WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1501/15**
Applicant: **Omar Abdou**
Respondent: **Australian Concert & Entertainment Security Pty Ltd**
Date of Determination: **17 February 2020**
Citation: **[2020] NSWWCC 46**

The Commission determines:

1. The applicant's application pursuant to section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* for reconsideration of the orders made in the Certificate of Determination dated 3 January 2017 is declined.

2. The orders in the Certificate of Determination dated 3 January 2017 are confirmed.

3. No order as to costs.

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

Glenn Capel
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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Omar Abdou (the applicant) is 50 years old and was employed by Australian Concert & Entertainment Security Pty Ltd (the respondent) as a security guard. The applicant sustained injury to his left upper extremity and back on 8 October 2010.

2. The applicant submitted a claim for lump sum compensation in 2011 and he issued proceedings in matter no. 010787/11 in the Workers Compensation Commission (the Commission) in 2011. The claim documents and pleadings are not in evidence.

3. The applicant's claim was referred to an Approved Medical Specialist (AMS), Dr Stephenson, who issued his Medical Assessment Certificate (MAC) on 28 February 2012. The AMS diagnosed a comminuted fracture of the middle phalanx of the applicant's left middle finger and he assessed 8% whole person impairment of the left upper extremity.

4. On 19 September 2014, the applicant's solicitor served a notice of claim in respect of further lump sum compensation pursuant to s 66 of the 1987 Act due to injury sustained on 8 October 2010. The applicant relied on reports of Dr Ellis dated 27 June 2014, Dr Bolin dated 21 October 2014 and Dr Freiberg dated 28 October 2014.

5. Dr Ellis assessed 71% whole person impairment, and Dr Bolin assessed 7% whole person impairment of the upper digestive tract and 6% whole person impairment of the lower digestive tract for a combined total of 13% whole person impairment. Dr Freiberg assessed 20% whole person impairment due to the applicant's sleep apnoea.

6. On 16 January 2015, Gallagher Bassett Services Pty Ltd (GBS) issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant suffered any injury or consequential condition in the form of a sleep disorder, psychological condition, gastric function, nerve or neurological condition or Chronic Regional Pain Syndrome (CRPS) as a result of the accepted injuries to his left hand and back on 8 October 2010. It disputed the applicant's entitlement to claim lump sum compensation.

7. The applicant lodged an Application to Resolve a Dispute (the Application) in the Commission on 18 March 2015. The applicant claimed lump sum compensation pursuant to s 66 of the 1987 Act and compensation for pain and suffering pursuant to s 67 of the 1987 Act. The applicant did not seek an assessment for a threshold dispute for Work Injury Damages.

8. At a conciliation conference on 22 June 2015, the applicant's claim was referred to two AMSs for non-binding opinions as to whether the applicant had a consequential condition in his upper and lower gastrointestinal tracts, and whether his sleep apnoea was a result of injury to his left little finger and back on 8 October 2010.

9. The AMS, Dr Kaufman, stated that the applicant's sleep apnoea was a pre-existing condition that may have been aggravated by the regular use of analgesics. The other AMS, Dr Garvey, diagnosed dyspepsia, functional gastrointestinal disease and non-alcoholic steatohepatitis syndrome that resulted from the injury to the applicant's left little finger and back.

10. The proceedings were discontinued following the decision of the Court of Appeal in *Cram Fluid Power Pty Ltd v Green*[1], but they were restored on 23 November 2015 after the *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015* (the 2015 Regulation) was enacted. This amended Sch 8 of the *Workers Compensation*

[1] [2015] NSWCA 250, (*Cram Fluid*).

Regulation 2010 by inserting cl 11A (currently cl 11 of the *Workers Compensation Regulation 2016*), meaning that the applicant was entitled to make one further claim after 19 June 2012.

11. The matter was listed for arbitration hearings on 12 February 2016 and 8 March 2016 before Arbitrator Harris. He determined that the applicant had developed consequential conditions in his upper digestive tract, lower digestive tract, and a sleep and arousal disorder as result of the accepted injury to his left hand on 8 October 2010.

12. The Arbitrator remitted the matter to the Registrar for referral to an AMS to assess the whole person impairment of the applicant's lumbar spine, left upper extremity, sleep and arousal disorder, upper digestive tract and lower digestive tract due to injury sustained on 8 October 2010.

13. In his MAC dated 27 May 2016, the AMS, Dr Bryant, assessed 9% whole person impairment due to sleep apnoea, but he educed this assessment to nil, on the basis that the applicant had clinically significant sleep apnoea prior to the accident and there was a history of multiple attempts to lose weight. He stated that there was no evdience of sufficient weight gain since the accident that would be sufficient to explain the development of sleep apnoea.

