WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **883/19**
Applicant: **Akram Mikhail**
Respondent: **Universal Anodisers Pty Ltd**
Date of Determination: **22 October 2019**
Citation: **[2019] NSWWCC 346**

The Commission determines:

1. The Application for Reconsideration is declined.

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

Michael Wright
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 MICHAEL WRIGHT, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

1. This is an application by Mr Akram Mikhail, the applicant, to reconsider and rescind a Certificate of Determination dated 23 May 2019 (the COD) pursuant to section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

2. For the reasons given below, I decline to reconsider this matter.

Background

3. An Application to Resolve a Dispute (ARD) was lodged by the applicant worker and the ARD was registered by the Commission on 25 February 2019 with matter number 883/19. The ARD claimed lump sum compensation where the degree of permanent impairment was in dispute in respect of injury to the lumbar spine on 5 August 2014, with a claimed whole person impairment (WPI) of 15%.

4. The Reply was received by the Commission on 15 March 2019. The Reply at Part 3 confirmed the matters in dispute as per the dispute notice attached to the ARD.

5. However, the Reply also attached a section 78 notice dated 14 March 2019. This notice post-dated the registration of the ARD. The Reply also sought a telephone conference "for the purposes of ascertaining whether there is to be a further surgery".

6. The section 78 notice dated 14 March 2019 (the section 78 notice), issued by the respondent, disputed whether the level of WPI was fully ascertainable "to your accepted lumbar spine" and whether maximum medical improvement (MMI) had been reached; and whether the applicant was entitled to any compensation pursuant to section 66 and whether he met the relevant section 66 threshold entitling him to lump sum compensation.

7. The section 78 notice stated:

> "Subsequently, you have seen Dr Raoul Pope with a report issued 22 January 2019 regarding treatment in the form of a 'discal nerve block' on your accepted lumbar spine injury and as Dr Raoul Pope has noted, there may be a further treatment in the form of a spinal fusion surgery required. As such, we dispute that you have reached maximum medical improvement.
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> …
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> In order to be assessed, you must have reached a state of maximum medical improvement. Both independent medical examiners, Dr J Brian Stephenson and Dr Richard Powell, at the time of their assessments, noted that you had reached this status.
>
> However, you have been referred by D Mohammed Abdul Mannion, dating: 15 January 2019 to seek a second opinion regarding a 'FUSION operation'. Moreover, you have subsequently sought further treatment in respect of your accepted lumbar spine in the form of guided nerve blocks.
>
> Dr Raoul Pope, in his report issued 22 January 2019 notes that you are 'suffering from discogenic lower back pain with mild radicular residual features, mainly numbness.' As noted above, Dr Pope has also indicated that he 'would like [you] to have a discal block… [and that if] it does prove to be the pain generator then a spinal fusion is something that could be looked into.'

Therefore, GIO disputes that maximum medical improvement has been reached as further surgery has been contemplated."

8. The report of Dr Pope dated 22 January 2019 was attached to the Reply.

9. A teleconference did not take place. In response to an enquiry by the respondent, the worker's then solicitors informed the respondent by way of an email dated 18 March 2019, that "my instructions are that he will not be going ahead with a spinal fusion".

10. On 26 March 2019, the Registrar referred a medical dispute for assessment by the Approved Medical Specialist (AMS) Dr Harvey-Sutton. The medical dispute that was referred for assessment in respect of injury on 5 August 2014 to the lumbar spine was the degree of permanent impairment of the worker as a result of an injury; whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion; whether impairment is permanent; whether the degree of permanent impairment of the injured worker is fully ascertainable.

11. The AMS examined the worker on 8 April 2019 and issued a Medical Assessment Certificate (MAC) dated 18 April 2019. The MAC certified that the AMS assessed the worker as having 12% WPI as a result of injury to the lumbar spine on 5 August 2014.

12. In a letter dated 18 April 2019 to Mr Mikhail, his previous solicitors enclosed a copy of the MAC and advised that it "confirms that there are no verifiable signs of radiculopathy in the left leg, therefore you do not obtain the extra 3% WPI which would see your impairment achieve 15% WPI" and that "without…an assessment of 15% WPI, you will not be able to pursue a claim for work injury damages." The letter ended with the statement that "we will review this matter further and advise on appeal prospects, as any appeal must be filed within 28 days of the Certificate".

