WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6079/15 and 1867/20**
Applicant: **Nathan Ross**
Respondent: **SR Constructions Pty Ltd**
Date of Determination: **10 July 2020**
Citation: **[2020] NSWWCC 232**

The Commission determines:

Findings

1. The applicant is entitled, with leave, to amend his one claim to include the further conditions contained in the letter dated 19 December 2019.

2. The applicant's one claim has not been determined within the meaning of s 66(1A) of the *Workers Compensation Act 1987* and the one assessment has not concluded within the meaning of s 322A of the *Workplace Injury Management & Workers Compensation Act 1998.*

Orders

3. The Referral to the Approved Medical Specialist is amended to include the following further body parts as consequential conditions:

    (a) upper gastrointestinal tract;
    (b) lower gastrointestinal tract;
    (c) anus;
    (d) left Inguinal hernia;
    (e) haemorrhoidectomy;
    (f) facial abnormality; and
    (g) mastication.

4. The matter is remitted to the Registrar for referral to an Approved Medical Specialist. The Referral is amended in accordance with these Orders.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. Mr Nathan Ross (the applicant) was employed by SR Constructions Pty Ltd (the respondent) and sustained a compensable injury on 12 December 2013 when he fell from a ladder.

2. This application concerns the operations of s 66(1A) of the *Workers Compensation Act 1987* (1987 Act) and s 322A of the *Workplace Injury Management & Workers Compensation Act 1998* (1998 Act).

3. The applicant commenced employment with the respondent in January 2013 as a gardener. On 12 December 2013, the applicant was using an old steel ladder. He was approximately 1.5 metres above the ground when the last step of the ladder gave way, resulting in him falling to the ground.[1] The applicant stated that his head hit the wall and he blacked out and lost consciousness. He was taken by ambulance to Westmead Hospital.

4. An injury incident report form indicated that the applicant was on an aluminium ladder cleaning windows when the ladder step he was standing on failed, causing the applicant to fall approximately 1.5 metres hitting his left shoulder on the ground and striking his head against the wall.[2]

5. The applicant commenced proceedings in matter number 6079 of 2015 claiming permanent impairment compensation pursuant to s 66 of the 1987 Act. That matter was listed for telephone conference before Arbitrator Wardell when the claim was referred to an Approved Medical Specialist to assess the applicant's degree of permanent impairment resulting from injury to the left upper extremity (brachial plexus lesion), the right upper extremity (carpal tunnel syndrome), the cervical spine and brain/head injury resulting from injury suffered on 12 December 2013.[3]

6. Due to the nature of the injuries, the assessment claim was referred by the Registrar to two Approved Medical Specialists. Dr Geoffrey Boyce provided a Medical Assessment Certificate dated 10 May 2016[4] in which he was described as the non-lead assessor. Dr Boyce concluded that he could not assess any impairment of the brain as the "injuries are not stable".[5]

7. Dr Alan Home, provided a Medical Assessment Certificate as the "lead assessor".[6] Dr Home assessed the applicant as having a 0% whole person impairment (WPI) of the cervical spine and a 3% WPI of the right upper extremity due to carpal tunnel. He also reviewed the findings documented by assessor Dr Geoffrey Boyce and agreed that the brachial plexus injury had not been assessed appropriately and that the applicant required EMG studies of the left upper limb.[7]

8. The applicant then filed an Application to Appeal the Assessment of the Approved Medical Specialist only in relation to the assessment of the cervical spine. That application was determined by a Medical Appeal Panel on 27 July 2016.[8] The Medical Appeal Panel found error with respect to the assessment provided by Dr Home and assessed the applicant as having a 5% WPI of the cervical spine.

---

[1] Application to resolve a Dispute (Application), p 3.
[2] Application, p 13.
[3] Reply, p 2.
[4] Application, p 54.
[5] Application, p 59.
[6] Application, p 45.
[7] Application, p 53.
[8] Application, p 60.

