WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: **2107/19**
APPLICANT: **Wayne King**
RESPONDENT: **Metalcorp Steel Pty Ltd**
DATE OF DETERMINATION: **13 July 2020**
Citation: **[2020] NSWWCC 234**

The Commission determines:

1. The Certificate of Determination dated 1 July 2019 is reconsidered pursuant to s 350 (3) of the *Workplace Injury Management and Workers Compensation Act 1998*.

2. The findings in paragraph 6 on page 1 and paragraph 51 on page 8 of the Certificate of Determination dated 1 July 2019 are rescinded.

3. The orders in paragraph 7 on page 1 and paragraph 52 on page 8 of the Certificate of Determination dated 1 July 2019 are rescinded.

4. The following findings and orders are substituted on page 1 and page 8 of the Certificate of Determination dated 1 July 2019 as follows:

    The Commission determines:

    1. The applicant sustained an injury to his back arising out of or in the course of his employment on 21 October 2005 and 24 February 2006.

    2. The applicant's employment was a substantial contributing factor to his injuries.

    3. The applicant has been assessed by the insurer as having no current work capacity.

    4. The insurer ceased payments of weekly compensation on 25 December 2017 pursuant to section 39 of the *Workers Compensation Act 1987*.

    5. The applicant complied with Clause 28C(a) of Part 2A of Schedule 8 of the Workers Compensation Regulation 2016 on 25 October 2018.

    6. The insurer reinstated payments of weekly compensation on 25 October 2018 pursuant to section 38 of of the *Workers Compensation Act 1987*.

    7. The applicant is entitled to weekly compensation in the period from 26 December 2017 to 24 October 2018.

The Commission orders:

8. The respondent to pay the applicant weekly compensation pursuant to s 38(6) of the *Workers Compensation Act 1987* as follows:

    (a) $828.72 per week from 26 December 2017 to 31 March 2018.
    (b) $839.28 per week from 1 April 2018 to 30 September 2018.
    (c) $845.92 per week from 1 October 2018 to 24 October 2018.

9. Liberty to the parties to apply with respect to these calculations within 14 days of this determination.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Wayne King (the applicant) filed an Application to Resolve a Dispute (the Application) that was registered in the Workers Compensation Commission (the Commission) on 2 May 2019, claiming weekly compensation from 26 December 2017 to 24 October 2018 pursuant to s 38 of the *Workers Compensation Act 1987* (the 1987 Act) due to injury sustained to his lumbar spine on 21 October 2005 and 24 February 2006.

2. A conciliation conference and arbitration hearing were held before me in Orange on 25 June 2019. Submissions were made by the legal representatives regarding the liability dispute and I reserved my decision.

3. On 1 July 2019, I determined the dispute. A Certificate of Determination (COD) was issued in the following terms:

> "The Commission determines:
>
> 1. The applicant sustained an injury to his back arising out of or in the course of his employment on 21 October 2005 and 24 February 2006.
>
> 2. The applicant's employment was a substantial contributing factor to his injuries.
>
> 3. The insurer ceased payments of weekly compensation on 25 December 2017 pursuant to section 39 of the *Workers Compensation Act 1987*.
>
> 4. The applicant complied with Clause 28C(a) of Part 2A of Schedule 8 of the *Workers Compensation Regulation 2016* on 25 October 2018.
>
> 5. The insurer reinstated payments of weekly compensation on 25 October 2018 pursuant to section 38 of of the *Workers Compensation Act 1987*.
>
> 6. The applicant is not entitled to weekly compensation in the period from 26 December 2017 to 24 October 2018.
>
> The Commission orders:
>
> 7. There will be an award for the respondent.
>
> 8. No order as to costs.
>
> A brief statement is attached to this determination setting out the Commission's reasons for the determination."

4. The applicant lodged an appeal against my determination. The appeal is currently pending in the Presidential Unit.

5. In *RSM Building Services Pty Ltd v Hochbaum*[1], and *Technical and Further Education Commission t/as TAFE NSW v Whitton*[2]**,** President Phillips held that compensation could not be awarded in respect of the period before the criteria in s 39 of the 1987 Act were satisfied.

[1] [2019] NSWWCCPD 15, (*Hochbaum No 1*).
[2] [2019] NSWWCCPD 27, (*Whitton No 1*).

6. The Presidential determinations in *Hochbaum* and *Whitton* were the subject of appeals by the injured workers to the Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [3].

