

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5449/19
Applicant: Dimitrios Mitropoulos
Respondents: Qantas Airways Limited
Date of Determination: 2 September 2020
Citation: [2020] NSWCC 297

The findings of the Commission are as follows:

1. The Application to set aside the Certificate of Determination issued by Arbitrator Wright dated 7 February 2020 is refused.
2. Leave is not granted to reconsider the Medical Assessment Certificate dated 3 January 2020.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Dimitrios Mitropoulos (the applicant) is a 56 year old man who was employed by QANTAS Airways Ltd (the respondent) at its air transfer terminal in Sydney. On 31 July 2016, he pushed a container in the course of his employment and injured both of his shoulders.
2. The applicant brought a claim pursuant to section 66 of the *Workers Compensation Act (NSW) 1987*, as amended (1987 Act) for a lump sum payment in respect of whole person impairment (WPI) resulting from injury to his shoulders occurring on 31 July 2016.

PROCEDURE BEFORE THE COMMISSION

3. This matter came for conciliation and arbitration hearing on 31 August 2020 by telephone conference. Mr M Eirth of counsel instructed by Mr K Ramsey, solicitor, appeared for and with the applicant. Mr J Dodd of counsel instructed by Mr C Tompkins, solicitor, appeared for the respondent.
4. The matter proceeded to conciliation but regrettably was not capable of settlement. I am satisfied that the parties to the dispute understood the nature of the dispute, the procedure which was adopted and the implications of proceeding to arbitration hearing. I have used my best endeavours to attempt to bring the parties to mutual resolution of the outstanding issues.
5. The matter proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

6. The following documents were before the Commission and were taken into account in making this determination:
 - (a) Application to Resolve a Dispute (Application) dated 21 October 2019 and attachments;
 - (b) Reply dated 11 November 2019 and attachments (Reply);
 - (c) Medical Assessment Certificate of Dr D Gorman dated 3 January 2020 (MAC);
 - (d) Certificate of Determination dated 7 February 2020 signed by Arbitrator M Wright (COD);
 - (e) Submissions of the applicant dated 6 May 2020;
 - (f) Submissions of the applicant dated 6 July 2020 and attachments;
 - (g) Submissions of the respondent filed 21 July 2020, and
 - (h) Further submissions of the applicant dated 26 August 2020.

Oral evidence

7. No oral evidence was given.

SUBMISSIONS

8. It is unnecessary to summarise in detail the submissions provided in this matter, because both parties prepared written submissions.
9. Additionally, on 31 August 2020 at the arbitration hearing Counsel wished to add supplementary oral submissions and leave was granted to the parties to so proceed. Those supplementary oral submissions were recorded and sound recordings are available to the parties by application to the Registry.

DISCUSSION, FINDINGS AND REASONS

Issues for determination

10. The issue in this matter is :
 - (a) Should the Commission exercise its discretion pursuant to section 350 (3) of the 1987 Act to reconsider the determination of Arbitrator Wright dated 7 February 2020?

The claim

11. The applicant obtained the opinion of orthopaedic surgeon Dr W G D Patrick. Dr Patrick thought that the applicant suffered a whole person impairment of 15 per cent. The respondent engaged Professor M Ryan who on 19 November 2018 opined that the applicant presented with five per cent whole person impairment in respect of his left shoulder injury and two per cent whole person impairment in respect of his right shoulder injury, totalling seven per cent whole person impairment.
12. This matter resolves simply to a dispute about the applicant's degree of whole person impairment.

The AMS assessment

13. Because of the dispute concerning the extent of the applicant's WPI, the matter was referred to Approved Medical Specialist (AMS), Dr David Gorman. A MAC was issued by Dr Gorman on 3 January 2020 certifying a WPI of six per cent, namely two per cent in respect of the applicant's right upper extremity and four per cent in respect of the applicant's left upper extremity.
14. On 7 February 2020 Arbitrator Wright issued a COD to the effect that because the MAC resulted in six per cent WPI the applicant had no entitlement to compensation under section 66 of the 1987 Act¹.
15. The respondent's Reply accepts that the applicant suffered injury to both of the applicant's shoulders. The respondent says, however, that because the combined WPI is less than 10 per cent, there is no entitlement to a lump sum payment available to Mr Mitropoulos under section 66 (1) of the 1987 Act.

¹ Section 66 (1) 1987 Act.