9. A further Medical Assessment Certificate (MAC) dated 27 July 2016 was contained in the Panel's reasons which revoked the prior assessment. The further assessment[9] specified that the brain and the left upper extremity brachial plexus were "N/A"[10], the cervical spine was assessed at 5% WPI with no section 323 deduction and the right upper extremity was 3% WPI with no section 323 deduction.

10. On 1 September 2016, the Commission issued a Certificate of Determination (the COD) in the following terms:[11]

    1. The degree of permanent impairment resulting from injury to the applicant on 12 December 2013 is not fully ascertainable.

    2. The proceedings may be restored when the applicant has obtained maximum medical improvement.

11. Further reports were then obtained by the applicant in late 2019.

12. Dr Drew Dixon provided a further report dated 4 November 2019[12] when he assessed the applicant in respect of the cervical spine, left upper extremity, haemorrhoidectomy left inguinal hernia and brain injury. Dr Anthony Greenberg also provided a report dated 14 November 2019 when he assessed the upper gastrointestinal tract at 1% WPI, the lower gastrointestinal tract at 3% WPI and of the anus at 1% WPI.[13]

13. The applicant was also assessed by Dr Michael McGlynn, a Hand, Plastic and Reconstructive Surgeon who provided a report dated 1 November 2019.[14] Dr McGlynn assessed the applicant as having a 6% WPI due to facial disfigurement and a 6% WPI due to mastication.

14. The applicant then served a letter on Employers Mutual (New South Wales) Ltd (EML) dated 19 December 2019. The letter incorrectly refers to sections 101, 102 and 103 of the 1998 Act stating that it understood that EML was the relevant insurer on risk for the injury on 12 December 2013 and attaches the reports of Dr Dixon dated 4 November 2019, Dr McGlynn dated 1 November 2019 and Dr Greenberg dated 14 November 2019. A claim for lump sum compensation pursuant to section 66 of the 1987 Act is made for 41% WPI. The applicant also states that he seeks a threshold dispute with respect to work injury damages.

15. It is unfortunate that this letter does not refer to the prior claim and the prior assessments of some of the body parts.

16. EML provided a response by letter dated 17 February 2020.[15] The Insurer summarised its position in the following terms:

    > "We do not believe that you are eligible for permanent impairment lump sum compensation because you accepted physical injuries have not resulted in more than 10% whole person impairment as required by section 66 (1) of the *Workers Compensation Act 1987*… We consider you are not entitled to second assessment of any further body parts pursuant to a section 66 claim beyond the body parts which were assessed by AMSs Dr Home and Dr Boyce in 2016. This is because you already have had your one assessment of impairment allowable under section 322A of the 1998 Act".

[9] Application, p 66.
[10] Application, p 66.
[11] Application, p 68.
[12] Application, p 25.
[13] Application, pp 37-38.
[14] Application, p 39.
[15] Application, p 1866.

17. The Insurer referred to the Medical Assessment Certificate of the Appeal Panel and the Certificate of Determination issued by the Commission on 1 September 2019. It also referred to the applicant's letter of 19 December 2019 which sought to include the further body parts of the anal canal, left-sided inguinal hernia, facial abnormality, loss of teeth, and upper and lower gastrointestinal tracts.

18. The Insurer stated that it relied on the Commission's decisions of *O'Callaghan v Energy World Corporation Ltd*[16] (*O'Callaghan*) and *Singh v B & E Poultry Holdings Pty Ltd*[17] (*Singh*) and asserted that the applicant was not entitled to claim for the further body parts due to the operation of s 66(1A) of the 1987 Act or ss 322A of the 1998 Act. The notice continued: [18]

> "Should you wish to have your claim for alleged brain injury and alleged left arm (brachial plexus) injury referred to the WCC for further assessment, we invite you either to commence new proceedings limited to a claim for injury of those body parts or to restore the 2015 WCC proceedings".

19. The applicant commenced the present proceedings by application dated 3 April 2020. At that time, the applicant's solicitors did not seek to restore the previous proceedings.