14. In his MAC dated 27 May 2016, the other AMS, Dr Davis, diagnosed disuse atrophy of the left upper extremity with a healed fracture of the middle phalanx of the left hand, and aggravation of the lumbar spondylosis, gastrointestinal side-effects affecting the upper and lower gastrointestinal tracts, and sleep apnoea. He assessed 0% whole person impairment of the lumbar spine, 8% whole person impairment of the left upper extremity, 2% whole person impairment of the upper digestive tract and 1% whole person impairment lower digestive tract, for a total of 11% whole person impairment due to injury sustained on 8 October 2010.

15. The applicant lodged an appeal against the MAC of Dr Bryant. The Medical Appeal Panel (MAP) issued a decision on 24 November 2016. The MAP accepted that the applicant had suffered from significant sleep apnoea prior to his work injury and it was satisfied that the s 323 deduction applied by the AMS was appropriate. Therefore, the MAP confirmed the MAC of Dr Bryant.

16. A Certificate of Determination (COD) was issued on 3 January 2017 in the following terms:

> "The Commission orders:
>
> 1. That the respondent pay the applicant, as lump sum compensation under section 66 of the *Workers Compensation Act 1987* (the 1987 Act), $4,400 in respect of further permanent impairment resulting from injury on 8 October 2010.
>
> Brief statement of reasons
>
> 2. The Medical Assessment Certificate dated 27 May 2016 certifies 11% permanent impairment resulting from injury on 8 October 2010, compensable as $15,400.
>
> 3. The applicant was previously paid $11,000 in respect of 8% permanent impairment resulting from injury on 8 October 2010 in accordance with previous WCC matter 010787/11.
>
> 4. Therefore, the applicant is entitled to $4,400 in respect of further lump sum compensation under section 66 of the 1987 Act.
>
> 5. The proceedings commenced after 2 April 2013 and therefore no order is made as to costs."

17. The applicant's claim was transferred to Allianz Australia Workers Compensation (NSW) Ltd (Allianz). On 18 December 2017, Allianz advised the applicant that following an examination by Dr Powell, his weekly payments of compensation would continue to be made after 260 weeks had elapsed.

18. On 18 December 2017, the applicant made a further claim for lump sum compensation in respect of 55% whole person impairment based on the report of Dr Powell dated 7 December 2017.

19. On 14 February 2018, Allianz accepted that the applicant was a worker with highest needs for the purposes of s 39 of the 1987 Act.

20. On 26 February 2018, Allianz issued a notice pursuant to s 74 of the 1998 Act, disputing liability on the grounds that the applicant had exhausted his rights for lump sum compensation. It relied on s 66(1A) of the 1987 Act and cl 11A of the 2015 Regulation. The claim was later transferred to Employers Mutual Ltd (the insurer).

21. On 26 October 2018, the applicant's solicitor served a Pre-Filing Statement, Statement of Claim and Statement of Particulars on the respondent's solicitor. The respondent's solicitor served a Pre-Filing Defence on 27 November 2018 and raised a threshold dispute pursuant to s 151H of the 1998 Act.

22. On 6 February 2019, the insurer issued a notice pursuant to s 78 of the 1998 Act, disputing that the applicant was entitled to make a further claim for lump sum compensation as his rights had been exhausted. The insurer confirmed its position on review on 12 June 2019.

23. On 23 August 2019 and 20 September 2019, the applicant's solicitor wrote to the Commission seeking a reconsideration of or an appeal against the MAC of Dr Davis, on the grounds that the applicant's condition had deteriorated. Both applications were rejected. The current application was eventually filed on 6 November 2019.

24. The respondent's solicitor filed a response to the application on 13 November 2019 and a telephone conference was listed before me on 29 November 2019.

PROCEDURE BEFORE THE COMMISSION

25. At the telephone conference, the applicant's counsel, Mr Hickey, confirmed that the applicant sought a reconsideration and rescission of the COD dated 3 January 2017 pursuant to s 350(3) of the 1998 Act on the grounds that there had been a deterioration in the applicant's condition.

26. Mr Hickey indicated that if the COD was revoked, the applicant would seek a referral back to Dr Davis pursuant to s 329 of the 1998 Act, or in the alternative, the applicant would seek to lodge an appeal against the MAC of Dr Davis relying on the grounds in ss 327(3)(a) and 327(3)(b) of the 1998 Act.

