WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5619/19**
Applicant: **Paul Anthony Hyland**
Respondent: **NSW Sugar Milling Co-operative Limited**
Date of Determination: **4 February 2020**
Citation: **[2020] NSWWCC 33**

The Commission determines:

1. The applicant is a worker with highest needs.

2. The applicant is not estopped from pursuing his claim for weekly benefits pursuant to s 38A of the *Workers Compensation Act 1987* by the discontinuance of a claim for such benefits for the period 18 March 2017 to 10 February 2019 by the Certificate of Determination – Consent Orders dated 10 May 2019 in matter number 1737/19.

3. The respondent is to pay the applicant $788.32 per week, pursuant to s 38A of the *Workers Compensation Act 1987* as adjusted by s 82BA of that Act, for the period 17 September 2012 to 10 February 2019.

4. The respondent is to have credit for payments made in that period.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Paul Anthony Hyland (the applicant/Mr Hyland) sustained injury on 6 March 1997 arising out of or on the course of his employment with NSW Sugar Milling Co-operative Limited when he fell and injured his right knee and right hip.

2. The applicant has undergone extensive surgery on his right knee and hip, including right knee replacement in about November 2011, right hip replacement on 12 April 2017 and revision of the right knee replacement on 5 July 2017.

3. Mr Hyland was assessed by Dr J Brian Stephenson, Approved Medical Specialist (AMS), on 30 January 2019. Dr Stephenson issued a medical assessment certificate (MAC) dated 11 February 2019 containing an assessment of 40% whole person impairment (WPI) as a result of injury to the right knee, right hip, the lumbar spine and scarring.

4. In earlier proceedings before the Commission[1] the applicant claimed weekly benefits compensation for the period from 18 March 2017 to date and continuing. These proceedings were discontinued on 10 May 2017 when a Certificate of Determination – Consent Orders (COD 10 May 2019) was issued in the following terms:

> "By and with the consent of the parties, the determination of the Commission in this matter is as follows:
>
> 1. The applicant is a worker with highest needs pursuant to section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
>
> 2. The claim for weekly benefits pursuant to section 38A of the 1987 Act for the period 18 March 2017 to 10 February 2019 is discontinued.
>
> 3. Respondent to pay the applicant weekly benefits pursuant to section 38A of the 19787 Act as follows:
>
>   a. $831 per week from 11/2/2019 to 31/3/2019;
>   b. $840 per week from 1/4/2019 to date and continuing with such amount to be further indexed in accordance with section 82A of the 1987 Act.
>
> The following is not a determination of the Commission; however, I note that the parties have agreed:
>
> A. The respondent is to have credit for weekly benefits paid to the applicant in Respect of the period in order 3 above."[2]

5. On 12 September 2019, the solicitor for the applicant emailed the solicitor for the respondent[3] drawing attention to the decision of Acting Deputy President Parker SC in *Melides v Meat Carter Pty Limited*[4] (*Melides*), and asserting that the effect of the decision was that a worker with highest needs is entitled to weekly benefits from the date of injury and not the date of the MAC, which was issued on 9 June 2017. Noting that the date of injury in this case was 6 March 1997, the applicant's solicitor requested the respondent to agree to pay the applicant weekly benefits from the date of injury to date with credit for payments already made.

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[1] 1737/19.
[2] Application p 55.
[3] Application p 67.
[4] [2019] NSWWCCPC 48.

6. The applicant's solicitor sent a further email to the solicitor for the respondent dated 19 September 2019[5] again referring to the decision in *Melides* and to cl 35 of Sch 8 to the Workers Compensation Regulation 2016 (the Regulation) which provides that s 38A of the 1987 Act does not apply to the determination of the compensation payable in respect of any period of incapacity occurring before 17 September 2012. Accordingly the applicant's claim pursuant to s 38A was amended to the period from 17 September 2012 to date and continuing.

7. On 17 October 2019 AAI Limited trading as GIO, the claims manager for icare workers insurance which insured the respondent, issued to the applicant a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) in which it disputed liability that the applicant was entitled to weekly payments of compensation pursuant to s 38A of the 1987 Act prior to 11 February 2019, the date of the MAC of Dr J Brian Stephenson[6]. GIO disputed that the applicant was a worker with highest needs prior to that date. In the notice, GIO also expressed the understanding that a Notice of Intention to Appeal had been lodged against the decision in *Melides*.