7. On 17 June 2020, the Court of Appeal set aside the President's determination and reinstated the decisions of Senior Arbitrator Bamber dated 7 January 2019 in both matters. This meant that both workers were entitled to weekly compensation from the time that weekly compensation payments ceased after 260 weeks until the date that the workers were assessed as having a degree of permanent impairment in excess of 20%.

8. Brereton JA (White JA agreeing) analysed the legislation and came to the following conclusion:

> "Section 39(2) exempts from the 260-week cap otherwise imposed by s 39 a particular class of injured worker, namely those whose injury results in a degree of permanent impairment of more than 20%.
>
> The words 'to be assessed' in s 39(3) point to provisions that contain the methodology and process for measuring impairment and resolving any dispute about it; they do not mandate that there must be a formal assessment before s 39(2) is enlivened. The function of s 39(3) is not to make assessment a precondition to the engagement of s 39(2), but to provide a mechanism for measuring and determining the degree of permanent impairment that results from an injury, so as to resolve any dispute about whether or not a worker is within the exempt class.
>
> There is no 'temporal element' in s 39(2). Ultimately, there can be only one degree of *permanent* impairment resulting from an injury, even though it may not be immediately ascertainable. Permanent impairment, once ascertained, dates from the injury. Section 39(2) poses the simple question, what degree of permanent impairment results from the injury; if that degree is greater than 20%, the worker is in the exempt class, and s 39 never applies to him or her."

PROCEDURE BEFORE THE COMMISSION

9. In light of the determination of the Court of Appeal, the parties were advised on 19 June 2020 of my intention to reconsider my decision. The parties were invited to make any submissions regarding the proposed reconsideration by 10 July 2020.

SUBMISSIONS

10. On 24 June 2020, the applicant's solicitor, Mr Tancred, advised the Commission that as the applicant had lodged an appeal, it was more appropriate for the matter to be determined by Presidential Unit rather than by a reconsideration. No reasons were given in support of the applicant's submission.

11. In an email to the Commission on 26 June 2020, Mr Tancred acknowledges the Commission's power to reconsider the COD, but he submits that it is appropriate for the appeal to proceed for the following reasons:

    (a) There has been an extensive delay by me to decide to reconsider the decision, presumably because the Court of Appeal reserved its decision in *Hochbaum and Whitton No.2;*

    (b) The facts in this case are distinct from *Hochbaum and Whitton No.2* and involve a consideration of cl 28(c) of Part 2(a) of Sch 8 of the 2016 Regulation;

[3] [2020] NSWCA 113 (*Hochbaum and Whitton No 2*).

(c) The applicant lodged the appeal on 26 July 2019, and there is otherwise no explanation for the 11 month delay in the reconsideration.

12. Mr Tancred submits that if it is determined that a reconsideration is appropriate, it should be conducted by a different arbitrator, an approach that was permissible and consistent with *Rasia v University of Sydney (No 3)*[4].

13. Mr Tancred submits that I wrongly determined the applicant's claim for compensation and not in accordance with the law when the application was first before me.

14. Mr Tancred submits that I will not be able to bring an impartial, balanced and fair minded approach to the task, having been unswayed for the past 11months that my original determination was wrong.

15. Mr Tancred did not make any submissions regarding the applicant's entitlement to weekly compensation following the decision in *Hochbaum and Whitton No.2.*

16. The respondent was directed to file submissions by 10 July 2020. No submissions were filed in accordance with the direction.

17. On 13 July 2020, the respondent's solicitor, Mr Strachan, advised the Commission via email that the respondent adopted the applicant's submissions and indicated that it was most appropriate for the appeal to proceed for determination by the Presidential Unit. No further submissions were made as to why the COD should not be reconsidered by me.

18. I have reviewed my COD dated 1 July 2019, and I have taken note of the submissions made by both counsel that were summarised in paragraphs 23 to 34. I do not propose to repeat these here.

ISSUES FOR DETERMINATION

19. The following issues remain in dispute:

(a) Whether I should recuse myself from reconsidering the COD dated 1 July 2019.

(b) Whether the COD dated 1 July 2019 should be reconsidered - s 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

(c) If the COD is reconsidered, the extent and quantification of the applicant's entitlements to weekly compensation in the period 26 December 2017 to 24 October 2018 – s 38 of the 1987 Act.

EVIDENCE

Documentary evidence

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

(a) Application and attached documents;
(b) Reply and attached documents, and
(c) COD dated 1 July 2019.