20. The respondent filed a Reply dated 24 April 2020.

21. The matter was listed for telephone conference on 1 May 2020 when the following orders and directions were made:

    1. On his application and by consent, the applicant restores proceedings numbered 6079/15.

    2. Matter number 6079/15 is to be heard with these proceedings.

    3. The respondent consents to the assessment of the left upper extremity and the brain injury on the basis that these body parts were previously referred and assessed as having not reached maximum medical improvement.

    4. The reference to "hand" is discontinued in the description of injury in matter number 1867/20.

    5. The legal issue is whether the applicant can now amend the referral for assessment and/or have the following further body parts assessed by an AMS in addition to the body parts previously referred and assessed Haemorrhoidectomy, Inguinal, Upper digestive, Lower digestive, anal, teeth and mastication.

    6. The applicant is to file and serve written submissions by close of business, 22 May 2020.

    7. The respondent is to file and serve written submissions by close of business, 12 June 2020.

    8. The applicant is to file and serve written submissions in response by close of business, 19 June 2020.

22. The respondent confirmed at the telephone conference that it had not disputed that the further conditions now claimed were consequential to the accepted work injuries.

---

[16] [2016] NSWWCCPD 1.
[17] [2018] NSWWCCPD 52.
[18] Application, p 1868.

SUBMISSIONS

Applicant's submissions

23. The applicant filed written submissions dated 22 May 2020. He referred to the background facts which have been set out earlier in these reasons. Under the heading ‘‘current proceedings" he noted that the original claim under section 66 had been amended to add the following secondary conditions:

    (a) haemorrhoidectomy;
    (b) the inguinal hernia;
    (c) upper digestive system;
    (d) lower digestive system;
    (e) anal irritation; and
    (f) mastication.

24. The applicant submitted that the respondent's defence was misconceived and that the current proceedings are "materially different from *O'Callaghan* and *Singh*" because the Certificate of Determination dated 1 September 2016 stated that the permanent impairment was "not fully ascertainable".

25. The applicant submitted:[19]

> "The applicant in these proceedings still has not had his 'one assessment' of the degree of permanent impairment yet. As such, S322A of the 1998 Act does not apply to those proceedings. …
>
> By restoring the proceedings 6079/15, the applicant seeks to pursue is original and unresolved section 66 claim.
>
> Proceedings 1867/20 reflects the applicant's intention to amend the section 66 claim before resolution or determination by adding the secondary conditions."

26. The applicant referred to the decision of *Woolworths Ltd v Stafford*[20] (*Stafford*) and particularly to paragraphs 90, 94 and 97, which, he submitted suggest that amendment of a claim is not a second claim and that the secondary conditions claimed are amendments to the original section 66 claim.

27. The applicant sought to distinguish both *Singh* and *O'Callaghan* on the basis that the COD stated that the degree of permanent impairment was not fully ascertained and that the applicant has "still not had his 'one assessment'".[21]

Respondent's submissions

28. The respondent noted that the applicant complained of digestive problems in 2015 and tooth decay in 2016. It was submitted that conditions for the haemorrhoids, problems due to loss of teeth and the upper and lower gastrointestinal tracts were not "new secondary injuries" and could have been made prior to the 2015 application "being made and/or determined". The only new secondary condition was the left-sided inguinal hernia which was diagnosed after an incident in mid-2018.

29. The respondent submitted that the decision of *Stafford* should be read in context and the decision was "directed towards a circumstance where an applicant proposed to amend a

[19] Applicant's submissions, paragraphs 15-17.
[20] [2015] NSWWCCPD 36.
[21] Applicant's submissions, paragraph 15.

claim well before the claim's determination"[22]. Reference was made to the observations of the Deputy President at [94] of *Stafford* which discuss amendment of the claim prior to the "resolution or determination of the claim".

