WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**6432/19**
Applicant:	**Michael Kennewell**
Respondent:	**ISS Facility Services Australia Limited t/as Sontic Pty Ltd**
Date of Determination:	**13 March 2020**
Citation:	**[2020] NSWWCC 77**

The Commission orders:

1. The application for reconsideration of the Certificate of Determination dated 10 June 2015 pursuant to section 350 of the *Work Injury Management and Workers Compensation Act 1998* (the 1998 Act) is granted. The Certificate of Determination is revoked.

2. I refuse to refer the matter for further medical assessment or reconsideration pursuant to section 329 of the 1998 Act.

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

Nicholas Read
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 NICHOLAS READ, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Michael Kennewell sustained an injury to his right shoulder and elbow in the course of employment with ISS Facility Services Australia, the respondent, in May 2005. In 2010 Mr Kennewell brought a claim for lump sum compensation, the claim was resolved by way of a Complying Agreement.

2. In 2014, Mr Kennewell made a further claim for lump sum compensation. He was referred to an Approved Medical Specialist (AMS), Dr David O'Keefe. Dr O'Keefe issued a Medical Assessment Certificate in which he assessed Mr Kennewell as suffering from 11% permanent impairment as a result of the injury (the 2015 MAC).

3. On 10 June 2015, the Commission issued a Certificate of Determination ordering the respondent to pay Mr Kennewell lump sum compensation in respect of 11% permanent impairment (the COD).

4. In 2018, Mr Kennewell sought an assessment as to whether his degree of permanent impairment was fully ascertainable. The purpose of the assessment was to determine whether Mr Kennewell was caught by the application of section 39 of the *Workers Compensation Act 1987* (the 1987 Act), which specifies that a worker has no entitlement to weekly payments after a five-year period unless certain criteria are met.

5. On 6 April 2018, an AMS issued a Medical Assessment Certificate in which it was determined that the degree of Mr Kennewell's permanent impairment was not fully ascertainable.

6. In 2019, Mr Kennewell saw Dr Tim Anderson who assessed his degree of permanent impairment of the right shoulder and elbow at 28%. There is no dispute between the parties that Mr Kennewell's right shoulder and elbow injury has deteriorated. Since 2005 Mr Kennewell has undergone three surgical procedures to his right shoulder and one on his elbow.

7. Mr Kennewell subsequently made a claim for lump sum compensation. He also made a separate claim for work injury damages.

8. In June 2019, the respondent disputed that Mr Kennewell was able to make the claims because he was bound by the 2015 MAC by virtue of section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

9. In August 2019, Mr Kennewell lodged an Application to Appeal against the Decision of an AMS. Mr Kennewell sought the assessment for two reasons: firstly, to determine his degree of permanent impairment for the lump sum compensation claim pursuant to section 66 of the 1987 Act, and secondly, to determine whether his degree of permanent impairment was at least 15% for the purposes of bringing a work injury damages claim (see section 151H of the 1987 Act).

10. The Commission advised that Mr Kennewell was unable to appeal against the 2015 MAC for the purpose of bringing a lump sum compensation claim by reason of section 66A the 1987 Act and could not seek to appeal the MAC because the matter had not been referred to the AMS for purposes of establishing the threshold pursuant to section 151H.

11. In December 2019 Mr Kennewell lodged this application. Mr Kennewell seeks for the COD to be reconsidered and revoked, and a direction that the matter be referred for further medical assessment or reconsideration pursuant to section 329 of the 1998 Act.

12. The respondent maintains that Mr Kennewell is not entitled to a further assessment by virtue of sections 322A and 327(7) of the 1998 Act.

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a telephone conference on 24 January 2020. At the telephone conciliation I made directions for the parties to lodge and serve written submissions and fixed the matter for a further telephone conference.

14. The parties lodged written submissions. Mr Kennewell's submissions sought an opportunity to be heard at an arbitration and to respond to submissions lodged by the respondent. On 20 February 2020 I vacated the further teleconference and issued further directions requesting any submissions in reply. Mr Kennewell filed submissions in reply and the respondent also filed a short submission.

