WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*
Amended pursuant to the slip rule.

Matter Number:	**3278/18**
Applicant:	**Lynne Dickson**
Respondent:	**Giona Holdings Pty Limited t/as Peter Dickson Motors**
Date of Determination:	**30 July 2019**
Date of Amended Determination:	**31 July 2019**
Citation:	**[2019] NSWWCC 259**

The Commission determines:

1. The assessment of 17% whole person impairment assessed by Dr David McGrath, Approved Medical Specialist, in the Medical Assessment Certificate dated 4 December 2018 in respect of injury deemed to have occurred on 13 November 2017 represents aggregation of impairment arising from:

    (a) injury to the right arm at or above the elbow (right shoulder) deemed to have occurred on 8 December 1999, and

    (b) injury to the right thumb, right middle finger and right little finger deemed have occurred on 1 June 2004

    and is consistent with the referral pursuant to consent orders filed by the parties.

2. The respondent is to pay the applicant $41.610 pursuant to section 66 of the *Workers Compensation Act 1987* in respect of 17% whole person impairment in respect of injury to the right upper extremity (shoulder, thumb, middle finger and little finger) resulting from work tasks performed by the applicant from 1996 to 1 June 2004 and deemed to have occurred on 13 November 2017.

3 The respondent is to have credit for payment(s) previously made pursuant to section 66 of the *Workers Compensation Act 1987* in respect of injury to the right shoulder deemed to have occurred on 8 December 1999.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Lynne Dickson (Mrs Dickson/the applicant) commenced employment with Giona Holdings Pty Ltd trading as "Peter Dickson Motors" (the respondent) in 1986. The respondent conducted business selling used cars.

2. Mrs Dickson was initially employed in office duties but by 1990 she was also working as a car detailer. Her activities involved active use of the arms and hands.

3. On 8 December 1999, Mrs Dickson was cleaning the roof of the vehicle when she experienced pain in her neck and right shoulder. She received medical treatment and a claim for compensation benefits was accepted by the insurer.

4. Mrs Dickson returned to work with the assistance of a rehabilitation provider performing administrative duties. She also performed duties washing cars. From 1999 Mrs Dickson also started to experience symptoms in both wrists. She also noted cramps and pain in the right hand when performing typing tasks from 2000 to 2004.

5. With increasing symptoms Mrs Dickson was referred to an orthopaedic surgeon, Dr Chris Roberts with respect to the wrists and hands. She was referred to another orthopaedic surgeon, Dr Woods for management of the right shoulder symptoms.

6. Mrs Dickson ceased work on 31 January 2005. Her symptoms did not settle and in June 2017, Dr Roberts performed a right endoscopic carpal tunnel decompression, right thumb, middle and little finger distal interphalangeal joint arthrodesis.

7. In 2010, Mrs Dickson was paid lump-sum compensation pursuant to the Table of Disabilities in respect of injury to the right shoulder.

8. Mrs Dickson was examined by Dr Endrey-Walder on 16 October 2017 at the request of her solicitors for the purpose of assessment of impairment resulting from her employment with the respondent to 2004. Dr Endrey-Walder assessed whole person impairment as a result of the work tasks performed by Mrs Dickson as follows:

    (a) lumbar spine –DRE Lumbar Category III – 12% WPI
    (b) right shoulder – 30% WPI
    (c) right thumb – 4% hand impairment
    (d) right middle finger 36% finger impairment – 7% hand impairment
    (e) right little finger – 36% finger impairment – 4% hand impairment.

    The hand impairments converted to 14% upper extremity impairment which in turn converted to 8% WPI. Dr Endrey-Walder assessed combined values of 43%.

9. On 13 November 2017, Mrs Dickson's solicitors made a claim for lump-sum compensation in respect of 43% WPI alleged to have arisen from "nature and conditions of employment as described in the statement of the worker between 1 July 1990 and 31 January 2005 which include incidents in February 1994 and December 1999 with an injury date of the insurer of 1 June 2004."

10. The date of injury was specified as "1 July 1990 and 31 January 2005".

11. The insurer disputed injury to the right shoulder, right wrist, right hand (thumb and fingers) and lumbar spine.

12. Mrs Dickson commenced proceedings in the Commission claiming permanent impairment of the right shoulder, right wrist, the right hand/fingers and the lumbar spine as a result of the nature and conditions of her employment with the respondent from 1 July 1990 to 31 January 2005 with the injuries deemed to have happened on 1 June 2004 and 13 November 2017, the latter being the date of claim for lump-sum compensation.

