2016 at 18%. The applicant was assessed as having 22% whole person impairment in respect of the lumbar spine. The AMS deducted one fifth as due to the prior injuries in 1996 and 1999.

8. The respondent has sought determination of liability for the respective injuries pursuant to section 22 of the 1987 Act, the respondent asserts that the appropriate award pursuant to section 66 is to be made in accordance with that apportionment.

9. The applicant asserts that he is entitled to be paid as if the impairment resulted from injury in March 2016.

ISSUES FOR DETERMINATION

10. The parties agree that the only issue in dispute is whether the applicant's entitlement to lump-sum payment pursuant to section 66 is to be calculated after apportioning liability between the 2003 and 2016 injuries and then adding the two figures.

PROCEDURE BEFORE THE COMMISSION

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

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute and attached documents;

    (b) Reply and attached documents, and

    (c) Medical Assessment Certificate dated 5 June 2019.

Oral Evidence

13. There was no application to adduce oral evidence or cross examine any witness.

FINDINGS AND REASONS

14. Section 322 of the 1998 Act 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 Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> Note. Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.
>
> (4) An approved medical specialist may decline to make an assessment of the degree of permanent impairment of an injured worker until the approved medical specialist is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made."

15. Section 22 of the 1987 Act provides:

> "22 Compensation to be apportioned where more than one injury
>
> (1) If:
>
> (a) the death or incapacity of a worker, or
>
> (b) a permanent impairment suffered by a worker as referred to in Division 4 of Part 3, or
>
> (c) a liability under Division 3 of Part 3 to a worker,
>
> results from more than one injury to the worker, liability to pay compensation under this Act is to be apportioned in such manner as the Commission determines.
>
> (1A) Death, incapacity, loss or liability that results partly from one injury and partly from one or more other injuries is taken to have resulted from more than one injury.
>
> (2) Liability to pay compensation under this Act includes:
>
> (a) the liability of an employer (including an employer who is a self-insurer), and
>
> (b) the liability of an insurer under a policy of insurance in respect of the payment of that compensation (including a direct liability to the worker), and
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> (c) a liability in respect of a claim under Division 6 of Part 4, and
>
> (d) in the case of a worker who is partially incapacitated for work, a liability that arises because the worker is entitled to be compensated under this Act as if totally incapacitated.
>
> (3) Liability to pay compensation under this Act is not to be apportioned by the Commission if the parties to whom the liability relates have agreed on the apportionment.
>
> (4) Liability to pay compensation under this Act may be apportioned by the Commission even though it is the liability of a single insurer in respect of different periods of insurance, but only if the employer or the Authority applies for such an apportionment.
>
> (5) The Commission may, on the application of any insurer or employer concerned or of the Authority, determine a dispute as to whether:
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> (a) liability to pay compensation under this Act should be apportioned under this section, or
>
> (b) any such liability should be apportioned under this section in respect of different injuries.
>
> The determination of the Commission has effect despite any agreement on apportionment if the application for determination was made by an employer (in the employer's own right) or the Authority.
>
> (6) (Repealed)
>
> (7) A person who is liable to pay compensation under this Act is not entitled in any proceedings under this Act to a reduction in that liability by apportionment on account of the existence of any other person who is also liable to pay any part of that compensation unless that other person is a party to the proceedings.
>
> (8) This section applies to any liability arising before or after the commencement of this Act."

16. Deputy President Roche in *Department of Juvenile Justice v Edmed*[1] identified the phrase "the same injury" in section 322(2) of the 1998 Act as referring to the pathology resulting from separate injurious events. That interpretation has been accepted in a number of Presidential decisions since.[2]

17. The parties agree that 18% whole person impairment in respect of injury to the lumbar spine as at 16 March 2016 would, prima facie, entitle a worker to a payment pursuant to section 66 of $45,213.

18. The applicant asserts that the assessment entitles him to an award of $40,838 representing the sum of $45,213 less the sum of $4375 paid earlier in respect of the impairment resulting from the 2003 injury.