[4] [2012] NSWWCCPD 21, (*Rasia*), [8].

REVIEW OF EVIDENCE

21. I provided a detailed summary of the evidence that was attached to the Application and the Reply in my COD dated 1 July 2019. I have reviewed the evidence, and I do not propose to provide a further summary.

REASONS

Should I recuse myself from reconsidering the COD dated 1 July 2019?

22. Mr Tancred submits that the appeal should proceed in preference to a reconsideration by me or by another arbitrator. He submits that if there is a reconsideration, it should be by another arbitrator because I determined the applicant's claim contrary to the law, and therefore, I will not be impartial, balanced and fair.

23. In the COD dated 1 July 2019, I made the following comments:

> "In *Kennewell*, Arbitrator Sweeney indicated that cl 28C(a) of Pt 2A of Sch 8 of the 2016 Regulation was intended to be a beneficial provision and once the preconditions that resulted in the exclusion of s 39 of the 1987 Act were satisfied, the section did not apply and weekly compensation payments were payable in accordance with s 38 of the 1987 Act from the date of the termination of payments. This reasoning was followed by me in *Gillard v G and H Harris and M E Jarret*[5]*,* but it was rejected by the President in *Hochbaum* and *Whitton.*
>
> In *Hochbaum* and *Whitton*, the President did not have to deal with cl 28 of Pt 2A of Sch 8 of the 2016 Regulation. In both decisions, His Honour confirmed that s 39 of the 1987 Act was expressed in the present tense and therefore compensation could not be awarded in respect of the period before the relevant criteria in the section were satisfied. He also indicated that the section was not a beneficial provision. He summarised the effect of s 39 of the 1987 Act as follows:
>
> > 'Where the worker ceases to be paid weekly payments of compensation due to s 39(1), it is only if a worker has been assessed, for the purpose of s 65, to have a degree of permanent impairment of greater than 20%, that s 39(2) is engaged to determine whether the worker's entitlement to weekly payments of compensation may be restored. The worker having undertaken the process of an assessment of permanent impairment as defined in s 39(3) and having achieved the criterion set out in s 39(2) is then relieved of the bar provided for in s 39(1). The bar is lifted at the point in time of the assessment of permanent impairment of greater than 20%. The phrase '[t]his section shall not apply' set out in s 39(2) is dependent upon the completion of this process and the achievement of the criterion. The operation of s 39(2) is subject to the existence of an assessment of the degree of permanent impairment, as set out in s 39(2) when read with s 39(3). A worker's entitlement to weekly compensation, beyond the aggregate period of 260 weeks remains dependent on satisfying the preconditions for payment of weekly compensation pursuant to s 38 of the 1987 Act. This is confirmed by the note to s 39(2)[6]'."[7]

[5] [2019] NSWWCC 22 (*Gillard*).
[6] *Hochbaum No 1*, [147].
[7] COD, [39] to [40].

24. I concluded:

> "In the circumstances, I see no reason not to adopt the reasoning in *Hochbaum*, *Whitton* and *Strooisma* and apply it to the present matter. The applicant is not entitled to weekly compensation in the period from 25 December 2017 to 25 October 2018 before the AMS certified that the degree of permanent impairment in his lumbar spine was not fully ascertainable. Accordingly, there will be an award for the respondent."[8]

25. It is apparent from my decision that I was bound to follow the reasoning of President Phillips in *Hochbaum No 1*. This was contrary to the reasoning that I applied in *Gillard*, which coincidently involved Mr Tancred.

26. Therefore, in the present matter, I applied the law as it had been interpreted by the President in *Hochbaum No 1*. There was no reason for me to reconsider my COD dated 1 July 2019, which was the subject of an appeal to the Presidential Unit, until the Court of Appeal's determination in *Hochbaum and Whitton No.2.* Any delay was not the result of any inaction on my part.

27. Mr Tancred submits that if it is determined that a reconsideration is appropriate, it should be conducted by a different arbitrator, an approach that was permissible and consistent with *Rasia.*

28. In *Rasia*, Deputy President O'Grady considered whether he should recuse himself from hearing the worker's appeal. He stated:

> "It is clear that a decision need not be reconsidered only by the member of the Commission who made the original order. That fact is well established by past practice both of the Commission and the former Court. However, in the present matter, as with many such matters which come before the Commission, it makes much sense that the maker of the decision which is the subject of the application is assigned such task. That is so in the present matter given the very voluminous documentary evidence relied upon by the parties before the Arbitrator and the lengthy history of the proceedings."

