

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4968/19
Applicant: Wendy Noreen Freeman
Respondent: Secretary, Department of Education
Date of Determination: 20 December 2019
Citation: [2019] NSWCC 417

The Commission determines:

1. Matter remitted to the Registrar for referral to an Approved Medical Specialist for determination of the whether the applicant's condition has reached maximum medical improvement.
2. The documents to be referred to the Approved Medical Specialist to assist with their decision are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) Application to resolve a Dispute and attachments;
 - (c) Reply and attachments;
 - (d) Applicant's Application to Admit Late Documents dated 28 November 2019 and attachments; and
 - (e) Respondent's Application to Admit Late Documents dated 16 December 2019 and attachments.
3. Upon receipt of the Medical Assessment Certificate, the matter is to be listed for further telephone conference before me.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer



As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant suffered significant injury as a result of a tuberculosis infection contracted from a student while in the course of her employment.
2. The infection manifested itself as an abscess in the applicant's lumbar spine which required removal and several operations, including a fusion and discectomy. Those operations were paid for by the respondent.
3. The applicant brings a claim for permanent impairment compensation. The respondent opposes that claim on the basis the applicant's condition has not reached maximum medical improvement as, absent an opinion from an infectious diseases specialist to the effect the tuberculosis infection has been eradicated, it may return and worsen the applicant's condition.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) whether an Arbitrator has power to determine whether the applicant's condition has reached maximum medical improvement;
 - (b) whether I should exercise that power in the circumstances of these proceedings or instead refer the question to an Approved Medical Specialist (AMS).

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a hearing on 19 December 2019. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
6. Mr T Hickey of counsel acted for the applicant at the hearing, and Ms K Balendra for the respondent.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attachments;
 - (c) Applicant's Application to Admit Late Documents dated 28 November 2019 and attachments; and

- (d) Respondent's Application to Admit Late Documents dated 16 December 2019 and attachments.

Oral evidence

- 8. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Does an Arbitrator have power to decide whether a condition has reached Maximum Medical Improvement?

- 9. In my view, since the amendments to the legislation which came into effect on 1 January 2019, an Arbitrator of the Commission has power to determine whether maximum medical improvement (MMI) has been reached. I find this to be the case for the following reasons.

- 10. Section 65 of the *Workers Compensation Act 1987* provides permanent impairment is to be assessed as provided in that section and in Part 7 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

- 11. Section 293 of the 1998 Act deals with medical disputes. It provides that when a matter concerns a medical dispute as defined in Part 7 of that Act, the Registrar *may* refer the matter for medical assessment by an AMS. The power to refer a matter is subject to regulations under section 321A of the 1998 Act, however, at the date of this decision, no such Regulations have been enacted. It is apparent from the wording of section 293 that the Registrar is not required to refer a medical dispute to an AMS.

- 12. "Medical dispute" is defined in section 319 of the 1998 Act. That section relevantly provides:

"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),

(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."

13. On my reading of the above sections, there is little doubt a dispute concerning whether MMI has been reached are “medical disputes” for the purposes of the legislation. Absent a specific provision in the legislation or a regulation which specifies such disputes can only be referred to an AMS, I am of the opinion the Commission constituted by an arbitrator has the power to determine whether an applicant has reached MMI.
13. Ms Balendra submitted that such a finding is contrary to the intent of the amendments to the Act which establish the current regime with regards to medical disputes. She said it was apparent from the Explanatory Memorandum to the amending Act that it was meant to deal only with disputes as to the degree of permanent impairment, rather than whether MMI had been reached.
14. The contents of the explanatory memorandum would be of guidance if the wording of the legislation itself was unclear, however, in my view it is not. The statutory provisions clearly set out what is or is not a “medical dispute” and in my view are also clear that the Registrar has power to refer disputes as to MMI, but is not compelled to do so, meaning the Commission constituted by an arbitrator may determine them.

Should I exercise the power to determine whether MMI has been reached?

15. The circumstances of this matter are sufficiently unusual as to warrant further explanation. The applicant relies on reports from Professor Fearnside, who says she has reached MMI and assesses her degree of whole person impairment (WPI) at 26%.
16. The respondent relies on the reports of Dr Stening. He also indicates the applicant’s WPI totals 26%, however, he states he is unable to say that impairment is permanent without evidence from an infectious diseases specialist to the effect the tuberculosis infection has been completely eradicated from the applicant. He says until such time as he has a report to that effect, he cannot say there will be no recurrence in future and therefore cannot say MMI has been reached.
17. As is well-known, an injury or condition has reached MMI when it is well stabilised and unlikely to change substantially in the next year with or without medical treatment.
18. Mr Hickey submitted, and I accept, that the applicant last had active treatment for the tuberculosis infection in or about June 2017, that is, 2.5 years ago. He said that in the circumstances, it is likely the applicant’s condition is stable and will not substantially change within the next 12 months.
19. Mr Hickey said the applicant should not be made to wait for her compensation in circumstances where two medical specialists are in furious agreement as to the degree of whole person impairment which she suffers. I have a large measure of sympathy for that position, however, for the following reasons, I am not minded to exercise the power of determining whether the applicant has reached MMI.
20. The NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (the Guidelines) set out the principles of assessment. They note assessing permanent impairment involves a clinical assessment of the claimant as they appear on the day [1.6] in order to determine, among other matters, whether the condition has reached MMI.

21. At [1.15] and [1.16], Guidelines state assessments of WPI are only to be conducted when the medical assessor considers that the claimant has reached MMI. Such a determination is, in my view, a clinical determination in the province of an AMS rather than an arbitrator. In this matter, two eminent specialists retained by the parties are unable to agree whether MMI has been reached, in the context of the applicant having suffered serious injury requiring multiple surgeries owing to an unusual cause.
22. In these circumstances, I do not consider it appropriate to exercise the power to determine whether MMI has been reached, and accordingly remit the matter to the Registrar for referral to an AMS to determine whether MMI has been reached.