15. Having reviewed the parties' submissions, I was satisfied that the materials before me were sufficient to determine the matters in dispute.

ISSUES FOR DETERMINATION

16. The issues for determination are:

    (a) whether Mr Kennewell's application for reconsideration of the COD should be permitted, and

    (b) whether the matter should be referred for further medical assessment or reconsideration pursuant to section 329 of the 1998 Act.

EVIDENCE

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

    (a) Application to Resolve a Dispute, and attachments (ARD);
    (b) Reply, and attachments;
    (c) Mr Kennewell's written submissions dated 7 February 2020;
    (d) the respondent's written submissions dated 12 February 2020;
    (e) Mr Kennewell's written submissions in reply dated 26 February 2020, and
    (f) the respondent's further written submissions dated 26 February 2020.

REASONS

The statutory framework

18. The issues in this matter relate to the interactions between section 322A of the 1998 Act and Part 7 of the 1998 Act.

19. Section 322A provides:

    "(1) Only one assessment may be made of the degree of permanent impairment of an injured worker.

    (1A) A reference in subsection (1) to an assessment includes an assessment of the degree of permanent impairment made by the Commission in the course of the determination of a dispute about the degree of the impairment that is not the subject of a referral under this Part.

(2) The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).

(3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of—

(a) assessment and a medical assessment certificate under this Part, or
(b) a determination by the Commission under Part 4.

(4) This section does not affect the operation of section 327 (Appeal against medical assessment) or 352 (Appeal against decision of Commission constituted by Arbitrator)."

20. Section 326, which appears in Part 7, provides:

"(1) An assessment certified in a medical assessment certificate pursuant to a medical assessment under this Part is conclusively presumed to be correct as to the following matters in any proceedings before a court or the Commission with which the certificate is concerned:

(a) the degree of permanent impairment of the worker as a result of an injury,
(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,
(c) the nature and extent of loss of hearing suffered by a worker,
(d) whether impairment is permanent,
(e) whether the degree of permanent impairment is fully ascertainable.

(2) As to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings."

21. Section 327 provides:

"(1) A party to a medical dispute may appeal against a medical assessment under this Part, but only in respect of a matter that is appealable under this section and only on the grounds for appeal under this section.

(2) A matter is appealable under this section if it is a matter as to which the assessment of an approved medical specialist certified in a medical assessment certificate under this Part is conclusively presumed to be correct in proceedings before a court or the Commission.

(3) The grounds for appeal under this section are any of the following grounds:

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

(c) the assessment was made on the basis of incorrect criteria,

(d) the medical assessment certificate contains a demonstrable error.

(4) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and any submissions made to the Registrar, at least one of the grounds for appeal specified in subsection (3) has been made out.

(5) 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.

(6) The Registrar may refer a medical assessment for further assessment under section 329 as an alternative to an appeal against the assessment (but only if the matter could otherwise have proceeded on appeal under this section).

Note. Section 329 also allows the Registrar to refer a medical assessment back to the approved medical specialist for reconsideration (whether or not the medical assessment could be appealed under this section).

(7) There is to be no appeal against a medical assessment once the dispute concerned has been the subject of determination by a court or the Commission or agreement registered under section 66A of the 1987 Act ...".

22. Section 294(1) provides that if a dispute is determined by the Commission, the Commission must as soon as practicable after the determination of the dispute issue the parties to the dispute with a certificate as to the determination (a COD).

23. The Commission's Practice Direction No 11 (Permanent impairment disputes) relevantly provides at paragraphs 18 and 19 that after the expiration of 28 days, being the time period to lodge an appeal, the dispute will be finalised by issue of a COD where the only issue in dispute is permanent impairment compensation.

24. Section 329 provides a power to the Registrar and Commission to refer a matter for further assessment or reconsideration, as follows:

"(1) A matter referred for assessment under this Part may be referred again on one or more further occasions for assessment in accordance with this Part, but only by:

(a) the Registrar as an alternative to an appeal against the assessment as provided by section 327, or

(b) a court or the Commission.

