WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4366/19**
Applicant: **Ian Woods**
Respondent: **Hills Grammar School**
Date of Direction: **29 January 2020**
Citation: **[2020] NSWWCC 26**

The Commission determines:

Orders

1. The application pursuant to s 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* to rescind the Certificate of Determination dated 12 December 2019 is granted.

2. The applicant suffers 5% permanent impairment resulting from injury to the cervical spine on 8 November 2004 and is not entitled to any further permanent impairment compensation under s 66 of the *Workers Compensation Act 1987* (1987 Act).

3. The applicant suffers 20% permanent impairment resulting from injury on 1 March 2005 in accordance with the Medical Assessment Certificate dated 21 October 2019 and the complying agreement executed by the parties on 1 December 2010.

4. The respondent is to pay the applicant permanent impairment compensation under s 66 of the 1987 Act in the sum of $27,500 with credit for the payment of $5,000 previous made resulting in a net entitlement of $22,500.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Ian Woods (the applicant) was employed by The Hills Grammar School (the respondent) and sustained compensable work injuries on 8 November 2004 and 1 March 2005.

2. This is an application pursuant to s 350 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to rescind the Certificate of Determination dated 12 December 2019 (the COD). To understand the application, it is necessary to set out the prior agreements/proceedings between the parties and the present proceedings.

3. The applicant commenced proceedings in 2007 for compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) resulting from injury on 8 November 2004. In those proceedings Dr Thomas Rosenthal issued two Medical Assessment Certificates dated 13 February 2007[1] and 1 May 2007[2] which both assessed the applicant as having 5% whole person impairment (WPI) of the cervical spine resulting from injury on 8 November 2004 (the first MAC). Consent orders were issued in accordance with the first MAC on 15 June 2007.[3]

4. On 9 November 2010, the Insurer wrote to the applicant[4] offering 4% WPI for injury on 1 March 2005 made up of 3% for the occipital nerve and a further 1% for the effect on the activities of daily living (ADLs). The letter identifies the basis of the 3% assessment for the occipital nerve as "the supporting assessor's report". The offer of an additional 1% for ADLs is stated to be based on Dr Guirgis' report dated 13 July 2010. A complying agreement was attached to the letter.

5. On 1 December 2010, the applicant signed a s 66A agreement for 4% WPI due to injury sustained on 1 March 2005 (the complying agreement). The complying agreement states that it is based on Dr Guirgis' report dated 13 July 2010. It also refers to the previous agreement to pay s 66 compensation of 5% for the cervical spine due to injury sustained on 8 November 2004.

6. In 2019, the applicant made a claim for further WPI in respect of the injuries of 8 November 2004 and 1 March 2005.

7. By notice dated 25 July 2019[5] issued pursuant to s 78 of the 1998 Act, the respondent noted that it had previously paid 5% WPI for the cervical spine due to injury on 8 November 2004 and 4% for injury to the lumbar spine due to injury on 1 March 2005. Liability for further s 66 compensation was denied as it was asserted that the applicant did not have further loss of the lumbar and cervical spines and was otherwise not entitled to compensation for consequential conditions to the upper extremities as these conditions were disputed.

8. The applicant then filed an Application to Resolve a Dispute (Application) with the Commission claiming permanent impairment compensation for the cervical spine arising from injury on 8 November 2004 and for the lumbar spine, right and left upper extremities and the right lower extremity arising from injury on 1 March 2005.

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[1] Application, p 31
[2] Application, p 39
[3] Application, p 26
[4] Application, p 24
[5] Application, p 21

9. The Application pleads injury to the neck on 1 March 2005 but made no claim for s 66 compensation for that body part. There was no reference in the Application to the complying agreement and/or a request that any assessment be combined with the assessment contained in the complying agreement.

10. The assessment was referred by the Registrar of the Commission to Dr Timothy Anderson who provided a further Medical Assessment Certificate dated 7 November 2019 (further MAC). The AMS assessed the cervical spine due to injury on 8 November 2004 at 5% WPI. He also made the following assessments resulting from injury on 1 March 2005:

    - Lumbar Spine – 7%;
    - Right upper extremity – 6%;
    - Left upper extremity – 6%, and
    - Right lower extremity – 0%.

11. This produced a combined assessment of 18% resulting from the injury on 1 March 2005.

12. Neither party filed an appeal against the further MAC. On 12 December 2019 Arbitrator Wright made the following determinations and orders (the Orders):

    "The Commission determines:

    1. That the applicant suffers 5% permanent impairment resulting from injury on 8 November 2004.

    2. That the applicant suffers no further loss resulting from injury on 8 November 2004.

    The Commission orders:

    1. The respondent is to pay the applicant, as lump sum compensation under section 66 of the Workers Compensation Act 1987 (the 1987 Act), $19,500 in respect of further permanent impairment resulting from injury on 1 March 2005.