8. The proceedings were the subject of a telephone conference on 27 November 2019. At that conference the respondent was granted leave pursuant to s 289A(4) of the 1998 Act to rely on an *Anshun* estoppel defence[7] in in respect of the proceedings number 1737/19 which were, in part, discontinued on 10 May 2019. The matter was stood over for conciliation/arbitration.

ISSUES FOR DETERMINATION

9. The parties agree that the following issues remain in dispute:

    (a) Is the decision of Acting Deputy President Parker SC in *Melides* the correct position at law, that is, is the applicant in this case entitled to weekly benefits compensation from 17 September 2012 to the date of the MAC, 11 February 2019?

    (b) Is the applicant estopped by the decision in *Anshun* from recovering compensation in the proceedings?

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conciliation conference/arbitration hearing in Coffs Harbour on 20 January 2020. Mr M Inglis of counsel appeared for the applicant briefed by Mr W Langler. The applicant was present. Mr T Baker of counsel appeared for the respondent. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. 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.

EVIDENCE

Documentary evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) the Application to Resolve and attached documents;

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[5] Application p 68.
[6] Application p 69.
[7] *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589.

(b) Reply and attached documents.

Oral evidence

12. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

13. The submissions of the parties have been recorded and a transcript (T) of the arbitration hearing on 20 January 2020 is available. I will not repeat the submissions in full. In summary they are as follows (noting that by agreement between counsel, in view of the fact that the respondent was seeking a finding from the Commission other than in accordance with *Melides*, Mr Baker presented the respondent's submissions first).

Respondent

14. The respondent submits that *Melides* was incorrectly decided, noting information on the Commission's website that an appeal to the Court of Appeal had been lodged on 4 December 2019.

15. The submissions advanced by counsel for the respondent were those which he anticipated would be put before the Court of Appeal to demonstrate that the decision of Acting Deputy President Parker SC was, with respect, incorrect. Although counsel for the respondent concedes that it would be difficult for the Commission in this case to find other than in accordance with *Melides*, in the interests of his client, he felt bound to make the submissions.

16. The respondent concedes that there is no issue that the applicant is a worker with highest needs within the meaning of that term in s 32A of the 1987 Act. This is in accordance with the COD 10 May 2019. The agreement in that document was that the respondent would pay the applicant weekly benefits from 11 February 2019, the date of the MAC issued by the AMS, Dr Stephenson.

17. The respondent notes that in the current proceedings the claim for weekly benefits extends from 17 September 2012, whereas in the earlier matter number 1737/19 the claim for such benefits commenced on a later date,18 March 2017.

18. The respondent notes that the applicant did receive lump sum compensation in 2002 pursuant to a s 66A agreement for 25% permanent loss of efficient use of the right leg at or above the knee and 5% permanent impairment of the back, calculated with reference to the Table of Maims. That settlement has no relevance to a whole person impairment assessment.

19. The respondent notes that the medical dispute in the current case was settled when Dr Stephenson issued the MAC containing an assessment of 40% WPI for injuries that included the right lower extremity (knee and hip). The assessment took into account that the applicant underwent surgery on both his knee and hip in 2017, with Dr Stephenson making his assessment due to a finding of a fair result for the hip and knee replacements. To get to an assessment of 40% WPI the respondent asserts that the AMS had to consider the outcome of those surgical procedures, as well as an assessment in respect of the lumbar spine.

20. The respondent submits that the AMS would not have been in a position to make an assessment in respect of the hip and knee until after some period following the hip and knee surgery in April and July 2017, probably six to twelve months after each surgery. This is because the applicant had to be assessed by the AMS as having reached maximum medical improvement before an assessment of WPI could be made by him.

21. In this circumstance, the respondent submits that it cannot be the case that the applicant always suffered a 40% WPI. That is the effect of following the finding of the Acting Deputy President in *Melides* when he found that the worker in that case was entitled to the payment of compensation provided for in s 38A of the 1987 Act from the date of injury, because he was assessed at a date well after the injury giving rise to the claim as a worker with highest needs, that is, a worker with a degree of permanent impairment of more than 30%.

