# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**MATTER NO:** 9215/10
**APPLICANT:** Chetin Salih
**RESPONDENT:** Alex & Ibtisam Fahd T/as Versatile Ceramics

**DATE OF DETERMINATION: 11 October 2011**

The Commission determines:

1. Respondent to pay the applicant $15,820 lump sum compensation (including 5 per cent uplift in respect to lumbar spine) pursuant to section 66 of the *Workers Compensation Act* 1987 for 11 per cent whole person impairment in respect to 17 November 2008 injury as assessed in amended Medical Assessment Certificate dated 28 March 2011 and lump sum compensation under section 67 of the *Workers Compensation Act* 1987 in the sum of $12,500 for pain and suffering.

2. That the respondent is to pay the applicant's costs as agreed or assessed.

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

I CERTIFY THAT THIS PAGE AND THE FOLLOWING 6 PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GARTH BROWN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Sarojini Naiker
Senior Dispute Services Officer
By Delegation of the Registrar

**STATEMENT OF REASONS**

## BACKGROUND

1. Chetin Salih (the applicant) was employed by Alex & Ibtisam Fahd T/as Versatile ceramics (the respondent), as a storeman for about eight years. On about 17 November 2008 the applicant was told by the respondent to mow a large area of land using a push mower. He was not able to finish the job completely that day and resumed mowing the following day. It was a very hot day. By morning tea time he complained about suffering from neck and low back pain radiating into his arms and legs. He resumed mowing and at about 1 pm he passed out. It was thought he had suffered a myocardial infarct. He was taken by ambulance to Westmead Hospital where he was admitted for four days and discharged with a diagnosis of "heat exhaustion".

2. The applicant lodged an Application to Resolve a Dispute (the Application) in the Workers Compensation Commission (the Commission). The Application claims lump sum compensation pursuant to section 66 and section 67 of the *Workers Compensation Act* 1987 (the 1987 Act). The applicant claims to have suffered an injury to his lower back, neck, left arm right arm (including shoulder) and right leg arising out of or in the course of his employment with the respondent.

3. The respondent lodged its Reply on 30 November 2010. The parties attended a teleconference on 21 December 2010. There being no issue in respect to liability for injury to the neck, back and left arm (including shoulder) the matter was referred by the Registrar to attend a medical examination by an Approved Medical Specialist (AMS) as arranged by the Commission pursuant to Chapter 7 Part 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act).

4. Ultimately the AMS issued an amended Medical Assessment Certificate (MAC) dated 28 March 2011 certifying that the applicant had suffered an 11 per cent whole person impairment. The AMS assessed the applicant had suffered a 5 per cent whole person impairment of the cervical spine, 6 per cent whole person impairment of the lumbar spine and 0 per cent whole person impairment of the left upper extremity.

5. The parties are unable to agree on the level of lump sum compensation payable under section 66 and section 67 of the 1987 Act. In particular, as a threshold point, the parties were unable to agree the operation of section 66(2A) of the 1987 Act.

6. The applicant contended that the reference to "back" in section 66(2A) was a reference to the entire spine including the neck. Accordingly the applicant contends the 5 per cent uplift for lump sum compensation provided by the section for back injuries ought to apply to the total 11 per cent whole person impairment, that is in respect to both the 5 per cent cervical spine whole person impairment and 6 per cent lumbar spine whole person impairment. The respondent contends that the reference to "back" in section 66(2A) ought not to be read as a reference to the neck and the 5 per cent uplift ought to apply to the assessed whole person impairment in relation to the lumbar spine only.

7. The parties were unable to agree the amount of lump sum compensation payable pursuant to section 67 of the 1987 Act.

## ISSUES FOR DETERMINATION

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

    (a) The quantum of the applicant's entitlement pursuant to section 66 of the 1987 Act - in particular having regard to the operation of section 66(2A), and
    (b) The quantum of the applicant's entitlement pursuant to section 67 of the 1987 Act.

## PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conciliation conference and arbitration hearing.The proceedings were sound recorded and a copy of the recording is available to the parties.

10. 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 and attached documents;
    (b) Reply and attached documents, and
    (c) Medical Assessment Certificate and Amended Medical Assessment Certificate issued by Dr Loretta Reitter dated 17 February 2011 and 28 March 2011.

### Oral Evidence

12. There was no application to adduce oral evidence.

### Submissions

13. Oral submissions were made by legal representatives on behalf of both parties. In addition, the applicant's solicitor also provided draft written submissions (marked "2") and a letter dated 11 April 2011 (marked "1") that had been faxed to the applicant's solicitors from Lynne McEachern, WorkCover Manager Medical Providers.

## FINDINGS AND REASONS

### (a) The quantum of the applicant's entitlement pursuant to section 66 of the 1987 Act - having regard to the operation of section 66(2A).

14. Section 66 of the 1987 Act is in the following terms:

> "66 Entitlement to compensation for permanent impairment
>
> (1) A worker who receives an injury that results in permanent impairment 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.

(2) The amount of permanent impairment compensation is to be calculated as follows:

(a) if the degree of permanent impairment is not greater than 10%, the amount of permanent impairment compensation is to be calculated as follows:
$D \times \$1,375$

(b) if the degree of permanent impairment is greater than 10% but not greater than 20%, the amount of permanent impairment compensation is to be calculated as follows:
$\$13,750 + [(D - 10) \times \$1,650]$

(c) if the degree of permanent impairment is greater than 20% but not greater than 40%, the amount of permanent impairment compensation is to be calculated as follows:
$\$30,250 + [(D - 20) \times \$2,750]$

(d) if the degree of permanent impairment is greater than 40% but not greater than 75%, the amount of permanent impairment compensation is to be calculated as follows:
$\$85,250 + [(D - 40) \times \$3,850]$

(e) if the degree of permanent impairment is greater than 75%, the amount of permanent impairment compensation is $220,000,
where "D" is the number derived by expressing the degree of permanent impairment as D%.

(2A) To the extent to which the injury results in permanent impairment of the back, the amount of permanent impairment compensation calculated in accordance with subsection (2) is to be increased by 5%.

**Note:** A person suffers 10% permanent impairment. Under subsection (2), the amount of permanent impairment compensation to which he or she is entitled is $13,750 (10 × $1,375). If the whole of the impairment is to the back, the compensation payable in relation to the back will be the whole $13,750. Under this subsection, that $13,750 will be increased by 5%, yielding $14,437.50.

**Note:** A person suffers 50% permanent impairment. Under subsection (2), the amount of permanent impairment compensation to which he or she is entitled is $123,750 ($85,250 + (10 × $3,850)). If two-thirds of the impairment is to the back, the compensation payable in relation to the back will be two-thirds of $123,750, or $82,500. Under this subsection, that $82,500 will be increased by 5%, yielding $86,625. The total compensation payable for the impairment will therefore be $127,875.

(3) The amount of permanent impairment compensation is to be calculated under this section as it was in force at the date the injury was received."

15. In summary, the applicant submitted that the reference to "back" in section 66(2A) operates to apply to injuries to the whole of the spine, including cervical spine, thoracic spine and lumbar spine.

16. The respondent submits that section 66(2A) is expressed to be confined to impairments affecting the back, and the reference to "back" does not include "neck" or "cervical spine".

17. In respect to the operation of the section 66(2A) there is apparent a lack of consistency in the terminology used by the 1987 Act and the *WorkCover Benefits Guide April 2011* referenced in Workers Compensation Service (Butterworths) (*Mills)* at 130,274. Relevantly, whereas section 66(2A) refers to "back" the *WorkCover Benefits Guide April 2011* refers to the "spine".

