WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2538/19**
Applicant: **Aliasghar Hadipour**
Respondent: **The Bread and Butter Project**
Date of Determination: **11 February 2020**
Citation: **[2020] NSWWCC 41**

The Commission determines:

1. The application for further medical assessment under section 329 of the *Workplace Injury Management and Workers Compensation Act 1998* is refused.

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

Josephine Bamber
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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Aliasghar Hadipour sustained an injury to his lumbar spine on 26 May 2016 during the course of his employment with the respondent, The Bread and Butter Project, when lifting a box of butter. He also claimed that he developed oedema of the left lower extremity from this injury.

2. On 27 May 2019, Mr Hadipour through his then solicitors, Firths, filed an Application to Resolve a Dispute (ARD) in the Workers Compensation Commission seeking lump sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) and weekly compensation. On 17 June 2019 a Reply was filed by the respondent's solicitors.

3. On 24 June 2019, the matter was listed for telephone conference before me. Mr Greg McKean, solicitor from Firths, appeared for Mr Hadipour and Ms Belinda Brown, solicitor from Gillis Delaney Lawyers appeared for the respondent. The parties agreed for the lump sum claim to be referred to an Approved Medical Specialist (AMS) for assessment of the permanent impairment suffered by Mr Hadipour. Accordingly, the Commission issued a Certificate of Determination- Consent Orders that day as follows:

> "By and with the consent of the parties, the determination of the Commission in this matter is as follows:
>
> 1. The lump sum claim is remitted to the Registrar for referral to an AMS to assess permanent impairment as follows:
>
>   a. Date of injury: 26 May 2016
>   b. Body parts: Lumbar spine and left lower extremity (vascular oedema)
>
> 2. The documents to be referred to the AMS are to include the ARD, and Reply.
>
> 3. The matter is to be listed for telephone conference after the AMS assessment to deal with the outstanding claim for weekly compensation."

4. On 26 June 2019, a Referral for Assessment of Permanent Impairment to Approved Medical Specialist was issued by a delegate of the Registrar appointing AMS Dr Mark Burns to conduct the assessment of the lumbar spine and left lower extremity.

5. In accordance with the usual practice of the Commission, a copy of this referral was forwarded by email to Mr Hadipour's solicitors and also to the respondent's solicitors on 26 June 2019 at "2:43:30PM". Also, a Persian- Farsi interpreter was arranged for the AMS appointment.

6. On 17 July 2019, AMS Dr Burns issued his Medical Assessment Certificate assessing the degree of permanent impairment of Mr Hadipour from the injury on 26 May 2016. He found 13% whole person impairment (WPI) for the lumbar spine and 0% WPI for the left lower extremity.

7. On 17 July 2019, a telephone conference was booked by the Commission and notification was sent to both parties' legal representatives that the telephone conference would take place on 23 August 2019.

8. On 14 August 2019, the Commission received an email from Hayley Song, solicitor from Benefit Legal Lawyers, advising that Mr Hadipour had changed his legal representation to that firm.

9. On 14 August 2019, an Application to Appeal Against Decision of Approved Medical Specialist was filed in the Commission by Ms Esther Ihn, solicitor from Benefit Legal Lawyers. The accompanying submissions stated that the Appeal was made under sections 327(3)(c) and 327(3)(d) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The submissions only dealt with the assessment of the left lower extremity.

10. As the Appeal had been filed, the telephone conference scheduled to take place on 23 August 2019 before me, to deal with the outstanding weekly compensation claim, was cancelled.

11. On 4 September 2019, a Notice of Opposition to Appeal Against Decision of Approved Medical Specialist was filed by the respondent's solicitors.

12. On 23 September 2019, the Delegate of the Registrar Ms Camp issued a Direction noting there appeared to be paragraphs missing from Mr Hadipour's Appeal and directing the same be filed.

13. On 23 September 2019, Ms Ihn emailed Ms Camp and the respondent's solicitors that there were no submissions missing and that the submissions were numbered paragraph 1.18 and then 2.5.