22. The other matter that indicates that the applicant has not, since the date of injury, always suffered from 40% WPI is the functional capacity that he has demonstrated since his injury on 6 March 1997. According to the evidence in the case including:

    (a) from Dr Mark Pearce who operated on Mr Hyland in 2011 and 2017. In two reports dated 25 January 2012 Dr Pearce said that Mr Hyland was making good progress following surgery on the right knee in November 2011[8]. He later reported on 4 June 2012[9] the Mr Hyland was happy and living life to the fullest. This improvement in the applicant's condition is reflected in later reports of Dr Pearce up until July 2016 when the onset of hip pain is recorded;

    (b) from the "whole series" of WorkCover certificates of capacity[10] containing certification of the applicant having capacity for some type of employment, up to 40 hours a week, with restrictions, and

    (c) from the financial records of the applicant, an examination of which reveals a capacity to work and earn income which, according to the respondent, "dovetails" with the WorkCover certificates of capacity,

    the applicant has demonstrated significant functional capacity to work and earn income inconsistent with an assessment of 40% WPI.

23. Counsel for the respondent made detailed submissions on those parts of the judgement in *Melides*, which he submits are incorrect. Those submissions may be relevant when the appeal in that case is before the Court of Appeal, but it is not necessary to repeat them for the purpose of this judgement.

24. On the *Anshun* estoppel issue, the respondent notes the timeline of events in 2019 relevant to this defence. This is as follows:

    (a) January 2019 when Mr Melides' claim was heard before a Commission Arbitrator;

    (b) 26 February 2019 when the Arbitrator handed down his decision in favour of the respondent employer, determining that the provisions of s 38A did not commence until the date of a MAC containing an assessment of more than 30% WPI;

    (c) 9 April 2019 when the Application to Resolve a Dispute in matter number 1737/19 was registered;

    (d) 10 May 2019 when, in matter number 1737/19, Mr Hyland discontinued his claim for weekly benefits pursuant to s 38A for the period 18 March 2017 to 10 February 2019, and

    (e) 10 September 2019, the date of the appeal decision in *Melides*.

[8] Application pp132 & 133.
[9] Application p 134.
[10] Application from p 175.

25. The respondent notes that in respect of the COD 10 May 2019, the applicant received benefits pursuant to s 38A for the period from 11 February 2019 to date and continuing. That claim was the subject of litigation and s 38A was clearly in the minds of the parties at that time.

26. The respondent submits that having regard to what the High Court (Gibbs CJ, Mason and Aickin JJ) said at [37] in *Anshun*, if the applicant in the current proceedings succeeds it, will result in a judgement that conflicts with an earlier judgement. That is because the claim for weekly benefits for the period 18 March 2017 to 10 February 2019 was discontinued on 10 May 2019 and the applicant now claims weekly benefits for that period. This is notwithstanding the fact that the claim for weekly benefits in the earlier proceedings commenced on 18 March 2017 and the claim in the current proceedings commences from 17 September 2012. In that circumstance, any entitlement from 18 March 2017 in the current proceedings would be in complete contradistinction to what was agreed on 10 May 2019 when matter number 1737/19 was discontinued.

27. The respondent submits that, in accordance with the finding of the Court of Appeal in *Rail Services Australia v Dimovski*[11](*Dimovski*), a consent order can create an estoppel.

28. The respondent refers to the recent detailed discussion of *Anshun* by Deputy President Wood in *Israel v Catering Industries (NSW) Pty Ltd*[12](*Israel*), and the more recent cases in the Compensation Court of NSW dealing with estoppel in the context of workers compensation litigation.

29. The respondent submits that it was unreasonable for the applicant not to pursue the argument in respect of his entitlement to weekly benefits pursuant to s 38A of the 1987 Act in proceedings number 1737/19 and to now seek to argue that entitlement.

30. As an alternative to a finding that the applicant is estopped from pursuing his claim for the whole period from 17 September 2012 to 10 February 2019, the respondent submits that he should at least be estopped for the period from 18 March 2017 to 10 February 2019, the period which overlaps the period claimed in the current proceedings.

31. The respondent submits that if it is not successful in having the applicant estopped from pursuing his claim for weekly benefits, the current proceedings should be stood over to await the determination of the Court of Appeal decision in *Melides*. This is notwithstanding that this may involve an indeterminate delay in finalising the current proceedings.

Applicant

32. The applicant submits that the decision in *Melides* should be followed, and that Commission arbitrators at least are bound to follow it until such time as the Court of Appeal decides that it is wrong. The fact that *Melides* is "nominally binding" on Commission arbitrators was acknowledged by the respondent[13].

