WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **109/20**
Applicant: **Tony Howard Porter**
Respondent: **State Rail Authority of New South Wales**
Date of Determination: **21 August 2020**
Citation: **[2020] NSWWCC 287**

The Commission determines:

1. The monetary amounts for the agreed lump sum compensation is to be calculated by reference to the maximums in section 66 of the *Workers Compensation Act 1997* as it applied prior to the *WorkCover Legislation Amendment Act 1996,* as follows:

    (a) $3,969 for 5% additional permanent impairment of the back;
    (b) $26,460 for additional 25% of the right arm at or above the elbow, and
    (c) $9,287.46 for 10.8% binaural acoustic hearing loss.

2. The parties have liberty to apply on three days' notice to seek a reconsideration of this Certificate of Determination/Statement of Reasons under section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* if they wish to address the legal authorities to which reference has been made.

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

Josephine Bamber
Senior Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Tony Howard Porter, the applicant, commenced employment with the respondent, State Rail Authority of New South Wales, in 1973 as a labourer. He later worked as a fitter's assistant and a shunting tractor driver. He remained working for the respondent until 1997 when he was medically retired. He is now aged 65.5 years.

2. On 7 February 1996, Mr Porter was involved in an accident at work when a carriage was running out of control and collided with the shunting tractor he was operating. He had to jump off to save himself. He says the impact caused an explosive noise and was very close to him. He estimates the carriage was travelling at 60 km per hour prior to the impact.

3. The respondent now concedes that in this incident the injuries sustained by Mr Porter include to his back, right arm, and traumatic binaural hearing loss.

4. Previously, Mr Porter made a claim for lump sum compensation in relation to the injury on 7 February 1996. The date of this claim does not appear in the documents before the Commission. He commenced proceedings in the Compensation Court of New South Wales in matter number 15430/96 which were before Judge Maguire on 4 August 1997. Given that matter has a 1996 matter number it is a reasonable inference that the claim was made before 1997.

5. In those proceedings, Mr Porter was awarded lump sum compensation in respect of the injury on 7 February 1996 as follows:

    (a) $11,907 in respect of 15% permanent impairment of the back.

    (b) $5,292 in respect of 5% loss of use of the right arm at or above the elbow.

    (c) $2,480 in respect 2.5% loss of use of the left leg at or above the knee.

    (d) $2,480 in respect 2.5% loss of use of the right leg at or above the knee.

    (e) $17,841 in respect of pain and suffering pursuant to the former section 67 of the *Workers Compensation Act 1987* (the1987 Act)[1].

6. The Award is dated 3 September 1997, a copy of which appears in the Reply[2]; and a copy of the Terms of Settlement is in the Application to Resolve a Dispute (ARD)[3].

7. Apparently on 6 April 2018, Mr Porter made a further claim for lump-sum compensation and amended that claim by letter dated 26 June 2018[4].

8. On 10 October 2018, the respondent's insurer, QBE Insurance (Australia) Ltd issued a notice pursuant to the former section 74 of the 1987 Act disputing the lump sums claimed[5].

9. On 14 January 2020, the ARD was filed on behalf of Mr Porter. On 4 February 2020 the respondent's Reply was filed.

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[1] Section 67 of the 1987 Act was repealed by the 2012 amendments to the 1987 Act.
[2] Reply p 54.
[3] ARD p 35.
[4] These dates appear in the section 74 notice at p 1 of the Reply.
[5] Reply p 1.

PROCEDURE BEFORE COMMISSION

10. This matter was listed for a conciliation/arbitration hearing before me on 27 March 2020 which was conducted by telephone due to the COVID-19 situation. Mr Carney, counsel, instructed by Mr Jeyakumaran, solicitor, appeared for Mr Porter, who was present. Ms Goodman, counsel, instructed by Mr McLean, solicitor, appeared for the respondent.

