WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number:	**1219/20**
Applicant:	**Clifford Thomas Corton**
Respondent:	**Nariment Pty Limited t/as the Oakes Bakery**
Date of Determination:	**25 June 2020**
Date of Amendment:	**29 June 2020**
Citation:	**[2020] NSWWCC 211**

The Commission determines:

1. I remit the matter to the Registrar to be placed in the Approved Medical Specialist Pending List.

2. I direct the parties to discuss and consider if the matter can be the subject of assessment by video conference in accordance with e-bulletin 106 dated 23 June 2020.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Clifford Corton suffered an injury to his thoracic spine on 6 January 2006 when he was employed by Nariment Pty Ltd t/as the Oakes Bakery as an apprentice baker. Following that injury, he gained substantial weight - in the order of 90 kg.

2. On 6 January 2006, Arbitrator Burge dealt with two sets of proceedings commenced by Mr Corton. In 4812/19, Mr Corton claimed the cost of bariatric surgery. He also sought a determination that his whole person impairment (WPI) was greater than 20% for the purpose of s 39 of the *Workers Compensation Act 1987* (the 1987 Act). Arbitrator Burge determined that bariatric surgery was reasonably necessary medical treatment within the meaning of s 60 of the 1987 Act.

3. The surgery was scheduled to take place in April 2020 but was cancelled due to the COVID-19 pandemic.

4. On 3 March 2020, Mr Corton commenced further proceedings seeking a determination that his WPI was greater than 20%. Those proceedings were referred to an Approved Medical Specialist (AMS).

5. On 24 March 2020, the President of the Commission announced that in-person medical examinations by AMSs would be suspended because of the pandemic. On 2 April 2020, the President announced that medical disputes would be listed for teleconference before an arbitrator. The purpose of the teleconference was to attempt to resolve the dispute, to determine the medical dispute where appropriate, to narrow the evidence and issues to permit assessment by video conference or to remit the matter to the pending list.

6. This matter was listed before me for teleconference on 1 June 2020. The dispute between the parties is whether it can be said that Mr Corton's condition has reached maximum medical improvement (MMI).

PROCEDURE BEFORE THE COMMISSION

7. At the telephone conference on 1 June 2020, Ms Gordon, solicitor, appeared for Mr Corton and Ms Brown, solicitor, appeared for Nariment.

8. Ms Brown argued that Mr Corton's condition had reached MMI until the bariatric surgery is undertaken. She said that Nariment's insurer sought a determination from an AMS that MMI had not been reached.

9. I directed that the parties file and serve written submissions "on the meaning of 'maximum medical improvement' and whether it can be said that the applicant has reached maximum medical improvement when proposed bariatric surgery has been postponed."

10. The submissions were received in accordance with the timetable and remain in the file.

PREVIOUS DECISION AND MEDICAL EVIDENCE

11. In his Certificate of Determination in 4812/19, Arbitrator Burge said:

> "There is no issue the applicant suffered a serious injury to his thoracic spine while working for the respondent. Likewise, it is agreed that if the applicant is successful in his claim for the cost of the future surgery, the section 39 application in proceedings number 4814/19 will be dismissed, as the degree of whole person impairment arising from the applicant's injury will not yet be fully ascertainable."

12. The Arbitrator said that “[e]ven on the respondent’s best case, the applicant has gained between 80-90 kg since the injury.”

13. The Arbitrator determined that the weight gain suffered by Mr Corton was a result of his thoracic spine injury and that the surgery was reasonably necessary medical treatment as a result of that injury. The Arbitrator quoted from the reports of Dr L Wallace, Mr Corton’s treating pain specialist who said in February 2018:

> "Since his injury in 2006 Clifford has gained weight from approximately 100 kilograms to whatever he weighs now, I would estimate 180 kilograms. I think this is a very large factor in his pain and I think Clifford will be unable to achieve significant pain reduction and significant functional improvement without a major decrease in his weight.
>
> I think weight loss is the most important factor in allowing Clifford to increase his physical function, to reduce his pain and to maximise his chances of ever being able to achieve a return to work.”