13. On 16 May 2019 at 4.56 pm Mr Mikhail was given advice by letter and email by his previous solicitors against an appeal, this being the last day that he could lodge an appeal. In the same letter Mr Mikhail's previous solicitors ceased to act on his behalf. That letter also stated that "we note you have spoken to Andrew of our office on even date. You have informed him that you have spoken to another solicitor who informed you that you may have a claim for gastrointestinal impairment." The former solicitors said that this was the first they had heard of such a condition, nor were they aware of any specialist consultations or tests in respect of such a condition.

14. A COD dated 23 May 2019 was issued by the Commission. The respondent employer was ordered to pay lump sum compensation under section 66 in respect of 12% permanent impairment resulting from injury on 5 August 2014.

15. On 10 June 2019 Mr Mikhail's current solicitors took over conduct of his claim and sought Counsel's advice in relation to this application.

16. By way of email and letter dated 3 July 2019, the applicant's new solicitors sought to lodge an application to appeal against the decision of the AMS. The appeal was rejected by the Commission in an email dated 4 July 2019. The appeal lodgement was rejected pursuant to section 327(7) of the 1998 Act. It was noted by the Commission that the applicant worker wanted to appeal the MAC and request a reconsideration of the COD. The Commission noted in that email that the applicant worker must first lodge a request for a reconsideration of the COD dated 23 May 2019 in accordance with the Registrar's guidelines, which could be located on the Commission's website.

17. By way of letter dated 4 July 2019, the applicant worker sought a reconsideration of the COD dated 23 May 2019, pursuant to section 350(3) of the 1998 Act.

The applicant's submissions

18. As noted above, the applicant worker seeks to rescind the COD and to appeal or seek a referral for further assessment of the MAC of the AMS dated 18 April 2019.

19. The applicant submitted that from the history and findings by the AMS, the applicant's condition had in all probability worsened following surgery on 7 March 2017 and that the worker had been referred for necessary further treatment and that the worker's condition was not stable and had not reached maximum medical improvement at the time of the examination by the AMS.

20. The applicant submitted that despite the history of worsening of his condition and of his referral for further treatment, the AMS did not seek to determine whether the worker had undergone any of that further treatment or assessment and, if not, whether he intended to do so.

21. The applicant also submitted that at paragraph 8(b) of the MAC the AMS answered "no" to the question "Have all body parts/systems stabilised/reached maximum medical improvement". The applicant submitted that this is consistent with what had been noted by the AMS regarding the worker's condition and that it had worsened since the previous surgery and that he had been offered diverse and significant treatment options up to and including fusion surgery and that apparently no determination had been made as to whether he would be undergoing those treatments or not.

22. The applicant also submitted that the AMS inconsistently answered "not applicable" to the questions at paragraph 8(c) of the MAC, that is "if not, please list those injuries not yet stable/at maximum medical improvement"; and at paragraph 8(d), that is "if stabilisation/maximum medical improvement, of any or all injuries has not been reached, when, in your opinion, will this occur?"

23. With reference to paragraph 1.34 of the Permanent Impairment Guidelines, the applicant submitted that there is no evidence in the MAC that the AMS had determined whether the worker had refused additional or alternative medical treatment offered to him or whether and when he intended to undergo that medical treatment if that was the case.

24. The applicant also submitted that the AMS failed to conduct a fair, accurate and comprehensive assessment as required by paragraph 1.46 of the Guidelines, with reference to failing to give the worker the opportunity to explain inconsistencies on examination.

25. The applicant also submitted that there are special circumstances which justify exercise of the discretion in his favour to extend time for an Appeal of the earlier medical assessment of the AMS. The applicant submitted that the reason for delay in making this application for reconsideration is that his previous solicitors either did not perceive the alleged errors in the MAC and did not advise him to seek to appeal or review that assessment and that further, his previous solicitor's advice against the appeal was given to him on the last day that he could appeal.

26. The applicant submitted that the COD should be reconsidered and rescinded to allow for an appeal against the MAC, as otherwise it would be procedurally unfair and prejudicial to the applicant for the MAC to stand in circumstances where the applicant has not reached MMI.