30. It was submitted that the application of the amendment procedure was available prior to assessments undertaken by Dr Home and Dr Boyce.[23]

31. The respondent submitted that the prior proceedings were "determined" by the issuing of the certificate dated 1 September 2015 and that there was prejudice by the unexplained delay from September 2016 until the filing of the present application in April 2020.[24]

32. The respondent referred to the comments by Roche DP in *Stafford* that an assessment of a claim of less than 11% WPI would "still constitute a claim and section 322A would still apply to that claim".[25] It asserted that the "MAC dated 27 July 2016 issued by the Medical Appeal Panel is the one and only MAC which can be considered in assessing the applicant's degree of whole person impairment".[26]

33. The respondent accepted that the applicant can be assessed for "those body parts/body systems which were the subject of a finding by an AMS that the applicant's condition could not be assessed in the MACs dated 10 May 2016."[27]

34. The respondent submitted that the applicant is not able to make a "further claim" and that the proposed referral for the additional body parts cannot be made because it is not a medical dispute within the meaning of s 319. Reference was also made to s 322A(3) of the 1998 Act.

35. The respondent conceded that the "alleged brain injury and alleged left arm (brachial plexus) injury" could be "further assessed" but the assessment of further body parts was a breach of ss 322A and 326 of the 1998 Act. Reference was made to the decision of *O'Callaghan* which, it was submitted "prevented" the current claim.

36. The respondent also referred to *Singh* "which discussed favourably the passage in *Stafford*".

37. The respondent sought the dismissal of matter number 1867/20. It conceded there should be a "further assessment" of the brain and the left arm (brachial plexus) in matter number 6079/15.

Applicant's reply submissions

38. The applicant submitted that he was unaware that the conditions which are the subject of the present application were consequential to the injury until medical evidence was provided in 2019.

39. It was further submitted that the respondent incorrectly places emphasis on when the conditions developed and referred to the recent discussion by Brereton JA in *Hochbaum v RSM Building Services Pty Ltd*[28] (*Hochbaum*). Reference was particularly made to the observations at [56] where his Honour observed that there can "ultimately be only a single degree of permanent impairment that results from an injury"[29].

[22] Respondent's submissions, paragraph 13.
[23] Respondent's submissions, paragraph 15(b).
[24] Respondent's submissions, paragraph 15(d).
[25] Respondent's submissions, paragraph 17.
[26] Respondent's submissions, paragraph 19.
[27] Respondent's submissions, paragraph 21.
[28] [2020] NSWCA 113 at [53]-[56].
[29] At [56].

40. The applicant's claim was deferred as the brain and left brachial plexus had not stabilised. Since then the applicant has amended the original claim to rely on further secondary conditions.

41. The matter was listed for a further telephone conference on 8 July 2020 as the respondent sought a right to reply to the applicant's reply submissions.

42. The respondent confirmed its position that the one assessment process was restricted to what had been claimed and referred. Reference was made to s 322A(3) of the 1998 Act and that a medical certificate had been issued. Accordingly, the one assessment was limited to what had been referred and assessed in the matter.

REASONS

43. The submissions sometimes did not distinguish between the concept of one claim and one assessment and at times merge the distinct concepts.

44. Section 66 of the 1987 Act was amended by the *Workers Compensation Legislation Amendment Act 2012* (NSW) (2012 Amending Act) which commenced on 27 June 2012. The 2012 Amendment Act introduced a threshold for obtaining permanent impairment compensation (s 66(1)) and introduced the one claim provision in s 66(1A). The section relevantly provides:

> "(1) A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.
>
> **Note.** No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less.
>
> (1A) Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury."

45. The 2012 Amendment Act also introduced the notion of "one assessment" by inserting s 322A into the 1998 Act. That section has since been further amended by providing that the Commission, as opposed to an AMS, can make the one assessment.[30] That section now relevantly provides:

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

[30] See for example subsection (1A) and part of subsection (4).

(3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of—

(a) assessment and a medical assessment certificate under this Part, or

(b) a determination by the Commission under Part 4.