14. On 24 September 2019, the Delegate of the Registrar Ms Camp issued a Decision permitting the Appeal to proceed.

15. A Medical Appeal Panel was convened with Arbitrator Catherine McDonald, AMS Dr David Crocker and AMS Dr Gregory McGroder. On 31 October 2019 the Medical Appeal Panel issued its Statement of Reasons for Decision of the Appeal Panel in Relation to a Medical Dispute and confirmed the Medical Assessment Certificate issued by AMS Dr Burns.

16. On 31 October 2019, Ms Ihn forwarded a letter to Ms Camp seeking a further medical assessment under section 329 of the 1998 Act.

17. On 1 November 2019, Ms Camp acting as Delegate of the Registrar issued a Direction noting the application filed on 31 October 2019 relied on a report of Dr Anthony Greenberg dated 28 October 2019, but that it was not attached to the letter. Directions were made regarding the filing of this report and for the respondent to file and serve a response in reply by 13 November 2019.

18. On 6 November 2019, Ms Ihn filed a copy of Dr Greenberg's report.

19. On 13 November 2019, Ms Brown filed a copy of the respondent's submissions in response.

20. On 26 November 2019, a telephone conference was held by me. Ms Ihn appeared on behalf of Mr Hadipour and Ms Brown for the respondent. The claim for weekly compensation was not able to be resolved and so was listed for Conciliation/Arbitration hearing before me on 21 January 2020. I was informed about the application of 31 October 2019 and the subsequent correspondence. I advised the parties I would obtain copies of the same and determine that application on the papers.

21. On 21 January 2020, Mr Hadipour was represented by Mr Simon Grey, counsel, instructed by Ms Ihn and Ms Brown appeared for the respondent. Mr Hadipour attended in a wheelchair and a Persian interpreter was present. The weekly compensation claim was settled in conciliation. Mr Grey asked for me to consider written submissions he had prepared dated 21 January 2020 in relation to the Application for further medical assessment. I agreed to do so and made an oral direction for the respondent to file any further submissions in response by 31 January 2020.

22. On 31 January 2020, the respondent's further submissions in reply were filed.

FINDINGS AND REASONS

23. I am satisfied that I have sufficient information for the parties to determine this application "on the papers".

Relevant legislative provisions

24. Section 66 of the 1987 Act relevantly 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 …".

25. The following sections of the 1998 Act have relevance to this matter:

> "**322A One assessment only of degree of permanent impairment**
>
> (1) Only one assessment may be made of the degree of permanent impairment of an injured worker.
>
> (1A) A reference in subsection (1) to an assessment includes an assessment of the degree of permanent impairment made by the Commission in the course of the determination of a dispute about the degree of the impairment that is not the subject of a referral under this Part.
>
> (2) The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).
>
> (3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of assessment and a medical assessment certificate under this Part.

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

"**326 Status of medical assessments**

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

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

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

(c) the nature and extent of loss of hearing suffered by a worker,

(d) whether impairment is permanent,

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

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

"**327 Appeal against medical assessment**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) a court or the Commission.

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

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

Application

26. The letter dated 31 October 2019 states that "The worker seeks the Commission refer the matter for further medical assessment as provided by s329 of the 1998 Act".

27. It is stated that the worker seeks to rely upon the report of Dr Anthony Greenberg, gastroenterologist dated 28 October 2019 and the gastrointestinal endoscopy report of 3 September 2019 of Dr Elke Wiseman, gastroenterologist.

28. It is submitted that Dr Greenberg's opinion supports the proposition that Mr Hadipour has gastrointestinal reflux disease and colonic dysfunction that are consequential to the work-related lumbar spine injury. It is noted that Dr Greenberg assesses 4% WPI for these gastrointestinal conditions.

29. It is also submitted that Mr Hadipour was not aware when he first instructed Benefit Legal Lawyers on 14 August 2019 that his gastrointestinal injuries were causally linked at law to the lumbar injury, and that he may be entitled to compensation for the same. I pause to note that there has been no statement filed by Mr Hadipour in this Application and that solicitors should not make assertions in submissions concerning matters that are not in evidence before the Commission.