Respondent's submissions in reply to the reconsideration application

27. The respondent provided submissions on 31 July 2019. The respondent noted "the lack of any supporting medical evidence" with respect to further treatment, particularly with reference to treatment recommended by Prof Sheridan and Dr Pope. The respondent also noted that previous proceedings were commenced by the applicant in the Commission on 23 October 2018. The respondent submitted that those proceedings were subsequently discontinued as the respondent understood that the worker had been reviewed by Prof Sheridan, who was said to have recommended surgery. Thereafter the proceedings that are the subject of this reconsideration application were commenced within three months of the discontinuation of the previous proceedings. The respondent noted that the recommenced proceedings did not contain any medical reports from Prof Sheridan.

28. The respondent said that, on receipt of the ARD in the current proceedings, it approached the worker's then legal representative that it was seeking a telephone conference in light of the spinal fusion issues as there was "a clear liability issue preventing the matter being referred to an AMS". In response, the workers then legal representative sent an email to the respondent advising that the worker was not going ahead with the spinal surgery.

29. The respondent submitted that the workers statement did not provide any supporting medical evidence with respect to the recommendations of Dr Sheridan and Dr Pope. The worker did not specify what he meant by "diverse and significant treatment option" that had been given to him.

30. The respondent submitted that a reconsideration cannot proceed on the basis of the workers legal representative's oversight or error. The respondent submitted that the current legal representative had not provided the basis for, nor the circumstances surrounding, the original legal representatives error or mistake in failing to advise the worker of the implications of the MAC and any right of appeal.

31. The respondent also submitted that should the COD be rescinded, the MAC cannot be rescinded having regard to section 322A of the 1998 Act and the decisions in *Singh v B and E Poultry Holdings Pty Ltd*[1], *Milosavljevic v Medina Property Services Pty Ltd*[2], and *O'Callaghan v Energy World Corporation Ltd*[3].

32. The respondent also submitted that, with reference to grounds of appeal against the MAC, there is no medical evidence of deterioration and no medical evidence of further treatment. If there had been a recommendation for a spinal cord stimulator, the SIRA Guidelines at clause 4.41 provide that a spinal cord stimulator or similar device does not attract or warrant additional WPI, meaning that there would be no change to the overall assessment of WPI.

33. The respondent also submitted that with regards to appeals under the provisions of section 327(3)(c) and (d), the worker did not identify special circumstances which would justify an increase in the period for an appeal, with the proposed appeal being well outside the time limits imposed by section 327(5).

34. The respondent also submitted that the AMS's answers at Part 8 of the MAC were either oversight or typographical error having regard to the overall tenor of the MAC and the completion of Table 2 annexed to the MAC.

[1] [2018] NSWWCCPD 52 (*Singh*)
[2] [2008] NSWWCCPD 56 (*Milosavljevic*)
[3] [2016] NSWWCCPD 1 (*O'Callaghan*)

35. The respondent submitted that the evidence and submissions of the worker are merely assumptions and speculation as to what may or may not happen at some stage in the future and the medical evidence in the ARD, that is the report of Dr Stephenson, stated that he had reached maximum medical improvement.

Further applicant submissions in reply

36. Following directions by the Commission, the worker's solicitors lodged further submissions dated 8 August 2019. Annexed to those submissions were a further statement of the worker, also dated 8 August 2019, together with a copy of letters of the worker's former solicitors dated 16 May 2019 and 18 April 2019, as well as treating medical records of Dr Alan Nazha, pain physician and interventional pain specialist, including his reports dated 29 July 2019, 1 July 2019, 3 May 2019 and 12 March 2019.

37. The worker submitted that he was prohibited, due to ineffective legal representation, from exercising his right to file an appeal against the MAC. The late advice dated 18 May 2019, said to have been sent to the worker by email at about 4.56 pm, did not allow time for the worker to seek a second opinion or to consider the advice. That letter of 18 May 2019 was also said to be deficient in that it did not contain "an advice with regards to his right to discontinue the proceedings".

38. The worker's solicitors submitted that his former solicitor's failure to provide adequate and timely advice was not merely a mistake or an oversight, it was ineffective legal representation.

39. The worker's solicitors submitted that the treating reports of Dr Nazha is evidence of treatment received by the worker after the MAC was issued and of recommendations for further treatment.

40. In reply to the respondent's submissions, the worker's solicitors submitted that in the event that the COD is rescinded, the MAC would be appealed with the grounds of appeal as set out above.

Further respondent submissions

41. The respondent provided further submissions dated 9 August 2019 in response to the worker's solicitor's further submissions. As the worker's solicitors provided new material in their submissions, that is the worker's additional statement and the treating reports of Dr Nazha, and the correspondence of the workers former solicitors, I will consider the respondent's further submissions of 9 August 2019.