18. The applicant referred to the WorkCover fax dated 11 April 2011 admitted into evidence (marked 1) in support of the contention that the reference in section 66(2A) to "back" ought to be read to include cervical spine/neck. The fax states: "WorkCover is of the view that the 5% uplift for impairments of the spine apply to all areas of the spine, cervical spine (or neck) being one of those." The Respondent noted that the fax was from an officer associated with WorkCover medical department, not its legal department.

19. The applicant referred also to the *WorkCover Benefits Guide April 2011* It was noted that Notes 10 and 11 of the guide refer to impairment of the "spine" and "spinal injuries". The guide confirms that amendment to section 66 of the 1987 Act operated to increase the amount payable as compensation for all permanent impairment assessments by 10 per cent (Note 10).

20. In giving information concerning the operation of section 66(2) and 66(2A) Note 10 states the 10 per cent increase "applies to all types of permanent impairment, including permanent impairment of the spine, arising from injuries received on or after 1 January 2007". Note 11 of the guide states "For spinal injuries occurring after 1 January 2006, the amount of compensation payable under section 66(2A) of the 1987 Act increased by 5 per cent.

21. It is noted that the specific example used at Note 11 to demonstrate how section 66(2A) ought to operate to provide the additional 5 per cent uplift refers only to an impairment involving the "back" not the "neck" or cervical spine.

22. The respondent referred to the plain wording of section 66(2A) of the 1987 Act in support of the contention that "back" does not include "neck". It was contended the wording of the section is paramount to that of the WorkCover guideline and WorkCover letter and unlike the plain wording of the section neither the WorkCover fax dated 11 April 2011 nor the *WorkCover Benefits Guide April 2011* of themselves have force of law.

23. In *Fletcher International Exports Pty Limited v Barrow* [2007] NSWCA 244 (*Barrow*) Mason P, with whom Santow JA and Tobias JA agreed, stated at [43] that "the word 'guidelines' is usually encountered with reference to a non-binding indication of policy" Further it was held that the guidelines, having regard, in that matter, to the to the context of s 260(1), including ss 260(5)-(7), did not limit the jurisdiction of the Commission with respect to a dispute if a claim is not made in accordance with the WorkCover Guidelines including determining whether there is a dispute or the parameters of a dispute. His Honour said:

> "Nothing in the statute appears to provide support for the proposition that the Guidelines operate to qualify or restrict the statutory scheme or the Commission's duties and powers referable to investigating disputes that arise." (at [41])

24. I accept the *WorkCover Benefits Guide April 2011* is a guideline. It does not override the plain language of the 1987 Act. It has been held that a guideline does not imply command or dictation. The High Court in *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513 and the

Full Federal Court in *Gail Riddell v The Secretary To the Department of Social Security* [1993] FCA 261; (1993) 114 ALR 340; (1993) 42 FCR 443 and *Gary Ian Smoker v The Pharmacy Restructuring Authority* [1994] FCA 1487; (1994) 53 FCR 287 (*Smoker*) have made it clear that the normal meaning of "guideline" is guidance, and something that is not binding or mandatory in nature. In Smoker reference was made to *Liversidge v Sir John Anderson* [1941] UKHL 1; [1942] AC 206 at 245 where Lord Atkin said "and it is not asking too much of the legislature to expect it to use plain English according to its plain meaning."

25. I agree with the view that had the legislature intended for the 5 per cent uplift to apply to impairments affecting the neck it would have been a simple matter for the legislature to have used the words "back and neck" or "spine". It did not do so.

26. I am fortified in the view that the reference in section 66(2A) to "back" does not include impairments of the cervical spine by reference to the Commission's e-bulletin No 33 issued November 2009, where, under the heading "***Application of section 66(2A) in the Commission***", His Honour President Keating states:

> "It is the Commission's practice that the 5 per cent uplift in compensation payable under section 66(2A) applies only to injuries to the lumbar and thoracic spine, thus excluding injuries to the cervical spine.
>
> This position has been adopted by the Commission on the basis that section 66(2A) refers to the "back" and not "the spine" and there is a long line of prevailing case law that regards the cervical spine as part of the neck rather than the back.
>
> Lump sum compensation awards issued by the Commission for the cervical spine will not include the uplift under section 66(2A)."