(1A) A matter referred for assessment under this Part may be referred again on one or more further occasions by the Registrar to the approved medical specialist for reconsideration.

(2) A certificate as to a matter referred again for further assessment or reconsideration prevails over any previous certificate as to the matter to the extent of any inconsistency."

Consideration

25. The following matters are common ground between the parties:

    (a) a claim for lump sum compensation and a claim for work injury damages are separate and distinct claims (respondent's further submissions at paragraph 8; see also discussion of Arbitrator Harris in *Galea v Colourwise Nursery (NSW) Pty Ltd* [2019] NSWWCCPD 362 (*Galea*));

    (b) Mr Kennewell cannot bring a further claim for permanent impairment compensation under section 66 of the 1987 Act (Mr Kennewell's submissions paragraph 35; section 66(1A) of the 1987 Act; *Woolworths Ltd v Stafford* [2015] NSWWCCPD 36; *Stella Maris College v Robin-True* [2015] NSWWCPD 57 at [54]). Mr Kennewell has abandoned his claim for lump sum compensation and seeks an assessment to determine whether he will meet the threshold in section 151H of the 1987 Act;

    (c) the 2015 MAC had the effect of determining the degree of Mr Kennewell's permanent impairment and that assessment also had the effect of conclusively determining Mr Kennewell's degree of permanent impairment for the threshold in any work injury damages claim (section 322A(2), 326(1)(a); *O'Callahgan v Energy World Corporation Ltd* [2016] NSWWCCPD 1 at [100] (*O'Callahgan*)), and

    (d) section 322A of the 1998 Act does not affect the operation of section 327 (section 322A(4)); respondent's further submissions at paragraph 4).

26. The respondent says section 327(7) operates as a complete bar to Mr Kennewell's application because it says there is to be no appeal against a medical assessment once the dispute concerned has been the subject of a determination from the Commission. The 2015 COD effectively brought to an end to Mr Kennewell's right of appeal.

27. This submission does not directly address the current application. Mr Kennewell is seeking a reconsideration of the COD and for the matter to be referred for assessment on a further occasion under section 329. He does seek to appeal the MAC; an application for appeal being rejected by the Commission. He seeks a reconsideration of the COD and referral of the matter for reconsideration or assessment on a further occasion.

28. The respondent says there is no basis for the application under section 350 "as the applicant is subject to a binding MAC under section 322A which is not subject to any appeal, given orders in relation to the MAC have been made by the WCC" (respondent's further submissions at paragraph 14). The only submission made by the respondent is that the reconsideration application is without merit because Mr Kennewell has had his one MAC and has not appealed it.

29. Section 350(3) of the 1998 Act provides the Commission may reconsider any matter that has been dealt with by it and rescind, alter or amend any decision previously made. The Commission has a wide discretion to reconsider previous decisions (*Samuels v Sebel Furniture Ltd* [2006] NSWWCCPC 141 at [43] (*Samuels*)). Mr Kennewell accepts the COD amounts to a "determination" by the Commission.

30. There does not appear to be any part of the Workers Compensation Acts which says that a COD issued following the outcome of a medical assessment cannot be the subject of a reconsideration application pursuant to section 350(3). To the contrary, the Commission has previously held that such CODs may be the subject of reconsideration. In *Graziani v Burrangong Pet Food Pty Ltd* [2007] NSWWCCPD 215 (*Graziani)* Roche DP said at [46]-[47]:

"46. ...I agree that an Arbitrator does not have the power to reopen or reconsider an Appeal Panel decision and no power to deal with reconsiderations under section 378 of the 1998 Act. However, the Commission does have power to 'reconsider *any matter* that has been previously dealt with' (emphasis added) by it (section 350(3) of the 1998 Act). That includes the power to reconsider any Certificate of Determination. Mr Graziani sought a reconsideration of the Certificate of Determination of 5 July 2006. In addition, the Commission has the power to refer matters for further assessment by an AMS (section 329(1)(b) of the 1998 Act).