13. The claim for lump sum compensation as particularised at Part 5.6 of the Application to Resolve a Dispute (the Application) was for 43% WPI of the right upper extremity and the lumbar spine with the injury deemed to have happened on 13 November 2017.

14. The dispute was listed for hearing before a Commission Arbitrator at Queanbeyan. The claim in respect of the lumbar spine was discontinued and the parties reached agreement in principle for resolution of the dispute. The parties subsequently filed consent orders:

> "1. The permanent impairment dispute is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of permanent impairment.
>
> 2. The terms of the referral to the AMS to read as follows:
>
> (a) Nature and Conditions from 1986 up to 8 December 1999 (with 8 December 1999 the deemed dated based on washing cars) for an assessment of impairment for the injury to the right arm at or above the elbow under the Table of Disability;
>
> (b) Nature and Conditions from 9 December 1999 to 1 June 2004 (with 1 June 2004 deemed date based on clerical and administrative work activities) – for an assessment of impairment for injury to the right upper extremity, (right thumb, right middle finger, right little finger) under the relevant Whole Person Impairment regime, and
>
> (c) Nature and Conditions claim from 1986 to 1 June 2004 (with 13 November 2017 the deemed date based on period of employment involving washing cars up to 8 December 1999 and subsequent administrative duties thereafter up to 1 June 2004) – for an assessment of impairment for the injury to the right upper extremity, (right shoulder) right thumb, right middle finger, right little finger) under the relevant Whole Person Impairment regime.
>
> 3. On receipt of the Medical Assessment Certificate from the AMS, the parties have leave to apply to the Commission for a further Conciliation/Arbitration date in Queanbeyan, if required, to determine an application for the aggregation of any impairment assessments."

15. The dispute was referred by the Registrar to an Approved Medical Specialist (AMS), Dr David McGrath, Occupational Physician, in the following terms (original emphasis):

"**Date of 1st Injury:**	**Nature and conditions from 1986 to 8 December 1999 (with 8 December 1999 as the deemed date)**
Body part/s referred:	**Right arm at or above the elbow**
Method of assessment:	**Table of Disabilities**
Date of 2nd Injury:	**Nature and conditions from 9 December 1999 to 1 June 2004 (with 1 June 2004 as the deemed date)**

Body part/s referred:	**Right Upper Extremity (right thumb, right middle finger, right little finger)**
Method of assessment:	**Whole Person Impairment**
Date of 3rd Injury:	**Nature and conditions from 1986 to 1 June 2004 (with 13 November 2017 as the deemed date)**
Body part/s referred:	**Right Upper Extremity (right shoulder, right thumb, right middle finger, right little finger)**
Method of assessment:	**Whole Person Impairment**"

16. The AMS assessed the impairments resulting from each of the three injuries referred as follows:

> **"First injury 08 12 1999 Nature and conditions from 1986 up to 08.12.1999**
> Mrs Dickson has a 15% impairment of the right arm at or below the elbow under the Table of Disabilities.
>
> **Second injury 01. 06 2004 Nature and conditions from 1986 to 01. 06 2004**
> Mrs Dickson has a 8% WPI.
>
> **Third injury 13. 11 2017 Nature and conditions from 1986 to 01. 06 2004**.
> Mrs Dickson has a 17% WPI."

The AMS issued a Medical Assessment Certificate accordingly.

17. The AMS made no deduction pursuant to section 323 of the *Work Injury Management and Workers Compensation Act 1998* (the 1998 Act) in respect of any of the injuries referred.

18. The Medical Assessment Certificate was the subject of an appeal pursuant to section 327(c) and (d) of the 1998 Act. The Medical Appeal Panel found no demonstrable error or application of incorrect criteria and confirmed the Medical Assessment Certificate

19. The parties are now in dispute as to the appropriate award(s) to be made pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in accordance with the Medical Assessment Certificate.

ISSUES FOR DETERMINATION

20. The parties agree that the issue now in dispute is whether the applicant is entitled to an award of lump sum compensation which combines the assessments of WPI in respect of injury deemed to have occurred on 1 June 2004 and that deemed to have occurred on 13 November 2017.

PROCEDURE BEFORE THE COMMISSION

21. 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.

22. The parties have agreed to the determination of the matter without a conference or formal hearing.

EVIDENCE

Documentary evidence

23. 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;
    (c) Documents attached to the Application to Admit Late Documents by the respondent dated 7 August 2018, and
    (d) Medical Assessment Certificate of Dr McGrath dated 4 December 2018.