29. Therefore, there is no merit in the submission that I determined the applicant's claim contrary to the law, and will not be impartial, balanced and fair in any reconsideration, particularly when one has regard to my reasoning in *Gillard*. Common sense dictates that it is appropriate for me to reconsider the COD, rather than waiting for the outcome of the appeal and the potential of a further hearing before another arbitrator. Accordingly, I decline to recuse myself from this matter.

Should the COD dated 1 July 2019 be reconsidered? - s 350(3) of the 1998 Act

30. In light of the Court of Appeal's decision, my finding that the applicant was not entitled to weekly compensation in the period from 26 December 2017 to 24 October 2018, and the award for the respondent in respect of the applicant's claim, could not stand, so it is appropriate to reconsider the COD dated 1 July 2019.

31. Section 350 of the 1998 Act deals with the Commission's power to reconsider a decision. It provides:

> "**350 Decisions of Commission**
>
> (1) Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is final and binding on the parties and is not subject to appeal or review.

[8] COD, [44].

(2) A decision of or proceeding before the Commission is not:

(a) to be vitiated because of any informality or want of form, or
(b) liable to be challenged, appealed against, reviewed, quashed or called into question by any court.

(3) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission."

32. In *Howell v Stringvale Pty Ltd*[9], Arbitrator Johnstone, as he then was, provided a useful summary of the principles regarding reconsideration of determinations pursuant to s 350(3) of the 1998 Act. He stated:

"The subsection and its predecessors have been considered in a number of cases. Having reviewed those cases the following summary of principles may be made as to its application:

1. The power to reconsider is unlimited: *Hilliger v Hilliger* (1952) 52 SR (NSW) 105, but discretionary: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192. However, it is important to keep in mind the distinction between the existence of the power and the occasion of its exercise: *Hilliger* at 108.

2. The general rule is that public interest requires that litigation should not proceed interminably, and courts must be on their guard to refuse to allow the same matter to be litigated again and again. Nevertheless, it is appropriate to exercise the power to remedy some manifest injustice: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26].

3. The power applies to both questions of fact and law, and is not limited to changed circumstances or fresh evidence: *Hardaker v Wright & Bruce Pty Ltd* (1960) 62 SR (NSW) 244 at 248 and 249.

4. The section overrides the common law doctrine of estoppel: *Lambidis v Commissioner of Police* (1995) 12 NSWCCR 225, but the discretion should not be exercised where the party has unreasonably refrained from raising the issue in the earlier proceedings: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]. See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

5. New evidence must be distinguished from additional evidence as opposed to fresh evidence: *Maksoudian v J Robins & Sons Pty Ltd* (1993) 9 NSWCCR 642. If the evidence was readily available at the time of the first hearing, this is a factor to be weighed in considering whether or not to exercise the discretion: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [58]. However, any new evidence must be such that it would have been a determining factor in the decision: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.

[9] [2005] NSWWCC 64, (*Howell*).

6. Other grounds for the exercise of discretion include where the original decision maker did not consider an available and possibly determinative argument: *Lasaitis v Email Ltd* (1990) 6 NSWCCR 154 at 171A. But where the Commission does not have jurisdiction to determine the particular matter asserted, the discretion should not be exercised: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.

7. Mistake or inadvertence on the part of legal advisers is an insufficient ground: *Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] 27 WCR (NSW) 29 at 30. But disposal of litigation by legal advisers on a basis contrary to their instructions has been held to be sufficient: *Sorcevski v Steggles Pty Ltd* (1991) NSWCCR 315.

8. An application must be brought without delay and the matter raised must be of such a nature that it would have affected the outcome of the original decision: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]."[10]

33. In *Samuel v Sebel Furniture Limited* [11], Acting Deputy President Roche, as he then was, cited with approval the Court of Appeal decision in *Schipp v Herfords Pty Ltd* [12], where the court considered the equivalent reconsideration provisions in the *Workers Compensation Act 1926*. He stated:

> "The factors relevant to the exercise of the discretion in section 36 of the 1926 Act were considered by the Court of Appeal in *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413 ('*Schipp*'). The court noted the following factors were relevant in deciding whether the discretion should be exercised in favour of the moving party:
>
> 1. delay;
> 2. whether the worker had a right of appeal from the first decision but failed to exercise that right;
> 3. waiver or estoppel issues, and
> 4. rescinding an earlier award will allow a worker to bring fresh proceedings."[13]

34. The Acting Deputy President continued:

> "Having regard to the above authorities and the provisions and objectives of the 1998 Act I believe that the following principles are applicable to reconsideration applications under section 350(3) of the 1998 Act:
>
> 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;

[10] *Howell*, [27].
[11] [2006] NSWWCCPD 141 (*Samuel*).
[12] [1975] 1 NSWLR 413 (*Schipp*).
[13] *Samuel*, [45].