11. After lengthy conciliation the parties came to an agreement and an Amended Certificate of Determination – Consent Orders was issued thereafter recording the following:

> "1. The respondent agrees to pay the applicant pursuant to section 66 of the *Workers Compensation Act 1987* in respect of an additional 5% permanent impairment of the back and an additional 25% of the right arm at or above the elbow; the parties are to agree upon the monetary sums.
>
> 2. Award for the respondent for the further permanent impairment claim for the right and left legs at or above the knees.
>
> 3. Award for the respondent in respect of injury to and/ or consequential condition of the left shoulder.
>
> 4. Award for the respondent for the claim for weekly compensation
>
> 5. Award for the respondent for the claim for section 67.
>
> 6. The hearing loss claim is remitted to the Registrar for referral to an Approved Medical Specialist for a non-binding opinion as to the following:
>
> a. Is there hearing loss?
> b. If so, is any part traumatic hearing loss?
> c. If so, how much is traumatic in origin?"

12. Approved Medical Specialist (AMS) Dr Henley Harrison issued his Medical Assessment Certificate on 1 June 2020 finding there was traumatic hearing loss equating to 10.8% binaural hearing loss due to acoustic trauma of the accident on 7 February 1996.

13. The matter was then listed for telephone conference on 29 June 2020 before me with Mr Carney and Mr Jeyakumaran appearing with Mr Porter and Mr McLean appearing for the respondent. Apparently since the parties agreement referred to in the Amended Certificate of Determination - Consent Orders, they had not been able to agree on how the monetary entitlement of their settlement of the compensation under section 66 should be calculated. They wished to file written submissions in relation to the same. Directions for the provision for written submissions were issued. The parties also agreed to accept the non-binding AMS assessment of 10.8% binaural hearing loss for acoustic trauma on 7 February 1996.

14. The parties have agreed to the determination of the issue about calculation of the agreement without a conference or formal hearing. I am satisfied I have sufficient information to determine the matter 'on the papers'.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;
    (b) Reply and attached documents;
    (c) AMS Medical Assessment Certificate - General Medical Dispute 1 June 2020;
    (d) applicant's submissions dated 2 July 2020; and
    (e) respondent's submissions dated 14 July 2020.

Oral evidence

16. There was no oral evidence.

FINDINGS AND REASONS

Applicant's submissions

17. Because the submissions are comparatively brief I have reproduced them below.

> "2. The submissions are to address the question of how much monetary compensation the applicant is to receive from his claim for increase in his Whole Person Impairment (WPI) [sic][6] resulting from the deterioration in the permanent impairment in his back and loss of use of his right arm at or above the elbow.
>
> 3. There is no dispute that the increase in:
>
> a. the permanent impairment of the back is an additional 5%, and
> b. the loss of use of the right arm is an additional 25%
>
> 4. The Applicant maintains that this should result in an additional payment as follows:
>
> a. for the permanent impairment to the back 20% is 20% x $79,380 = $15,876.00
> b. for the loss of use of the right arm is 30% x $105,840 = $31,452
>
> | | |
> |---|---|
> | Total | $47,628 |
> | Less Amount already paid | $19,817 [sic, $17,199[7]] |
> | Amount now due | $27,811[sic, $30,429] |

[6] Because the date of injury is before 1 January 2002 the permanent impairment is not assessed as "whole person impairment" but under the Table of Disabilities.
[7] The submissions have mathematical error as the sum previously paid for the back was $11,907 and the right arm $5,292 which total $17,199.

5. The respondent submits the additional amounts should be:

    a. for the permanent impairment for the back, 20% x $60,000 $12,000
    b. for the loss of use of the right arm above the elbow, 30% x $80,000 $24,000

Total	$36,000
Less amount already paid	$19,817 [sic, $17,199]
Amount now due	$18,801

6. The difference in the amounts payable between the parties stems from the 1996 amendments which reduced the amounts payable for s66 claims under the 'Table of Disabilities.'

7. The question is what amounts for s66 apply to this claim, is the pre 1996 amounts claimed by the applicant or the post 1996 amendment amounts claimed by the respondent?

8. The applicant contends that the pre 1996 position in relation to the amount payable for s66 compensation is the correct law to apply.

9. The applicant submits that the present claim is brought as an additional claim for an existing impairment under clause 11 of the schedule 8 of the regulations. This clearly states that:

> cl11 (1) A further lump sum compensation claim may be made in respect to an existing impairment.

10. The applicant also refers to clause 10 of schedule 8 of the regulations cl10 (1) the amendments made by schedule 2 to the 2012 amending extend to a claim for compensation …. But not to [a claim] s66 &67.