Oral evidence

24. No application was made to adduce oral evidence or to cross examine any witness.

Discussion and findings

25. The applicant and the respondent have both filed written submissions which have been considered.

26. Counsel for the applicant summarised the effect of his submissions:

> "It is the contention of the applicant that the Commission should order that the respondent paid [sic – pay] the applicant the sum of $62,960 in respect of a 24% WPI due to an injury caused as a result of the nature and conditions of employment between 1986 and 1 June 2000 for the deemed date of injury being 13 November 2017 being the date of claim. That is it [sic], that the two findings of the AMS, confirmed by the MAP [Medical Appeal Panel] of 8% WPI and 17% WPI be accumulated and that the combined total of 24% pursuant to the guidelines, be determined as the appropriate percentage for an award pursuant to section 66."

27. It was submitted on behalf of the applicant that this result follows from application of section 322(2) of the 1998 Act as explained by Deputy President Roche in *Department of Juvenile Justice v Edmed*[1]*, (Edmed)*.

28. The applicant also sought a notation:

> "A notation might also be made to the effect that as the 2nd to 'injuries' as distinct from the first 'injury', which is assessed under the former scheme ('table of names') as preserved, the applicant is entitled to separate benefits from the first injury on one hand and the 2nd to combined on the other hand."

29. For the reasons set out below I do not accept the submission of the applicant as to aggregation of the WPI assessments nor as to the making of a notation in the form suggested.

[1] [2008] NSWWCCPD 6 at [25] to [27]

30. The respondent submitted, in summary, that the respective assessments addressed the same impairment and addition of the WPI assessments would result in overpayment by way of double accounting. The assessment in respect of the "third injury" should not be reflected by payment based on that assessment because the total assessment was based upon two separate injuries which should not be aggregated.

31. The respondent submitted:

> "The first injury arose out of washing cars at the respondent's premises between 1986 and 8 December 1999 and was to her right shoulder, the second injury arose out of clerical and administrative work activities between 9 December 1999 and 1 June 2004 and was to her right thumb, right middle finger and right little finger and the third injury as a combination of the first and second injuries the nature and conditions of the applicant's employment between 1986 and 1 June 2004 involving the duties that cause the applicant's first and second injuries."

32. Although it may not have been intended, the effect of the referral to the AMS in respect of the "third injury" constituted an aggregation of the shoulder pathology and the wrist and finger pathology.

33. The "medical dispute" referred for assessment was a dispute as to:

(a) the degree of permanent impairment of the worker as a result of an injury (section 319(c) of the 1998 Act);

(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion" (section 319(d) of the 1998 Act);

(c) whether the impairment is permanent (section 319(f) of the 1998 Act), and

(d) whether the degree of permanent impairment of the injured worker is fully ascertainable (section 319(g) of the 1998 Act).

34. The assessments certified in the Medical Assessment Certificate are conclusively presumed to be correct as to those matters.

35. Section 321 of the 1998 Act provides for the referral of medical disputes other than a dispute concerning permanent impairment to an AMS for assessment. The assessment sought in the present case was clearly a dispute concerning permanent impairment. Section 65 of the 1987 Act provides:

> **"65 DETERMINATION OF DEGREE OF PERMANENT IMPAIRMENT**
>
> (1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.
>
> (2) If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division.
>
> Note : The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires the impairments that result from those injuries to be assessed together. Physical injuries and psychological/psychiatric injuries are not assessed together. See section 65A."

36. Section 322 of the 1998 Act provides:

> **"322 Assessment of impairment**
>
> (1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> Note. Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.
>
> (4) An approved medical specialist may decline to make an assessment of the degree of permanent impairment of an injured worker until the approved medical specialist is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made."

37. The respondent's primary submission is that the assessment in respect of the "third injury" should not represent a valid basis for payment pursuant to section 66 because the impairments that comprise the WPI assessed arise from different "nature and conditions", car washing in respect of the shoulder and administrative tasks in respect of the fingers.

38. In *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd*[2] Emmett JA explained the respective roles of the Arbitrator and the AMS:

> "[109]…If there is a medical dispute within the meaning of that term in s 319 of the Management Act, an arbitrator would have no jurisdiction to decide it. However, an arbitrator may refer such a medical dispute for assessment by an approved medical specialist under s 321. Section 321 confers a power that, in a proper case, an arbitrator is bound to exercise in aid of the private rights of the parties. Thus, because an arbitrator has no jurisdiction to decide a medical dispute, an arbitrator has no jurisdiction to make findings that are binding on an approved medical specialist or on an Appeal Panel. A finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (see *Haroun v Rail Corporation New South Wales* [2008] NSWCA 192 at [16] and [19] - [21]).