33. The applicant submits that Acting Deputy President Parker at [51]-[54] and [61] in *Melides* is quite explicit in his findings that the entitlement to the special payment under s 38A for workers with highest needs arises at the same time as the entitlements to weekly compensation under ss 36, 37 or 38. That date is the date of injury.

[11] [2004] NSWCA 267.
[12] [2017] NSWWCCPD 53.
[13] T 48.10 - 48.15.

34. The applicant also agrees with the useful summary of relevant principles in respect of *Anshun* estoppel by Deputy President Wood in *Israel*. He makes the following points:

    (a) there has not been a determination by the Commission. There has been a Certificate of Determination based on consent orders. That is important because the respondent submits that the Commission in the current proceedings is being asked to make a decision inconsistent with a previous finding by an arbitrator of the Commission.

    (b) the decision by the arbitrator in *Melides*, argued in January 2019 and decided in February 2019, was against the worker. It was only overturned on appeal in September 2019;

    (c) the only guidance available to the applicant and his advisors at the time the consent orders were entered into (on 10 May 2019) was the decision in *RSM Building Services Pty Ltd v Hochbaum*[14](*Hochbaum*), which did not assist the applicant at that time, and

    (d) it was only when the appeal decision in *Melides* was handed down that it became apparent that a cogent argument was available to the applicant in this case.

35. The applicant submits that, at the time the claim for weekly benefits for the period from 18 March 2017 to 10 February 2019 was discontinued on 10 May 2019 in proceedings number 1737/19, his chances of success were remote as a result of the decision in *Hochbaum*, which was handed down in 18 April 2019, and the arbitrator's decision in *Melides*.

36. The applicant also notes that the respondent did not, on 10 May 2019, seek an award in respect of the matter referred to in [2] of the COD 10 May 2019, and that to all intents and purposes the matter was left open for a future determination by the Commission in the event that a further application was pursued by him.

37. For the same reasons referred to in [35]-[36] above, the respondent should not be entitled to have the benefit of the applicant being estopped for the more limited period from 18 March 2017 to 10 February 2019 as opposed to the longer period of weekly benefits claimed in the current proceedings from 17 September 2012 to 10 February 2019.

38. The applicant also relies on the summary of the law relating to *Anshun* estoppel in *Israel*, and in particular [121] of the judgement, which refers to the prospect of inconsistent judgements being described as an "obviously important" and a critical factor in any assessment of whether an *Anshun* estoppel arises. The applicant submits that there can be no question of a determination in the current proceedings creating a judgement inconsistent with an earlier judgement, because there was no judgement in the earlier proceedings.

39. The applicant submits (with apparent reference to *Dimovski*, which was referred to by Deputy President Wood at [136] in *Israel*) that whilst consent orders may result in issue estoppel arising, it does not necessarily follow. Each case turns on its own facts, and on the facts of this case the Commission would not be satisfied that an *Anshun* estoppel arises.

40. The applicant's final submission is that whilst the respondent was given leave to raise a matter that was not in the s 78 notice (but was raised in the Reply), that is the *Anshun* estoppel argument, there was no mention of the applicant's capacity for work in that notice or in the Reply. Therefore the Commission should disregard any argument in respect of the applicant's capacity for work.

[14] [2019] NSWWCCPD 15.

FINDINGS AND REASONS

MELIDES

41. The decision on *Hochbaum* was handed down by the President, Judge Phillips, on 18 April 2019. It is under appeal to the Court of Appeal and was argued before the Court on 21 October 2019. No decision has been given yet.

42. Acting Deputy President Parker in *Melides* referred to *Hochbaum* at [66]-[75] of his judgement. He distinguished it from the position in *Melides*, on the basis that Mr Melides was seeking weekly benefits pursuant s 38A(1), whereas in *Hochbaum* the worker was seeking restoration of weekly benefits in accordance with s 39(1). In *Hochbaum* the President held that a worker requires an assessment of permanent impairment in excess of 20% to become entitled to further weekly compensation after having received weekly payments of compensation for an aggregate period of 260 weeks, referred to in s 39(1). "Absent such an assessment the bar imposed by s 39(1) remains. An assessment in excess is an essential precondition to continuing entitlement"[15].

