WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4321/19**
Applicant: **Scott Freestone**
Respondent: **State of New South Wales**
Date of Determination: **22 October 2019**
Citation: **[2019] NSWWCC 345**

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) as follows:

Date of injury:	25 September 2008 to 2 May 2017 (2 May 2017 deemed)
Body part / system:	psychological
Method:	whole person impairment.

2. The materials to be referred to the AMS are to include the Application to Resolve a Dispute and all attachments and the Reply and all attachments.

3. The matter will be listed for further teleconference upon receipt of the Medical Assessment Certificate to deal with the claim for s 67 compensation and orders as to costs.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Scott Freestone (the applicant) was employed with Ambulance Service of NSW (the respondent) as a paramedic. The applicant claims that he sustained a psychological injury as a result of a cumulative exposure to traumatic events in the course of his employment, commencing from an attendance on a patient suffering severe burns on 25 September 2008. The applicant was first certified as having incapacity for work on 2 May 2017. The applicant notified the respondent of an injury and made a claim for compensation. The claim appears to have been accepted and compensation paid.

2. The applicant later made a claim for lump sum compensation pursuant to ss 66 and 67 of the *Workers Compensation Act 1987* (the 1987 Act), relying on a report of consultant psychiatrist, Associate Professor Michael Robertson, dated 5 February 2019. Associate Professor Robertson diagnosed the applicant as having chronic post-traumatic stress disorder and assessed the applicant as having 16% Whole Person Impairment (WPI) as a result of his injury.

3. The claim for lump sum compensation was not formally notified as disputed, although the respondent arranged for the applicant to be medically examined by psychiatrist Dr Graham Vickery. In a report dated 23 April 2019, Dr Vickery made a diagnosis of "post-traumatic stress disorder in remission" and found there was no permanent impairment resulting from the work-related psychological injury.

4. The applicant filed an Application to Resolve a Dispute (ARD) in the Commission on 23 August 2019. In its Reply, filed on 16 September 2019, the respondent sought leave pursuant to s 289A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to dispute that the applicant continued to suffer from an "injury" on the basis that the injury was now in remission. The respondent asserted that the applicant had suffered no permanent impairment or, if he did, the degree of permanent impairment failed to satisfy the threshold in s 65A(3) and there was no entitlement to compensation under ss 66 and 67 of the 1987 Act.

5. At teleconference on 20 September 2019, the respondent declined to make any offer to settle the claim and also declined to consent to the matter being remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment as to the degree of permanent impairment. The respondent relied on the decisions in *Peric v Lee & Ran t/as Pure and Delicious Healthy*[1] (*Peric*) and *Workcover New South Wales v Evans*[2] (*Evans*) to say that there was no longer an "injury" to be referred to an AMS. It was submitted that this matter would require determination by an arbitrator.

6. After some discussion as to the effect of the decisions in *Bindah v Carter Holt Harvey Wood Products Australia Pty Limited*[3] *(Bindah)* and *Jaffarie v Quality Castings Pty Limited*[4] (*Jaffarie)* on the authorities relied on by the respondent, the respondent's position remained unchanged. In the circumstances and to afford the parties procedural fairness, I directed them to file written submissions on the question of the Commission's jurisdiction to determine whether the applicant's "injury" had resolved. The parties were advised of my intention to determine the issue on the papers upon receipt of their submissions.

[1] [2009] NSWWCCPD 47.
[2] [2009] NSWWCCPD 95.
[3] [2014] NSWCA 264.
[4] [2014] NSWWCCPD 79.

ISSUES FOR DETERMINATION

7. The following issue is presently in dispute and requires determination:

    (a) Whether the Commission has jurisdiction to determine whether the applicant's psychological injury has resolved.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;
    (b) Reply and attached documents;
    (c) Written submissions filed by the respondent on 1 October 2019, and
    (d) Written submissions filed by the applicant on 10 October 2019.

Respondent's submissions

9. The respondent has confirmed that there is no dispute that the applicant suffered a diagnosable psychiatric injury for the purposes of ss 4 and 11A(3) of the 1987 Act. The respondent disputes that the applicant continues to suffer that injury.

10. The respondent submitted that s 321(4)(a) of the 1998 Act provides that the Registrar may not refer for assessment under Part 7, a medical dispute concerning permanent impairment where liability is in issue and has not been determined by the Commission.