27. The parties were advised of my intention to determine the dispute without holding a conciliation conference or arbitration hearing. Given the uncertainty surrounding the status of the applicant's application, I directed the applicant to file evidence and for the parties to file further written submissions, if required.

28. On 22 January 2020, I issued a further direction in the following terms:

    a. "The respondent is to file and serve the documents described in paragraphs 9 and 10, and 12 to 17 of the respondent's submissions;

b. The parties are to file written submissions in respect of the above documents, if not previously addressed in submissions, and in respect of the relevance, if any, of the provisions in s 66(1A) of the *Workers Compensation Act 1987* and s 322A of the *Workplace Injury Management and Workers Compensation Act 1998*, by 31 January 2019.

c. Any submissions in reply are to be filed and served by 7 February 2020."

29. The relevant documents were filed by the respondent's solicitor on 23 January 2020. No further submissions were filed by the respondent.

30. Written submissions were filed by the applicant on 12 December 2019 and 31 January 2020.

ISSUES FOR DETERMINATION

31. The following issue remains in dispute:

(a) Whether the COD dated 3 January 2017 should be reconsidered - s 350(3) of the 1998 Act.

EVIDENCE

Documentary evidence

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

(a) The Application and attached documents;
(b) Reply and attached documents;
(c) Application to Admit Late Documents received on 16 April 2015;
(d) Application to Admit Late Documents received on 20 April 2015;
(e) Application to Admit Late Documents received on 21 April 2015;
(f) Application to Admit Late Documents received on 23 April 2015;
(g) Application to Admit Late Documents received on 30 April 2015;
(h) Application to Admit Late Documents received on 26 May 2015;
(i) Application to Admit Late Documents received on 10 June 2015;
(j) Application to Admit Late Documents received on 22 December 2015;
(k) Application to Admit Late Documents received on 20 April 2016;
(l) MAC of Dr Kaufman dated 14 August 2015;
(m) MAC of Dr Garvey dated 14 August 2015;
(n) MAC of Dr Bryant dated 27 May 2016;
(o) MAC of Dr Davis dated 27 May 2016;
(p) Decision of MAP dated 24 November 2016;
(q) COD dated 3 January 2017;
(r) Application for Reconsideration received on 6 November 2019 (dated 24 August 2019 and 20 September 2019);
(s) Respondent's Response and submissions received on 13 November 2019;
(t) Application to Admit Late Documents received on 12 December 2019, and
(u) Letter from the Respondent's solicitor with attached documents received on 23 January 2020.

REVIEW OF EVIDENCE

Applicant's statements

33. The only statement in evidence is the applicant's statement dated 17 April 2015. He has not provided a statement that deals with the deterioration in his condition since he was examined by the AMS in May 2016.

Reports of Dr Ellis

34. Dr Ellis reported on 24 June 2014 and 8 May 2015. Dr Ellis recorded that the applicant had intense pain in his left hand and arm that was aggravated by the slightest contact or movement. He was able to use his arm, but he held it against his chest wall with his hand in his jacket pocket to avoid cold and contact. His hand sweated excessively, and his forearm was discoloured.

35. Dr Ellis reported that the applicant had no pain-free movement in his left arm. Finger movements were restricted to flickering flexion over a few degrees. The left arm was hypersensitive and painful, typical of allodynia. The applicant's left palm was moist from sweating and there was dark vascular discolouration of the forearm.

36. Dr Ellis diagnosed a fracture of the middle phalanx of the applicant's left hand and CRPS, which affected the entire left arm and hand and was spreading to the left leg. The applicant suffered a musculo-ligamentous contusion that aggravated the degenerative changes in his lumbar spine, depression and a post-traumatic reaction, sleep apnoea and gastrointestinal symptoms due to medication.

37. Dr Ellis assessed 60% whole person impairment of the left upper extremity, 13% whole person impairment of the gastrointestinal system, 10% whole person impairment in respect of a sleep and arousal disorder and 5% whole person impairment of the lumbar spine, for a total of 71% whole person impairment.

MACs of Drs Garvey and Kaufman

38. Drs Garvey and Kaufman provided medical opinions in non-binding MACs on 15 August 2015. These reports are of minimal assistance to the current application, although the doctors' findings on examination are of some interest.

39. Dr Garvey's focus was on the applicant's digestive tract, so his examination was restricted to the applicant's abdomen. He commented that he could not carry out a rectal examination because the applicant "could not lie on the left lateral position due to his painful left upper extremity which remained in a pocket of his tracksuit top during the whole interview and examination".