27. It is noted that section 66(2A) also provides examples of how the additional 5 per cent uplift may be applied in accordance with the section. The examples only reference impairment to the "back". Example 2 reads:

> "A person suffers 50% permanent impairment. Under sub-section (2), the amount of permanent impairment compensation to which he or she is entitled is $123,750.00 ($85,250.00 + (10 x 3850). If 2/3 of the impairment is to the back, the compensation payable in relation to the back will be 2/3 of $123,750.00 or $82,500.00. Under this section, that $82,500.00 will be increased by 5%, yielding $86,625.00. The total compensation payable for the impairment will therefore be $127,875.00."

28. Accordingly, noting the applicant has been assessed as suffering a 11 per cent whole person impairment and applying the 5 per cent uplift to the 6 per cent lumbar spine proportion but not to the 5 per cent cervical spine impairment I am satisfied section 66(2A) operates to provide that the applicant is entitled to compensation in the sum of $15,820 calculated in the following manner:

> 11 per cent whole person impairment is equal to $15,400. Six elevenths (6/11) of $15,400 is equal to $8,400. Applying a 5 per cent uplift to the amount of $8,400 is equal to $420 which when added to $15,400 (11 per cent whole person impairment) provides an entitlement to the applicant in the sum of $15,820.

**(b) The quantum of the applicant's entitlement pursuant to section 67 of the 1987 Act.**

29. Section 67 of the 1987 Act is in the following terms:

“67 Compensation for pain and suffering

(1) A worker who receives an injury that results in a degree of permanent impairment of 10% or more is entitled to receive from the worker’s employer as compensation for pain and suffering resulting from the permanent impairment an amount not exceeding $50,000. Pain and suffering compensation is in addition to any other compensation under this Act.

> Note: Section 65A provides that pain and suffering compensation for permanent impairment arising from psychological injury is not payable unless the injury is a primary psychological injury (as defined in that section) and the degree of permanent impairment arising from the injury is 15% or more.

(1A) (Repealed)

(2) Because there is a distinction between injury and impairment resulting from an injury (and compensation is payable under this section only for pain and suffering resulting from impairment), the pain and suffering for which compensation is payable does not include pain and suffering that results from the injury but not from the impairment.

(3) The maximum amount of compensation under this section is payable only in a most extreme case and the amount payable in any other case shall be reasonably proportionate to that maximum amount having regard to the degree and duration of pain and suffering and the severity of the permanent impairment.

(3A) (Repealed)

(4) The amount of compensation payable under this section in any particular case shall, in default of agreement, be determined by the Commission.

(4A) (Repealed)

(5) Compensation under this section is not payable after the death of the worker concerned.
(6) If an amount mentioned in this section at any time after the commencement of this Act:

> (a) is adjusted by the operation of Division 6, or
> (b) is adjusted by an amendment of this section,
> the compensation payable under this section is to be calculated by reference to the amount in force at the date of injury.

(7) In this section:
“pain and suffering” means:

> (a) actual pain, or
> (b) distress or anxiety,
> suffered or likely to be suffered by the injured worker, whether resulting from the permanent impairment concerned or from any necessary treatment.”