(4) This section does not affect the operation of section 327 (Appeal against medical assessment) or 352 (Appeal against decision of Commission constituted by Arbitrator).

46. Section 322(4) of the 1998 Act provides:

> "An approved medical specialist may decline to make an assessment of the degree of permanent impairment of an injured worker until the approved medical specialist is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made."

The One Claim – s 66(1A) of the 1987 Act

47. "Claim" is defined in s 4 of the 1998 Act to mean "a claim for compensation or work injury damages that a person has made or is entitled to make".

48. In *Stafford* Roche DP accepted that an amendment of a claim could be made prior to the "date of resolution or determination of that claim". The relevant passage of the reasons was:[31]

> "However, there will be rare cases, such as the present, where there is a change in impairment between the date of the initial claim and the date of resolution or determination of that claim. In such cases, it is appropriate that the claim be amended to reflect the correct position. That is especially so where workers are now restricted to only "one claim" for permanent impairment compensation and where formal proceedings have not commenced in the Commission. It is clearly in the interests of justice that, subject to any prejudice to the appellant, and none has been suggested in the present case, particulars of the worker's claim properly reflect the claim that is being pursued."

49. That amendment process was discussed by Snell DP in *Singh* when the Deputy President stated:[32]

> "The Deputy President in *Stafford* concluded that a lump sum claim could be amended, in circumstances where the claim, as originally made, was ultimately found to be unavailable as a matter of law, due to the amendments to s 66 of the 1987 Act, introduced in 2012. Proceedings had not, at the time of the amendment, been commenced, and permanent impairment had not been assessed by an AMS. The Deputy President, in an *obiter* passage of that decision, suggested that amendment may be appropriate "where there is a change in impairment between the date of the initial claim and the date of resolution or determination of that claim". Nowhere in *Stafford* does the Deputy President suggest that a claim may be amended, after it has been assessed by an AMS and a MAC issued. His discussion at [73]-[74] of that decision is to the contrary…".

[31] *Stafford* at [94].
[32] *Singh* at [60].

50. The discussion in *Singh* suggests that a claim cannot be amended "after it has been assessed by an AMS and a MAC issued".

51. In *Cram Fluid Power Pty Ltd v Green*[33] (*Cram Fluid*) the applicant brought a claim in 2010 (the first claim) which resolved when the parties entered into a complying agreement. The applicant subsequently underwent surgery to the lumbar spine which resulted in a significantly higher assessment of permanent impairment. A second claim was brought in 2013, after the commencement of amendments introduced by the 2012 Amendment Act.

52. The Court held that the second claim was in breach of s 66(1A) of the 1987 Act. Emmett JA discussed the distinct claims in the following terms:[34]

> "The short answer to the Worker's contention is that, by the letter of 29 October 2013, the Worker made a further claim under s 66 of the Act. While the claim made by the letter of 29 October 2013 was a claim that specifically sought compensation under s 66, it was not made before 19 June 2012. Of course, the Worker had in fact made an earlier claim for compensation that specifically sought compensation under s 66. He made such a claim on 14 December 2010. However, that claim was resolved by the complying agreement entered into on 22 December 2010. The claim made on 14 December 2010 was no longer on foot. It was a totally separate and discrete claim from the claim made by the letter of 29 October 2013."

53. His Honour noted that the first claim "had resolved by complying agreement entered into on 22 December 2010".

54. At various parts of the reasons delivered by Gleeson JA[35] there is reference to the first claim having "resolved"[36].

55. In my view the description of the processes of the resolution of the first claim due to entering into a complying agreement and a second claim brought later is similar in context to the description used by Roche DP in *Stafford* where the Deputy President referred to "the date of resolution or determination of that claim".

56. Roche DP referred to the decision of the Court of Appeal in *Baldry v Jackson*[37] and concluded, in the absence of any special legislative provision or rule, that a similar principle should be applied in workers compensation.