14. Dr Wallace also prepared a report dated 14 August 2019 in which he said:

> “I have advocated a number of times for Clifford to have bariatric surgery. I think this would benefit him greatly. Specifically I think It will reduce his pain. I think it will Improve his physical function and allow him to progress his weight loss further as his weight at the moment is preventing him from physical activity. It Is quite obvious that Clifford's weight has substantially increased because of his initial injury and the pain associated with It and I cannot see how Clifford will make any progress with his function or his pain without the operation. In particular, it Is almost impossible to do appropriate imaging for Clifford to determine if he has any lumbar spinal issues, which his symptoms suggest, without weight loss surgery so that he can lose weight and we can get appropriate images. Furthermore, I would be unable to perform most procedures to treat his pain at his current weight.”

15. The reports of Dr R Abraszko, neurosurgeon, confirm that treatment of Mr Corton’s back injury is made difficult by his weight. She said in her report dated 29 August 2018:

> “Since the last time he looks like he has put on some more kilos. especially around his waist. He was not able to locate any MRI machine in whole Australia. His weight is still 240 kilos.
>
> He is too heavy for a spinal cord stimulator, which was recommended by the Pain Specialist. He was too heavy to have a weight reduction. He doesn't want to have any new needles, so he did not want to have Ct lumbar myelogram. MRI is not possible due to his weight. So is the possible surgery due to his weight, OT table is limited t 18- kg.[sic]
>
> He complains of a mid-thoracic pain more today than the leg pain. He previously had T 10 fracture with 50% loss of vertebral body height and some T9 vertebra. I recommended him follow-up CT scan of the thoracic spine and a separate CT scan of the lumbar spine with bone window and assessment of the fracture. The CT scan should be done in Spectrum Radiology, so I can have a good view into his pathology.
>
> He may be a candidate for vertebroplasty if the vertebral fracture progresses. At this stage, there is no neurosurgical solution for his problem, especially if he does not loose [sic] the weight.”

16. Dr Abraszko alludes to the difficulty of performing bariatric surgery and medical evidence in the file shows that some doctors were reluctant to undertake it unless Mr Corton lost some weight first. As the Arbitrator found, Dr C Jameson is willing to undertake the surgery.

17. In finding that the surgery was reasonably necessary medical treatment as a result of the injury, the Arbitrator said:

> "In my view the evidence overwhelmingly discloses the applicant's weight loss is consequent upon his accepted thoracic spine injury. Medical evidence also discloses it is more likely than not he will derive benefit by way of reduction in pain if he were to lose weight. He has tried other modalities and now seeks a proven method for weight loss which, if implemented, is more likely than not to provide him with relief."

18. Dr Jameson provided a short letter dated 2 June 2020 for the purpose of this application which was attached to the submissions filed for Mr Corton. She said:

> "This letter is to certify that Clifford Corton was scheduled in April 2020 to undergo bariatric surgery, unfortunately due to COVID-19 there was a ban on elective surgery, this was publically [sic] announced by the Australia Government in March 2020. To date the government have not lifted the ban for complicated cases, with this in mind we are still awaiting the ban to be lifted and Mr Corton remains in limbo awaiting a new surgical date."

SUBMISSIONS

19. In submissions signed by his solicitor, Ms Gordon, Mr Corton submitted that the previous application in respect of s 39 of the 1987 Act and the current application were filed in reliance on cl 28C of the Worker Compensation Regulation 2016 (the Regulation).

20. Clause 28C of Schedule 8 of the Regulation provides:

> **"28C 5 year limit on weekly payments**
>
> Section 39 of the 1987 Act (as substituted by the 2012 amending Act) does not apply to an injured worker if the worker's injury has resulted in permanent impairment and—
>
> (a) an assessment of the degree of permanent impairment for the purposes of the Workers Compensation Acts is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or
>
> (b) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20% (whether or not the degree of permanent impairment has previously been assessed)."

21. Mr Corton submitted that the 2019 amendments to the legislation give an arbitrator the power to determine if MMI has been reached relying on the decision of Arbitrator Burge in *Freeman v Secretary, Department of Education*[1] *(Freeman)*. Mr Corton relied on the definition of MMI in the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment 4th edition 2016* (the Guidelines):

[1] [2019] NSWWCC 417.