3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');

4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');

5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*');

6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun'*);

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act)."[14]

35. Further in *New South Wales Police Force v Winter*[15], Deputy President O'Grady confirmed that following the amendment to s 352 of the 1998 Act, the principles discussed in *Samuel* still applied. He stated:

> "…The principles enunciated in *Samuel*, properly considered, demonstrate that the exercise of the wide discretion is tempered by the need to take into account those matters noted at sub paragraphs (3), (4), (7), (8) and (9) [SIC] of [58]. Those matters, in my view, represent the substance of any constraint that must be exercised when the provision is invoked."

36. I have a wide discretion to reconsider my COD in accordance with s 350(3) of the 1998 Act, but the discretion must be exercised fairly. When one considers the matters raised in *Samuel* and *Howell*, the only matter of relevance is the interests of justice between the parties. A reconsideration by me will avoid any further delay associated with the pending appeal and redetermination by another arbitrator on remittal.

37. The Court of Appeal in *Hochbaum and Whitton No 2* determined that there was no temporal element in s 39(2) of the 1987 Act, meaning that once the degree of permanent impairment is ascertained, and provided that the assessment exceeds 20%, a worker is exempt from the application of the section. Accordingly, a worker is entitled to weekly compensation for any period that payments were not paid prior to the date of assessment.

[14] *Samuel*, [58].
[15] [2014] NSWWCCPD 70 (*Winter*).

38. I am obliged to do justice between the parties according to the substantial merits of the case. One must have regard to s 354(3) of the 1998 Act, which provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case". I have a wide discretion, but I must be fair, and justice must be done between the parties.

39. There is no prejudice to the respondent, as any reconsideration by me, or determination by the Presidential Unit, will only achieve an outcome that is consistent with the current interpretation of the legislation by the Court of Appeal.

40. In the circumstances, as a result of the decision in *Hochbaum* and *Whitton No 2,* the findings in paragraph 6 on page 1 and paragraph 51 on page 8 of the COD, and the orders in paragraph 7 on page 1 and paragraph 52 on page 8 of the COD dated 1 July 2020 cannot stand and should be rescinded.

Legislation

41. The applicant's entitlements after the second entitlement period are calculated in accordance with s 38 of the 1987 Act. It provides:

> "**38 Special requirements for continuation of weekly payments after second entitlement period (after week 130)**
>
> (1) A worker's entitlement to compensation in the form of weekly payments under this Part ceases on the expiry of the second entitlement period unless the worker is entitled to compensation after the second entitlement period under this section.
>
> (2) A worker who is assessed by the insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.
>
> (3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:
>
> (a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and
>
> (b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least $155 per week, and
>
> (c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.
>
> (3A) A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.

(4) An insurer must, for the purpose of assessing an injured worker's entitlement to weekly payments of compensation after the expiry of the second entitlement period, ensure that a work capacity assessment of the worker is conducted:

(a) during the last 52 weeks of the second entitlement period, and

(b) thereafter at least once every 2 years.

Note.

An insurer can conduct a work capacity assessment of a worker at any time. The Workers Compensation Guidelines can also require a work capacity assessment to be conducted.

(5) An insurer is not to conduct a work capacity assessment of a worker with highest needs unless the insurer thinks it appropriate to do so and the worker requests it. An insurer can make a work capacity decision about a worker with highest needs without conducting a work capacity assessment.

(6) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled under this section after the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − D, or

(b) MAX − D,

whichever is the lesser.

(7) The weekly payment of compensation to which an injured worker who has current work capacity is entitled under this section after the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − (E + D), or

(b) MAX − (E + D),

whichever is the lesser.

(8) A worker's entitlement to compensation under this section may be reassessed at any time."

42. Section 39 of the 1987 Act sets out the provisions relating to the cessation of weekly benefits after 5 years. It provides:

"**39 Cessation of weekly payments after 5 years**

(1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.