The present Application

16. By the present application the applicant seeks reconsideration of the assessment made by Dr Gorman (AMS) concerning the applicant's left upper extremity. It transpires that following the issue of the MAC the applicant re-engaged Dr Patrick to consider the opinion and methodology of AMS Dr Gorman. Dr Patrick raised some additional matters which then caused the applicant to lodge an Application for Reconsideration (of Arbitrator Wright's determination). This was initially lodged through the applicant's solicitors letter dated 6 May 2020.
17. The grounds supporting a reconsideration were identified as:
 - (a) Dr Gorman allegedly failed to include any assessment of symptomatic left shoulder instability patterns. He did not, therefore, correctly categorise the applicant's left upper extremity in accordance with "Upper Extremity Impairment due to Symptomatic Shoulder Instability Patterns".
 - (b) Dr Gorman did not advance reasons as to why he disagreed with Dr Patrick's opinion and this also constitutes an error on the part of (Dr Gorman) as the AMS.
18. The reports of Dr Patrick which were initially relied upon by the applicant were dated 8 February 2019 and 8 October 2019. It is noteworthy that both reports pre-date Dr Gorman's assessment of 3 January 2020. Dr Patrick's reports were available to AMS Dr Gorman and the Commission would expect that in the absence of contrary evidence, Dr Gorman had read those reports. In fact, Dr Gorman confirms that he did consider Dr Patrick's reports. Dr Patrick's most recent report (on which the reconsideration application is based) is dated 17 March 2020.

Delay

19. The applicant in submissions offered initially an explanation for delay in questioning the MAC in these terms. First, it was submitted that the applicant's solicitor thought that an appeal could be lodged within 28 days after the Commission issued a COD. As mentioned, Arbitrator Wright issued the COD on 7 February 2020, so the applicant's solicitor says that he was thinking that he had until 6 March 2020 to lodge an appeal. The applicant's solicitor subsequently discovered that the 28 days for appeal ran from the date of the MAC, namely from 3 January 2020 which meant that an appeal should have been filed in fact by 31 January 2020.
20. But in my view none of this is really of any moment. The reconsideration application presently before this Commission was filed at the earliest on 6 May 2020, namely two months after the date when the applicant's solicitor concedes that he thought that a deadline existed. Much of the matters raised concerning timelines just don't make much further sense in these circumstances.
21. I mention these matters because an important consideration in exercising discretion concerning reconsideration applications is the question of delay. I do not think it is of benefit to canvass the matter beyond what I have just said because there may exist a significant amount of evidence (or none) to explain that issue. The delay issue is a significant one in my view in this matter.

Authorities on reconsideration applications

22. In terms of the relevant case authorities, Roche DP in 2006 identified in *Samuel*² some relevant matters to consider in exercising discretion regarding allowing matters to be reconsidered. An “appeal” is a different creature to a “reconsideration”. The High Court has held that appeals can only be pursued where the original decision of the (Arbitrator) is affected in some way by a legal, factual or discretionary error³.
23. Well in advance of the decision of Roche DP in *Samuel* Street CJ observed that because of public policy involved in the finality of litigation, a party must produce all available evidence at the initial stages of dispute determination. The exercise is to balance finality of litigation with the Tribunal’s power to ensure that justice and fairness are achieved⁴.
24. Other decisions prior to *Samuel* also established the relevant factors to consider in “Reconsideration Applications”. The Court of Appeal in *Schipp*⁵ thought that factors to consider were:
 - (a) Delay,
 - (b) Whether the worker failed to exercise a right of appeal,
 - (c) Waiver and estoppel,
 - (d) The effect that rescinding an earlier determination would have in terms of allowing fresh proceedings to occur,
 - (e) Consideration of the distinction between “fresh evidence” and “more evidence”.
25. His Honour O’Meally J in 1989⁶ adverted to the importance of the distinction between “fresh evidence” and “more evidence” in reconsideration applications⁷. In the present case, I see this distinction to be important because what the applicant is in effect seeking to do is to cavil with Dr Gorman’s MAC by providing more (post MAC) evidence from Dr Patrick. When one analyses this “more evidence” of Dr Patrick it is in my view fair to say that it is simply a restatement of Dr Patrick’s earlier opinions in his reports of 8 February 2019 and 8 October 2019. Second, Dr Patrick’s opinion does not happen to coincide with the opinion of the AMS. In this jurisdiction I cannot see any provisions in the legislation which entitle a party to dispute an AMS decision because they are not happy with the outcome.
26. In supplementary oral submissions on behalf of the applicant on 31 August 2020, Mr Eirth of counsel then (I thought somewhat valiantly) submitted that the issue concerning whether the applicant experiences problems with his left shoulder is a medical issue and hence not one which lawyers should be “sitting around” and “considering”. Whatever the actual merits of that assertion, I must say that (unless I misinterpreted the argument) it was a surprising submission. Put simply, as I explained to Mr Eirth, it is the Commission who has to determine reconsideration applications under section 350 of the Workplace Injury Management and Workers Compensation Act 1998 (1998 Act). The question for the Commission is whether the Commission’s earlier decision (ie., Arbitrator Wright’s decision) should be reconsidered.
27. Quite obviously, my task in deciding whether to permit a reconsideration must first look to Arbitrator Wright’s COD. The question becomes whether it overlooked any material matter. The answer is that it did not.

² *Samuel v Sebel Furniture Limited* [2006] NSWCCPD 141.

³ *Allesch v Maunz* [2000] 203 CLR 172).