40. Dr Kaufman, whose focus was on the applicant's sleep apnoea, made a similar observation. He commented:

> "Throughout the consultation he kept his left hand in his pocket. On removing his left hand from his pocket, he was very slow and methodical. He kept his wrist stiff as well as his whole left arm and shoulder. There was a healed scar on the left middle finger. There were no trophic changes. In particular, the colour of the skin was normal with no mottling, erythema, excess sweating or dryness. Hair distribution on hands was within the normal range and symmetrical with the right hand."

MAC of Dr Davis

41. Dr Davis provided his MAC on 27 May 2016. He recorded a consistent history and noted that following hand surgery, the applicant developed pain and stiffness in the whole of his left arm and was diagnosed with CRPS.

42. Dr Davis recorded the applicant's symptoms and findings on examination as follows:

> "present symptoms:

Lower Back:
There is pain in the lower back which is present all the time but is aggravated as a result of standing or sitting for any length of time. It is associated with a restriction in range of movement.

Left Upper Extremity:
Mr Abdou stated that he cannot move his left arm in any direction, keeping the left arm and hand in a pocket.

He also suffers with sleep apnoea.

Gastrointestinal Symptoms:
With respect to the lower gastrointestinal tract, he has burping with oesophageal reflux, anorexia and nausea.

With respect to the lower gastrointestinal tract, he has constipation that requires medication."

"**FINDINGS ON PHYSICAL EXAMINATION**

Mr Abdou is a male who is 172 cm in height and 82 kg in weight. He is right hand dominant.

Mr Abdou presented in a very dishevelled way continually belching and air swallowing. His left arm was immobile beside his body with the left hand in a pocket of his jacket from which he was reluctant to move it.

He walked slowly in a bent-forward position and sat during the interview continually burping and air swallowing.

Lumbosacral Spine:

There was the normal lordosis without evidence of muscle wasting or muscle spasm.

Motor Function:

Flexion was 90°, extension was 10°, lateral extension and rotation to the right and left was 20° all ranges allegedly limited by back pain.

Sensory function – there were no areas of localised tenderness to palpation.

Right & Left Lower Extremities:

Neurological examination of the lower limbs was normal.

Left Upper Extremity:

As he kept his left arm fixed to the left side of his body and the left hand in a jacket pocket, it was impossible to examine function of the shoulder, elbow or wrist. After a considerable period of time he eventually was able to withdraw his left hand from the pocket to allow examination of the middle finger of the left hand.

He refused to remove any clothing to allow a proper examination.

As far as could be determined, according to AMA5 criteria, Mr Abdou did not demonstrate the required signs to make a diagnosis of complex regional pain syndrome.

The physical signs and symptoms of failed treatment for complex regional pain syndrome are not specifically documented even if all the original criteria have been met.

However, the Workers Compensation Commission Medical Assessment Certificate of 28 February 2012, Dr B Stephenson states "*no clinical signs consistent with the objective criteria of chronic regional pain syndrome apart from stiffness of the left middle finger resulting from the fracture injury.*"

Taking the above factors into consideration, disuse atrophy, possibly of a voluntary nature, appears to be a more appropriate conclusion.

Disuse atrophy appeared to be a more appropriate conclusion.

Left Hand:

The function of the thumb, index, 4th and 5th fingers appeared to be within normal limits.

3rd Finger:

Motor function:

distal interphalangeal joint – flexion 10°, extension, 0°
proximal interphalangeal joint – flexion 10°, extension 0°
metacarpophalangeal joint – flexion 70°, extension 20°

Sensory function – there was partial loss of sensation to light touch (2 point discrimination) of both medial and lateral digital nerves.

Abdomen:

Examination of the abdomen was equivocal. Suspected voluntary guarding was evident. As far as could be determined, there were no palpable masses.

Sleep Apnoea:

Assessment of sleep apnoea was not carried out as this was outside my area of expertise."

43. Dr Davis diagnosed disuse atrophy of the left upper extremity with a healed fracture of the middle phalanx of the left hand (healed), an aggravation of the lumbar spondylosis, gastrointestinal side-effects affecting the upper and lower gastrointestinal tracts, and sleep apnoea. He assessed 0% whole person impairment of the lumbar spine, 8% whole person impairment of the left upper extremity, 2% whole person impairment of the upper digestive tract and 1% whole person impairment lower digestive tract, for a total of 11 % whole person impairment due to injury sustained on 8 October 2010.

Reports of Dr Powell

44. Dr Powell reported to Allianz on 10 July 2017, 21 August 2017 and 7 December 2017. He recorded a brief history of the circumstances of the applicant's back and hand injury, his symptoms and treatment. He noted that the applicant had pain down his entire arm. He was unable to use the arm due to stiffness and he could only bend his elbow to place his hand in his pocket. He experienced fluctuating back pain.