30. The solicitor also states that after the examination by AMS Dr Burns and the issue of his MAC on 17 July 2019, Mr Hadipour's gastrointestinal injury became increasingly symptomatic to the point where he was referred by his GP to Dr Wiseman, gastroenterologist and underwent and endoscopy under her care on 3 September 2019 as well as presenting to the Emergency Department of Ryde Hospital on 4 September 2019 with abdominal pain". This information also should have been dealt with in a statement from Mr Hadipour. The Commission does not have before it any records from Ryde Hospital nor from Dr Wiseman.

31. The solicitor advises that they arranged for Mr Hadipour to be seen by Dr Greenberg.

32. It is submitted that to deny the worker this referral would offend procedural fairness. It is submitted that procedural fairness to the respondent can be given by allowing it to investigate the gastrointestinal injury including having the worker examined.

33. The submissions then refer to section 322A of the 1998 Act and it is submitted that the MAC of AMS Dr Burns was not given in connection with the "injury concerned" as referred to in section 322A(2). It is also submitted that the gastrointestinal injuries diagnosed by Dr Greenberg, while consequential to the lumbar injury by virtue of Mr Hadipour's medication regime, do not represent *an injury* under section 4 of the 1987 Act because they are distinct from the lumbar spine injury and are not an aggravation of the lumbar spine.

34. These submissions show a fundamental lack of understanding of how consequential conditions have been treated in numerous Presidential decisions of the Commission. In cases such as *Kumar v Royal Comfort Bedding Pty Ltd*[1] Roche DP explained at [35] that it is not necessary for a worker to prove an injury under section 4 of the 1987 Act when seeking to prove the existence of a consequential condition from a work-place injury. As stated in *Kumar* at [36], the legal test to be applied is one of causation such as discussed in cases such as *Kooragang Cement Pty Ltd v Bates*[2]*.*

35. A worker is entitled to have his injury assessed for permanent impairment and this includes assessment of conditions that are a result of the injury, or as often termed "consequential conditions". However, since the 2012 legislative amendments there is a restriction to having only one assessment of the degree of permanent impairment.

36. Furthermore, the interpretation of section 322A is not as contended by Ms Ihn. It is quite clear section 322A(1) permits only one assessment of the degree of permanent impairment of an injured worker. Section 322(1A) is also clear in its meaning. It does not matter that a body part was not assessed (because it was not part of the referral for assessment), it is still caught by sub-section (1). So, section 322A(2) does not permit Mr Hadipour to have his gastrointestinal symptoms referred for assessment. He has had his one assessment.

37. Section 322A(3) applies to Mr Hadipour's case because he has had his degree of permanent impairment assessed and a medical assessment certificate has been issued. The reference in that sub-section "*about that matter*" refers a medical dispute about the degree of permanent impairment of a worker *as a "result of the injury"*. The gastrointestinal condition is contended by Mr Hadipour to be as a result of the injury to the lumbar spine on 26 May 2016. The section does not enable a body system as a result of the injury, that was not assessed, to be subsequently assessed.

38. The next ground raised in the application is that section 322A does not preclude the filing of a further appeal of the MAC of 17 July 2016. This is also a misguided submission. Quite simply the AMS assessed those matters referred to him, being the lumbar spine and the left lower extremity. Mr Hadipour has exercised his right to appeal the assessment of those body parts and was unsuccessful. It is argued in his application he can file a further appeal of the MAC relying on section 327(3)(b), the availability of additional relevant information. However, this can only be additional relevant information in relation to the body parts assessed by the AMS.

39. Logically, a worker cannot successfully argue in an appeal that the AMS erred by not assessing a body system that was not referred to him. The respondent's submissions, referred to below, elaborate further on this aspect of Mr Hadipour's submissions.