⁴ *Hilliger v Hilliger* (1952) 52 SR (NSW) 105.

⁵ *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413.

⁶ *Galea v Ralph Symonds Pty Limited* (1989) 5 NSWCCR 192.

⁷ The section(s) in previous legislation was almost identical.

28. The next enquiry is whether the evidence relied upon by (in this case) Arbitrator Wright was so incorrect that Arbitrator Wright's decision should be reconsidered. In my view it is at that point that the Commission in exercising its power to reconsider can and should consider in general terms whether the AMS decision was wholly or in part vitiated by the fact that the AMS failed to take into account matters which he/she should have considered. That then invokes, in my view, a consideration of the "usual" complaints made about decision makers.
29. Specifically, did the AMS fail to take into account relevant considerations? Did the AMS take into account irrelevant considerations? Did the AMS afford more or insufficient weight to certain aspects of the applicant's claim? Was there bias? (Dr Patrick's latest report suggests that the applicant's examination with Dr Gorman touched upon this aspect but insufficient evidence exists). Have circumstances in the sense of uncovering of fresh evidence (for example, previously unknown pathology, previously unknown central facts or circumstances or diagnosis or events, to name a few) that it is in the interests of justice that the earlier COD be set aside to enable the MAC to be reconsidered?
30. In this matter, the Commission has a MAC. There was no appeal filed within time. There is a request for reconsideration pursuant to section 350 of the 1998 Act. The only additional evidence (even if one concedes that it is "fresh" evidence) is contained in a critique of the binding AMS Certificate of Determination provided by a medical practitioner whose findings on examination were not the same as the findings on examination of the AMS.
31. In *Maksoudian*⁸ Bishop J commented that the reconsideration test involves a two-step process. First, is there fresh evidence? In my view, if Dr Patrick's new comments about the AMS approach of Dr Gorman is "fresh evidence" it is only "fresh" in the sense that it is a restated opinion following the AMS assessment, not "fresh" in terms of any changed factual circumstances or unknown earlier circumstances relevant to the applicant's original injury and/or assessment. The second part of Bishop J's test is to ask whether, had this evidence been earlier available, would it have likely affected the earlier outcome? In terms of this second limb, again Dr Patrick's further opinion follows evidence which is already in place and which was before the AMS. Dr Patrick's further comments regarding the approach by the AMS are not evidence, but rather further opinion.

Reasons and decision

32. In general terms, the approach to reconsideration applications involves a number of considerations, including those mentioned above. I think that they are:
 - (a) Section 354 of the 1998 Act requires that decisions be made with as little technicality and formality as is appropriate.
 - (b) The discretion to reconsider must be exercised fairly to both parties and also consider responsibilities for delay.
 - (c) There is clear public interest in the finality of litigation so that re-airing of determined grievances is a matter to be avoided.
 - (d) It is only if new evidence could not with reasonable attention by a party be obtained at the prior application that any new evidence should be considered.
 - (e) Anshun estoppel applies. A party cannot on a reconsideration application pursue an argument or position pleading which should have reasonably been raised at an earlier time, specifically in the earlier action.

⁸ *Maksoudian v J Robins & Sons Pty Limited* (1993) 9 NSWCCR 642 per Bishop J.

- (f) Mistakes on the part of lawyers do not constitute grounds for reconsideration.
 - (g) An overriding principle is that the Commission must do justice to the parties according to the substantial merits of their cases.
33. In *Samuel*, the applicant after an initial Determination underwent surgery. That surgery unveiled and discovered specific physical pathology which was earlier thought by the doctors did not exist. For that reason, fresh evidence emerged which was not earlier available. It was appropriate for a reconsideration of the earlier Determination to occur. That I think is a lesson from the *Samuel* decision and in my view it is correct.
34. This Commission is not suggesting that identical facts to the *Samuel* situation is necessary to establish a worker's entitlement. The existence of discretion in varied factual circumstances is the key, so that there may well be many pathways to seek reconsideration of an earlier decision of the Commission. Because the discretion is wide, it is likely in my view that the categories of reasons for exercise of it are not circumscribed.
35. An illustration of the facts is perhaps (by obiter) of assistance. This matter is unlike *Samuel*. Dr Patrick's post MAC report does not provide any new revelations concerning the applicant's physical pathology, physical capacity or any potentially changed diagnosis. It simply argues the case that Dr Patrick's diagnosis is correct and the AMS's diagnosis and opinion is incorrect. That is a matter which might have been pursued, if at all, by an appeal process, namely appeal to the Medical Appeal Panel with an allegation that Dr Gorman approached the Guidelines incorrectly or failed to properly categorise the applicant in accordance with AMA 5, or whatever else those allegations to be aired might be.

Determination

36. For the above reasons, the Application to set aside the COD issued by Arbitrator Wright dated 7 February 2020 is refused. It follows that leave is not granted to reconsider the MAC dated 3 January 2020 given by Dr David Gorman, AMS.