45. Dr Powell diagnosed an injury to the left long finger with a fracture of the middle phalanx and back pain in October 2010. He noted that the applicant had developed CRPS with chronic pain, allodynia and circulatory abnormality with decreased temperature, vasomotor changes mottling, colour disturbance, atrophy and altered sweating. The applicant also had stiffness in the joints of his left upper limb from shoulder to fingers.

46. Dr Powell assessed 45% whole person impairment of the left upper extremity, but there was no impairment in the applicant's lumbar spine. In his report dated 7 December 2017, the doctor reviewed his assessment, using the passive range of motion of joints which included sensory impairment, and concluded that the applicant had 55% whole person impairment of the left upper extremity.

Reports of Associate Professor Fernandes

47. In his report dated 7 March 2016, the Associate Professor Fernandes advised that the applicant continued to be gainfully employed. He had severe pain and over time, and he had developed progressive loss of function of his left shoulder, arm, forearm, wrist and hands. The applicant reported that he had experienced increased sweating, particularly when he had not taken his medication.

48. Associate Professor Fernandes stated that the applicant had evidence of increased sweating in his forearm, muscle wasting, stiffness in the joints of his fingers, and he was unable to make a fist. He considered that the applicant's condition had reached maximum medical improvement. It is noteworthy that this report was compiled shortly before the MAC of Dr Davis.

49. Associate Professor Fernandes reported more recently on 12 October 2017 and 17 January 2019. He confirmed that the applicant still had signs of CRPS with sweating, atrophy and a lack of movement of his left upper extremity. There was no comment of any progression or deterioration in his symptoms.

50. In his report dated 3 June 2019, Associate Professor Fernandes recorded that the applicant was still experiencing pain in his left upper extremity which he could not move. Small hand movements or touch caused him pain. He had stiffness in the joints and there was redness and discolouration. There were only passive movements of the arm.

51. Associate Professor Fernandes diagnosed CRPS with an almost dysfunctional left upper extremity which the applicant only supported in his pocket.

Reports of Dr Gibson

52. The reports of Dr Gibson are difficult to read. In May 2017, he noted that the applicant continued to protect his arm by keeping it in his pocket. Nevertheless, he was still able to work for 16 hours per week as he had done for the past four years. The doctor diagnosed CRPS and confirmed that the applicant required on-going treatment.

53. In May 2019, Dr Gibson reported that the applicant was doing well at work and in his pain management plan. No changes were recommended regarding his treatment.

APPLICANT'S SUBMISSIONS

54. The applicant's initial submissions are contained in the letter to the Commission dated 23 August 2019.

55. The applicant's solicitor, Mr Coorey, submits that there has been a progressive deterioration of the worker's condition that has resulted in an increase in the degree of permanent impairment in his left upper extremity. The applicant relies on available additional relevant information, namely fresh and up to date medical evidence, which was not available to, and could not reasonably have been obtained by the applicant before Dr Davis issued his MAC.

56. Mr Coorey submits that in the MAC dated 27 May 2016, Dr Davis assessed 8% whole person impairment of the applicant's left upper extremity, which was the same assessment made by the previous AMS, Dr Stephenson, on 28 February 2012.

57. Mr Coorey submits that Dr Stephenson considered that the applicant did not exhibit clinical evidence of CRPS, apart from stiffness in the left middle finger due to the comminuted fracture injury.

58. Mr Coorey submits that the applicant first consulted the Royal Prince Alfred Hospital Pain Management Clinic from 6 October 2011 to 2019 for treatment of CRPS. He submits that the present application focuses on a seemingly incomplete and inadequate examination of the applicant's left arm and left hand by Dr Davis on a background of developing CRPS.

59. Mr Coorey submits that according to Dr Powell, the applicant's CRPS has continued to trouble him with chronic pain, allodynia, circulatory abnormality and stiffness in the left arm joints. Dr Powell noted that the applicant's initial injury was to the left middle finger, but he has developed stiffness and CRPS affecting the entire left upper limb. He assessed 55% whole person impairment of the left upper extremity.

60. Mr Coorey submits that the reports of Dr Gibson and Associate Professor Fernandes confirm the continuing effects of CRPS and the ongoing need for treatment. According to Associate Professor Fernandes, the applicant worker has a useless left upper extremity due to CRPS

61. Mr Coorey submits that if this matter proceeds by way of appeal to a MAP rather than a reassessment by the AMS pursuant to s 329 of the 1998 Act, the reports of these three doctors constitute fresh evidence that was not available prior to the assessment by Dr Davis and could not reasonably have been obtained before that medical assessment, because the CRPS was still developing and has worsened.

