WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3414/18**
Applicant: **Scott Stephen Wales**
Respondent: **State of NSW (NSW Police Force)**
Date of Determination: **29 July 2019**
Citation: **[2019] NSWWCC 257**

The Commission determines:

1. The application to reconsider the Certificate of Determination dated 28 September 2018 is declined.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Scott Stephen Wales suffered a psychological injury on 16 December 2014 in the course of his employment with the NSW Police Force. The diagnosis was post-traumatic stress disorder and alcohol use disorder. He claimed permanent impairment compensation and filed an Application to Resolve a Dispute on 3 July 2018.

2. The permanent impairment claim was the subject of a Medical Assessment Certificate (MAC) dated 23 August 2018. The Approved Medical Specialist (AMS) assessed 6% whole person impairment (WPI). On 28 September 2018, the Commission issued a Certificate of Determination (COD) stating that Mr Wales had no entitlement to compensation based on that assessment of WPI.

3. Mr Wales seeks to file an appeal against the decision of the AMS. His current solicitor made an application for reconsideration of the COD by writing to the Commission on 31 March 2019. The application is opposed by the State of NSW (the State). Directions for the filing of further documents and submissions with respect to the application for reconsideration of the COD were made at a telephone conference on 11 June 2019. The parties were informed that a decision would be made on the papers when those documents had been filed.

SUBMISSIONS AND FURTHER EVIDENCE

4. The letter written by Mr Wales' current solicitor on 31 March 2019 was brief. Ms Sellars of Slater and Gordon requested reconsideration of the COD. She said that Mr Wales had been represented by another firm. A solicitor from that firm sent the MAC to Mr Wales on 3 September 2018 and "asked for his thoughts" about the MAC. He was not informed that there was a 28-day appeal period. On the same day, Mr Wales sent his former solicitors two emails concerning errors in the report which he followed up on 6 September. Mr Wales "relied on his lawyers to progress the claim and believed this was done." He sought a second opinion after discussing the matter with his treating psychiatrist, Dr Selwyn Smith. Mr Wales telephoned Ms Sellars on 24 February 2019 and a conference took place on 6 March. Relevant documents were provided on 11 March. Ms Sellars said that Mr Wales did not know that there was a 28-day appeal period until he spoke to her.

5. A further request for reconsideration was made on 26 April 2019 and on this occasion, the request was accompanied by submissions. The submissions sought an extension of time "under s 357(5)."

6. Presumably the section referred to was s 327(5) of the *Workplace Injury Management and Workers Compensation Act 1998* which relates to an extension of time to file an appeal against a medical assessment. That sub-section provides:

> "If the appeal is on a ground referred to in subsection (3)(c) or (d), the appeal must be made within 28 days after the medical assessment appealed against, unless the Registrar is satisfied that special circumstances justify an increase in the period for an appeal."

7. Ms Sellars repeated the substance of her letter dated 31 March 2019. She contended that the AMS had made demonstrable errors with respect to the "PIRS scores." With respect to self-care and personal hygiene, she noted that the AMS had assessed Mr Wales in class 2 and that A/Prof M Robertson, who had been qualified for Mr Wales had assessed him in

class 3. She submitted that Mr Wales should have been assessed in class 3 because he avoids showering unless prompted and rarely cooks. The AMS said that this was because Mr Wales does not have a kitchen, which is incorrect. Ms Sellars said that Mr Wales cuts his own hair and does not trim his beard. A friend provides home cooked meals.

8. With respect to social and recreational activities, Ms Sellars submitted that the AMS wrongly assigned class 1. A/Prof Robertson assigned class 3 and Dr G George, qualified for the State assessed class 3. Though Mr Wales does visit a pub with friends once a fortnight, Ms Sellars provided examples of the way in which his social life is constrained compared to before the injury. He visits the pub on the advice of his psychologist who suggested he get out of the house more.

9. Similarly, Ms Sellars submitted that the assessments made by the AMS with respect to travel, concentration, persistence and pace and employability were in error. It was submitted that the appeal grounds were made out and that the matter should be referred to a Medical Appeal Panel.