47. These powers, however, can only be used in the appropriate circumstances. The circumstances in which the Commission will entertain an application for reconsideration under section 350(3) were considered in *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 141 and *Nan v Country Road Freight Services Pty Limited* [2006] NSWWCCPD 160. Those cases both referred to and applied the principles discussed in *Maksoudian v J Robins & Sons Pty Limited* [1993] NSWCC 36; (1993) 9 NSWCCR 642, where Bishop J said at 645D:

> 'The legal basis for a reconsideration for an award of the Court as laid down in section 36 of the previous legislation and section 17 of the present is well settled. There is no doubt that the discretion of this Court to reconsider is wide and far reaching. The task of the Court is to balance the policy requirement of finality of litigation with the obligation to rectify any clear cut injustice. The cases do not comprehensively indicate how the Court is to approach this task, but it does seem that two broad requirements are laid down. The first of these is that the material leading to an application for reconsideration must be what can broadly be described as 'fresh evidence', namely material that with reasonable diligence could not have been put before the Court at the time of the original proceedings and the application for reconsideration has to move with appropriate speed and diligence to bring that matter to the Court's attention. The second point is that the fresh evidence must be of such a nature that if it had been before the Court when the original proceedings were heard it would more likely than not have affected the outcome of the proceedings: *Hardaker v. Wright & Bruce Pty Ltd* (1962) 62 SR (NSW) 244 and *Hilliger v. Hilliger* (1952) 52 SR (NSW) 105.'"

31. Having regard to DP Roche's observations in *Graziani*, I am satisfied that the Commission may reconsider the 2015 COD pursuant to section 350(3). In my view, the question is whether it is appropriate in the circumstances to entertain the application.

32. The respondent submits that Mr Kennewell's application is contrary to sections 322A and 327(7), parliament having made changes to the legislation aimed at restricting the number of claims and assessments by an AMS in order to save costs of to the scheme.

33. The respondent submits that section 327(7) provides that the administrative action of issuing a COD creates a strict limitation period for bringing an appeal on the grounds of subsections327(3)(a) and (b).

34. Whether the respondent's position is correct is to be resolved by applying the principles of statutory construction, however it is not determinative of Mr Kennewell's application. This is because Mr Kennewell has brought an application under section 350 for the COD to be revoked and not an appeal.

35. Questions of statutory construction are to be determined by reference to the text, context and purpose of an Act. The starting point is consideration of the text itself (*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v*

Commissioner of Territory Revenue [2009] HCA 41; *Grain Growers Limited v Chief Commissioner of State Revenue (NSW)* [2016] NSWCA 359).

36. The Court of Appeal in *Police Association of New South Wales v State of New South Wales* [2020] NSWCA 3, referring to the decision in *The Queen v A2* [2019] HCA 35, recently said at [86]:

> "Four basic principles [of statutory construction] must be observed**:**
>
> 1. The method to be applied in construing a provision commences with a consideration of the words of the provision itself, but it does not end there.
>
> 2. Consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.
>
> 3. Consideration of the context for the provision is undertaken at the first stage of the process of construction.
>
> 4. Context includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole and extends to the mischief which it may be seen that the statute is intended to remedy."

37. There appears to be some tension between the words of section 327(3)(a) and (b) and section 327(7).

38. Section 327(5) provides that an appeal made on the statutory grounds of demonstrable error and incorrect criteria (subsections 327(3)(c) and (d)) must be made within 28 days unless the Registrar finds special circumstances exist to justify an increase in the period. Section 327(5) does not contain any reference to subsections 327(3)(a) or (b). It is reasonable to assume that the express reference to subsections 327(3)(c) and (d) means there has been a deliberate intention by parliament to exclude subsections 327(3)(a) and (b) from the requirement to bring an appeal within 28 days.

39. The Commission's practice is to issue a COD after the expiration of the appeal period (see Practice Direction No 11 (Permanent impairment disputes) at paragraphs [18] to [19]). The appeal period referred to can only be a reference to the appeal period in respect of appeals under subsections 327(3)(c) and (d), the legislation being silent on the appeal period for appeals under subsections 327(3)(a) and (b).