11. Clauses 10 and 11 (above) clearly over rule the decision of Cram Fluid v Green and allow a person with an existing impairment to make 'one last claim'.

12. The last claim must by definition be a claim for deterioration. It cannot be a new claim.

13. When the transitional provisions concerning the 1996 amendments are considered it is clear that if a claim is made before the operation of amendment comes into effect then the old legislation applies. (see schedule 6 clause 18(1)). Clearly the old legislation applied to the assessment in this matter. The monetary amounts awarded in the first determination are clearly based on the pre 1996 amendment legislation.

14. As a claim had already been made which was subject to the pre 1996 amendment clearly schedule 6 clause 18 is read to mean that the 1996 amendments do not apply to this particular applicant. So that s66(3) does apply and the amount of compensation to be awarded is calculated according to when the date of the injury occurred.

15. Alternatively the 2012 amendments replaced the old s66 in all ways. The new s66(3) is different to the old s66(3) and in any event is part of a new regimen for determining s66 claims, the effect of the legislation as it stood at the time of the decision in Cram Fluid Power v Green meant that no second claim for s66 could be made after 19 June 2012. Clearly the new s66 was meant to 'cover the field' and did not allow for any of the old legislation to have effect. The transitional provision concerning the 1996 amendments (schedule 6 clause 18) referred to the old s66 when it referred to s66(3) and there was no provision in effect stating that a reference to the old s66(3) should now be a reference to the new s66(3). When clause 11 of schedule 8 came into effect it only removed the effect of s66(1),66(1)(A) and s322A so that claims could be made in effect under the new s66, including the new s66(3).

16. The applicant submits that the Arbitrator should make an award for binaural Hearing loss in the amount of 10.8% in accordance with the MAC of Henley C Harrison dated 1 June 2020 with the amount calculated in accordance with the pre-1996 amendments."

Respondent's submissions

18. The main points from the respondent's submissions are set out below:

"2.1 The Applicant's claim for lump-sum compensation is determined by reference to the former Table of Disabilities because the injury in respect of which compensation is payable occurred prior to 1 January 2002.

2.2 The Respondent submits that for a claim for permanent loss compensation that was made before 12 January 1997, the entitlement is fixed by reference to the date of injury. The compensation payable for the Applicant's first claim which is set out in paragraph 1.5 was calculated on that basis.

2.3 The WorkCover Legislation Amendment Act 1996 (the 1996 amendment) introduced changes (reductions) to the amounts payable for lump-sum compensation in respect of permanent loss. These changes took effect from 12 January 1997. These changes applied to:

a. Injuries on or after 12 January 1997 and up to 31 December 2001 (after which date the WPI regime commenced).

b. A claim made on or after 12 January 1997 if the injury occurred between 1 February 1992 and 31 December 2001.[8]

2.4 In the present case, the compensation payable in respect of the Applicant's injury (on 7 February 1996) is determined by reference to the date that his claim for compensation was made.

2.5 The Respondent submits that the date that the claim was made is 6 April 2018 this being the date of the Applicant's claim for additional lump sum compensation.[9] The Respondent submits that on this basis the lump-sum compensation payable in respect of the agreement referred to at 1.9 and 1.10, is calculated by reference to the reduced benefits introduced by the 1996 amendment.

[8] Schedule 6, Part 6, Cl 18 1987 Act.
[9] Respondent's dispute notice p 1 Reply.

2.6 The Applicant's fundamental position is that his claim was made prior to 12 January 1997, being the claim for which lump-sum compensation was paid set out in paragraph 1.5. He submits that his present claim is a claim for deterioration and it is not a new claim and as such is not caught by the 1996 amendments.

2.7 The Respondent submits that this is not correct and that the concept that there is only ever one claim for lump-sum compensation, being the first claim made was put to rest by the decision of the Court of Appeal in *Cram Fluid Power v Green*[10].

2.8 In the Respondent's submission Cram's case stands as authority for the proposition that in this case, the claim made by the Applicant in 2018 was a separate claim to the first claim made by the Applicant and in respect of which the lump-sum compensation referred to in paragraph 1.5 was paid.

2.9 The Respondent does not disagree with the Applicant's submission that he is entitled to make this one further claim by reason of Schedule 8, Clause 11 of the 2016 Regulations and this has never been in dispute. However, the Respondent submits that this does not 'overrule' or detract from the authority of Cram in relation to the meaning of 'a claim for compensation'.