42. The respondent submitted that it was irrelevant whether advice on the prospects of an appeal was issued on the first or last day of the appeal period as there was no basis for an appeal irrespective. The previous solicitor was correct in their advice in the respondent's submission. The respondent noted that there was no evidence of a gastrointestinal condition, as referred to in the former solicitor's correspondence.

43. The respondent submitted that the worker did not raise any issue with the AMS that would cause her to question MMI.

44. The respondent also submitted that the decisions of *Singh* and *Milosavljevic* with respect to section 322A(2) (referred to by the respondent as section 322(2) of the 1998 Act), although not affecting the operation of section 327, have not been distinguished by the worker and impliedly prevent the COD from being rescinded.

45. The respondent submitted that should the COD be rescinded under section 329 then it would be necessary to proceed to an appeal under section 327. In that regard, the worker has not demonstrated, in the respondent's submission, deterioration in his condition that would increase the level of WPI. The appellant worker, in the respondent's submission, has provided no evidence that the MAC contained demonstrable error or incorrect criteria.

46. The respondent submitted in summary that the appellant worker had provided no evidence of ineffective legal representation; no evidence that he is to undergo spinal surgery; no evidence to distinguish his case from the cases of *Singh* and *Milosavljevic*; no evidence to support an appeal under section 327.

47. The respondent submitted that in *O'Callaghan* it was observed that section 322A of the 1998 Act and section 66(1A) of the 1987 Act restricts a worker to only one claim under the 1987 Act for permanent impairment compensation resulting from an injury.

Additional documents

48. Both parties have provided additional evidence in relation to the current reconsideration application. There has been no objection to such further evidence from either party. In my view, is in the interests of justice to consider this further material. The applicant provided his statements dated 3 July 2019 and 8 August 2019; correspondence from his previous solicitors dated 18 April 2019 and 16 May 2019; and clinical records of Dr Nazha. The respondent provided a chain of email correspondence including an email of the applicant's former solicitors to the respondent's insurer dated 18 March 2019.

Legislation, Registrar's Guideline and certain relevant decisions

49. Section 350(3) of the 1998 Act provides that the Commission may reconsider any matter that it has dealt with and rescind, alter or amend any previous decision made by the Commission.

50. The Commission's policy document, available on its web site, *Requests for Reconsiderations under Sections 329 (1A), 350 (3) and 378 of the Workplace Injury Management and Workers Compensation Act 1998*,[4] (the Registrar's Guideline) relevantly provides:

> "This Guideline provides guidance to parties and their legal representatives, concerning requests for reconsideration under sections 329(1A), 350(3) and 378 of the *Workplace Injury Management and Workers Compensation Act 1998* ('the 1998 Act').
>
> …
>
> SCOPE OF SECTION 350 (3)
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> The term 'matter' in section 350(3) is not defined. Section 350(3) authorises the Commission, to rescind, alter or amend any decision it has previously made. The section applies to decisions by a Presidential Member, an Arbitrator, or the Registrar exercising the functions of an Arbitrator.
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> …
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> APPLICATIONS FOR RECONSIDERATION
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> There is no specific form for making an application for reconsideration under sections 329(1A), 350(3) or 378. Parties may make application by way of letter that includes the following information:

[4] February 2010

- The matter that is the subject of the application for reconsideration;
- The basis upon which a reconsideration is sought;
- Where relevant, the special circumstances which justify any delay in the making of the application for reconsideration;
- Where relevant, submissions addressing why the decision should be the subject of reconsideration rather than appeal;
- The date of service of the application on any other party to the proceedings.

The application for reconsideration should be made as soon as practicable after the party making the application becomes aware of the basis for seeking reconsideration. It should be served on the other parties prior to lodgment with the Commission, together with a notification to the parties served that they have 21 days in which to reply.