> **"Maximum medical improvement**
>
> 1.15 Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement. This is considered to occur when the worker's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment.
>
> 1.16 If the medical assessor- considers that the claimant's treatment has been inadequate and maximum medical improvement has not been achieved, the assessment should be deferred and comment made on the value of additional or different treatment and/ or rehabilitation - subject to paragraph 1.34 in the Guidelines."

22. The submissions refer to the medical evidence in the file to argue that MMI had not been reached.

23. Nariment's submissions were prepared by its solicitor, Ms Brown. She submitted that the reasoning in *Freeman* does not extend to the application of cl 28C because it requires that an AMS has declined to make an assessment on the basis that MMI has not been reached and the degree of permanent impairment is not fully ascertainable. Nariment submits that only an AMS can make the relevant determination.

24. Nariment also relied on the Medical Appeal Panel decision in *Hines v Odysssey House McGrath Foundation*[2] (*Hines*) where the Appeal Panel said:

> "The effect of paragraph 1.15 is to preclude assessment by an Approved Medical Specialist unless he or she forms a view that maximum medical improvement has been reached and the degree of impairment is unlikely to improve further – that is, to change substantially in the next year, with or without treatment. Generally speaking, where a claimant is intending to undergo surgery of the relevant body part, it is not possible to form the requisite view, because there is a chance that there will be improvement in the next year. A request by a treating surgeon for insurer's approval for surgery is compelling evidence that the worker has decided to have that surgery."

25. Nariment said that Mr Corton did not propose to undergo surgery to his lumbar spine which is the subject of the referral by the Commission. It submitted that Mr Corton had not provided an impairment rating for the Commission to determine. It submitted that the application should be dismissed or deferred until an assessment can be undertaken by an AMS.

FINDINGS AND REASONS

26. Neither party addressed the agreement in the previous proceedings that the application of s 39 should be deferred if Mr Corton was successful in the claim for the expenses of bariatric surgery or provided any correspondence concerning that issue in the time since Arbitrator Burge's decision.

27. In *Freeman*, the worker contracted tuberculosis in the course of her employment. Surgery was required to treat the manifestations of the infection. The worker sought an assessment of permanent impairment but her employer opposed it in the absence of an opinion from an infectious diseases specialist that the tuberculosis had been eradicated. Arbitrator Burge considered the legislation and determined that an arbitrator has the power to determine if MMI has been reached. For the reasons set out below, I agree. In the circumstances of that case, Arbitrator Burge decided that he should not exercise the power because two specialists were unable to agree if MMI had been reached.

[2] [2018] NSWWCCMA 83 at [16].

28. The issue to be determined is whether I can determine whether MMI has been reached or whether that decision must be made by an AMS.

29. Section 39 of the 1987 Act provides:

> **"39 Cessation of weekly payments after 5 years**
>
> (1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.
>
> (2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.
>
> **Note.**
> For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.
>
> (3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

30. The decision of the Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd and Whitton v Technical and Further Education Commission t/as TAFE NSW*[3] explained that the 260 week limit on the payment of compensation never applies to a worker whose permanent impairment is more then 20%. The consequences of determining that s 39 applies to a worker are significant. It is not necessary that there be a Medical Assessment Certificate before a worker is exempted from the operation s 39(1) (see the judgment of Brereton JA at [50]).

31. Nariment's argument based on the decision in *Hines* can be dealt with shortly. The statement relied on is taken out of context and a Medical Appeal Panel decision is not binding authority in respect of an arbitral decision. That appeal concerned the failure by an AMS to take proposed left total knee replacement surgery into account because there was no definite proposal for that surgery. The AMS assessed permanent impairment. The Panel revoked that certificate and found that the degree of permanent impairment was not fully ascertainable because the worker proposed to have surgery on the body part to be assessed. The reference to the "relevant body part" in that decision cannot be relied on to support the contention that only surgery to the body part which was injured and will be the subject of assessment will preclude an assessment of MMI.