2.10 The Applicant's submission that the 2012 amendments 'replaced the old s66 in all ways' is not, in the Respondent's submission correct. Those amendments like the amendments to the lump-sum compensation provisions that have preceded them and come afterwards are subject to transitional provisions. The transitional provisions are not repealed; they prevail and dictate how particular lump-sum compensation claims are to be compensated having regard to the date of injury and the date a claim is made.

2.11 Although the Respondent concedes that the Worker's Compensation Benefits Guide (the Guide) published by the State Insurance Regulatory Authority is not an authoritative statement as to the law, the Respondent observes that its submissions as to the compensation payable are consistent with the Guide and the information published under 'Permanent Impairment Benefits' commencing at P81 of the Guide.

2.12 The Respondent submits that the calculation of the compensation payable is explained at P83 of the Guide and the Table commencing on P97 of the Guide.

Summary

3.1 The Respondent submits that the compensation payable to the Applicant in respect of the agreed impairment/loss referred to in paragraphs 1.9 and 1.10 is to be determined by reference to the occurrence of injury on 7 February 1996 and a claim made for compensation after 12 January 1997.

3.2 The Respondent submits that the compensation payable is:

a. Additional 5% permanent impairment of the back in the amount of $93 (this being $12,000 for a 20% permanent impairment less $11,907 previously paid).

[10] [2015] NSWCA 250, *Cram Fluid*.

b. Additional 25% loss of use of the right arm at or above the elbow in the amount of $18,708 (this being $24,000 for a 30% loss of use less $5,292 previously paid).

c. 10.8% binaural hearing impairment in the amount of $7,020."

DETERMINATION

19. As explained by Roche DP in *BP Australia Ltd v Greene*[11], for injuries received before 1 January 2002 the assessment of permanent impairment is undertaken by reference to the Table of Disabilities (which is also referred to as the Table of Maims). Therefore, the submissions made at [15] in the alternative on behalf of Mr Porter are not correct.

20. Mr Porter's submissions, with respect, are somewhat confusing but appear to state at [13] because a claim was made before the date the 1996 amendment came into effect, the old legislation applies, referring to "schedule 6 clause 18(1)". It was further submitted the monetary amounts awarded in the first determination are clearly based on the pre 1996 amendment legislation.

21. The *WorkCover Legislation Amendment Act 1996* (the 1996 amending Act) in its schedule 1, clause 1.4[1] omitted the maximum amount from section 66(1) of $132,300 and inserted instead $100,000 and clause 1.4[2] omitted from section 66(2) the figure of $160,950 and inserted $121,000. In schedule 1, clause [4] of the 1996 amending Act clause 18 was inserted into the savings, transitional and other provisions in Schedule 6, Part 6 of the 1987 Act. Clause 18 provides:

> **"18 Reduction in lump sum compensation amounts-1996 amendments**
>
> (1) Despite sections 66 (3) and 67 (6), the compensation payable under section 66 or 67 in respect of any injury received before the commencement of the amendment of those sections by the *WorkCover Legislation Amendment Act 1996* where no claim for compensation under either section 66 or 67 in respect of the injury was duly made by the worker before that commencement is to be calculated by reference to the requisite percentage of the amounts in force under the relevant section immediately after its amendment by that Act.
>
> (2) If proceedings are pending before the Compensation Court on a claim for compensation under section 66 or 67, a claim for that compensation is taken not to have been made before the commencement of the amendments to which this clause applies if:
>
> (a) no claim for that compensation was duly made before the commencement of those amendments, or
>
> (b) the worker did not, before the commencement of those amendments, give the employer particulars (including, in the case of a claim for compensation under section 66, a supporting medical report) sufficient to enable the employer to ascertain the nature and amount of the compensation claimed.
>
> (3) If this clause results, in a particular case, in a greater amount of compensation being payable in that case than would have been the case in the absence of this clause, this clause does not apply in that particular case."

[11] [2013] NSWWCCPD 60.