…

MATTERS FOR CONSIDERATION

The power contained in sections 329(1A), 350(3) and 378 is a discretionary one. It will be exercised in order to achieve the Commission's statutory objective of providing a fair dispute resolution system (section 367(1)(a)) and in a way, that is consistent with accepted authority. Regard will be had to existing common law principles applicable to reconsideration applications:

(1) The sections confer a wide discretion to reconsider previous decisions;

(2) Whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration;

(3) One of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely;

(4) Reconsideration may be allowed if new evidence, that could not have reasonably been obtained prior to the decision, is later obtained and that new evidence, if it had been put before the decision maker in the first instance, would have been likely to lead to a different result;

(5) Depending on the facts of the particular case, a party may be prevented from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;

(6) A mistake or oversight by a legal representative or agent will not give rise to a ground for reconsideration; and

(7) The Commission has a duty to do justice between the parties according to the substantial merits of the case…"

51. In *Samuel v Sebel Furniture Ltd*[5], general principles relevant to the application of a section 350(3) reconsideration were set out as follows (references omitted):

    1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');

    2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include "an award, order, determination, ruling and direction". In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;

    3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');

    4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');

    5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*');

    6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

    7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');

    8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and

    9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act).

52. In my view, the principle referenced at (5) above in *Samuel* extends to a COD issued following the expiration of the appeal period without an appeal being lodged against a MAC, as in this matter.

53. However, consideration of the principle referenced at (8) above in *Samuel* should have regard to the context in which it was originally stated in *Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd*[6]: *Atomic Steel Constructions Pty Ltd v Tedeschi*[7].

54. Thus, applying *Sorcevski v Steggles Pty Ltd*[8], mistakenly signed consent orders by counsel were found not to be determinative of whether relief should be granted: *Tedeschi.*[9]

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[5] [2006] NSWWCCPD 141; 5 DDCR 482 (Samuel)
[6] [1953] WCR 29 (*Hurst*)
[7] [2013] NSWWCCPD 33 (*Tedeschi*) at 43.
[8] (1991) 7 NSWCCR 315
[9] *Tedeschi* at 42-55

Reasons

55. The COD is a "decision" for the purpose of a reconsideration pursuant to section 350(3).

56. I have considered the principles set out above in the Registrar's Guideline and in *Samuel*, and also in *Tedeschi* as they apply to the reconsideration of the COD.

57. I am satisfied that the applicant has sufficient reason and has explained the reason for the delay in lodging the application for reconsideration. The COD was dated 23 May 2019. The current solicitors received instructions on 10 June 2019, following which they sought counsel's advice. The application for reconsideration was made on 4 July 2019. The extent of the delay was, in my view, not unduly long and did not require greater explanation.

58. It is necessary to consider the substantial merits of this application. As this application for reconsideration has the purpose of rescinding the COD to allow an appeal or further reconsideration to proceed, it is necessary to consider the merits of the appeal (or further reconsideration) as part of the substantial merits of the application. The matters referred to below apply to both an appeal or further reconsideration.

59. The question of delay in lodging an appeal (or further reconsideration) against the MAC is distinct in this matter from the delay in lodging the application for reconsideration. The delay in lodging an appeal against the MAC is a factor in considerations of doing justice between the parties according to the substantial merits of the case; and in considerations of the public interest that litigation should not proceed indefinitely.

60. I am satisfied that the applicant has sufficient reason, and has explained that reason, for the delay in not lodging an appeal (or further reconsideration) against the MAC. The applicant was advised against an appeal by his former solicitors on 16 May 2019, the last day of the appeal period, and he was also informed that they no would no longer act on his behalf. Although their advice may have been correct, as the respondent contends, in respect of the merits of seeking to increase the assessment of WPI, that advice did not extend to considering the applicant's treatment at that time and the question of MMI. As at 10 June 2019, the applicant was being treated by Dr Nazha, who was considering further treatment, including a trial of spinal cord stimulation.

61. The advice of 16 May 2019 may be characterised as an oversight on the part of the applicant's previous solicitors. On the current evidence, that is the applicant's statements, Dr Nazha's reports and the previous solicitors' letter of 16 May 2019, I am of the view that this was an oversight not to advise in relation to the issue of further treatment and maximum medical improvement (as distinct from gastrointestinal symptoms).

62. I have considered the context of *Hurst*.[10] In my view, that context, applied to this matter, allows a finding that oversight of the solicitor is not determinative for the relief to be granted. In this matter, the relevant considerations were the oversight in not advising until the appeal period had almost expired, and not dealing with the issue of continuing specialist treatment, and whether the possibility of further surgery had changed in light of further treatment and since the email of 18 March 2019.