11. The respondent submitted that in *Peric* it was held that if it is determined that the effects of an injury have ceased then there is no medical dispute to be referred to an AMS. In *Evans*, the Commission held that a worker was estopped, once it had been determined that the effect of an injury had ceased, from arguing to the contrary for the purposes of a lump sum compensation claim. The respondent submitted that these decisions were distinguishable from *Bindah* and *Jaffarie* on the basis that the later decisions dealt with the respective roles of the Commission and an AMS in regard to the issue of causation. It was submitted that causation was not in issue in the present case. Rather the issue raised by the respondent was whether there was an ongoing injury to be assessed by an AMS.

12. The respondent submitted that Dr Vickery had concluded that the applicant's condition was now in remission and, as such, he had not suffered permanent impairment by reason of a work-related psychological injury. Whilst Dr Vickery agreed that the applicant required ongoing treatment, he found that this treatment was required to prevent a 'relapse' rather than to address an ongoing injury.

13. In accordance with the decisions of the Commission in *Peric* and *Evans*, the respondent submitted that it was appropriate for the matter to be listed for hearing to determine whether there was an ongoing injury to be referred for examination and assessment by an AMS.

Applicant's submissions

14. The applicant submitted that the respondent required leave pursuant to s 289A(4) to raise a liability dispute in the absence of a notice issued pursuant to s 78 of the 1998 Act. The applicant contended that s 321A(2) of the 1998 Act was not enlivened as the respondent had not put liability in dispute.

15. The applicant noted that the respondent continued to pay for the applicant's ongoing treatment and medication. The applicant submitted that Dr Vickery's diagnosis of post-traumatic stress disorder in remission did not mean the applicant did not continue to suffer a work-related primary psychological injury. The applicant said the use of the word "remission" did not indicate that an injury was no longer present. The term "remission" referred to an abatement of symptoms. An injury in remission was still capable of assessment albeit the assessment may be of 0% WPI or that the applicant has not reached maximum medical improvement.

16. The applicant distinguished *Peric* and *Evans* on the basis that the effects of injury had ceased in each of those cases, which was not the case here. Dr Vickery's report did not support the proposition that the effects of injury had ceased and ongoing treatment was still required, indicating the presence of an injury.

17. The applicant submitted that the insurer had accepted that the applicant had suffered injury in accordance with s 4 of the 1987 Act and the present dispute was one categorised as a medical dispute. The applicant submitted that the appropriate course of action was for him to be assessed by an AMS.

FINDINGS AND REASONS

18. The Commission's jurisdiction to deal with a dispute about a claim for lump sum compensation is enlivened pursuant to s 289(3)(c) of the 1998 Act when the person on who the claim is made fails to determine the claim as and when required by the 1998 Act. Further restrictions on when a dispute can be referred to the Commission are set out in s 289A of the 1998 Act. A dispute cannot be referred to the Commission unless it was notified in a statutory notice of dispute or concerns a matter raised in writing between the parties concerning an offer of settlement of a claim for lump sum compensation.

19. None of the matters raised in the Reply were previously notified as disputed by the respondent and therefore require the granting of leave pursuant to s 289A(4) of the 1998 Act. Leave may be granted if the Commission is of the opinion that it is in the interests of justice to do so.

20. The principles to be considered in the exercise of the discretion in s 289A(4) were discussed in *Mateus v Zodune Pty Limited t/as Tempo Cleaning Services*[5]. Amongst other things, Roche DP observed that the merit and substance of the issue that is sought to be raised will be relevant to the exercise of the Commission's discretion.

21. Section 321 of the 1998 Act, to which the respondent refers, was amended by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) to omit subsection (4) and now applies only to disputes other than disputes concerning permanent impairment of an injured worker.

22. The 2018 amending Act inserted s 321A which deals with referral of medical disputes concerning permanent impairment. Section 321A contains a regulation making power with respect to the circumstances in which a medical dispute concerning permanent impairment on an injured worker is authorised, required or not permitted to be referred. To date no such Regulations have been made.

[5] [2007] NSWWCCPD 227.

23. The Registrar is, however, given power to refer matters to an AMS under s 293 of the 1998 Act as follows:

> **"293 Medical assessment**
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> (1) When a dispute referred for determination by the Commission concerns a medical dispute within the meaning of Part 7, the Registrar may (subject to the regulations under section 321A (Referral of medical dispute concerning permanent impairment)) refer the medical dispute for medical assessment under Part 7, and defer determination of the dispute by the Commission pending the outcome of that medical assessment.
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> (2) (Repealed)
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> (3) The Registrar may not refer for assessment:
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> (a) (Repealed)
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> (b) a medical dispute other than a dispute concerning permanent impairment (including hearing loss) of an injured worker, except when dealing with the dispute under Part 5 (Expedited assessment)."