10. The submissions were served by email on 3 May 2019 and the State's solicitor was told he had 21 days to reply.

11. On 27 May 2019, the State filed a Notice of Opposition in the form which would be filed on a medical appeal under s 327. The State's solicitor noted that the submissions filed on behalf of Mr Wales were in respect of a medical appeal and that it was unclear whether he sought a reconsideration by the AMS or a medical appeal. If Mr Wales sought an extension of time to appeal the MAC, the State's solicitor submitted that there was no evidence from Mr Wales' former solicitor to corroborate his assertion that he had not been informed of the 28-day appeal period. He also noted that there was no explanation why Mr Wales had not contacted his current solicitors until 24 February 2019 or why the current application was not lodged until 26 April 2019 when he had attended a conference on 6 March 2019.

12. The State submitted that the Commission would not be satisfied that special circumstances within the meaning of s 327(5) existed. In any event, a COD had been issued so that s 327(7) precluded an appeal.

13. With respect to the merits of the appeal, the State submitted that the application was misconceived because the errors relied on by Mr Wales were a difference of specialist opinion and not errors within the meaning of s 327(3)(d). The AMS had obtained a detailed history, undertaken a mental state examination and applied his own knowledge, expertise and experience to make his assessment.

14. The State noted that Mr Wales had not made any submissions in support of a reconsideration by the AMS under s 328. The State sought that the application be dismissed.

15. At a telephone conference on 11 June 2019, I made the following directions:

    1. The applicant is to lodge and serve any evidence on which he seeks to rely together with written submissions as to the admissibility of that evidence and with respect to the reconsideration of the Certificate of Determination dated 28 September 2018 by 25 June 2019.

    2. The respondent is to lodge and serve any further evidence, written submissions as to the admissibility of the applicant's evidence and with respect to the reconsideration by 16 July 2019.

    3. At the conclusion of the time allowed for submissions the dispute will be determined on the papers.

16. On 25 June 2019, Mr Wales filed submissions practically identical in form to those filed on 26 April 2019. The erroneous reference to s 357(5) was repeated. The submissions were accompanied by a statement from Mr Wales and a statement by his friend, Ms Coleman.

17. Mr Wales' statement set out advice given to him by his former solicitor Mr Cox on the day before his assessment by the AMS, based on previous interactions between Mr Cox and the AMS. Mr Wales attached a copy of the email sent to him on 3 September 2018. It said:

> "As discussed with JC just now, please find attached MAC of Dr Parmegiani. Let us know your thoughts in writing please. We'll let you know what we hear from the barrister when we hear from her about potentially appealing."

18. Mr Wales' long responses to the MAC were attached to the email together with his follow up email. He said that he believed that his former solicitors were progressing the claim, "rectifying the errors and communicating with the relevant people." He confirmed that he sought a second opinion on the advice of Dr Smith and that he did not know of the 28-day appeal period until he had spoken with Ms Sellars.

19. The remainder of his statement dealt with the alleged errors in the MAC.

20. Ms Coleman's statement provided her comments on the alleged errors in the MAC.

21. The State provided submissions dated 16 July 2019 and set out the brief history of the matter. It noted that Mr Wales had now filed submissions dealing with the issue of delay but there was no corroborating material from his former solicitors and no explanation why he did not seek to press the matter until he contacted his former solicitors in February 2019. There were no special circumstances warranting the extension of time in s 327(5).

22. The State submitted that there was no application in Mr Wales' submissions to set aside the COD nor submissions in support of it. With respect to "the merits of the application itself" the State said that the submissions with respect to demonstrable error were misconceived.

23. The State submitted that the "late evidence" was infected by opinion and hearsay. Their admissibility was disputed on the basis that no order was made at the telephone conference regarding additional evidence.

FINDINGS AND REASONS

24. Unfortunately, the submissions of both parties fail to grapple with the application made by the letters dated 31 March 2019 and 26 April 2019. As the State noted, there can be no medical appeal once a COD has been issued. If a medical appeal is sought, that COD must be reconsidered and set aside. The submissions on the application to reconsider and set aside the COD are scant.

25. The Commission's power to reconsider a decision and to rescind, alter or amend it is found in s 350(3) of the 1998 Act, which provides

> "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."