    Brief statement of reasons

    2. The Medical Assessment Certificate dated 21 October 2019 certifies:

        a) 5% permanent impairment resulting from injury on 8 November 2004, compensable as $6,250.
        b) 18% permanent impairment resulting from injury on 1 March 2005, compensable as $24,500.

    3. The applicant was previously paid:

        a) $6,250 in respect of 5% permanent impairment resulting from injury on 8 November 2004 in accordance with the Certificate of Determination dated 15 June 2007.

        b) $5,000 in respect of 4% permanent impairment resulting from injury on 1 March 2005 in accordance with the Complying Agreement Under S66A dated 1 December 2010.

4. Therefore, the applicant is entitled to $19,500 further lump sum compensation under section 66 of the 1987 Act in respect of further permanent impairment resulting from injury on 1 March 2005.

5. Therefore, the applicant has no further entitlement to lump sum compensation under section 66 of the Workers Compensation Act 1987 resulting from injury on 8 November 2004.

6. The proceedings were commenced after 2 April 2013 and therefore no order is made as to costs."

RECONSIDERATION APPLICATION

13. The applicant filed an application for reconsideration on 13 December 2019 seeking to set aside the Orders (application for reconsideration). It appears that this was the first time the applicant sought an order seeking to combine the assessment made in the complying agreement with those contained in the further MAC. The applicant particularised the s 66 assessment as 21% WPI by combining 18% from the further MAC with the 4% WPI from the complying agreement.

14. The respondent filed an opposition to the Application by letter dated 7 January 2020. The respondent relevantly submitted:

> "The Complying Agreement that is attached to the Application however at pages 27 onwards (particularly page 28) refers to a date of injury of 1 March 2015 amounting to $5,000.00 with respect to the cervical spine. It also refers to the previous agreement which was dated 15 June 2007.
>
> The Respondent submits that the Arbitrator Mr Michael Wright in this instance has accurately set out the Applicant's entitlements to further permanent impairment compensation resulting from the injuries sustained in the course of the Applicant's employment on 1 March 2005, and submits that the Certificate of Determination should not be altered."

15. The matter was listed for telephone conference on 22 January 2020 when the parties made further submissions.

16. The applicant accepted that the reconsideration application was restricted to the assessment of the injury on 1 March 2005 and that the part of the Orders concerning the injury on 8 November 2004 were correct.

17. The applicant submitted that the assessment contained in the complying agreement should be combined with the assessment in the MAC as they were different body parts.

18. In oral submissions the applicant conceded that she had previously been awarded 1% for the effects on the ADLs. Accordingly, the 18% assessed by the AMS included an allowance of 2% for ADLs and could not recover the additional 1% included in the complying agreement for ADLs. In those circumstances the applicant submitted that she was entitled to 18% WPI (the further MAC) plus 3% WPI being that part of the complying agreement not otherwise included in the further MAC. These amounts totalled 20% WPI under the combined tables contained in *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5).[6]

[6] AMA 5, p 605

19. The respondent submitted that the applicant was assessed by the AMS at 5% for the cervical spine arising from injury on 8 November 2004 and had not been assessed for the cervical spine for injury on 1 March 2005. It was submitted that any occipital nerve injury would have been included in that assessment.

20. The respondent alternatively submitted that the applicant is assessed as at the date of assessment and had not been assessed for the occipital nerve injury. The occipital nerve injury was not referred to the AMS and could not be aggregated with those assessments as the AMS assessed all assessments resulting from the injury.

21. It was submitted that the 3% could not be combined with the AMS assessment as this would be "opening a can of worms".

22. In reply, the applicant alternatively submitted that the amount of $5,000 for 4% WPI could not be deducted for the amount of compensation paid for the 18% as, pursuant to the respondent's argument, the applicant was not entitled to be compensated for that 4%. It was submitted that only the 1% for ADLs was paid as previous compensation and included in the further MAC and the only deduction would be $1,250 from the compensation for 18% WPI as compensation previously paid.

Reasons

23. The applicant's further entitlement to permanent impairment compensation is due to the provisions of Schedule 8, cl 11 of the Workers Compensation Regulations 2016. Accordingly, this is the applicant's one further claim for permanent impairment compensation in respect of the injuries on 8 November 2004 and 1 March 2005.

24. Section 350 of the 1998 Act provides a general discretion to review previous Orders. There were no submissions that the discretion should not be exercised in the present case subject to the applicant showing error in the Orders based on the quantification of his entitlements based on the further MAC and/or the prior complying agreement.