24. The 2018 amending Act also repealed s 65(3) of the 1987 Act, with the effect that there is no longer any requirement for a dispute about permanent impairment to be referred to an AMS before an arbitrator can make a determination as to a worker's entitlement to permanent impairment compensation.

25. The 2018 amendments described above apply to an injury received before the commencement of the amendments, and a claim for compensation made before the commencement of the amendments[6], and are therefore applicable in this case.

26. In *Haroun v Rail Corporation New South Wales*[7] (*Haroun*), the Court of Appeal determined that it was solely within the province of an AMS to determine whether any permanent impairment results from an injury. *Haroun* involved a claim for lump sum compensation only. The arbitrator, by consent, found that the worker suffered an injury and the injury continued to contribute to impairment suffered by the worker. The matter was referred to an AMS for assessment of the degree of permanent impairment. The AMS assessed the permanent impairment to be wholly the result of a previous injury or pre-existing condition. The worker appealed against the AMS assessment, arguing that the AMS was bound to observe the consent findings. Ultimately, the Court of Appeal (Handley AJA, with whom McColl JA and McDougall J agreed) held that the arbitrator had no jurisdiction to make findings that were binding on the AMS or Appeal Panel. The finding made by the arbitrator that the injury continued to contribute to impairment was held not to be conclusive of this issue.

27. The facts in *Peric* and *Evans* were distinguished from *Haroun*. In *Evans*, Snell ADP said at [59],

> "There can be no room for the suggestion, in such circumstances, that an Arbitrator does not have jurisdiction to determine questions such as causation. The Arbitrator clearly had jurisdiction to do this, pursuant to s 105(1) of the 1998 Act. It was necessary that an Arbitrator determine causation, amongst other issues, for the purpose of determining the claims for weekly compensation and medical expenses.

[6] Schedule 6, Part 19L, cl 2 of the 1987 Act.
[7] [2008] NSWCA 192.

> Having decided, as part of this fact-finding exercise, that the effects of injury subsisted for a closed period only, such finding also disposed of the dispute between the parties regarding whether there was a permanent impairment resulting from the injury. There could not be, consistent with the finding on causation. The finding created an issue estoppel that bound the parties. The result was that there could no longer be a dispute, about the degree of permanent impairment resulting from the injury, to be referred to an AMS."

28. Both *Peric* and *Evans* involved claims for compensation other than permanent impairment compensation. In *Greater Taree City Council v Moore*[8]*(Moore)*, Roche DP distinguished *Peric* and *Evans* on the basis that the disputes in those cases involved claims for weekly benefits and medical expenses in addition to lump sum compensation. The Deputy President found in *Moore* that, where the only claim before the arbitrator involved permanent impairment compensation, arbitral jurisdiction was limited to a determination of the issue of injury. It was not open to the arbitrator to find that the effect of an admitted or proven injury had ceased in a permanent impairment claim. The Deputy President said at [99]:

> "This construction is consistent with *Haroun*, where it was held (at [20]) that '[i]f there is a medical dispute of a kind defined in s 326(1) of the 1998 Act, an Arbitrator has no jurisdiction to decide it, but "may refer it for assessment" by an AMS: s 321(1)'. The Court (Handley AJA, McColl JA and McDougall J agreeing) went on to observe that, since the Arbitrator had no jurisdiction to decide the medical dispute, namely, the extent of whole person impairment, he had no jurisdiction to make findings that were binding on an AMS or an Appeal Panel. That the parties agreed that the effects of an injury were continuing did not prevent an AMS from finding that no impairment resulted from that injury. Thus, in the present case, the Arbitrator's finding that Ms Moore suffered only a temporary strain did not bind the AMS in making his finding as to the degree of permanent impairment as a result of the injury."

29. Although the decision of Roche DP in *Jaffarie* was overturned by the Court of Appeal in *Jaffarie v Quality Castings Pty Ltd* [2015] NSWCA 335*,* the Court of Appeal's decision did not turn on the Deputy President's findings as to the interaction between arbitrators and AMSs. In *Jaffarie*, the arbitrator found the worker had sustained a strain to his lower back from which he had recovered. The worker was awarded a closed period of weekly compensation. The arbitrator, having regard to the finding of recovery, declined to refer a claim pursuant to s 66 of the 1987 Act to an AMS (consistent with *Peric* and *Evans*). There was an award for the respondent on the claim for lump sum compensation. The Deputy President observed:

> "…in a claim for lump sum compensation, the physical consequences of the injury (in relation to the assessment of whole person impairment as a result of the injury) are not within the exclusive jurisdiction of the Commission. They are within the exclusive jurisdiction of the AMS. That is so even if the matter also involves a disputed claim for weekly compensation and disputes about causation, which the Commission has determined.
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> …
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> It follows that, since "the nature of the injury" (or the "condition" or "aetiology of the condition") is not a matter on which an assessment in a MAC is conclusively presumed to be correct, the opinions of an AMS on such matters do not bind the Commission. This follows from s 326(2), which states that "[a]s to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings".