62. Mr Coorey submits that Dr Davis had access to the report of Associate Professor Fernandes dated 7 March 2016, so he was aware of the CRPS with the progressive loss of function of the shoulder, arm, forearm, wrist and hand, but the AMS did not appear to carry out a proper assessment of the disuse in accordance with the accepted range of movement criteria and he rejected the significance of the CRPS at that stage. However, the AMS noted that there was complete immobility of the whole of the left upper extremity. He was aware of the diagnosis of CRPS and the history of treatment at the Royal Prince Alfred Hospital Pain Management Clinic. The AMS reported that he was unable to undertake a complete and detailed examination and he only assessed the fracture of the middle finger of the left-hand.

63. Mr Coorey submits that the medical evidence of Dr J Powell, Dr Gibson and Associate Professor Fernandes is overwhelming in its support of the applicant worker suffering from CRPS. He submits that the insurer has accepted that the applicant is a worker with highest needs based on the assessment of Dr Powell.

64. Mr Coorey submits that in the circumstances, the applicant's assessment of whole person impairment should be reconsidered and that the matter be referred by the Registrar to an AMS to assess the whole person impairment of the applicant's left upper extremity as a result of the injury on 8 October 2010 and any consequential condition.

65. In the written submissions dated 31 January 2020, Mr Hickey submits that the applicant has provided evidence showing the reasons and an explanation for the delay in bringing this application for reconsideration.

66. Mr Hickey submits that the applicant relies on fresh evidence gathered over time as his CRPS became more evident, and this could not have been brought immediately after the MAC of Dr Davis as it did not come into existence until 2016, 2017 and 2019.

67. Mr Hickey submits that the applicant did not exhibit the classic signs of CRPS when examined by Drs Stephenson and by Dr Davis, who diagnosed disuse atrophy and rejected the significance of the developing CRPS.

68. Mr Hickey submits that any inaction or delay by the applicant must be assessed having regard to the fresh medical evidence of Associate Professor Fernandes and Drs Powell and Gibson, the service of a claim for further lump sum compensation based on the assessment of Dr Powell, the decision by the insurer that the applicant was a worker with highest needs, the service of a Pre Filing Statement and a Pre-Filing Defence by the legal representatives, the issue of a dispute notice on 1 April 2019, the application for review requested by the applicant's solicitor on 3 May 2019, service of an amended claim for lump sum compensation, the dispute notice issued on 12 June 2019 and this present application served on 23 August 2019.

69. Mr Hickey submits that the respondent's ongoing claim commitment militates against any otherwise presumption of prejudice caused by the effluxion of time between the MAC and the COD. The applicant obtained opinions that challenges the opinions of the two AMSs, who refuted the diagnosis of CRPS. The respondent had its own medical opinion and it was kept informed of the applicant's status. The fresh evidence would have had a material effect upon the MAC issued in 2016 if it had been available at that stage. It was not available or the condition evident then as it is now.

70. Mr Hickey submits that the justice and merits of the applicant's application should be assessed having regard to the significant disability assessed by Dr Powell, which is evidence of the progression of the applicant's CRPS, and there is no real prejudice to the respondent in any reconsideration, given its own specialist's opinion.

71. Mr Hickey makes no submissions regarding the effects of s 66(1A) of the1987 Act and s 322A of the 1998 Act, although the chronology attached to his written submissions identifies the Direction which I issued on 22 January 2020.

RESPONDENT'S SUBMISSIONS

72. The respondent's solicitor, Mr Orr, submits that the applicant's solicitor does not address or does not sufficiently address the principles and objectives relevant to reconsideration applications that were discussed in *Samuel v Sebel Furniture Limited* [2].

73. Mr Orr submits that according to Practice Direction No 17 (Reconsideration Applications) (Practice Direction 17), a reconsideration application should be made "as soon as practicable after the party making the application becomes aware of the basis for seeking reconsideration".

74. Mr Orr submits that the applicant did not exercise his right to lodge an appeal against the MAC of Dr Davis, and he did not lodge the current reconsideration application for a period in excess of 3 years after the MAC was issued.

[2] [2006] NSWWCCPD 141(*Samuel*)

75. Mr Orr submits that a large majority of the further evidence relied on by the applicant in the present application originated in 2017, so the current application could and arguably should have been made well before late 2019.

