# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** **6183/20**
**Applicant:** **Alison Austin**
**Respondent:** **State of New South Wales (Sydney Children's Hospital)**
**Date of Determination:** **21 December 2020**
**Citation No:** **[2020] NSWWCC 420**

The Commission determines:

1. There is a medical dispute within the meaning of s 319 of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Commission orders:

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

| | |
|---|---|
| Date of injury: | 9 February 2016 (deemed) |
| Body parts: | Left upper extremity<br>Right upper extremity |
| Method: | Whole Person Impairment |

2. The materials to be referred to the Approved Medical Specialist are to include the Application to Resolve a Dispute and all attachments, the Reply and all attachments and this Certificate of Determination and accompanying Statement of Reasons.

A 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.

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Lucy Golic
Acting Senior Dispute Services Officer
**As delegate of the Registrar**

# STATEMENT OF REASONS

## BACKGROUND

1. Ms Alison Austin (the applicant) was employed as a paediatric vision screener by the Sydney Children's Hospital (the respondent).

2. The applicant claims that she suffered an injury to her hands and wrists due to the nature and conditions of her employment with the respondent when the applicant was required to repetitively enter data into a computer in a poorly set up home-based workstation.

3. Liability for the applicant's injury was initially disputed by notices issued pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 14 June 2016 and 23 December 2016.

4. On 27 July 2018, the applicant made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act), relying on an assessment of 48% whole person impairment (WPI) made by Dr Min Fee Lai in a report dated 12 June 2018. The claim for lump sum compensation was disputed in a notice issued pursuant to s 74 of the 1998 Act on 7 December 2018. That decision was maintained following an internal review on 9 October 2019.

5. On 25 November 2019, Associate Professor Allan Meares prepared a medicolegal report for the respondent's insurer in which he assessed the applicant as having 69% WPI of the right and left upper extremities.

6. Notwithstanding A/Prof Meares' assessment, a further dispute notice was issued on 7 February 2020 in which the decision to dispute liability to pay lump sum compensation was maintained. The notice identified a number of issues with respect to the history and examination taken by A/Prof Meares noting, amongst other things, that the applicant had arrived at the examination with abdominal pain and had been vomiting. The applicant held a bag during the examination in case she needed to vomit again. The applicant was advised to attend the Emergency Department but wished to proceed with the examination, which occurred with some difficulty. The applicant felt cold and sweaty at times and was nauseous during the examination. The notice stated:

> "Following the examination, A/Prof Meares diagnoses you with bilateral Complex Regional Pain Syndrome. We say that the opinion and the examination and resultant assessment of your degree of permanent impairment, cannot be accepted given your presentation on the day.
>
> We are unable to accept the opinion of A/Prof Meares, for the reasons explained above. In addition to the above, we say that your degree of permanent impairment is not stable and therefore not ascertainable."

7. On 6 May 2020, the applicant made a further claim for lump sum compensation in respect of 69% WPI, relying on the report of A/Prof Meares, as well as a claim for weekly compensation. A further dispute notice was issued on 26 May 2020. In that notice, the respondent's insurer adhered to the previous dispute notices stating:

> "For reasons explained in the previous dispute notices, we do not accept the opinion of A/Prof Meares. Therefore, our opinion as outlined in those notices has not altered. We continue to dispute liability for your condition.
>
> Further, we continue to say that your degree of permanent impairment is not fully ascertainable."

8. On 23 October 2020, the applicant lodged an Application to Resolve a Dispute (ARD) in the Commission seeking lump sum compensation for 69% WPI and weekly benefits from 9 February 2016 onwards.

## PROCEDURE BEFORE THE COMMISSION

9. The matter proceeded to teleconference on 23 November 2020 at which the legal representatives for the respondent informed me that liability for the injury had been conceded and agreement reached with respect to the claim for weekly compensation. The respondent offered to pay lump sum compensation in respect of 48% WPI in accordance with the assessment of Dr Lai. The applicant rejected the offer with respect to the lump sum claim and made a counter offer which was not accepted by the respondent. Neither party was willing to make a further offer.