---

[1] [2012] NSWWCCPD 8, *Kumar*
[2] (1994) 35 NSWLR 452, *Kooragang*

Respondent's submissions

40. In the respondent's submissions dated 13 November 2019 it was noted that the claim for lump sum compensation made by Mr Hadipour was based on the assessment by Dr Patrick in his report dated 22 January 2018. The respondent refers to the history taken by Dr Patrick that Mr Hadipour takes various medication for pain and uses antacids and Gaviscon to control stomach upset. The respondent submits based upon this history to Dr Patrick, the assertion made in the application that Mr Hadipour did not know his gastrointestinal injuries were causally linked to the lumbar injury, is not correct. However, this is not what the submission in the application stated, it was submitted that Mr Hadipour did not understand "at law" of this connection and that he could get compensation for the same. However, as I stated above a solicitor should not seek for factual findings to be made by the Commission from assertions in submissions, without actual evidence.

41. The respondent makes this point at [15] of its submission in relation to the assertion about the attendance on Ryde Hospital and Dr Wiseman. At [17] the respondent also submits that Mr Hadipour has not provided a statement of evidence about a sudden increase in symptoms.

42. The respondent also challenges the submission that a report from Dr Greenberg could not have been obtained earlier, because Dr Patrick in his report mentioned the presence of gastrointestinal symptoms and that Mr Hadipour was represented by experienced solicitors, who commissioned this report. I accept this submission has force.

43. The respondent submits the attempt to bring an appeal under section 327 cannot succeed and relies on the decision of Roche AP in *O'Callaghan v Energy World Corporation Limited* [3]. Those submissions set out the passages at [72], [83] and [86] from *O'Callaghan,* which are pertinent to Mr Hadipour's matter.

44. In *O'Callaghan* the worker only made a claim for lump sum compensation for the lumbar spine. He did not make a claim for the cervical spine. Accordingly, the referral to the AMS was only in relation to the lumbar spine. However, subsequently the worker tried to use section 327(3)(a) of the 1998 Act to have an assessment of the cervical spine. As Roche DP found at [72]:

> "As Dr Ho was not asked to do so, it was not open to him to assess any other body part (*Aircons*). It follows that it is not open to use s 327(3)(a) to appeal against an assessment that Dr Ho did not make, that is, an assessment of whole person impairment as a result of injury to the cervical spine. As the respondent submitted, s327 does not contemplate a situation where a worker can continue to bring claims, under the guise of an appeal, for a deterioration in respect of parts of the body that were not previously the subject of a dispute or an assessment by an AMS."

45. At [83] Roche DP also stated:

> "The critical point is that a s 327(3)(a) appeal is an appeal against the AMS's "medical assessment". In the present case, the AMS made no assessment of Ms O'Callaghan's cervical spine and, consistent with the authorities applied by the Arbitrator, which are binding on the Commission, there can be no medical appeal with respect to something that the AMS did not assess."

[3] [2016] NSWWCCPD 1

46. The respondent also submits that Mr Hadipour's submissions overlook the provision in section 66(1A) of the 1987, Act which allows for only one claim to be made for permanent impairment compensation. The respondent submits that Mr Hadipour has made his one claim in the letter from Firths dated 23 July 2018[4]. The respondent relies upon the decision of Snell DP in *Singh v B & E Poultry Holdings Pty Ltd*[5]*.* While the facts in *Singh* differ to Mr Hadipour's case, there is similarity in that he has made his one claim for permanent impairment and he has had that claim assessed by AMS.

Mr Hadipour submissions dated 21 January 2020 and respondent's response.

47. These submissions were prepared by Mr Grey, Mr Hadipour's counsel. I do not find these submissions to be persuasive. Counsel refers to section 329 of the 1998 Act and to the decision by Malpass AsJ in *Read v Liverpool City Council* [6] and to Roche DP's discussion of section 329 in *Milosavljevic v Medina Property Services Pty Ltd*[7]*.* Firstly, I find caution must be used relying on cases dealing with the legalisation before the 2012 amendments. *Read* was decided in 2007 and *Milosavljevic* in 2008. Secondly, those cases have been more recently considered by Roche DP in *O'Callaghan* and by Snell DP in *Singh.*

48. Roche DP at [87] in *O'Callaghan* expressed a view that "it is difficult to see how the reconsideration power in s329 can work with s322A, which appears to be the dominant provision." He added at [88] and [89]:

> "… [Section 322A] was introduced as part of a range of measures introduced in the *Workers Compensation Legislation Amendment Act* 2012 [2012 Amending Act], which were designed to reduce benefits for permanent impairment compensation. It works in concert with s 66(1A) of the 1987 Act, introduced at the same time, which restricts a worker to only one claim under the 1987 Act for permanent impairment compensation in respect of the permanent impairment that results from an injury.
>
> Consistent with a worker now having the right to make only one claim for permanent impairment compensation, only one assessment may be made of the degree of permanent impairment of an injured worker (s 322A(1))."