25. The issue of aggregation now arises because the applicant's solicitors remained mute, did not plead the complying agreement and at no stage until after the Orders were issued, request the Commission to provide or otherwise request the AMS to provide a combined assessment incorporating the agreed impairment of the occipital nerve.

26. Neither party referred to any authority, relevant statutory or subordinate provision.

27. The assessment of WPI is now undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[7] The fourth edition guidelines adopts AMA 5. Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[8]

28. The complying agreement must be construed on an objective basis given the surrounding circumstances.[9]

[7] The 4th edition guidelines are issued pursuant to s 376 of the s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*
[8] Clause 1.1 of the fourth edition guidelines
[9] *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7.

29. The complying agreement was poorly drafted and does not refer to the body parts covered by the 4% assessment. It refers to the prior agreement dated 15 June 2007 to pay compensation for 5% for the cervical spine. That prior agreement must be the Orders of the Commission made on that date which required the respondent to pay for impairment referable to injury on 8 November 2004.[10]

30. The letter from the Insurer dated 9 November 2010 explains the basis of the assessment contained in the complying agreement. The letter states that a complying agreement is attached for the applicant's signature and makes an offer of 4% WPI for injury on 1 March 2005, that is the same percentage and date of injury contained in the complying agreement. The letter was written shortly prior to the execution of the complying agreement.

31. The "surrounding circumstances" must include the Insurer's letter dated 9 November 2010 which provides powerful objective evidence of the construction of the complying agreement.

32. I accept that the offer of 1% for ADLs is inconsistent with the offer of 3% for the occipital nerve as the applicant does not have an entitlement for ADLs arising from an assessment of the occipital nerve. The right to assessment for ADLs arises from impairment to the spine.[11] However, that inconsistency does not contradict the clear wording in the letter dated 9 November 2010 that the 3% was offered for the occipital nerve.

33. I note that there is no other correspondence contemporaneous with the complying agreement which would objectively explain the contents of that document.

34. For these reasons I accept that the complying agreement is properly construed as providing a settlement of 3% WPI for the occipital nerve and a further 1% WPI for ADLs.

35. The respondent in its written submissions, quoted at paragraph 14 above, asserted that the complying agreement was in respect of the cervical spine. That submission is rejected. The complying agreement refers to the cervical spine in the context of the previous orders dated 15 June 2007 which related to the injury sustained on 8 November 2004.

36. The suggestion in the s 78 notice dated 25 July 2019 that the complying agreement was for the lumbar spine is rejected for the same reasons.

37. The respondent's oral submission that the occipital nerve and the cervical spine assessment overlap or relate to the same body part is rejected.

38. The greater and lesser occipital nerve is now assessed in accordance with Table 5.1 of Chapter 5 of the fourth edition guidelines. That Chapter pertains to the assessment of the nervous system. Table 5.1 provides a range of between 0% and 5% WPI. An assessment or agreement that the applicant had 3% WPI for the occipital nerve now indicates an acceptance of "mild to moderate neurogenic pain and sensory alteration in an anatomic distribution".

39. The cervical spine is assessed in accordance with Chapter 15, particularly Table 15-5 of AMA 5, as varied by Chapter 4 of the fourth edition guidelines.

40. There is no direct overlap between the assessments of the occipital nerve and the cervical spine although they may both occur and be assessed as resulting from the one injury. The fact that the AMS assessed the applicant as having 5% WPI of the cervical spine resulting from the injury on 8 November 2004 and did not assess the cervical spine for the injury on 1 March 2005 is not inconsistent with the prior complying agreement.

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[10] Application, p 26

[11] See for example paragraphs 4.33-4.36 of the fourth edition guidelines

41. I reject the respondent's submission that the MAC is inconsistent with the prior complying agreement.

42. A consent agreement can give rise to an issue estoppel. In *Rail Services Australia v Dimovski*[12] (*Dimovski*) Handley JA held that a prior consent award conclusively determined the extent of permanent impairment as a result of injury sustained in the course of employment as at the date of the award[13]. Hodgson JA held that the issue estoppel binds the parties "as to the issues actually determined, they are not bound in relation to any different issue"[14]. See also the discussion by McColl JA in *Habib v Radio 2UE Sydney Pty Ltd*[15] and *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine*[16].