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[10] In *Hurst,* a 1953 decision*,* the context was a failure to claim in initial proceedings in 1946 certain medical expenses for an injury in 1940; further proceedings were commenced in 1948 for the 1940 injury for weekly compensation and the identical medical expenses claimed in the 1953 decision; the 1948 proceedings were unsuccessful as the maximum amount of compensation had been paid; 1949 proceedings claiming the medical expenses identical to the 1953 decision but alleged to be the result of a 1945 injury were also unsuccessful; and finally proceedings for the 1940 injury were commenced in original form (as distinct from an application to re-open, rescind or revoke the three previous proceedings and thereafter amend the re-opened 1946 proceedings) in 1952 (decided 1953) for the 1940 injury for medical expenses identical to the 1948 and 1949 proceedings.

63. In my view, this oversight should not be determinative of this application for reconsideration, although this does not mean that this application has substantial merits. Rather, the oversight is not determinative of whether relief should be granted. It is not necessary for me to decide on the applicant's submission that the former solicitors should have advised on whether to discontinue proceedings after the MAC was issued, nor whether an undefined and new category of "ineffective legal representation" should not be determinative of whether relief should be granted. It is also not necessary for me to decide whether the previous solicitor's email of 18 March 2019 was a mistake or oversight, or as the applicant said in his statement of 8 August 2019, "incorrect instructions". The clinical records of Dr Nazha show that specialist treatment and treatment discussions had continued after that time.

64. However, I am not satisfied that the substantial merits of the application have been demonstrated on the material available to me. The matters dealt with below in my view outweigh my acceptance of the reason for delay in lodging the appeal (or further reconsideration by the AMS).

65. The applicant in his submissions has not identified the grounds of appeal required pursuant to section 327(3) of the 1998 Act, nor has there been specific reason put for the further reconsideration by an AMS. I will apply the additional material and submissions to the grounds that may be argued, both as an appeal and further reconsideration, being demonstrable error or matters requiring further reconsideration by an AMS; and further relevant information for an appeal or further reconsideration by an AMS.

66. The applicant's statements would in my view be in support arguments of demonstrable error (section 327(3)(d)), or of matters for further reconsideration by the AMS. For the reasons given below, I do not accept those arguments.

67. The applicant's statements dated 3 July 2019 and 8 August 2019 and submissions take issue with the conduct of the examination by the AMS concerning the question of whether MMI had been reached. I do not accept the additional statements of the applicant as to what was said or what was not questioned in the examination by the AMS, nor do I accept the applicant's submissions in this regard. This is evidence in support of a subsequent competing assertion. The assessment of whether MMI has been reached, or whether the degree of permanent impairment can be fully ascertained, is a matter of clinical judgement and assessment in the examination by the AMS.[11,12 13]

68. The applicant has not provided medical evidence in support of his argument that he has not reached MMI. I do not have before me a recommendation for surgery, or further treatment, from any of the surgeons that he has consulted for treatment opinions. According to Dr Nazha (29 July 2019), three of the four surgeons consulted have recommended against surgery. The applicant relied upon a medico legal report of Dr Stephenson which assessed permanent impairment and which did not certify that MMI had not been reached. I also do not have before me evidence of further treatment actually undertaken, other than referrals by Dr Nazha (see below).

69. Also, the applicant has pointed to the MAC in which the AMS noted the applicant said that the operation has made his condition worse; and also the answer by the AMS of "no" at paragraph 8(b) of the MAC, while paragraphs 8(c) and (d) were inconsistent and further indicative of error.

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[11] *Marina Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2008] NSWCA 88
[12] *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (4th ed)*, 1.15
[13] *Ferguson v State of New South Wales* [2017] NSWSC 887.

70. Taking the MAC as a whole, I am satisfied that the AMS was referring to the outcome of the surgery and not a continuing deterioration, and the answer of “no” at paragraph 8(b) was a slip or typographical error, in the context of the MAC assessing permanent impairment. I do not accept this argument. Contrary to the applicant’s submissions, the answers by the AMS to the questions posed at paragraphs 8(c) and (d) are consistent with the assessment of permanent impairment and an answer that properly read should have been “yes” at paragraph 8(a).

71. The worsening of pain following the surgery in March 2017 recorded by the MAC does not suggest a continuing deterioration and there is no other medical evidence before me to suggest that is the case. The AMS considered the history of surgery and pain following that surgery and exercised clinical judgment in assessing permanent impairment. I do not accept this submission.