76. Mr Orr submits that the applicant's delay is entirely unreasonable, and he has not or has not sufficiently identified a reason for the delay or for the extent of the delay.

77. Mr Orr submits that the respondent should be entitled to finality of litigation including the comfort of knowing that seemingly finalised proceedings have in fact finalised and are not going to be re-activated years "down the track".

78. Mr Orr submits that the respondent will be severely prejudiced if the applicant is allowed to be re-examined by another AMS, given the time has passed since Dr Davis examined him in 2016. Accordingly, the matter should not be reconsidered. He makes no submissions regarding the effects of s 66(1A) of the1987 Act and s 322A of the 1998 Act.

Legislation

Workers Compensation Act 1987

79. A worker's entitlement to lump sum compensation is governed by s 66 of the 1987 Act. It provides:

> "**66 Entitlement to compensation for permanent impairment**
>
> (1) A worker who receives an that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.
>
> **Note**. No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less.
>
> (1A) Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury…"

Workplace Injury Management and Workers Compensation Act 1998

80. There are a number of sections in the 1998 Act which are of relevance. These are as follows:

> "**322A One assessment only of degree of permanent impairment**
>
> (1) Only one assessment may be made of the degree of permanent impairment of an injured worker.
>
> (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 assessment and a medical assessment certificate under this Part.

(4) This section does not affect the operation of section 327 (Appeal against medical assessment)."

"**326 Status of medical assessments**

(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."

"**327 Appeal against medical assessment**

(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…."

"**329 Referral of matter for further medical assessment or reconsideration**

(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."

"**350 Decisions of Commission**

(1) Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is final and binding on the parties and is not subject to appeal or review.

(2) A decision of or proceeding before the Commission is not:

(a) to be vitiated because of any informality or want of form, or
(b) liable to be challenged, appealed against, reviewed, quashed or called into question by any court.

(2) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission."

"**378 Reconsideration of decisions of Registrar or Appeal Panel**

(1) The Registrar or an Appeal Panel may reconsider any matter that has been dealt with by the Registrar or an Appeal Panel, respectively, and rescind, alter or amend any decision previously made or given.

(2) Without limiting subsection (1), if the Registrar is satisfied that there is an obvious error in the text of a decision, the Registrar may alter the text of the decision to correct the error.

(3) Without limiting subsection (1), if an Appeal Panel is satisfied that its decision or any medical assessment certificate it has issued contains an obvious error, the Appeal Panel concerned may correct that error and, if necessary, issue a replacement medical assessment certificate (which is to prevail over any previous certificate).

(4) The reconsideration of a matter that is in response to an application for reconsideration must be completed within 2 months after the application is received.

(5) This section does not affect any other power under this Act or the 1987 Act to review or amend a decision."

81. The matters that I need to determine concern interpretation of the statutory provisions. The authorities confirm that one needs to look at the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application[3]. Reference to the authorities will also be of assistance.

REASONS

82. The applicant has based his application for reconsideration of the COD dated 3 January 2017 pursuant to s 350(3) of the 1998 Act on the grounds that there has been a deterioration in his condition since he was examined by the AMS, Dr Davis, on 27 May 2016. This would allow the applicant to seek a referral back to Dr Davis pursuant to s 329 of the 1998 Act, or the applicant would lodge an appeal against the MAC on the grounds in ss 327(3)(a) and 327(3)(b) of the 1998 Act.

Part 7 of Chapter 7 of the 1998 Act and s 66(1A) of the 1987 Act

83. The MAC which was issued by Dr Davis on 27 May 2016 was not subject of an appeal, so it is conclusively presumed to be correct as to the degree of the applicant's permanent impairment by reason of s 326(1) of the 1998 Act.

84. Section 327 of the 1998 Act identifies four specific grounds for an appeal. The applicant intends to rely upon the grounds set out in ss 327(3)(a) and 327(3)(b) of the 1998 Act in any future appeal to a MAP.

85. Section 327(7) of the 1998 Act provides that there can be no appeal against a MAC once the dispute has been determined by a court or the Commission or by a Complying Agreement. Therefore, given that the COD issued on 3 January 2017 determined the dispute, an appeal at this stage is not an option. Accordingly, the MAC issued by Dr Davis on 27 May 2016 is conclusively presumed to be correct as to the degree of the applicant's permanent impairment by reason of s 326(1) of the 1998 Act.

[3] *Project Blue Sky v Australian Broadcasting Authority*, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14, [43] – [44] (per Roche DP) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, [47] (per Hayne, Heydon, Crennan and Kiefel JJ).