22. The 1996 amending Act commenced on 12 January 1997.

23. I have inferred that the initial lump sum claim was made in 1996 because of the matter number in the Compensation Court proceedings. If this is correct clause18 (1) would not have had application to Mr Porter's case before the Compensation Court, because his injury was before 12 January 1997 and he had made a claim for compensation under section 66 *before* that date. It would seem that at 12 January 1997 proceedings were pending before the Compensation Court, but there is no information before me to suggest clause 18(2) would have had effect.

24. So, in Mr Porter's Compensation Court proceedings nothing in clause 18 had the effect that his entitlement to section 66 lump sums was to be calculated under the new maximums brought in by the 1996 amending Act. This is consistent with both parties referring in their respective submissions to Mr Porter's award dated 3 September 1997 in those proceedings being calculated under the pre-1996 maximums.

25. However, the claims for compensation which are the subject of these present proceedings are those made in 2018. Mr Porter's submission is that the 2018 claims are for deterioration in relation to the prior claim and so they are not "new claims". He argues that, therefore, the monetary compensation should be calculated on the pre-1996 figures.

26. The parties have not referred me to the relevant cases that deal with the issue between the parties.

27. In *O'Connor v IPEC Transport Group*[12] the worker injured his right leg on 11 October 1992 and received lump sum compensation in 1993 for a 5% loss of use of the leg. He then brought a lump sum claim in 1999. Judge Bishop when dealing with the 1999 claim in Compensation Court proceedings found the worker had 25% permanent loss of the efficient use of the right leg below the knee. He considered the monetary rate at which this additional entitlement should be paid. He stated the following:

> "19. Dealing firstly with the rate at which the applicant's entitlement to lump sum compensation should be assessed, there was no issue on the pleadings as to the original claim for compensation having been appropriately made in 1992. Similarly, there was no issue about compliance with the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) relative to the pre-conditions for commencing proceedings for lump sum compensation. There is no doubt that for many years the legislation provided that the scale applicable for determining the amount of lump sum compensation payable was the scale in existence at the date of injury – s66(3) of the 1987 Act. However, indexation of the scales ceased following the passage of the *WorkCover Legislation Amendment Act 1995* and the scale itself was reduced by the *WorkCover Legislation Amendment Act 1996* with regard to claims lodged on or after 12 January 1997. It will be recalled that the submission for the applicant was that, since the concept of 'a claim duly made' did not exist in 1992 when the injury to the applicant occurred, the old regime should still apply and the rates applicable to the date of injury were the relevant ones.
>
> 20. However, Sch 6, Pt6, cl 18 (2) presents in my view a fatal obstacle to that submission. The clause reads as follows:
>
> If proceedings are pending before the Compensation Court on a claim for compensation under section 66 or 67, a claim for that compensation is taken not to have been made before the commencement of the amendments to which the clause applies if:

[12] (2000) 21 NSWCCR 193, (*O'Connor*).

(a) no claim for **that** compensation was duly made before the commencement of those amendments, or

(b) the worker did not, before the commence of those amendments, give the employer particulars (including, in the case of a claim for compensation under section 66, a supporting medical report) sufficient to enable the employer to ascertain the nature and amount of the compensation claimed. (Emphasis added.)

21. As has been observed earlier, the claim for additional compensation was by correspondence with medical reports attached, dated 7 May 1999. Clause 18(1) of Sch6, Pt 6 relates cl18 (2) to injuries received before the commencement of the Act which reduced the scale. Despite the convoluted wording of the clause it must, I think, be interpreted as meaning that lump sum claims relative to injuries occurring prior to 12 January 1997 are caught by the reduced rates, unless prior to that date the employer is at least notified with medical report as to the compensation sought, even if the claim is not duly made in the formal sense. There is no evidence of any such notification for the additional compensation (i.e. that compensation referred to in cl 18(2) other than Exhibit 1. Accordingly, I conclude that the rates applicable in assessing the applicant's entitlement to lump sum compensation are the current rates in force since 12 January 1997."

28. Therefore, Judge Bishop found that the lump sum claim that he was dealing with was made in 1999, and so that claim not been made before 12 January 1997. The Judge then calculated by reference to the reduced maximums in section 66 brought in by the 1996 amending Act. The Judge did not work out the monetary amount for 25% loss of use of the right leg below the knee and deduct the monetary amount previously paid. He noted the worker had previously received compensation for 5% loss and entered an award for the additional 20% loss based upon the reduced maximum figures.