19. The respondent submits that the award should be apportioned between the 2003 injury and the 2016 injury and calculation of the sum to be paid be determined by applying the determined proportions respectively to the maximum figure applicable in 2003 and the maximum figure in 2016. That apportionment is affected by determining degree of whole person impairment applicable to each of the two injuries, calculating the appropriate payment in accordance with the SIRA Guidelines for each of the injuries at the respective dates and then adding the two figures to determine the appropriate payment. In the alternative, the respondent submits that the total impairment assessed by the AMS should be apportioned between the two injuries in in accordance with the evidence.

20. The respondent submitted that, if the first approach adopted, the appropriate apportionment would be determined in accordance with the opinion of Associate Professor Hope who assigned 12% whole person impairment to the 2003 injury and 5% to the 2016 injury.

21. Adopting the second approach, again based on the opinion of Associate Professor Hope, the sum to be paid would be calculated apportioning 12/17 to the 2003 injury and 5/17 to the 2006 injury. The payment would then be calculated by reference to 12/17 of the sum of $24,500 (that figure being 18% of the maximum sum in 2003) and 5/17 of the sum of $45,213 (that figure being 18% of the maximum sum in 2016) with an appropriate adjustment for the payment already made.

22. The respondent submitted that section 22 of the 1987 Act mandated apportionment by calculation of the payment due to the applicant in the case of aggregated injuries which fell within section 4(a) of the 1987 Act.

23. For the reasons set out by Neilson J in *Sidiropoulos v Able Placements Pty Ltd* [3] (*Sidiropoulos*) I accept the submission of the applicant that section 322 of the 1998 Act and section 22(1) of the 1987 Act create a single impairment and the applicant is entitled to be compensated pursuant to section 66 at the date when the final injury to the affected body part occurs.

24. In *Sidiropoulos* Neilson J made findings:

> "[36]……., I make the following specific findings:
>
> * The applicant sustained two injuries in the course of his employment, they were on 8 August 1995 and 28 December 1995. Those two injuries have had a cumulative effect. Prior to s22 being enacted, the impairment and loss were said to result from the last injury.

[1] [2008] NSWWCCPD 6

[2] see for example New South Wales Fire Brigades v Turton [2008] WWCCPD 66; St Andrews Village Ballina Ltd v Mazzar [2010] NSWWCCPD 99; Kolak v Hunai Pty Ltd [2008] NSWWCCPD 60 and Trustees of Roman Catholic Church for Diocese of Parramatta v Barnes [2015] NSWWCCPD 35

[3] [1998] NSWCC 7; (1998) 16 NSWCCR 123

> * The cumulative effect of the two injuries, as one can now refer to it, has caused one impairment of the back and one loss of efficient use of the left leg at or above the knee."

25. Neilson J referred to the decision of the Court of Appeal in *Sutherland Shire Council v Baltica General Insurance Co Ltd* [4] (*Sutherland Shire Council*) where Clark JA said (Priestley JA and Hunter A-JA concurring);

> "Liability here to pay compensation for death or incapacity is, relevantly, created by ss25 and 33. It arises when incapacity results from an injury or from more than one injury. It is not expressed to arise when incapacity partly results from an injury. Yet s22A(2) speaks of a liability to pay compensation arising from more than one injury and, by virtue of the extended definition, that must include the situation where incapacity results partly from one, and partly from another injury. In this way, the terms of s22A(2) may be thought to widen the tests in ss25 and 33. I do not think that they do. No amendment was made to either s25 or s 33. The test of causation "results from" has not been altered in those sections and it is inconceivable that the legislature intended that it be altered. The better view, in my opinion, is that the test of causation remains as it was and s22(1A) is limited in its operation to the widening of the meaning of the expression "results from more than one injury" where it is found in the Act. Where that expression appears in s22A(2), it is to be understood in the wider sense so that apportionment may be carried out in cases of deemed incapacity. The subsection does not, however, qualify the test of causation in ss25 and 33. It follows that I agree with Burke CCJ's conclusion that a trial judge's initial task is to determine the liability of an employer or employers to pay compensation to a worker. If the worker satisfies the test in the case where are a number of work injuries and apportionment is sought, the trial judge is then to apply the s22 test and that test will be satisfied if the incapacity resulted partly from one injury (presumably the injury which led to the finding under s 33) and partly from another or other injuries. While, therefore, I disagree with Burke CCJ in his description of the primary test of causation, I do agree with his view that there is a two-stage process when apportionment is sought."