72. I accept the respondent’s submission that the applicant’s statements and submissions on the current evidence amount to speculation as to what treatment may come to pass at some uncertain time in the future. This does not amount to evidence that the applicant is, or should have been, assessed as not having reached maximum medical improvement. That was a matter of clinical judgement of the AMS. The applicant did not identify in submissions, nor in his statements, the nature of any further treatment, other than a referral to a “pain psychologist” and a “trial of spinal cord stimulation”. The referral to a pain psychologist is in the report of Dr Nazha of 1 July 2019 but in the report of 29 July 2019, Dr Nazha believed the best course of action was to attend an ADAPT psychoeducational pain program. References to a spinal cord stimulation trial ceased in Dr Nazha’s reports of 1 July and 29 July 2019.There is no evidence to suggest how this may impact MMI and in view of the currently available evidence this amounts to no more than speculation.

73. The applicant in his statement of 8 August 2019 referred to right hip pain, which he said Dr Nazha informed him that this could very well be related to the lumbar spine injury. The applicant said he was still seeing his specialist to investigate the right hip pain. However, right hip pain was not mentioned in the reports of Dr Nazha, including the report of 29 July 2019. That report referred to a sacroiliac joint MRI. No opinion was given as to any relationship with the lumbar spine injury. There was no suggestion in that report of further investigation of the right hip. Absent medical evidence of the right hip condition, I do not accept that such condition is relevant to the issue of whether maximum medical improvement has been achieved. The applicant has not suggested that the right hip was a condition that should have been considered by the AMS, and it is not clear when right hip symptoms arose or when the sacroiliac joint was investigated.

74. The reports of Dr Nazha that post-date the MAC, that is reports dated 3 May, 1 July and 29 July 2019, may be said to be additional relevant information that could not have been obtained before the MAC (section 327(3)(b)) or for further reconsideration. That is so, but that additional information does not assist the argument that MMI has not been reached. The reports of Dr Nazha do not provide his view about this issue. Indeed, his most recent report before me, that is the report of 29 July 2019, does not assist the applicant. That report, although referring to the applicant’s “desire to have further surgery”, stated under “Treatment Plan”, “a significant period of time was spent discussing with Akram my concerns of his maladaptive treatment seeking followed by treatment rejecting behaviours”. This was a theme of Dr Nazha’s reports. On 3 May 2019 Dr Nazha reported “when detailing to him treatment options he seems fairly noncommitted to any options presented”. On 1 July 2019 Dr Nazha reported “he is still quite non-committed to any options presented to him”.

75. I do not accept the applicant's submissions regarding consistency. The AMS referred to straight leg raising being not consistent with the straight leg raising test, and of sensory disturbance not explicable by reference to anatomical structures and of variable gait. However, the AMS under "consistency of presentation' found that "the clinical findings are consistent with his presentation". I do not accept that the AMS was obliged to raise inconsistency with the applicant in these circumstances. I do not accept the applicant's submission that the assessment by the AMS, in respect of inconsistency, was not fair, comprehensive or accurate. The AMS simply noted the inconsistencies and moved on with the impairment assessment in the MAC to consider other clinical findings.

76. I also do not accept the applicant's submission that there is no evidence in the MAC that the AMS had determined that the applicant had refused additional or alternative treatment offered to him or whether or when he would undergo any treatment offered. In my view paragraph 1.34 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* is directed toward the assessment of "the level of permanent impairment", not whether MMI has been reached.

77. I accept the respondent's submissions that no medical evidence has been provided by the applicant to support a ground of appeal under section 327(3)(a), of deterioration of permanent impairment. The argument put by the applicant was that deterioration applied to the question of MMI. That argument did not suggest that deterioration applied to the question of an increase in permanent impairment.

78. The applicant has not expressly submitted that the additional material, that is the applicant's statements and the clinical records of Dr Nazha, was new information that had it been available to the AMS would have been likely to lead to a different result. However, this might be implied from the material provided. If that is the case, then the applicant's statements are not new information, insofar as they relate to the question of MMI, they are statements supporting later competing assertions, which I do not accept as new information. The clinical records of Dr Nazha, although new where they post-date the MAC, do not assist the applicant, as noted above, and I do not accept that they would have been likely to lead to a different result in the MAC.

79. It is not necessary for me to decide in relation to the submissions of the respondent regarding the decisions of *Singh*, *Milosavljevic*, and *O'Callaghan* and the operation of section 322A of the 1998 Act.