(2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

Note.
For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

(3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

43. The transitional provisions are contained in cl 28 of Pt 2A of Sch 8 of the Workers Compensation Regulation 2016 (the 2016 Regulation). They provide:

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

Does the applicant satisfy the requirements in Cl 28C of Pt 2A of Sch 8 of the 2016 Regulation?

44. President Phillips and the Court of Appeal were not required to deal with the transitional provisions in cl 28C of Pt 2A of Sch 8 of the 2016 Regulation. Therefore, it is appropriate to consider the impact of these provisions.

45. Section 39 of the 1987 Act removes the entitlement of a worker to weekly compensation after 260 weeks, unless the degree of permanent impairment resulting from the relevant injury is assessed as more than 20%. However, the section has to be read subject to cl 28C of Pt 2A of Sch 8 of the 2016 Regulation, which only applies to "existing recipients", such as the applicant.

46. The applicant was examined by an Approved Medical Specialist (AMS), Dr Anderson, on 15 October 2018. In his Medical Assessment Certificate (MAC) dated 25 October 2018, the AMS noted that the applicant was to undergo surgery within eight weeks. In the circumstances, the AMS advised that the degree of permanent impairment in the applicant's lumbar spine was not fully ascertainable in accordance with s 319(g) of the 1998 Act. The insurer eventually reinstated weekly payments as from 25 October 2018 pursuant to s 38 of the 1987 Act.

47. Once the applicant was assessed by the AMS that the degree of permanent impairment in his back was not fully ascertainable, he satisfied cl 28C(a) of Pt 2A of Sch 8 of the 2016 Regulation. This means that s 39 of the 1987 Act does not apply, and weekly compensation was payable to the applicant. This is consistent with the reasoning of Arbitrator Sweeney in *Kennewell v ISS Facility Services Australia Ltd t/as Sontic Pty Ltd*[16]*,* a decision that I followed in *Gillard.*

[16] [2018] NSWWCC 216.

Extent of incapacity

48. Liability was accepted by the prior insurer, CGU Workers Compensation (NSW) Ltd (CGU), In 2010, the claim was transferred to Allianz Australia Workers Compensation (NSW) Ltd (Allianz), who continued to pay the applicant weekly compensation at the transitional rate until 25 December 2017 on the basis that the applicant had no current work capacity. The current insurer, AAI Ltd t/as GIO (the insurer) took over the claim on 1 October 2018.

49. There is no list of payments in evidence, however, a remittance advice dated 22 November 2017 shows that prior to the cessation of weekly payments of compensation on 25 December 2017, the applicant was receiving $828.72 per week, being 80% of the transitional amount of $1,035.90, pursuant to s 38 of the 1987 Act.

50. There is no correspondence in evidence regarding the reinstatement of payments, however, in a letter dated 4 April 2019, the insurer advised that it had assessed the applicant as having no current work capacity and that he would be paid compensation at the newly indexed rate of $858.56 per week as from 1 April 2019. This represented 80% of the Pre-Injury Average Weekly earnings (PIAWE) based on the transitional amount of $1,073.20 per week.

51. Therefore, I am satisfied that the insurer assessed the applicant as having no current work capacity. In those circumstances, I am entitled to enter an award pursuant to s 38 of the 1987 Act consistent with the insurer's assessment that the applicant has no current work capacity.

Quantification

52. The PIAWE based on the transitional rate for the period of the claim is as follows:

    (a) 26 December 2017 to 31 March 2018 - $1,035.90 per week.
    (b) 1 April 2018 to 30 September 2018 - $1,049.10 per week.
    (c) 1 October 2018 to 24 October 2018 - $1,057.40 per week.

53. Accordingly, the applicant will be entitled to weekly compensation from 26 December 2017 to 1 March 2018 pursuant to s 38(6) of the 1987 Act as follows:

    (a) 26 December 2017 to 31 March 2018

    (AWE X 80%) – D =
    $1,035.90 x 80% - 0 =
    $828.72 – 0 = $828.72 per week

    (b) 1 April 2018 to 30 September 2018

    (AWE X 80%) – D =
    $1,049.10 x 80% - 0 =
    $839.28 – 0 = $839.28 per week

    (c) 1 October 2018 to 24 October 2018

    (AWE X 80%) – D =
    $1,057.40 x 80% - 0 =
    $845.92 – 0 = $845.92 per week

54. The applicant will be entitled to an award as calculated above. I will grant the parties liberty to apply with respect to my calculations within 14 days of this determination.