57. The "general" principle discussed and applied in *Stafford* has been the subject of ongoing judicial comment and at times limited. In *Air Link Pty Ltd v Patterson (No 2)*[38] Mason P noted that "doubts surfaced" in the 1980s concerning the "relation back principle to all amendments" and stated:[39]

> "66. Despite these developments, doubts surfaced in the 1980s as to the correctness of continuing to apply the relation back principle to all amendments permitted under rules of court that modified *Weldon v Neal*. The correctness of doing so was first doubted in 1980 by the English Court of Appeal (Stephenson and Brandon LJJ) in *Liff*, a case involving the addition of a new party. In 1987 Lord Brandon, as he had become, repeated these doubts in *Ketteman*. In 1989, Clarke JA referred to these doubts in *Fernance v Nominal Defendant* (1989) 17 NSWLR 710

[33] [2015] NSWCA 250.
[34] At [11].
[35] Beazley ACJ agreeing at [1].
[36] See for example at [16] and [102].
[37] [1976]2 NSWLKR 415 at 419.
[38] [2003] NSWCA 251.
[39] At [66], Beazley JA agreeing (Ipp J in dissent).

> at 732-3. He added (at 733) his opinion that the English cases were distinguishable from *Baldry* in that they entailed the addition of a new party, whereas *Baldry* entailed the addition of a new cause of action against an existing party. The distinction is important (see also *Stumann v Spansteel Engineering Pty Ltd* [1986] 2 Qd R 471). The authority of *Proctor* therefore stands undiminished in this context."

58. The letter from the applicant's solicitors dated 19 December 2019 serving the further reports for the various conditions made no attempt to refer to the previous claim[40]. This was unsatisfactory. It was not until the telephone conference that it was properly articulated that the applicant was purporting to amend the original claim.

59. Consistent with the observations of Roche DP in *Stafford*, I could not locate any specific rule or legislative provision referring to amendment.

60. The COD specifies that the impairment was "not fully ascertainable" and establishes that the applicant's claim for permanent impairment had not resolved and not been determined. The respondent's contrary submission that the claim was "determined"[41] ignores the clear wording of the COD that the applicant's permanent impairment was "not fully ascertainable".

61. The granting of an amendment is discretionary. There are in this case, as the respondent submitted, some unsatisfactory aspects of the application to amend.

62. The respondent referred to the inordinate delay between the issuing of the COD in September 2016 and the commencement of the proceedings in matter number 1867/20. The respondent also noted that many of the further conditions had surfaced prior to the assessments undertaken in 2016.

63. I would add that the applicant's solicitors commenced further proceedings without taking any steps to restore the original proceedings. That omission was only rectified at the telephone conference when the applicant's solicitors were directed to restore the original proceedings.

64. The extent of the delay is significant and a relevant factor although it is not as great as was alleged by the respondent.

65. Notice of the further body parts was given in December 2019 when the applicant served further medical evidence. The respondent had an opportunity to arrange medical examinations and obtain medical evidence at that time. It did not avail itself of that opportunity.

66. It seems extraordinary that the applicant now has a further seven consequential conditions capable of assessment. However, the respondent did not raise a liability issue that any of the further conditions are consequential to the accepted injuries and confirmed this position at the telephone conference.

67. The applicant has also served medical evidence supporting assessments of whole person impairments of these further body parts which, if accepted, would entail the applicant to significant entitlements in respect of various thresholds such as those contained in ss 39 and 151H of the 1987 Act.

68. The applicant also correctly noted in its reply submissions that it had no medical evidence supporting a causal link and that the consequential conditions had not been assessed until recently. In these circumstances it had no basis to previously make a claim for permanent impairment of those body parts.

---

[40] Application, p 1864.
[41] See for example Respondent's submissions at 15(d).

69. Whilst there is presumptive prejudice by reason of the delay, it is otherwise accepted by the respondent that the applicant is entitled to be assessed in respect of the injury to the brain and brachial plexus.[42]

70. Subject to the issues of whether there is a breach of s 322A and given the importance of the further body parts, I am satisfied that the applicant is granted leave to amend his one claim as it has not been determined. Despite the unsatisfactory nature of the amendment process, I am satisfied that the interests of justice should allow such an amendment.