[2] [2014] NSWCA 264 at [109] to [111].

[110] However, that is not to say that there is no scope for an approved medical specialist or Appeal Panel to make findings of fact necessary for the performance of the function that they are given under the Management Act. Questions of causation are not foreign to medical disputes within the meaning of that term when used in the Management Act. A medical dispute is a dispute about or a question about any of the matters set out in s 319. Those matters include the degree of permanent impairment of a worker as a result of an injury, and whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality. The words in bold in relation to each of those matters call for a determination of a causal connection. Thus, the language of causal connection is squarely within the definition of 'medical dispute'. Having regard to the conclusive effect of s 326, it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues. There is no bright line delineating causation from medical evidence. Issues of causation may well involve disputes between medical experts that must be resolved by an approved medical specialist or by an Appeal Panel (see Zanardo v Tolevski [2013] NSWCA 449 at [35]).

[111] It is for the Commission to determine whether a worker has suffered an injury within the meaning of s 4 of the Compensation Act. The Commission must also determine whether there are any disentitling provisions, such that compensation is not payable in respect of that injury. It is also the function of the Commission to determine by whom any compensation is payable. Jurisdiction is conferred on the Commission by s 105 of the Management Act. However, that jurisdiction is subject to the restriction contained in s 65(3) of the Compensation Act, which precludes the Commission from awarding permanent impairment compensation if there is a dispute about the degree of impairment, unless the degree of impairment has been assessed by an approved medical specialist. The fact that a medical dispute includes a dispute as to the degree of permanent impairment of a worker as a result of an injury is consistent with the entitling provision of s 66 of the Compensation Act in conferring an entitlement to receive compensation if the worker receives an injury that results in permanent impairment. The degree of permanent impairment that results from an injury is to be assessed as provided in Pt 7 of Ch 7.

[112] The reference in s 65(3) of the Compensation Act to a dispute about the permanent impairment of an injured worker includes a dispute about the degree of permanent impairment that results from an injury, since that is the only type of relevant assessment that can be made under Pt 7 of Ch 7 of the Management Act. The Commission cannot award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist. It follows that the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the approved medical specialist or, on appeal, the Appeal Panel. It is not a matter for determination by an arbitrator. Thus, it would not have been open for the arbitrator who made the consent Determination to determine, even by consent, that any degree of permanent impairment resulted from an exacerbation of the pre-existing cataract condition. That is a matter wholly within the jurisdiction of an approved medical specialist or an Appeal Panel."

39. It follows that an Arbitrator decides whether injury has been established. The consent award for referral of the dispute to the Registrar to be remitted to an AMS has the same effect as would be given to a determination by an Arbitrator following a hearing. That is, there is a determination in this case that there have been three injuries to be considered by the AMS which are to be assessed to determine the level of impairment attributable to each for the purposes of section 66.

40. The referral to the AMS in fact relies upon section 322(2) as its statutory basis in the present matter. In the case of each date of injury, the work tasks to be considered by the AMS as giving rise to permanent loss of use or WPI, include the whole period of employment with the respondent during which the work tasks to which injuries attributed were performed. In the case of the "third injury" the parties have, by their choice of words and perhaps inadvertently, referred an injury attributed to work tasks affecting both the shoulder and the fingers of the right-hand for an assessment that is binding in respect of the injury referred.

41. That is, the referral in respect of the third deemed date of injury, 13 November 2017, incorporates the work tasks which gave rise to the pathology considered in respect of the first deemed date of injury, 8 December 1999 and the second deemed date of injury, 1 June 2004. Unless the intention was to aggregate the injury to the shoulder with injury to the fingers assessment of the shoulder pursuant to the WPI method of assessment would not be appropriate.

42. The AMS correctly made no deduction for the previous injuries when assessing the extent of impairment attributable to the third deemed date of injury, 13 November 2017 because he had been asked to consider the total of the effects of the work tasks from 1996 to 1 June 2004.

43. In assessing impairment arising from injury deemed to have occurred on 13 November 2017 (the third injury), the AMS has performed his task in accordance with the referral. The AMS has assessed WPI arising from injury due to the work tasks performed by Mrs Dickson from 1986 to 1 June 2004.