40. The ground of appeal in section 327(3)(a), which is relevant in this matter, is for a deterioration of a worker's condition that results in an increase in the degree of permanent impairment. If section 327(7) provides a strict timeframe for an appeal under section 327(3)(a) it would mean that a deterioration of a worker's condition would need to take place within the period of time between the issue of a MAC and the issue of the COD (after the expiration of a 28-day appeal period). In Mr Kennewell's case it would require deterioration to take place within a period of 35 days (the time between the MAC and the 2015 COD).

41. "Deterioration" is a relational concept. It requires a comparison between the worker's condition at an earlier date and his or her condition at a later date (*Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW & Ors* [2007] NSWCA 149 (*Riverina*) per Campbell JA at [94]). The ground of appeal in section 327(3)(a) requires a comparison between a worker's condition at an earlier date and his or her condition at a later date. The earlier date is the date of the Medical Assessment Certificate. The later date is when the Registrar or his or her delegate comes to consider whether this ground of appeal exists (*Riverina* per Handley AJA at [122]).

42. If section 327(7) was intended to provide a strict statutory timeframe it is difficult to contemplate how a worker would ever be able to make out an appeal ground of deterioration within the short period of time between issue of the MAC and a COD. In my view, it is doubtful this was parliament's intention when formulating the appeal grounds and deliberately excluding subsections 327(3)(a) and 327(3)(b) from the 28-day limitation period in section 327(5). Imposing a strict timeframe is likely to have the unreasonable consequences of undercompensating workers who have suffered a deterioration by virtue of the MAC remaining a conclusive determinant of the extent of impairment and an inability to prove deterioration within the short period between the MAC and the COD. This view was also expressed by Arbitrator Harris in *Galea* at [106].

43. I accept the respondent's submission that section 322A was introduced to reduce the financial costs to the scheme and has a non-beneficial operation (see the respondent's submissions at [16] and *ADCO Constructions Pty Ltd* [2014] HCA 18 at [29] and *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA at [122]). However, whilst section 322A appears to be a "dominant provision" it is equally subject to section 327 (section 327(4)). Accordingly, the right to prosecute an appeal under section 327 does not offend section 322A.

44. The decision of Arbitrator Capel in *Parsons v Dell Australia Pty Ltd* [2019] NSWWCC 210 (*Parsons*) does not provide any support for the proposition that there is no basis for Mr Kennewell's current application.

45. In *Parsons* Arbitrator Capel dealt with a matter where the applicant sought reconsideration of a COD and referral to an AMS for the purposes of bringing further lump sum claims, not for the purpose of establishing a threshold. Unsurprisingly, Arbitrator Capel declined Mr Parson's application for reconsideration of the COD primarily on the basis the claim was precluded by section 66(1A) of the 1987 Act and section 322A of the 1998 Act (see *Parsons* at [113]-[117]). The same, uncontroversial, finding was made by Arbitrator Egan in *Krstanovic v D & D Technologies Pty Ltd* [2017] NSWWCC 29).

46. Mr Parsons appealed Arbitrator Capel's decision (see *Parsons v Dell Australia Pty Ltd* [2020] NSWWCCPD 2). The appeal did not seek to cavil with the primary finding of Arbitrator Capel and does not take the matter further.

47. In this case Mr Kennewell does not seek to appeal the MAC to bring a further impermissible claim for lump sum compensation, but in order to determine whether he meets the threshold for work injury damages. The respondent accepts it is uncontroversial that a claim for lump sum compensation and a claim for work injury damages are separate claims.

48. Ultimately, it is not necessary for me to express a concluded view as to whether section 327(7) imposes a clear timeframe for appeals brought under subsections 327(3)(a) and 327(3)(b) because in my view the COD may always be reconsidered and set aside providing there is a proper basis for doing so. If the COD is set aside it removes any impediment to appealing the MAC under section 327(7). I accept Mr Kennewell's submission that it is the merits of this application that should be considered. I do not accept the respondent's submission that the proceedings should be dismissed pursuant to section 354(7A) for being misconceived or lacking in substance.