32. The most probable assessment to be made by an AMS is in respect of Mr Corton's thoracic spine. The medical evidence is that the surgery proposed may have an impact on his condition generally. It may increase his movement or decrease his pain. It is being undertaken because the need was materially contributed to by the injury. It is also possible that an AMS may be required to assess consequential conditions as a result of an injury. Until the outcome of the bariatric surgery on his back condition is known, I do not believe it can be said that MMI has been reached.

33. The former s 65(3) of the 1987 Act required that, if there was a dispute about the degree of permanent impairment of a worker, the Commission could not award permanent impairment compensation unless the degree of permanent impairment had been assessed by an AMS. That sub-section was repealed effective 31 December 2018.

[3] [2020] NSWCA 113.

34. The definition of medical dispute appears in s 319 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act):

> ***"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."

35. Section 321 of the 1998 Act provides a discretion to refer a medical dispute to an AMS:

> **"321 Referral of medical dispute for assessment**
>
> (1) A medical dispute (other than a dispute concerning permanent impairment of an injured worker) may be referred for assessment under this Part by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute. The Registrar is to give the parties notice of the referral.
>
> (2) The parties to the dispute may agree on the approved medical specialist who is to assess the dispute but if the parties have not agreed within 7 days after the dispute is referred, the Registrar is to choose the approved medical specialist who is to assess the dispute."

36. The ability of an arbitrator to determine a medical dispute was confirmed by the President Judge Phillips in *Etherton v ISS Property Services Pty Limited*[4]. The President said with respect to s 65(3)[5]:

> "This provision was repealed with effect from 1 January 2019.
>
> A new provision was inserted into the 1998 Act, s 322A(1A) which provides as follows:
>
> > '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.'

[4] [2019] NSWWCCPD 53.
[5] At [103]-[105].

> As can be seen, the relevant alteration is that prior to 1 January 2019 the Commission was prohibited, by virtue of the terms of s 65(3) of the 1987 Act, from awarding permanent impairment compensation absent an assessment by an Approved Medical Specialist. That prohibition was removed and the Commission was then empowered to determine such matters itself."

37. The provisions discussed above permit an arbitrator to determine the medical dispute as to whether the degree of permanent impairment was fully ascertainable, that is, whether MMI has been reached.

38. However, cl 28C of the Regulation deals specifically with claims under s 39, which may have the effect of extending weekly compensation beyond a period of five years. Section 65(3) was repealed after the regulation was inserted and the regulation was not amended.

39. Section 321A of the 1998 Act provides:

> **"321A Referral of medical dispute concerning permanent impairment**
>
> (1) The regulations may make provision for or with respect to-
>
> (a) the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for assessment under this Part, and
> (b) the giving of notice of a referral to the parties to the dispute.
>
> (2) Without limiting subsection (1), the regulations may provide that a medical dispute may not be referred for assessment under this Part if the dispute concerns permanent impairment of an injured worker where liability is in issue and has not been determined by the Commission.
>
> (3) A medical dispute concerning permanent impairment of an injured worker that is authorised or required by the regulations to be referred for assessment under this Part may be referred by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute."

40. No regulations have been made under s 321A.

41. Because of the specific regulation dealing with applications for the purpose of s 39, I consider that it would be inappropriate for me to determine the issue of whether Mr Corton has reached MMI for this purpose. A referral to an AMS is therefore necessary.

42. Physical examination by an AMS is not mandatory. Section 324(1)(c) provides that an AMS assessing a medical dispute "may…require the worker to submit himself or herself for examination…" It may not be necessary for the AMS to conduct a physical examination of Mr Corton's back to determine if his condition has reached MMI and indeed the medical evidence suggests that, until the surgery is undertaken, an examination may not be possible.

43. The Commission issued e-bulletin 106 on 23 June 2020 which sets out the procedure for a careful return to assessments by AMSs. There will be a delay while the backlog of matters in the AMS pending list requiring in person examinations is dealt with. This may well be a matter in which assessment by video conference is appropriate and I direct the parties to consider whether that is possible and, if so, apply to the Commission.