10. The respondent's representatives submitted that in the absence of agreement the medical dispute as to the degree of permanent impairment resulting from injury should be referred to an Approved Medical Specialist (AMS) for assessment. The applicant did not agree to this course arguing that there was no medical dispute. The applicant relied on the assessment by the respondent's medicolegal expert and submitted that in the absence of a competing assessment, the matter should be determined by me as arbitrator consistently with the arbitral decision in *Kato v City of Sydney*[1].

11. The parties were directed to file written submissions the question of whether there was a medical dispute in respect of the claim for lump sum compensation for the purposes of s 319 of the 1998 Act and the further conduct of the proceedings. The parties were invited to consider the arbitral decision of *Sharman v Chemtools*[2] in doing so.

12. I am satisfied for the purposes of s 355(1) of the 1998 Act that I have used my best endeavours to bring the parties to the dispute to a settlement acceptable to all of them. The parties were unable to reach agreement. The parties were informed of my intention to determine the issue above without holding a further conciliation conference or arbitration hearing.

## ISSUE FOR DETERMINATION

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

    (a) whether there is a medical dispute in respect of the claim for lump sum compensation for the purposes of s 319 of the 1998 Act.

## EVIDENCE

### Documentary Evidence

14. 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 attachments;

    (c) Written submissions lodged by the applicant on 2 December 2020; and

    (d) Written submissions lodged by the respondent on 11 December 2020.

[1] [2019] NSWWCC 288.
[2] [2020] NSWWCC 237.

**Applicant's submissions**

15. The applicant relies on written submissions prepared by Mr Andrew Parker of counsel, dated 30 November 2020.

16. The applicant notes that the report of Dr Lai, on which the respondent's offer of settlement was based was prepared over two years ago. The report of A/Prof Meares was commissioned by the respondent and dated 23 November 2019.

17. The applicant says there is no dispute as to the degree of permanent impairment. There was no suggestion that the respondent relied on the report of Dr Lai or that a different level of WPI was warranted. In the absence of a dispute or an application pursuant to s 289A(4) of the 1998 Act there was simply no dispute before the Commission. The only notified dispute, relating to injury, had been abandoned at the teleconference.

18. The applicant submitted that to refer the matter to an AMS would, in the circumstances, amount to a denial of procedural fairness.

19. The applicant submitted that the applicant had been assessed by the respondent and it had not sought to commission a further export report, nor cavil with the assessment of A/Prof Meares. There was no medical basis to cavil with its own expert.

20. The applicant noted that the common law routinely recognised that an examination without consent constitutes a physical assault. The applicant did not consent to further examination and should not be put to the time, expense or physical requirements of further assessment. Nor should the workers compensation system have to fund the same.

21. Th applicant referred to six matters where arbitrators of the Commission had determined the degree of permanent impairment.

22. The applicant submitted that the applicant should be assessed as having 69% WPI or in the alternative the matter should be referred for conciliation arbitration to enable a further opportunity for conciliation or, if agreement is not reached, arbitration of the issue.

**Respondent's submissions**

23. The respondent relies on written submissions prepared by Ms Emily Angwin, legal practitioner, dated 11 December 2020.

24. The respondent referred to the content of its dispute notices and said it disputed liability in relation to the degree of permanent impairment suffered by the applicant for the reasons set out in the notices.

25. The respondent referred to the definition of a 'medical dispute' in s 319 of the 1998 Act and noted that it included the worker's condition, the degree of permanent impairment of a worker as a result of injury and whether the degree of permanent impairment is fully ascertainable.

26. The respondent said a medical dispute had clearly been raised in the dispute notices. The medical dispute was maintained despite the concession as to liability for the injury.

27. The respondent referred to the decision in *Sharman v Chemtools*[3] where it was found that there was a medical dispute in the absence of an assessment of WPI. The arbitrator noted that the Commission had power to determine permanent impairment but elected not to exercise that power and instead referred the matter to an AMS.

[3] [2020] NSWWCC 237.

28. Given the complexity of the matter, including but not limited to the issues as to diagnosis, the nature of the injury, the differences in the medical opinions and assessments of permanent impairment, the time which had elapsed since Dr Lai's assessment and the applicant's presentation on the day of the assessment with A/Prof Meares, the respondent submitted that it was not appropriate in the circumstances for the claim to be determined by an arbitrator.