26. The use of "may" indicates that the power is discretionary. The principles applicable to the exercise of its discretion to do so were distilled from relevant authorities and summarised by Roche DP in *Samuel v Sebel Furniture Limited*[1] *(Samuel)*:

[1] [2006] NSWWCCPD 141 at [58] (omitting citations)

"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;

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. …;

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)."

27. The sixth factor was based on a section which has been amended and is not relevant for this reconsideration.

28. As that summary makes clear, the discretion is a wide one. All relevant factors should be considered.

29. Despite the State's submission that the nature of the application is unclear, the letters dated 31 March 2019 and 26 April 2019 indicated that the application was for reconsideration of the COD. The submissions filed on behalf of Mr Wales do not deal adequately with the application but I will consider it based on the submissions which were made and by reference to the principles set out in *Samuel*.

30. The procedure is set out in the Commission's guideline for Requests for Reconsiderations under Sections 329(1A), 350(3) and 378 of the *Workplace Injury Management and Workers Compensation Act 1998*, which is found on the Commission's website. None of the applications or submissions filed on Mr Wales' behalf comply with the guideline.

Delay

31. The first relevant consideration is delay. The first application was made six months after the MAC was issued. It was inadequate and a further application was filed a month later.

32. While it is in the interests of the State - and in the public interest - that litigation should not proceed indefinitely, the delay is not such that the State has been prejudiced in being able to respond to the application. There is no evidence of prejudice.
33. The reasons which are given for the delay in making the application for reconsideration are scant. Mr Wales responded quickly to his former solicitors when asked for his comments on the MAC. He said that he phoned his former solicitors several times but there is no evidence of when and there are no further emails. There was perhaps some delay in contacting his current solicitors but I do not regard that as excessive.

34. However, the delay by his current solicitors in arranging a conference and making the application to the Commission in the proper form are not explained.

Further evidence

35. The direction made at the telephone conference clearly reminded the parties that this was an application for reconsideration of the COD dated 28 September 2018. Because there was no evidence attached to the original application, a direction was made that the evidence which supported the application be provided. The State was given an opportunity to provide submissions as to whether that evidence was admissible. It is common for applications for reconsiderations of CODs to be dealt with on the basis of evidence.

36. The statements which were filed provide very little assistance, being substantially directed to the alleged errors in the MAC. The elucidation of those errors is a matter for submissions made in accordance with the rules when a medical appeal has been filed. They are not matters for lay evidence.

37. In *Petrovic v BC Serv No 14 Pty Limited*[2]*,* Hoeben J held that evidence as to what took place at an examination by an AMS is not generally admissible on a medical appeal because it is not additional relevant information within the meaning of s 327(3)(b).

38. The Court of Appeal considered an appeal panel's decision to decline to permit a worker to rely on additional medical evidence being a statement from a worker about the conduct of the examination by an AMS in *Lukacevic v Coates Hire Operations Pty Limited*[3]. Hodgson JA said:

> "A dispute by the worker as to the history set out in the certificate, or the observations made by the AMS, can readily be raised; and it could be raised honestly or dishonestly, on strong or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the *WIM* Act."[4]

39. The parts of the statements which go to the conduct of the examination by the AMS are unlikely to be admissible on a medical appeal.

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[2] [2007] NSWSC 1156.
[3] [2011] NSWCA 112
[4] At [78].

40. Paragraph 1 of Mr Wales' statement sets out a conversation with his former solicitor. The material in that paragraph might, in a jurisdiction bound by the rules of evidence, be described as scandalous. It is certainly not probative on this application and should not have been included in the statement. It does not comply with rule 15.2 of the Workers Compensation Commission Rules 2011 and I will not have regard to it. Rule 15.2 provides:

> **"15.2 Principles of procedure**
> When informing itself on any matter, the Commission is to bear in mind the following principles:
>
> (1) evidence should be logical and probative,
> (2) evidence should be relevant to the facts in issue and the issues in dispute,
> (3) evidence based on speculation or unsubstantiated assumptions is unacceptable,
> (4) unqualified opinions are unacceptable."