43. The President therefore held in *Hochbaum* that the worker was not entitled to weekly benefits for the period between the expiration of the 260 week period during which he had received weekly compensation and the date of issue of the MAC containing an assessment of permanent impairment in excess of 20%:

> "Where the worker ceases to be paid weekly payments of compensation due to s 39(1), it is only if has been assessed, for the purpose of s 65, to have a degree of permanent impairment greater that 20%, that s 39(2) is engaged to determine whether the worker's entitlement to weekly payments may be restored.[16]"
>
> (The reference to s 65 being to that section in the 1987 Act)

44. In *Melides* the Acting Deputy President held that s 38A is not a disentitling provision but depends on the worker having a determination that s/he is entitled to compensation under ss 36, 37 or 38 as the case may be. He said that all s 38A does for a worker with the highest needs is to adjust the rate so that the weekly benefit paid does not fall below the prescribed minimum.

> "Section 38A proceeds on the premise that the worker has a 'determination of the amount of weekly payments of compensation' to which he is entitled pursuant to ss 36, 37 and 38. In relation to that determination s 38A operates. When he became a worker with highest needs is of no concern. The only issue is whether or not he is in fact a worker with highest needs as defined by s 32A."[17]
>
> …..
>
> "The focus of s 38A is on the amount of weekly payments to be made. The focus of s 39 is whether any payments are to be made."[18]

45. The respondent employer was therefore ordered to pay the appellant, Mr Melides, weekly compensation at the rate prescribed by s 38A of the 1987 Act for the period from the date of injury until a date after the issue of a MAC containing an assessment of whole person impairment of 60%, about the time an appeal against the MAC was lodged, that appeal being unsuccessful. Credit was given for payments made during that period.

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[15] *Melides* at [69].
[16] *Hochbaum* at [147] referred to in *Melides* at [68].
[17] *Melides* at [71].
[18] *Melides* at [73].

46. I have referred to the finding in *Melides* as counsel for the respondent put detailed arguments to me as to why it was incorrectly decided. Such arguments may find favour with the Court of Appeal. However, in my view, I am bound to follow that decision until such time as it is overturned.

47. I do not accept the tentative submission of the respondent that I should defer my decision in this matter until the Court of Appeal hands down its decision in *Melides*. The law is currently as stated by the Acting Deputy President. Any deferral of my decision would mean that the applicant is having a decision on his claim unfairly delayed for an indeterminate period.

***Anshun* estoppel**

48. In *Anshun* the High Court (Gibbs C.J., Mason and Aicken JJ) said at [38]:

> "It has been generally accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgement which conflicts with an earlier judgement. In this respect the discussion in Brewer v Brewer [1953] HCA 19;)1953 88 CLR is illuminating. (at p603)"[19]

49. One of the reasons put forward by the respondent in support of its submission that the applicant should be estopped from pursuing his claim on the basis of an *Anshun* estoppel is that it would result in an award in favour of the applicant (assuming that an award was made in his favour) inconsistent with the COD 10 May 2019. That is because the applicant's entitlement to weekly compensation pursuant to s 38A was litigated in matter number 1737/19 and the subject of an award, that being the "determination" in [2] to discontinue the claim for weekly benefits pursuant to s 38A of the 1987 Act for the period 18 March 2017 to 10 February 2019.

50. I do not accept this submission for two reasons. Firstly, notwithstanding the terms of order [2] in the COD 10 May 2019, there does not need to be a "determination" that the claim for weekly benefits is discontinued. An applicant in proceedings in the Commission may discontinue any proceedings, or any part of any proceedings, as against any or all of the other parties to the proceedings, at any time. Rule 15.7 of the Workers Compensation Commission Rules 2011 (the Rules) provides:

> "(1) An applicant may discontinue any proceedings, or any part of any proceedings, as against any or all of the other parties to the proceedings, at any time.
>
> (2) The applicant and any other party to any proceedings may agree to the discontinuance of the proceedings (or any part of the proceedings) as against that other party at any time.
>
> (3) A discontinuance referred to in subrule (1) or (2) takes effect when a notice of the discontinuance, stating the limits (if any) of the discontinuance, is lodged and served on all parties to the proceedings who are not parties to the discontinuance.
>
> (4) A party against whom proceedings are discontinued and who has not agreed to the discontinuance may, within 7 days after the discontinuance takes effect, lodge and serve an application to the Commission for an order for payment of the party's costs of the proceedings incurred before the discontinuance, subject to the applicability of section 341 of the 1998 Act as in force before 1 October 2012."

51. Section 341(2) inserted into the 1998 Act with effect from 1 October 2012 removed the power of the Commission to order the payment of costs in Commission proceedings. Subrule (4) has no application to the current proceedings.