26. I cannot see that any of the amendments to the 1987 Act nor the introduction of the 1998 Act has altered that position with respect to the facts in the present case. A further claim in respect of the 2003 injury is permitted by the *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015* and aggregation of the respective impairments is permitted by section 322 of the 1998 Act.

27. I am satisfied that Mr Alphenaar, as result of injury in 2003 and March 2016 suffered a single impairment arising from those injuries to the lumbar spine. The respondent did not dispute that there was a single impairment but submitted that calculation of the lump sum should be carried out by reference to the respective dates of injury and the relevant sums available at that time.

28. I do not accept the respondent's submission. I accept that section 322 of the 1998 Act and section 22 of the 1987 Act require that the Commission determine the payment applicable by reference to the degree of impairment established in respect of multiple injuries applied to the relevant maximum sum available as at the last date of injury, that is when the later of the two causative events has occurred and the assessed aggregated level of impairment is reached.

29. It follows from the decision of Clark JA in Sutherland Shire Council that "the Initial task is to determine the liability of an employer or employers to pay compensation to a worker." No apportionment is involved in arriving at the amount of compensation to be paid. Apportionment is the second step in the process of applying section 22. That apportionment does not, in my view, alter the quantum of the payment which is determined by reference to the last date of injury.

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[4] (1996) 39 NSWLR 87; 12 NSWCCR 716

30. The applicant submitted and I accept that this view is supported by the plain words of section 22A(3) of the 1987 Act:

> "(3) Liability may be apportioned under section 22 even if the liability has been discharged."

31. It appears to me that clear words of section 22A(3) are wholly inconsistent with the respondent's submission.

32. I am satisfied that, in accordance with the Medical Assessment Certificate of Dr Brian Noll dated 15 May 2019 the applicant is entitled to be paid the sum of $40,838 pursuant to section 66 in respect of injury to the lumbar spine in or about 2003 and on 16 March 2016. That sum is calculated by reference to 18% of the applicable maximum amount as at 16 March 2016 being $45,213 less allowance for the sum of $4375 paid in respect of the 2003 injury.

33. The issue of apportionment is a separate issue that does not bear upon calculation of the amount of the lump sum to which the applicant is entitled pursuant to section 66. (In accordance with the reasons of Clark JA in Sutherland Shire Council).

34. The respondent submitted that the appropriate apportionment was that assessed by Associate Professor Hope. If liability is required to be apportioned, it is necessary to consider the whole of the evidence.

35. Mr Alphenaar was able to continue working despite impairment arising from the 2003 injury. That injury was assessed at 3.5% whole person impairment arising from injury to the lumbar spine.

36. Associate Professor Hope assessed Mr Alphenaar as suffering 25% whole person impairment as result of work injuries. He deducted 5% for impairment resulting from the 1996 and 1999 injuries leaving 20% whole person impairment attributable to the 2003 and 2016 injuries.

37. Associate Professor Hope commented "The injury on 16 March 2016 was a permanent aggravation of the injury in 2003 because this injury significantly increased pain and accelerated the need for surgery." He regarded Mr Alphenaar as falling within DRE Lumbar Category IV "due to the two level L5/S1 fusion attracting 20% WPI." He added a further 2% in respect of impact on activities of daily living and a further 3% in respect of radiculopathy to arrive at a total of 25% whole person impairment due to injuries to the lumbar spine.

38. Associate Professor Hope assessed total deductions of 13.5% from the assessment of 20% in respect of the 2003 injury. That deduction was comprised of 5% for the injuries of 1996 and 1999, 5% for the injury of 2016 and 3.5% for the previous award.

39. I am of the view that it was inappropriate for associate Professor Hope to deduct 3.5% in respect of the previous award. That did not reflect the contribution of the 2003 injury because it confused the financial benefit which might ultimately flow pursuant to section 66 with the extent of contribution to the overall level of impairment.

40. Omitting the deduction of 3.5% in respect of the previous claim would apportion 15% to the 2003 injury. It would then be necessary to consider the 2016 injury. From the whole assessment Associate Professor Hope deducted 5% in respect of the 1996 and 1999 injuries and 15% arising from the 2003 injury. Accordingly, he assessed 5% as attributable to the 2016 injury.