49. Snell DP stated at [56] in *Singh*,

> "The 'context' of the legislation, given the introduction by the 2012 Amending Act of s 66(1A) of the 1987 Act and s 322A of the 1998 Act, plainly includes consistency with the scheme of those provisions. The application of the discretion in s 329, in the way for which the appellant argues, is inconsistent with the statutory scheme. It follows, for this further reason, that reconsideration of the MAC, pursuant to s 329, would not have been available."

50. The second argument made by counsel in these submissions is that the dictates of justice require a further assessment. The respondent in its further submissions submits that the "discretion in Section 329 is to be exercised in limited cases and where it is in the interests of justice to do so". But disputes that Mr Hadipour's Application is such a case.

51. This is not a case of a deterioration of a body system that was assessed by an AMS and has deteriorated before the Commission has finalised the matter. There may be grounds in such a case to refer the matter back to the AMS. However, in Mr Hadipour's case there was no claim made to the respondent for the gastrointestinal body system, nor is it claimed in the ARD and, at no stage, has there been an application to amend the claim or the ARD. The evidence from Dr Patrick suggests there may have been gastrointestinal problems in 2018 before the lump sum claim was made.

---

[4] ARD page 170
[5] [2018] NSWWCCPD 52, *Singh*
[6] [2007] NSWSC 320, *Read*
[7] [2008] NSWWCCPD 56, *Milosavljevic*

52. Counsel also submits that the Appeal of the MAC "was not reasonably capable of being cast so as to include the gastrointestinal injury" and lists three reasons. But this overlooks the obvious point that there never could have been an Appeal of the MAC in relation to the gastrointestinal system, because there had been no claim for gastrointestinal condition, thus no referral to the AMS for the same, and therefore, simply, the AMS did not err in assessing something not referred to him.

53. The points raised by counsel about lack of prejudice to the respondent were challenged by the respondent in its initial submissions. However, prejudice or the lack thereof is not relevant to the application of sections 66(1A) and 322A.

54. In relation to paragraph 18 of the applicant's further submissions the respondent submits this is a case where the applicant is seeking a more favourable result to remedy an ill-timed AMS assessment and the request for reconsideration is, in the respondent's submission, a clear attempt to circumvent the restrictions in Section 66(1A) and Section 322A. I find these submissions have merit.

55. Doubt has been expressed in *O'Callaghan* and *Singh* regarding the role now played by section 329 in the workers compensation legislation since the 2012 amendments and introduction of sections 322A and 66(1A). Even if section 329 can be utilised, I find that a discretion to do so would only be exercised in an extraordinary case. I am not persuaded this is such a case. The 2012 amendments were introduced to stop multiple lump sum claims being made. Workers and their legal representatives need to ensure when a lump sum claim is made that it deals with all body systems arising as a result of the injury. As the respondent submitted Dr Patrick in 2018 took a history about gastrointestinal symptoms.

56. In relation to paragraph 13 of the applicant's further submissions, the respondent notes that mistake or inadvertence on the part of legal advisors is an insufficient ground to exercise the discretion for reconsideration: *Hurst v Goodyear Tyre & Rubber Co (Australia) Limited*[8]. I accept this principle and find that there needs to be finality to litigation.

57. However, for the reasons discussed previously I find the applicant cannot obtain a further medical assessment, being precluded by the provisions of Section 322A of the 1998 Act and Section 66(1A) of the 1987 Act.

58. Therefore, the application is refused.

[8] [1953] 27 WCR (NSW) 29 at 30.