52. There is no evidence of the lodgement and service of a notice referred to in subrule (3). The COD 10 May 2019 makes no reference to the dispensation with the requirements of such subrule. However quite clearly, the respondent consented to the contents of COD 10 May 2019. Rule 15.9 provides for determination by consent order of the dispute between the parties, although its consent was not required to the applicant's discontinuance of the claim for weekly benefits for the period from 18 March 2017 to 10 February 2019.

53. Secondly in my view there has been no "determination" of the applicant's entitlement to weekly benefits pursuant to s 38A of the 1998 Act. The applicant has, with the consent of the respondent, discontinued that part of his claim for the period from 18 March 2017 to 10 February 2019. There has certainly been no determination for the period from 17 September 2012 to 18 March 2017, claimed in the current proceedings but not in the earlier proceedings. There is no award in favour of the respondent for this period. The applicant simply discontinued his claim for weekly benefits for the shorter period to 10 February 2019. Subject to a determination as to whether that discontinuance was in the circumstances, reasonable, the applicant left the matter open for determination at a later date should he wish to pursue such a claim. He has now done so, but in accordance with cl 35 of Sch 8 to the Regulation, which is a transitional provision dealing with workers with highest needs, specified the commencement date of his claim for weekly benefits as 17 September 2012.

54. Hodgson JA in the Court of Appeal held at [57] in *Dimovski* that:

> "…although an issue estoppel binds the parties as to the issues actually determined, they are not bound in relation to any different issue, not even where the combination of the original issue and extremely strong evidence would support a finding on the second issue:" (authorities omitted)

There has been no actual determination of the issue of the applicant's claim for weekly benefits pursuant to s 38A for the period claimed in the current proceedings or in matter number 1737/19.

Was the Discontinuance Reasonable?

55. In *Israel* Deputy President Wood referred to the prospect of inconsistent judgements at [121] and said at [122] that "…the concept of 'unreasonableness' is also a critical aspect for determination." At [123] she went on quote what Wilcox J said in *Ling v Commonwealth* in the Federal Court[20] as follows:

> "In considering reasonableness ... consideration must be given to all aspects of the case. They include the extent of the overlap between the facts underlying each claim; the greater the overlap, the easier it is to argue that it was unreasonable not to raise the matter in the first case. They also include any difficulties that existed, or might reasonably have been perceived, in raising the matter earlier ...
>
> In assessing the reasonableness of Mr Ling's failure to raise his claim against the Commonwealth when he was sued by it in the earlier action, it is necessary to look at the whole of the circumstances that he then confronted. His claim involved facts that overlapped the Commonwealth's case to some extent but were substantially extraneous to that case."

[20] [1996] FCA 1646; 68 FCR 180 at 184.

56. The circumstances that confronted the applicant in this case on 10 May 2019 when he discontinued part of his claim for weekly benefits pursuant to s 38A were those referred to in [34(b)-(d)] above. In that situation my view is that the applicant did not have a good prospect of success in his claim for weekly benefits for the period prior to 19 February 2019. He was faced with the decision of the Arbitrator in *Melides* and the decision of the President in *Hochbaum*. It was only when Acting Deputy President Parker gave his decision in *Melides* on 10 September 2019 that the applicant was in the situation of pursuing his claim with a good prospect of success.

57. I find that it was not unreasonable for the applicant to discontinue his claim for weekly benefits pursuant to s 38A of the 1987 Act for the period 18 March 2017 to 10 February 2019 on 10 May 2019.

58. The applicant is not estopped from pursuing his claim for s 38A benefits for the period 17 September 2012 to 10 February 2019 in the current proceedings.

Award

59. The respondent is to pay the applicant $788.32 per week, pursuant to s 38A of the 1987 Act as adjusted by s 82BA of that Act, for the period 17 September 2012 to 10 February 2019.

60. The respondent is to have credit for payments made in that period.

SUMMARY

61. The applicant is a worker with highest needs.

62. The applicant is not estopped from pursuing his claim for weekly benefits pursuant to s 38A of the 1987 Act by the discontinuance of a claim for such benefits for the period 18 March 2017 to 10 February 2019 by the COD 10 May 2019.

63. The respondent is to pay the applicant $788.32 per week, pursuant to s 38A of the 1987 Act as adjusted by s 82BA of that Act, for the period 17 September 2012 to 10 February 2019.

64. The respondent is to have credit for payments made in that period.