The one assessment – s 322A of the 1998 Act

71. The other issue is whether the applicant has had his "one assessment" for the purposes of s 322A of the 1998 Act.

72. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[43] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[44]

73. The fourth edition guidelines were recently referred to by the Court of Appeal in *Ballas v Department of Education*[45] as "having been held to have the force or effect of delegated legislation".[46]

74. The fourth edition guidelines provide that, where necessary, different medical assessors undertake assessments of different body parts. The separate assessments are then incorporated into a combined assessment.[47]

75. Clauses 1.15 and 1.16 of the fourth edition guidelines are contained under the heading "Maximum medical improvement" and provide when an assessment should not be made.

76. Clause 1.15 specifies when a claimant has not attained maximum medical improvement and provides:

> "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."

77. Clause 1.16 relates to when there has been inadequate treatment and provides:

> "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."

---

[42] I note that the respondent in its submissions refers to these injuries as "alleged" but has not denied that the body parts were injured. The matter could not be referred in 2016 if liability was then in issue: s 321(4) of the 1998 Act (since amended).
[43] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*.
[44] Clause 1.1 of the fourth edition guidelines.
[45] [2020] NSWCA 86.
[46] *Ballas* at [97] per Bell P and Payne JA, Emmett JA agreeing.
[47] Clause 1.20 of the fourth edition guidelines.

78. The applicant has been assessed for the cervical spine and the right upper extremity. He was found to have not attained maximum medical improvement in respect of the injuries for the brain and the left brachial plexus. In those circumstances the claim has not been determined and the assessment process is not finalised.

79. An appeal was filed in respect of the cervical spine and the assessment of the right upper extremity was accepted and confirmed at appeal. In these unusual circumstances the applicant has been assessed and exercised appeal rights in respect of two body parts, but no final assessment has been made in respect of two other body parts.

80. The parties have made no relevant submissions on the construction of s 322A save that the respondent submitted that the certificate had been issued in accordance with s 322A(3).

81. The difference in the parties' positions appears to be that the applicant submits that the overall process is not complete, and the one assessment is not finalised. The respondent submits that the process has been assessed and an appeal has been brought and finalised against two body parts.

82. The respondent relied on s 322A(3) of the 1998 Act as supporting its position. That sub-section relevantly provides that a medical dispute cannot be referred for assessment if "a medical dispute about that matter has already been the subject of assessment and a medical assessment certificate".

83. Whilst I accept that there is a merit in the respondent's position, I do not accept that there has been a concluded assessment because the AMS has declined to make an assessment for two of the body parts within the meaning of s 322(4) of the 1998 Act.

84. Pursuant to s 322(4) of the 1998 Act an Approved Medical Specialist may decline to assess whether the degree of impairment is permanent. The decision of *Hochbaum* referred to this subsection and observed that this "indicates that it may not be fully ascertainable at the outset".[48]

85. That statement is consistent with the conclusion that the assessment has not concluded. In my view the matter either has or has not been assessed. The fact that some of the body parts has not been assessed in my view indicates that the "one assessment" has not concluded.

86. Both the terms of the COD and the wording of s 322(4) indicate that the applicant has not had his one assessment.

87. The respondent referred to the decision of *O'Callaghan*. The facts in *O'Callaghan* were that the applicant's assessment of his claim which was restricted to an assessment of the lumbar spine had concluded. An appeal was brought based on deterioration within the meaning of s 327(3)(a) of the 1998 Act. However, the deterioration that was alleged was in respect of the cervical spine, that is, a matter not referred for assessment. It was held that the worker could not file an appeal on a body part not previously assessed by the AMS.