## FINDINGS AND REASONS

### Medical dispute

29. Section 321A of the 1998 Act was inserted by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) and contains a regulation making power with respect to the circumstances in which a "medical dispute concerning permanent impairment" of an injured worker is authorised, required or not permitted to be referred. To date no such Regulations have been made.

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

> **"293 Medical assessment**
>
> (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.
>
> (2) (Repealed)
>
> (3) The Registrar may not refer for assessment:
>
> (a) (Repealed)
> (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)."

31. The 2018 amending Act 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.

32. 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[4], and are therefore applicable in this case.

33. The expression "medical dispute" is defined in s 319 of the 1998 Act as:

> "'medical dispute' means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim—
>
> (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),

[4] Schedule 6, Part 19L, cl 2 of the 1987 Act.

(b) the worker's fitness for employment,
(c) the degree of permanent impairment of the worker as a result of an injury,
(d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
(e) the nature and extent of loss of hearing suffered by a worker,
(f) whether impairment is permanent,
(g) whether the degree of permanent impairment of the injured worker is fully ascertainable."

34. The submissions in this case raise the question of whether there is any medical dispute capable of being referred to an AMS. The applicant has submitted that a referral to an AMS in the absence of a medical dispute would constitute a denial of procedural fairness. The legislative framework referred to above, however, indicates that in the absence of a medical dispute there would be no power for the Commission or the Registrar to refer the matter to an AMS for assessment.

35. The applicant has submitted that no dispute as to the degree of permanent impairment has been raised by the respondent. The applicant's submissions do not, however, address the dispute notices of 7 February 2020 and 6 May 2020 in which the respondent's insurer notified the applicant that the examination and resultant assessment of the degree of permanent impairment made by A/Prof Meares were not accepted for reasons which were explained. The applicant was also notified that the respondent considered that the applicant's degree of permanent impairment was not stable and therefore not ascertainable. On the face of these notices, disputes falling within ss 319(c) and (g) appear to have been raised.

36. The applicant's submissions suggest, however, that a dispute could not properly be raised unless there was medical evidence that a different level of WPI was warranted. The respondent had not indicated that it relied on Dr Lai's assessment or sought to commission further export report. There was no medical basis on which to cavil with its own expert's assessment.

37. In *Sharman v Chemtools*[5] the arbitrator found that a similar submission required words to be read into s 319 to limit the concept of a 'dispute'. Referring to the test articulated in *Taylor v The Owners Strata Plan No 11564*[6] as applied in the contexts of the 1987 Act and the 1998 Act in *State of NSW v Chapman-Davis*[7] and *Cram Fluid Power Pty Ltd v Green*[8], the arbitrator found no basis to read in the words required to give s 319 the meaning advocated by the applicant.

38. Subsection 65(1) of the 1987 Act 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."

39. 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."

[5] [2020] NSWWCC 237.
[6] [2014] HCA 9 at [38].
[7] [2016] NSWCA 237 at [1] and [49].
[8] [2015] NSWCA 250 at [1], [12], [88] and [131].

40. Within this framework, whilst it is necessary, in order for an applicant to be entitled to compensation under s 66 of the 1987 Act to have an assessment of permanent impairment made in accordance with the Guidelines, I can find nothing in the statutory framework to support the conclusion that it is not open for an employer or their insurer to "dispute" an assessment of the degree of permanent impairment in the absence of a competing assessment.

41. The respondent has in this case articulated a number of reasons why the assessment of A/Prof Meares was not accepted. In the circumstances of this case, where the assessment involved consideration of whether the applicant had signs and symptoms of Complex Regional Pain Syndrome (CRPS), changes in skin temperature and sweating due to applicant's acute abdominal issues on the day of assessment had the potential to interfere with A/Prof Meares' examination and assessment. A/Prof Meares had suggested that the examination should be terminated to enable the applicant to go to the Emergency Department but the applicant was reluctant to do this and wished to proceed as she had travelled a long distance in order to be examined. Without expressing any opinion on whether the assessment was compromised by the applicant's other medical issues, I do accept that there was proper basis on which to dispute the assessment of the degree of permanent impairment of A/Prof Meares on which the applicant now relies.

42. I have given consideration to the cases to which the applicant has referred. The decision in *Kato v City of Sydney*[9] can be distinguished on the facts on the basis that in that case, not only was there no competing assessment of WPI from the respondent, there was no dispute notice nor any application or submissions made by the respondent in the Commission proceedings seeking to raise a dispute as to the degree of permanent impairment.