29. The decision in *O'Connor* was followed by Arbitrator Rimmer in *Osbourne v Department of Education & Communities*[13]*.*

30. In the decision in *Fergusson v Secretary, Department of Family & Community Services*[14] Snell DP considered *O'Connor* and *Osbourne* and the construction of Schedule 6, Part 6, clause 18 of the 1987 Act and the quantification of the entitlement to lump sums for an injury in 1994.

31. The facts are similar to that in Mr Porter's case in that Ms Fergusson was the recipient of a consent award on 18 October 1995 in relation to permanent impairment to various body parts. Then in proceedings numbered in 8984/2002 she recovered an additional 10% loss of use of the right arm at or above the elbow. In November 2015 she made an additional claim for permanent impairment for lump sum compensation involving various body parts, which were assessed by an AMS. Arbitrator Farrell issued a Certificate of Determination providing for the payment of additional lump sum compensation.

32. The worker's solicitors then submitted to Arbitrator Farrell that the percentages should have been applied to the maximum amount available pursuant to section 66(1) of the 1987 Act as at the date of injury, a sum of $130,400; whereas the Arbitrator had calculated the monetary figures by reference to the reduced figures inserted into section 66 by the 1996 amending Act.

[13] [2016] NSWWCC 128, (*Osbourne*).
[14] [2017] NSWWCCPD 7, (*Fergusson*).

33. The Arbitrator advised the worker that the decisions in *Osbourne* and *O'Connor* supported her decision in using the amended maximum figures in her calculations and she refused to amend her Certificate of Determination. The worker appealed her decision.

34. Snell DP revoked the decision of Arbitrator Farrell.

35. Before giving his decision, Snell DP called for submissions regarding the operation of Schedule 6, Part 6, clause18(2) noting the opening words of that clause referred to a matter being "pending before the Compensation Court", and the effect of the *Compensation Court Repeal Act 2002* and *Compensation Court Repeal (Transitional) Regulation 2003.* He determined that as the Compensation Court was abolished in 2002, there were no proceedings in *Fergusson* "pending before the Compensation Court" and so he found that clause 18(2) had no application. He distinguished the decision in *O'Connor* because in that case there were proceedings pending before the Court. Snell DP also found that *Osbourne* was of no assistance, as the parties agreed that the reduced figures applied and that the real issue of their dispute related to the approach when giving credit for previous lump sum compensation.

36. At [64] of his decision, Snell DP refers to the State Insurance Regulatory Authority (SIRA) Workers compensation benefits guide. The respondent in Mr Porter's case also makes reference to the same at [2.11] and [2.12] of its submissions. Snell DP at [65] in *Fergusson* found the guide has no statutory force and cannot be used as an aid in the construction of clause 18.

37. The respondent in *Fergusson* sought to rely upon clause 18(3) to argue the reduced maximum should be used, otherwise that sub-section would have no practical effect. Snell DP rejected this argument in [71] and [72] of his reasons, referring also to section 66(3) of the Act.

38. At [42] of his reasons Snell DP set out the terms of section 66 of the 1987 Act, in its relevant form having regard to the date of injury. The same version of section 66 applies to Mr Porter's case. It provided:

> "66 Compensation for permanent injuries
>
> (1) A worker who has suffered the loss of a thing mentioned in the Table to this Division as the result of an injury is entitled to receive from the worker's employer by way of compensation for the loss, in addition to any other compensation under this Act, the amount equal to the percentage of $130,400 set out opposite to that loss in that Table.
>
> (2) A worker who has suffered more than one of the losses mentioned in the Table to this Division as a result of the same injury is not entitled to receive as compensation under this section more than $158,650 in respect of those losses.
>
> (3) If an amount mentioned in this section at any time after the commencement of this Act:
>
> (a) is adjusted by the operation of Division 6, or
>
> (b) is adjusted by an amendment of this section,
>
> the compensation payable under this section is to be calculated by reference to the requisite percentage of the amount in force at the date of injury."