41. Dr Bentivoglio, who had seen Mr Alphenaar following the 1999 injury, saw him again with respect to the injury in 2003. Dr Bentovoglio reported:

> "He presents with a history of having a twisting injury while at work and exacerbation of low back pain, which now radiates into his right leg. This sciatica is new.
>
> Neurologically, I could not elicit any evidence of neurological dysfunction, except for the injury to his left leg, which is old.
>
> I reviewed his CT scan, which does not show any significant pressure on any of the nerve roots, plaintiff feels he needs to have an MRI scan performed to get a closer view of the situation."

42. Dr Bentovoglio reviewed Mr Alphenaar in March 2003 with the benefit of an MRI scan. He reported:

> "The MRI scan shows early disc deterioration and a diffuse disc bulge at the L4/L5 level but this is not causing significant neurological compromise. At the L5/S1 level, he has a significant disc bulge centrally with an annular tear, but again, this is not causing any neurological compromise."

43. Dr Bentovoglio suggested continuing conservative measures with restrictions on lifting more than 10 to 15 kg already repetitive bending and twisting. He commented "he needs to undertake good back care, back and abdominal strengthening exercises, and occasional swimming. His current job is appropriate."

44. Dr Bentovoglio saw Mr Alphenaar again on 17 August 2016 at the request of the respondent. He noted the history:

> "The work injury entailed when a person fell out of a wheelchair, he picked up, and this caused bending and lifting injury to his low back. He gives a past history of having low back pain 19 years ago and he has had low back pain on and off for many years and this low back pain secondary to L4/L5 and L5/S1 disc changes. This incident of bending and lifting a patient has just produced yet another flareup."

45. Dr Bentovoglio reported:

> "His current symptoms are low back pain going to the right leg in a non-dermatomal distribution. The left leg gets occasional pain, has altered sensation in the soles of his foot [sic]. The sciatica in the right leg is apparently a new symptom, which he has not had in the past. He maintains the right leg feels weak. His walking is restricted to 100 metres. There is no previous limitation in his walking. His bladder is slow to start and has had episodes or bladder control."

46. An updated MRI scan was noted showing "some right S1 root compression" Dr Bentovoglio "thought that Mr Alphenaar had right sciatica secondary to an L5 nerve root compression and the L5/S1 foramen, secondary to a well-known pre-existing degenerative spondylitic disease in his lumbar spine, which he has had for many years."

47. Dr Bentovoglio noted that "the fact that he has now developed right-sided sciatica is a change in his condition from previous low back pain. The sciatica is caused by trapping of the L5 nerve root and the L5/S1 foramen." He felt that the appropriate surgery was decompression of the S1 nerve root facetectomy and fusion at L5/S1. Dr Bentovoglio assessed Mr Alphenaar as unfit for his pre-injury duty noting trouble in walking any distance. He said, "at best he could do a sedentary type light duties work probably on a part-time basis."

48. The reports of Dr Cherukuri, the treating neurosurgeon, noted “multilevel spondylotic changes, more prominent L5/S1 with lace thesis at this level with severe right-sided disc protrusion extending into the forearm and with foraminal compression.”

49. The evidence establishes that Mr Alphenaar did in fact undergo L5/S1 spinal fusion in November 2016.

50. Having regard to level of impairment reported by Mr Alphenaar, Associate Professor Hope and Dr Bentovoglio and the radiological changes noted following the 2016 injury with the onset of compression of the L5 nerve root, I am of the opinion that the greater part of the assessment should be attributed to the later injury which has bought forward the need for surgery by causing nerve compression.

51. Prior to the 2016 injury Mr Alphenaar had been able to carry on his usual employment with “ongoing niggles and pain” in his back. The picture following the 2016 injury is significantly different and the level of impairment has clearly increased with the nerve root involvement. Mr Alphenaar is now no longer able to perform his pre-injury duties and is substantially impaired in his activities of daily living. Table 15-3 in AMA 5 (page 384) relevantly rates assessment within DRE Lumbar Category IV as based on loss of motion. In the present case that loss of motion relates substantially to the fusion at L5/S1. The requirement for that fusion flows from the 2016 injury.

52. Of the 18% whole person impairment calculated by the AMS I would apportion one third to the 2003 injury and two thirds to the 2016 injury.