[8] [2010] NSWWCCPD 49.

> The absence of any similar provisions for "the nature of the injury" points strongly to the conclusion that "the nature of the injury" is a matter for the Commission to determine. This is consistent with Emmett JA's statement at [111] that it is for the Commission "to determine whether a worker has suffered an injury within the meaning of s 4 of the [1987] Act" and his Honour's later statement (at [118]) that only "certain matters of causation" are within the exclusive jurisdiction of an AMS.
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> …consistent with the reasoning of Meagher JA [in *Bindah*], when the Commission, either by consent or after a contest, has determined the nature of the injury, it is for the AMS to determine the degree of whole person impairment that has resulted from that injury. While it is open to an AMS to determine that no whole person impairment has resulted from the agreed or found injury (*Austin; Haroun*), it is not open to an AMS to find that the worker suffered no injury or has suffered a different injury to that found or agreed'".

30. As indicated above, the statutory framework for dealing with claims for lump sum compensation has changed since these authorities were decided. In particular, permanent impairment disputes are no longer required to be referred to an AMS prior to the Commission awarding permanent impairment compensation. The effect of the amendment is that arbitrators now have a discretion to make a determination as to the entitlement to permanent impairment compensation. Importantly, however, an arbitrator may not *assess* permanent impairment.

31. Subsection 65(1) still provides:

> "(1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act."

32. Subsection 322(1) of Part 7 of Chapter 7 of 1998 Act provides:

> "(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."

33. Under the Guidelines, only a psychiatrist is qualified to assess permanent impairment resulting from a psychological injury.

34. The nature of the injury in this case is not in dispute. As confirmed in the respondent's submissions, only the ongoing effects of that injury are disputed. The present case is not one in which I consider it appropriate to determine the entitlement to permanent impairment compensation as arbitrator. There are divergent assessments from the parties' Independent Medical Examiners impacting on the threshold in s 65A(3). The parties have been unable to reach agreement themselves and there is no obvious basis on which I would reject either Examiner's assessment. I consider this to be a case where it is appropriate for an AMS to assess the degree of permanent impairment.

35. Where a referral is made to an AMS (under s 293 of the 1998 Act), s 326 of the 1998 Act still applies:

> **"326 Status of medical assessments**
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> (1) An assessment certified in a medical assessment certificate pursuant to a medical assessment under this Part is conclusively presumed to be correct as to the following matters in any proceedings before a court or the Commission with which the certificate is concerned:

(a) the degree of permanent impairment of the worker as a result of an injury,

(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,

(c) the nature and extent of loss of hearing suffered by a worker,
(d) whether impairment is permanent,

(e) whether the degree of permanent impairment is fully ascertainable.

(2) As to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings."

36. In my view, the observations in *Haroun, Moore* and *Jaffarie* remain relevant notwithstanding the 2018 amendments. In a case involving lump sum compensation, where a medical dispute concerning permanent impairment is referred to an AMS, the ongoing effects of the injury in relation to the assessment of WPI as a result of the injury are within the exclusive jurisdiction of the AMS. It would not be within the Commission's jurisdiction to make any finding as to whether the effects of the applicant's injury have resolved or are "in remission".

37. For these reasons, I am not satisfied that it is in the interests of justice for leave to be granted to the respondent to rely upon the disputes set out in the Reply. The matter will be remitted to the Registrar for referral to an AMS for assessment of the degree of permanent impairment resulting from the applicant's accepted injury. The Medical Assessment Certificate (MAC) will determine the quantum of the applicant's entitlement to permanent impairment compensation under s 66 of the 1987 Act.

38. The matter will be listed for further teleconference upon receipt of the MAC to deal with the claim for s 67 compensation and costs.

SUMMARY

39. The matter will be remitted to the Registrar for referral to an AMS for assessment of the degree of permanent impairment resulting from the applicant's accepted injury.

40. The matter will be listed for further teleconference upon receipt of the MAC to deal with the claim for s 67 compensation and orders as to costs.