30. Commissioner Wright discussed the principles applicable to determining appropriate compensation pursuant to section 67 in *Tyler v Marsden Industries* [2001] NSWCC 194. The decision was referred to with approval by his Honour the President Judge Keating in *NSW Police Service v Snape* [2008] NSWWCCPD 89. The principles identified by Commissioner Wright were:

> "· Pain and suffering awards under s 67, unlike the objective criteria in s 66 awards for physical loss and impairment, must take into consideration the actual individual experiences of the claimant, as to his or her past and future pain and suffering.
> · The measure of the extreme case must be compared with the measure of a *most extreme case* and does not need to make a comparison with the most extreme case.
> · The pain and suffering must result from the loss/impairment and not merely the injury (s 67(1A); *Scrimshaw v SAR Wood Pty Ltd* (1997) 14 NSWCCR 335).
> · Pain may be compensated even if the extent of the loss and its effects are not assessable until a later date (*Selimovic v Airfoil Registers Pty Ltd* [1999] NSWCC 29; (1999)18 NSWCCR 143).
> · Pain and suffering is compensable from the date of the compensable injury and not merely from the date on which the loss/impairment is crystallised (*Rico v Roads and Traffic Authority* (1992) 8 NSWCCR 515; *Corporate Ventures Pty Ltd v Borovac* (1995) 12 NSWCCR 84; *Bohanna & Appleton t/as Anscot Partnership v Bohanna* (1996) NSWCCR 724).
> · There is no necessary relationship between the impairment/loss and the intensity and duration of the pain and suffering. If an award is excessive upon a review of all the circumstances, an award may be overturned on the basis of falling outside the range of a sound discretionary judgment (*Ainsworth Nominees Pty Ltd v Crouch* (1995) 11 NSWCCR 640).
> · The age of the claimant is relevant. In *Regal Paints Pty Ltd v Wasson* (1993) 9 NSWCCR 301, the Court of Appeal observed (Priestley JA at 306C) that the younger a person is at the time of injury (loss) the greater is the chance that the worker would get into an extreme case category, but each case has to be looked at on its own merits due to the potential for the same injury to affect different workers differently. The Court of Appeal reiterated in *Ainsworth Nominees Pty Ltd v Crouch* (Kirby A-CJ at 652F) that age was a relevant consideration because age at injury had implications for the expected duration of any pain and suffering.
> · Distress caused by interference with social activities (*Department of School Education v Boyd* (1996) 13 NSWCCR 289) or by the effects of the compensable injury on a worker's relationships including marriage (*Pacific Dunlop Ltd v Krivec* (1996) 13 NSWCCR 353) can be relevant.
> · Objective factors may include the type of surgical procedures undergone, the nature of the convalescent process and any complications flowing therefrom, as well as the need for medication and difficulty with sleeping (*Dubbo Base Hospital v Harvey* (1996) 13 NSWCCR 545)."

31. The respondent submitted that an appropriate range in which to assess the applicant's pain and suffering is from 10 per cent of a most extreme case to about 15 per cent of a most extreme case.

32. It was noted the applicant had returned to full time employment, albeit in a different capacity, and there was little evidence of any significant distress being suffered by him as a result of the lumbar cervical spine impairments.

33. It was submitted by the respondent that in assessing pain and suffering, I should not have regard to pain related to carpal tunnel symptoms, as no impairment of left upper extremity had been assessed.

34. The applicant's solicitor referred to the evidence contained in the applicant's signed statement and the various medical reports admitted into the proceedings including the MAC and submitted the applicant had sustained a serious work injury, as a result of which he continues to suffer ongoing consequences. The applicant's written submissions usefully set out relevant factors and evidence that I have taken into consideration.

35. The applicant's medical evidence sets out the numerous investigative procedures and treatment including steroid injection and ongoing consumption of pain killers and corset use that has been undertaken in respect to injury and this should be considered in assessing his entitlement to compensation for pain and suffering. It is noted that he lost consciousness after the injury and was taken to hospital by ambulance where he was admitted for about four days before being discharged suspected of suffering heat exhaustion.

36. The applicant has been in pain since injury in 2008 when he was aged 48. He continues to suffer neck and back pain with pain said by him to be radiating into his left and right arm and down his right and left leg. The pain interrupts his sleep at least two or three times a night and causes discomfit.