Should the COD be rescinded?

49. Mr Kennewell seeks an order that the COD be revoked and that it be referred to the AMS for reconsideration under section 329.

50. In any event, I have had regard to the following factors when considering whether the COD should be revoked:

(a) the respondent has not made any submissions on the exercise of the discretion, its position being that the 2016 COD finally determined the issue of the degree of permanent impairment for all purposes;

(b) it is not disputed there has been deterioration in Mr Kennewell's condition. Dr Anderson has assessed Mr Kennewell as suffering 28% whole person impairment as a result of impairment to his right shoulder and elbow. Whilst it is a matter for an AMS or the Appeal Panel, there is a real likelihood that Mr Kennewell will be assessed as suffering from a higher degree of whole person impairment and exceeding the work injury damages threshold. I accept Mr Kennewell's submission that there is an almost inevitable likelihood of a further assessment resulting in an increase in the degree of permanent impairment from that assessed in the 2015 MAC;

(c) I also accept that there is additional relevant information, such as the reports of Dr Anderson, that could not have reasonably been obtained by Mr Kennewell prior to the issue of the MAC. I am satisfied that the evidence is of a nature that would likely lead to a different result;

(d) rescinding the COD would not enable Mr Kennewell to bring "fresh" proceedings or a further impermissible claim contrary to section 322A or section 66(1A). It would enable him to make an application to appeal the MAC pursuant to section 327(3)(a). Should Mr Kennewell succeed in his appeal a new MAC would be issued which would effectively replace the 2015 MAC and conclusively determine whether Mr Kennewell meets the threshold for work injury damages (sections 328(5) and 329(2)). In my view, setting aside the COD to enable a challenge to the MAC by way of appeal would not be incompatible with the cost savings objectives of parliament in the circumstances of this case;

(e) the reasons for delay in bringing the application for reconsideration are connected to the deterioration of Mr Kennewell's condition over time and him having sought to appeal the decision of the AMS but being refused by the Commission. Mr Kennewell has attempted to exercise his right of appeal but his application was rejected on the basis of the COD being an impediment to his application. The application was brought swiftly once the Commission rejected the appeal application. No question of prejudice has been raised by the respondent. This is probably not surprising in the circumstances where Mr Kennewell has previously obtained a MAC stating that he has not reached maximum medical improvement and has had multiple surgeries on his right shoulder and elbow since the 2015 MAC;

(f) I accept there is a public interest in litigation not proceeding indefinitely. This is an important factor in the nine considerations set out in *Samuels*. However, deterioration is a ground of appeal pursuant to section 327. If the COD is set aside Mr Kennewell may bring an appeal on the basis of deterioration of his condition. Also, this consideration must be balanced with the other competing factors, including the lack of any dispute about the deterioration of Mr Kennewell's condition, the fresh evidence, and the injustice that may prevail if Mr Kennewell is denied from challenging the MAC by way of appeal, reconsideration or referral for further assessment; and

(g) in my view, having regard to the long history of the matter and the fact that there is no issue as to the whether Mr Kennewell's right shoulder condition has deteriorated, doing justice between the parties, in this case, favours granting the application.

51. On balance, I accept this is an appropriate case to exercise my discretion under section 350(3) to reconsider and set aside the 2015 COD. I therefore rescind the 2015 COD.

Should the matter be referred for further medical assessment or reconsideration?

52. Section 329 provides the power to refer a matter for reconsideration or further assessment.

53. Neither party has made submissions on whether a referral is within the jurisdiction of the Commission or the factors relevant to the exercise of the discretion pursuant to section 329.

54. The Commission has a general power to refer a matter that has been referred on one or more further occasions for assessment (section 329(1)(b)). The Registrar also has a power under section 329(1A) however this power is limited to referrals back to "the" AMS who first dealt with the matter.