41. The only parts of the statements relevant to a reconsideration of the COD are paragraphs 2 to 6 of Mr Wales' statement and the annexed emails. I have considered those paragraphs only.

Mistake

42. As I read his submissions, Mr Wales submitted that the COD should be rescinded to allow him to file a medical appeal because of the mistake of his former solicitors.

43. While the email from the former solicitors dated 3 September 2018 does not refer to the appeal period, it confirms a conversation which had taken place immediately beforehand. There is no evidence of what took place in that conversation. That omission is significant.

44. In any event, mistake by a solicitor will not usually give rise to a COD being set aside. In *Hurst v Goodyear Tyre and Rubber Co (Australia) Ltd*[5], the worker brought proceedings in 1946 to recover compensation for an injury suffered in 1940. He did not claim medical and related expenses. He brought three sets of further proceedings. In the last proceedings in 1952 Rainbow J said that the proper procedure was to seek to reopen the original proceedings if there was sufficient reason. The only reason why the amounts were not claimed was mistake or inadvertence by his then solicitors and that was insufficient reason to reopen the first proceedings.

45. If the failure to file a medical appeal was an error on the part of Mr Wales' former solicitors, that is not a ground for setting aside the COD.

The merits of the appeal

46. This application is made because Mr Wales seeks to file a medical appeal. It is appropriate to consider the merits of the application by reference to general principles with respect to medical assessments and appeals.

47. The grounds of appeal sought to be relied on are with respect to the assessment made by the AMS with respect to several of the PIRS classes in the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (Fourth edition, 1 April 2016) (the Guidelines). The substance of the appeal is that a different assessment was more appropriate.

[5] [1953] WCR 29.

48. The AMS was required to undertake a "clinical assessment of the claimant as they present on the day of assessment, taking into account the claimant's medical history and all available medical information."[6] The Guidelines also provide that assessors "are to exercise their clinical judgement in determining a diagnosis when assessing permanent impairment…"[7]

49. It may therefore be reasonable for an assessor to reach a different conclusion to a practitioner who had examined a worker in the past.

50. The AMS is required to consider and comment on the reports of other practitioners, but not to choose between the medical opinions put forward by the parties.[8] It follows that an AMS is not required to agree with the opinion of those who have assessed the worker.

51. When applying the PIRS, the AMS must bear in mind that the "examples of activities are examples only."[9]

52. *Parker v Select Civil Pty Limited*[10] *(Parker*) was an application for judicial review which overturned a decision of a Medical Appeal Panel. The parties were referred to the decision at the telephone conference but the submissions filed do not refer to it.

53. The appeal panel in *Parker* had set aside a MAC on the application of the employer where the grounds of appeal concerned the application of the PIRS categories. On the worker's application for judicial review, Harrison As J said[11]:

> "The Appeal Panel identified the 'error' by stating that the AMS had erred in assessing Class 3 because on the proper application of the criteria an assessment of Class 2 mild impairment is the more **appropriate** one on the history taken by the AMS and the available evidence. ([27]). (My emphasis).
>
> However, it is important to appreciate that the descriptors, or examples, describing Class 2 and Class 3 of impairment for self-care and hygiene are ' examples only': see *Jenkins*. These descriptors are not intended to be exclusive and are subject to the variables that accompany a person seeking psychiatric help such as age, sex and cultural norms: see *Ferguson* [14].

54. Her Honour said[12]:

> "To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.
>
> The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ.

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[6] Guidelines paragraph 1.6.
[7] Guidelines paragraph 1.6 b.
[8] *State of New South Wales v Kaur* [2016] NSWSC 346.
[9] Guidelines paragraph 11.12.
[10] [2018] NSWSC 140
[11] At [67]-[68].
[12] At [70]-[71].

> Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene. There is an error of law on the face of the record. I am satisfied that the plaintiff has made out a case for an order in the nature of certiorari."

55. Based on those general principles and the material provided, the prospects of success of a medical appeal appear not to be strong.

56. Taking all of those principles into account on this reconsideration, I am not persuaded that the COD should be set aside under s 350(3).

57. For the reasons set out above, the application for reconsideration is declined.