39. At [73] of *Fergusson,* Snell DP summarised his interpretation of clause 18 when read with section 66(3) as follows:

> "The scheme of the transitional clause is apparent. Where an injury occurred, and a claim for lump sum compensation was made in respect of it, prior to commencement of the 1996 Amending Act, the s 66(1) figure applying at the date of injury continued to apply, providing that figure was equal to or greater than $100,000. Where no claim for lump sum compensation was made in respect of such an injury, prior to commencement of the 1996 Amending Act, the reduced s 66(1) figure of $100,000 applied. If the applicable s 66(1) lump sum, as at the date of injury, was less than $100,000, that lower figure continued to apply."

40. In [13] and [14] of Mr Porter's submissions, a similar conclusion was reached, although somewhat confusingly expressed. In answer to that position, the respondent at [2.7] of its submissions argues that this is not correct and that the concept that there is only ever one claim for lump sum compensation, being the first claim made, was put to rest by the decision of the Court of Appeal in *Cram Fluid*. At [2.8] the respondent submits that *Cram Fluid* "stands as authority for the proposition that in this case, the claim made by the Applicant in 2018 was a separate claim to the first claim made by the Applicant and in respect of which the lump-sum compensation" was previously paid.

41. The Court of Appeal's decision in *Cram Fluid* was given on 27 August 2015 and the decision in *Fergusson* in 2017. In *Fergusson, Cram Fluid* was not raised by the parties and Snell DP did not refer to the same. I consider it is not relevant to the issue I have to determine. It is not in issue that Mr Porter can bring his claim for additional lump sum benefits. Snell DP in *Fergusson* was considering a factual scenario that is on point in Mr Porter's case and concerns interpretation of different sections of the 1987 Act than were considered in *Cram Fluid*.

42. As *Fergusson* is a Presidential decision it is binding upon me. However, the parties have not addressed the same in their submissions. I intend to issue my decision and give the parties liberty to apply to seek a reconsideration if they contend error and, in that eventuality, they can then address the authorities to which I have referred.

43. Following *Fergusson*, I find that the entitlement to the agreed additional 5% permanent impairment of the back, additional 25% of the right arm at or above the elbow and 10.8% binaural acoustic hearing loss is to be calculated by reference to the maximums applicable for the date of injury 7 February 1996, being $132,300 for individual losses and no more in total than $160,950.

44. I find that the monetary amounts for the agreed lump sum compensation is to be calculated by reference to the maximums in section 66 of the 1997 Act as it applied prior to the 1996 amending Act. The maximum is $132,300. In the Table of Disabilities, the maximum an injured worker can be paid for permanent impairment of a back is 60%. Therefore, $132,300 x 60%=$79,380. It is agreed Mr Porter has 5% additional impairment, so $79,380 x 5% =$3,969. The maximum for the right arm at or above the elbow is 80%. So, $132,300 x 80%= $105,840 and it has been agreed Mr Porter is entitled to an additional 25%, so $105,840 x 25%= $26,460. Hearing loss of both ears is 65% of the maximum. Therefore, the calculation is $132,300 x 65%= $85,995 x10.8%= $9,287.46.

45. In *Fergusson,* the entitlement to the additional permanent impairment had been assessed by an AMS and so the Commission could make an award in relation to that entitlement. In Mr Porter's case the entitlement to additional permanent impairment has been agreed between the parties. The former section 65(3) of the 1987 Act qualified the Commission's jurisdiction to make an award of permanent impairment compensation unless there had been an assessment by an AMS. Section 65(3) was repealed by the *Workers Compensation Legislation Amendment Act 2018*. However, there was no repeal of Schedule 6, Part 18C, clause 4 of the 1987 Act which precludes the Commission from entering an award in respect to injuries before 1 January 2002 unless the dispute has been assessed by an AMS. In such situations the Commission's practice is to note the parties' agreement and the parties can choose, if they wish, to enter into a Complying Agreement for the agreed lump sum compensation.

46. In summary, I find that the monetary amounts for the agreed lump sum compensation is to be calculated by reference to the maximums in section 66 of the 1987 Act as it applied prior to the 1996 amending Act, as follows:

    (d) $3,969 for 5% additional permanent impairment of the back;
    (e) $26,460 for additional 25% of the right arm at or above the elbow, and
    (f) $9,287.46 for 10.8% binaural acoustic hearing loss.

47. For reasons discussed earlier, I also order that the parties have liberty to apply on three days' notice to seek a reconsideration of this Certificate of Determination/Statement of Reasons under section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* if they wish to address the legal authorities to which reference has been made.