43. In the other cases to which I have been referred, there was a medical dispute but the arbitrators exercised the discretion to determine the matter without a referral to an AMS.

44. For the reasons given above, I am satisfied that there is, in this case, a dispute between the applicant and the respondent as to the degree of permanent impairment as a result of the injury. I am satisfied that there is a medical dispute as defined in s 319(c) of the 1998 Act capable of being referred to an AMS by the Registrar.

45. The next question is whether it is appropriate to remit the matter to the Registrar for that purpose or whether a determination as to the degree of permanent impairment should be made by me as arbitrator.

**Exercise of the Commission's discretion**

46. There are before me two assessments of the degree of permanent impairment resulting from the applicant's injury that comply with the Guidelines. Neither party has sought now to rely on the assessment of Dr Lai. It is noted by the applicant that Dr Lai's assessment is now more than two and a half years old.

47. Although commissioned by the respondent, the applicant relies on the assessment of A/Prof Meares dated 25 November 2019. The respondent does not rely on any competing assessment of WPI.

48. The applicant has put forward a number of circumstances weighing in favour of a determination of the degree of permanent impairment based on A/Prof Meares' assessment including her lack of consent to a referral to an AMS, as well as the time, expense and physical requirements of a further assessment.

[9] [2019] NSWWCC 288.

49. The respondent has identified a number of reasons why that course would not be appropriate including, the complexity of the matter, the different assessments of permanent impairment, the time which has elapsed since Dr Lai's assessment and the applicant's presentation on the day of the assessment with A/Prof Meares.

50. I have weighed these competing considerations in determining how to exercise my discretion and have determined to remit the matter to the Registrar for referral to an AMS for an assessment of the degree of permanent impairment.

51. The concerns raised by the respondent with respect to the applicant's presentation at the time of A/Prof Meares' assessment do raise questions as to whether it was appropriate for the assessment to proceed and whether the assessment may have been compromised by the applicant's non-work related symptoms. A/Prof Meares has himself indicated that the applicant's condition made his examination difficult.

52. A/Prof Meares' assessment of 69% WPI was significantly higher than Dr Lai's assessment of 48% WPI. Whilst a deterioration of the applicant's condition as a result of the work injury in the intervening period may properly account for the difference, there is some question as to whether the circumstances referred to above could account, at least to some degree, for the discrepancy.

53. The applicant's concerns with regard to the additional time, expense and physical requirements of a further assessment are also valid, and I can sympathise with her unwillingness to undergo further assessment in circumstances where the assessment by the respondent's expert was more favourable than the assessment performed at her request. I also note the significant delay in her claim being resolved in her favour.

54. Nonetheless, for the reasons given above, I am not satisfied that it is appropriate to determine the applicant's entitlement to lump sum compensation based upon either of the assessments before me. I have determined to remit the matter to the Registrar for referral to an AMS for assessment.

55. In making this determination I have taken into account the applicant's request for a further opportunity for conciliation and, if necessary, arbitration. The parties were given a proper opportunity to reach agreement at the teleconference on 23 November 2020 and despite my best efforts were unable to do so. Both parties were legally represented and offers for settlement were exchanged. Each party has been given a proper opportunity, both orally at teleconference and in writing to make submissions on the issues relevant to the present determination. Section 354 of the 1998 Act does not require proceedings to be conducted by formal hearing in the Commission. In the circumstances, I decline to fix the matter for further conciliation and arbitration.

56. It remains open to the parties to consider their positions informally. If agreement is reached, consent orders may be lodged prior to a Medical Assessment Certificate being issued.

**SUMMARY**

57. The Commission determines:

    (a) There is a medical dispute within the meaning of s 319 of the 1998 Act.

58. The Commission orders:

(a) The matter is remitted to the Registrar for referral to an AMS for assessment as follows:

| | |
|---|---|
| Date of injury: | 9 February 2016 (deemed) |
| Body parts: | Left upper extremity<br>Right upper extremity |
| Method: | Whole Person Impairment |

(b) The materials to be referred to the AMS are to include the Application to Resolve a Dispute and all attachments, the Reply and all attachments and this Certificate of Determination and accompanying Statement of Reasons.