43. In *Bouchmouni v Bakhos Matta*[17] the Commission noted that consent orders can give rise to res judicata estoppels "only as to the matters that are 'necessarily decided'." Similar principles were discussed at the Presidential level in *Manpower Pty Ltd v Harris*[18] and *Hassan v Spotless Property Cleaning Services Pty Ltd.*[19]

44. The parties entered into a s 66A complying agreement which provided that the applicant had a 3% WPI for the occipital nerve resulting from injury on 1 March 2005. Nothing decided by the AMS in the further MAC was inconsistent with that agreement. Consistent with the above principles, the consent agreement contained in the complying agreement was binding on the respondent as the issue had resolved and was not contradicted by the findings contained in the further MAC.

45. The respondent also submitted that the AMS assesses all injuries as at the date of assessment, that the occipital nerve was not referred for assessment and cannot be combined with the assessment contained in the MAC.

46. Pursuant to clause 1.6 of the fourth edition guidelines the AMS assesses impairment as the worker presents on the date of assessment. That provision does not mean that the AMS must assess all body parts although if an applicant is restricted to one claim by virtue of s 66(1A) of the 1987 Act, then it will have the same practical operation. However, in the present case, the applicant is entitled to one further claim due to the Regulation referred to above.[20]

47. Paragraph 1.17 of the fourth edition guidelines provides that "impairments arising from the same injury are to be assessed together" and "impairments resulting from more than one injury arising out of the same incident are to be assessed together". That provision essentially repeats ss 322(2) and (3) of the 1998 Act. However, there is no reason nor is there any statutory provision prohibiting that an assessment made by the AMS cannot be combined with another body part which is either accepted by the parties or not in dispute.

48. Since the repeal of s 65(3) of the 1987 Act as and from 1 January 2019, the Commission has power to assess permanent impairment: *Etherton v ISS Properties Services Pty Ltd*.[21] Decisions prior to the repeal of s 65(3) of the 1987 Act concerning the absence of jurisdiction in the Commission to assess impairment, are no longer applicable.[22]

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[12] [2004] NSWCA 267
[13] *Dimovski* at [10]
[14] *Dimovski* at [57]. Young CJ in Eq agreed with both Handley JA and Hodgson JA as to issue estoppel
[15] [2009] NSWCA 231 at [186]
[16] [2016] NSWCA 213
[17] [2013] NSWWCCPD 4 at [33]
[18] [2011] NSWWCCPD 10 at [79]
[19] [2015] NSWWCCPD 19 at [30]
[20] See at paragraph [23]
[21] [2019] NSWWCCPD 53
[22] See for example my previous decision of *Veenstra v State of New South Wales* [2018] NSWWCC 278

49. Consistent with the amendments to the 1987 and 1998 Acts the Commission now has jurisdiction to combine the previous body part provided by the complying agreement with the further body parts assessed by the AMS.

50. The agreed assessment of the occipital nerve is not inconsistent with the assessments contained in the further MAC. Pursuant to s 322 of the 1998 Act the applicant is entitled to a combined assessment incorporating the assessments in the further MAC and the agreed assessment of the occipital nerve contained in the complying agreement.

Assessment

51. In his oral submissions the applicant conceded that the 1% WPI allowed for ADLs in the complying agreement was included in the further MAC and that he was only entitled to combine the 18% assessed made by AMS with 3% WPI for the occipital nerve.

52. Using the combined tables in AMA 5[23] and paragraph 1.18 of the fourth edition guidelines, the combined assessment is 20%. The s 66 entitlement as at the date of injury for 20% WPI is $27,500.[24] The respondent is entitled to credit for the amount of $5,000 paid for s 66 compensation in respect of this injury.

53. I raised with the parties the operation of s 66(2A) of the 1987 Act when quantifying the s 66 entitlement and allowing a 5% uplift in respect of the proportion of the assessment for the lumbar spine. On reflection I note that this provision does not apply in respect of injuries received prior to 1 January 2006 and no increase can be awarded.

54. I observe that if I am incorrect in my view as to combination and the applicant is not entitled to combine the 18% with the further 3%, then I agree with the applicant's alternative submission that credit would only be given for the amount of $1,250. This is because of the 4% WPI agreed and $5,000 previously paid pursuant to the complying agreement, only one-quarter of that assessment was included in the further MAC. Ironically the applicant's alternative submission, due to the effect of combination under the combined tables, would mean that the applicant is entitled to a lesser WPI (18%) but a greater net sum after deduction of the amount of $1,250.

55. However, I do not make orders in accordance with the alternative submission as the applicant's proper entitlement to compensation is based on 20% WPI less credit for s 66 compensation previously made.

CONCLUSIONS

56. The findings and orders are set out in the Certificate of Determination.

[23] AMA 5, p 605

[24] The parties incorrectly provided a figure of $30,250 for 20% WPI. This figure applies to injuries received between 1 January 2007 and 18 June 2012.