55. Section 322A carves out the right of appeal from the "one MAC rule". It also carves out the power of the Registrar to refer a medical assessment for further assessment as an alternative to an appeal against the assessment (but only if the matter could otherwise proceed on appeal under the section) (section 327(6)); section 322A does not affect the operation of section 327 in its entirety (section 322A(4)).

56. Prior to the introduction of section 322A the power in section 329 had been described as "broad" and "unlimited" (*Target Australia Pty Ltd v Mansour* [206] NSWWCCPD 286 at [68]; *Milosavljevic v Medina Property Services Pty Ltd* [2008] NSWWCCPD 56). In *Read v Liverpool City Council* [2007] NSWSC Malpass AJ observed that section 329 may have been introduced to remedy situations where the dictates of justice required a further referral but a statutory ground of appeal was not made out.

57. In *O'Callaghan* Roche DP expressed the view at that it was difficult to see how the power section 329 might operate after the introduction of section 322A. This was not a concluded view. On the face of the legislation section 322A is subject to section 327, which includes the power of the Registrar to refer the matter for further assessment as an alternative to an appeal. The power of the Registrar to refer a matter under section 329(1)(a) appears to be preserved.

58. Interestingly, the Note below section 327(6) appears to preserve the power under section 329(1A), however notes are not to be read as part of the text of the 1998 Act (section 4(3) of the 1998 Act).

59. In my view it is uncertain this matter may be referred for reassessment or reconsideration other than under section 329(1)(a). This is because section 322A is a dominant provision that is subject to section 327 and section 327(6) only preserves the power under section 329(1)(a). Section 329(1)(a) and (b) draws a distinction between the powers of the Registrar and the powers of a court or the Commission. It is not clear whether a direct referral to an AMS for further assessment that is not made as an alternative to an appeal is permitted, although this appears to be contemplated by the Note below section 327(6).

60. The above issue aside, a factor that weighs against the referral of the matter for further medical assessment or reconsideration is that Dr David O'Keefe, who dealt with the matter in 2015 is no longer an AMS. The matter cannot be referred to Dr O'Keefe. It would need to be referred to a different AMS for assessment.

61. Another factor that weighs against exercising the discretion under section 329 is that deterioration is a specific ground of appeal under section 327(3)(a). Referring the matter for further assessment to a different AMS to assess the extent of deterioration may cut across what parliament intended to be achieved via the appeals process. As the COD has been rescinded, Mr Kennewell may now exercise his right of appeal. This is not a matter where the

dictates of justice require a further assessment where no grounds of appeal may exist. As the COD has been rescinded, Mr Kennewell may now exercise his right of appeal.

62. A factor that weighs in favour of exercising the discretion is the likely reduced costs to the scheme. Referring the matter to an AMS under section 329(1)(a) avoids the costs of setting up an Appeal Panel and likely assessment, should Mr Kennewell satisfy the Registrar's delegate that a ground of appeal exists. The costs to the scheme of a direct referral to an AMS for further assessment are likely to be lower.

63. A factor that weighs in favour of referral for further assessment by the Commission is that there is no dispute that Mr Kennewell's condition has deteriorated. In the circumstances, there is no question of fact that would require determination by an Appeal Panel, the only issue is what is the extent of Mr Kennewell's permanent impairment resulting from injury to his right shoulder and elbow.

64. Ultimately, I am not satisfied this is an appropriate matter for referral under section 329. I am concerned that a referral may exceed the jurisdictional limits of the Commission. As a matter of discretion, a direct referral for further assessment or reconsideration under section 329(1)(b) is not appropriate given Dr O'Keefe is no longer an AMS.

Conclusion

65. The findings and orders are set out above. Mr Kennewell has the entitlement to file an application to appeal the 2015 MAC. Should Mr Kennewell lodge an appeal, his rights are to be determined in accordance with section 327(4) of the 1998 Act, that is by the Registrar being satisfied that a ground of appeal has been made out. Mr Kennewell has no further entitlement to permanent impairment compensation.

66. Mr Kennewell should exercise his right of appeal expeditiously. If he does not exercise, I will consider any further application by the respondent to reconsider the orders.