37. The applicant states that he is no longer able to assist his wife with a number of domestic chores such as putting out the washing and general housekeeping. He states that prior to injury he used to enjoy fishing every second week but no longer does this as he is unable to cast nor wind in. He states that he now no longer can mow lawns and struggles to take his dogs for walks as it is more difficult for him to manage them and it is less enjoyable.

38. The applicant submitted that in view of the effects of the injury upon his enjoyment of life and his age at the time of injury, 48 years, the assessment of his pain and suffering ought to be assessed at a relatively high level, namely in the order of 40 to 50 per cent of a most extreme case, and in any event not less than one third of a most extreme case.

39. Compensation pursuant to section 67 is to be awarded only for pain and suffering that results from the permanent impairment. It is necessary to distinguish between such pain and suffering, and pain and suffering that results from the injury, but not from the relevant permanent impairment. The section "… may require the Court to make difficult dissections and it is possible that the result of the provision may … produce artificial distinctions": *Fugen Holdings Pty Ltd v Brassington* [1999] NSWCA 107.

40. The applicant has suffered serious injuries, which have had a significant physical effect on him. In particular, he continues to experience pain in the lumbar spine, cervical spine radiating to his upper and lower limbs. He was admitted to hospital for four days after injury and has undergone a significant amount of treatment including physiotherapy, chiropractic, acupuncture and steroid injection. He continues to take pain killing medication.

41. In addition to the matters set out in the various medical reports admitted into the proceedings the applicant's statement, dated 1 November 2010 also sets out the effects of his injuries and their impact on his life. He described an inability to continue to engage in fishing as a past-time, his inability to assist his wife around the house to the extent he was able prior to injury and he described difficulties and lack of enjoyment he now has in respect to walking of his dogs.

42. I accept that the applicant's permanent impairment has caused in the past, and will cause in the future, significant pain, distress and lack of enjoyment. He has undergone a stay in hospital numerous investigations and forms of treatment, and continues to take various medications to alleviate his condition.

43. The applicant's age is also a factor that I am required to consider. He is currently 50 years old, so that his life expectancy is approximately 30 years. He has many years of pain and suffering before him, and his award will necessarily be greater than that of an older person in a similar situation

44. Section 67(3) provides that the compensation payable: "shall be reasonably proportionate to the maximum amount having regard to the degree and duration of pain and suffering and the severity of the permanent impairment". It is well established that there is no necessary proportion between the amount of lump sum compensation determined or agreed in respect of section 66 (permanent impairment) and the lump sum recoverable for pain and suffering (*Jones Bros Bus Co Pty Ltd v Baker* (1992) 26 NSWLR 332).

45. Deputy President Roche, in the matter of *New South Police Force v Cursley* [2010] NSWWCCPD 66, referred to the matter of *Alvorac General Engineering Pty Limited v Arlotta* (1993) 29 NSWLR 734 which held that determining the quantum of an award under section 67 requires "in a sense, a value judgment". Its resolution involves "questions of fact and degree, matters of opinion, impression, speculation and estimation calling for the exercise of common sense and judgment (*Dell v Dalton*)": *Galley v Pasminco Mining Limited* [1993] NSWCC 11; 9 NSWCCR 288.

46. Having regard to the matters referred to above, I have concluded that an appropriate figure, reasonably proportionate to the maximum amount, is 25 per cent of a most extreme case, that is an amount of $12,500.

**SUMMARY**

47. The reference in section 66(2A) to "back" does not include "neck". The applicant has an entitlement to lump sum compensation pursuant to section 66 of the 1987 Act in the sum of $15,820 which is calculated after applying a 5 per cent uplift to the compensation payable for the 6 per cent whole person impairment of the lumbar spine being 6/11ths of a total 11 per cent whole person impairment.

48. The applicant's entitlement pursuant to section 67 of the 1987 Act is assessed at 25 per cent of a most extreme case, being equal to the sum of $12,500.

49. The respondent is to pay the applicant's costs as agreed or assessed.

50. I make orders accordingly.