44. It was then appropriate that the AMS consider whether there was any previous injury or pre-existing condition or abnormality which contributed to the impairment. The appropriate date for consideration of whether there was any such previous injury or pre-existing condition or abnormality would have been 1986 when the work tasks first began to bear upon the applicant's shoulder. Similarly, the date of 9 December 1999 is the date when the parties agree that work tasks began to bear upon the applicant's wrists and fingers. (see *Cullen v Woodbrae Holdings Pty Ltd* [3]*).*

45. There was no evidence of any previous injury or pre-existing condition or abnormality as at 1986 in respect of the shoulder nor as at December 1999 in respect of the wrists and fingers. The impairment attributable to injury deemed have occurred on the second date of injury was not a "pre-existing" injury and the pathology disclosed at the time of the second date of injury and could not be said to constitute a "previous condition or abnormality" in respect of the injurious process agreed to have started in 1986 (shoulder) or December 1999 (wrists and fingers).

46. The AMS was correct to make no deduction for either of the earlier dates of injury when assessing incapacity in respect of the third deemed date of injury as this would have been contrary to the terms of the referral with respect to that deemed date.

[3] [2015] NSWSC 1416

47. The terms of the referral in respect of the third date of injury effectively performed the aggregation that is authorised by section 322(2), incorporating the whole of the effect of the workplace tasks which contributed to the assessed level of impairment from 1996 to 1 June 2004 and any further impairment attributable to the natural consequences of the pathology attributable to the whole of the period of employment in which the relevant work tasks were performed. The parties have effectively agreed that the tasks performed in washing and polishing cars and the administrative tasks satisfy the test of "arising out of the same incident" for the purposes of section 322(3).

48. The AMS has assessed 17% WPI arising from injury constituted by the "nature and conditions of employment" (that is, the work tasks) with the respondent and that assessment is binding upon the parties.

49. Mrs Dickson has not been assessed as suffering 24% WPI by the AMS upon examination on 23 November 2018 and to award payment respect of that level of impairment would be to overcompensate the applicant.

50. It would be otherwise if the AMS had assessed 17% WPI in respect of injuries deemed have occurred on 13 November 2017 *after* deduction for pre-existing injuries deemed have occurred on 8 December 1999 and 1 June 2004 pursuant to section 323 of the 1998 Act. In that case there would be a case for aggregation subject to the restrictions suggested in *Edmed*.

51. The notation suggested by the applicant is not appropriate. There are at least two sets of transitional provisions to be considered and any particular claim for benefits in respect of a particular injury needs to be considered on the merits of that claim.

52. The alternative submission put forward on behalf of the respondent is that:

> "when making his assessment in respect of the third injury the AMS has included the 8% assessed as a result of the second injury that therefore to aggregate the impairment resulting from the second and third injuries is to award the applicant double compensation."

53. That submission does not accurately reflect the reasoning of the AMS (nor the appeal panel). The AMS, in accordance with the referral for the "third injury" simply combined the 14% upper extremity impairment in respect of the hand with 18% upper extremity impairment in respect of the shoulder which was converted to 17% WPI. There is no double accounting with respect to the hand as no payment has previously been made in respect of that part.

54. The necessary double accounting in respect of the right shoulder is simply resolved by giving credit to the respondent for payment made pursuant to section 66 in respect of Mrs Dickson's earlier claim.

55. The claim relied upon in Part 5.6 of the Application is for lump sum compensation in respect of injury deemed have occurred on 13 November 2017 to the right upper extremity and lumbar spine. The claim in respect of the lumbar spine has been noted as discontinued earlier in these proceedings.

56. It appears that the award to be made should be consistent with that application but should be based upon the Medical Assessment Certificate as follows:

> "1. The assessment of 17% Whole Person Impairment assessed by Dr David McGrath, Approved Medical Specialist, in the Medical Assessment Certificate dated 4 December 2018 in respect of injury deemed to have occurred on 13 November 2017 represents aggregation of impairment arising from:

a) injury to the right arm at or above the elbow (right shoulder) deemed to have occurred on 8 December 1999, and

b) injury to the right thumb, right middle finger and right little finger deemed have occurred on 1 June 2004

and is consistent with the referral pursuant to the consent orders filed by the parties.

2. The respondent is to pay the applicant $41,610 pursuant to section 66 of the *Workers Compensation Act* 1987 (the 1987 Act) in respect of 17% WPI in respect of injury to the right upper extremity (shoulder, thumb, middle finger and little finger) resulting from work tasks performed by the applicant from 1996 to 1 June 2004 and deemed to have occurred on 13 November 2017.

3. The respondent is to have credit for payment previously made pursuant to section 66 of the 1987 Act in respect of injury to the right shoulder deemed to have occurred on 8 December 1999."