88. During the course of his reasons, Roche DP stated:[49]

> "71. The appeal available in s 327 is against 'a medical assessment under this Part'. That is, it is an appeal against the medical assessment made by the AMS under Pt 7 of the 1998 Act. The only medical assessment made by Dr Ho was in respect of the permanent impairment resulting from the injury

[48] *Hochbaum* at [55].

[49] *O'Callaghan* at [71]-[72].

> to Ms O'Callaghan's lumbar spine (as noted earlier, it seems to have been accepted without challenge that the referral of the lumbar spine included the sacro coccygeal spine).
>
> 72. As Dr Ho was not asked to do so, it was not open to him to assess any other body part (*Aircons*). It follows that it is not open to use s 327(3)(a) to appeal against an assessment that Dr Ho did not make, that is, an assessment of whole person impairment as a result of injury to the cervical spine. As the respondent submitted, s 327 does not contemplate a situation where a worker can continue to bring claims, under the guise of an appeal, for a deterioration in respect of parts of the body that were not previously the subject of a dispute or an assessment by an AMS."

89. Consistent with the reasoning in *O'Callaghan*, the applicant could not file an appeal and claim that further body parts had "deteriorated" within the meaning of s 327(3)(a) when these matters had not been assessed by the AMS.

90. The applicant is not filing an appeal pursuant to s 327 of the 1998 Act. The essential finding in *O'Callaghan* is not strictly relevant to the amendment of the claim that has not been finalised and in which, as the respondent concedes, there needs to be an assessment of at least two body parts.

91. The respondent's submission that the MAC dated 27 July 2016 issued by the Medical Appeal Panel "is the one and only MAC which can be considered in assessing the applicant's degree of whole person impairment"[50] is inconsistent with its concession that the applicant "can seek a further assessment" for those body parts which "could not be assessed in the MACs dated 10 May 2016".[51] That inconsistency was repeated later in its submissions when it again conceded that it "is clear that the applicant has the right to be further assessed by an AMS to the alleged brain injury and alleged left arm (brachial plexus) injury"[52]. Leaving aside the comment as to the injury being "alleged" when it has been admitted, the respondent clearly accepts that the assessment process is ongoing.

92. The respondent's contradictory submissions expose the unusual position in this matter. On the one hand it submitted that the decision issued by the Medical Appeal Panel "is the one and only MAC which can be considered"[53], yet then concedes that a further MAC can be issued for those body parts that had been claimed and not been assessed.[54]

93. The respondent otherwise referred to the application in matter number 1867/20 being "misconceived" and that the applicant was not able to make a "further claim" for the additional body parts included in that application.[55]

94. I agree that it was unnecessary and unfortunate that the applicant brought the further proceedings (1867/20) when he should have simply restored the proceedings commenced in 2015. That omission was corrected at the telephone conference when the applicant, somewhat belatedly, restored the 2015 proceedings. However, the real issue remains whether the claim can now be amended and assessed, in the circumstances where the claim and assessment process has not concluded.

---

[50] Respondent's submissions, paragraph 19.
[51] Respondent's submissions, paragraph 21.
[52] Respondent's submissions, paragraph 25.
[53] Respondent's submissions, paragraph 19.
[54] Respondent's submissions, paragraphs 21 and 25.
[55] Respondent's submissions, paragraphs 22 and 23.

95. In the circumstances of this case the matter is further complicated by the fact that the applicant has brought an appeal against the assessment of the cervical spine. However, whilst that appeal has been determined, the Appeal Panel only confirmed that the assessment had not concluded.

96. I conclude, consistent with the wording in s 322(4), that the assessment has not finalised because two of the body parts have not been assessed. In these circumstances the one assessment is still ongoing and there is no breach of s 322A.

CONCLUSIONS

97. My conclusion, with some reluctance, is that the claim has not resolved nor been determined, and that the assessment process remains on foot. In these circumstances the applicant has an entitlement, with leave, to amend his claim and have the one assessment in respect of that claim. As the one assessment has not concluded and is still ongoing, I do not consider that the amendment means that this is a further assessment.

98. The findings and orders are set out in the Certificate of Determination.