86. Section 378 of the 1998 Act gives the Registrar the power to reconsider any matter and rescind, alter or amend any decision that the Registrar has dealt with. So, he has the power to reconsider the COD, which is a decision of the Commission, but not a MAC, which is the decision of an AMS, who is not a member of the Commission. In the absence of a successful appeal to a MAP, the MAC is conclusively presumed to be correct and is binding on the parties.

87. The applicant is faced with the restrictions in s 66(1A) of the 1987 Act, which provide that only one claim can be made for permanent impairment compensation. This is consistent with the reasoning of the Court of Appeal in *Cram Fluid Power Pty Ltd v Green,* the interpretation of cl 11 of Sch 8 of the *Workers Compensation Regulation 2016* (the 2016 Regulation), and the analysis of what constitutes a claim in terms of s 66(1A) of the 1987 Act in *Woolworths Ltd v Stafford* [4]*.* The one claim, which was made after 19 June 2012, was made by the applicant on 19 September 2014.

88. A further complication arises as a result of s 332A of the 1998 Act, which provides that only one assessment of the degree of permanent impairment may be made. It prohibits the referral to an AMS for a further assessment, but this is subject to the appeal provisions in s 327 of the 1998 Act.

89. In recent times, there have been a number of decisions in the Commission that concern applications for reconsideration of a COD issued following an assessment by an AMS.

90. In *Lizdenis v Centrel Pty Ltd*[5], Arbitrator Harris considered whether a COD, which was issued following an unsuccessful appeal against a MAC, which was based on the grounds set out in ss 327(3)(c) and 372(3)(d) of the 1998 Act, should be reconsidered to allow Ms Lizdenis to lodge a second appeal against the MAC based on ss 327(3)(a) and 372(3)(b) of the 1998 Act due to a deterioration in her condition. These facts mirror those in the present matter except there was no appeal against the MAC of Dr Davis.

91. Ms Lizdenis claimed lump sum compensation in respect of 16% whole person impairment. She sought an assessment of lump sum compensation as well as a threshold assessment for work injury damages.

92. An AMS determined that Ms Lizdenis had 14% whole person impairment. On appeal, a MAP was satisfied that the AMS had fallen into error, so a member of the Panel examined the worker. The MAP assessed 14% whole person impairment and a COD was issued by the Commission on 30 May 2014.

93. On 8 September 2015, Ms Lizdenis was re-examined by her IME, who reported that there had been a worsening in her condition since his previous examination in March 2013. Ms Lizdenis' solicitor lodged an Application for Reconsideration after the insurer declined to consent to a further appeal.

94. A second application to appeal the MAC in accordance with s 327(3)(a) of the 1998 Act was lodged but this was rejected by the Commission based on the outcome of the first appeal.

95. Arbitrator Harris was satisfied that the worker had shown that there had been deterioration in her shoulder condition. He noted the difficulty in applying the reasoning in *Cram Fluid* to the conflict between s 66(1A) of the 1987 Act and s 327(3)(a) of the 1998 Act, because s 2A(3) of the 1998 Act provided that the 1998 Act prevailed over the 1987 Act in instances of inconsistency.

[4] [2015] NSWWCCPD 36, (*Stafford*).
[5] [2016] NSWWCC 21 (*Lizdenis*).

96. The Arbitrator stated that he saw no difference between an appeal against a MAC based on a deterioration and a further claim for deterioration after a resolution by way of a Complying Agreement. He stated that it would be inconsistent with the purpose and context of s 66(1A) of the 1987 Act to allow an appeal based on a deterioration of a worker's condition following a MAC.

97. Therefore, he concluded that "Using the language of Gleeson J A in *Cram Fluid* (at [108]), I find that the limitation in s 66(1A) is taken to be the leading provision and the power in s 327(3)(a) must give way to it"[6].

98. However, the Arbitrator drew a distinction between a claim for compensation and a threshold dispute for work injury damages. He was satisfied that Ms Lizdenis could seek to appeal the MAC on the threshold claim pursuant to s 327(3)(a) and 327(3)(b) of the 1998 Act. He did not have the power to rescind the COD to allow an appeal on the threshold claim, as he had determined that the COD should not be rescinded to allow an appeal in respect of the claim for lump sum compensation.

99. Arbitrator Harris was faced with a similar application in *Habib v Glowmeat Pty Ltd*[7]*.* Ms Habib made a claim for lump sum compensation in June 2013. Her claim was referred to an AMS, who assessed 11% whole person impairment. A COD issued on 3 March 2014.

100. Ms Habib had spinal surgery and was assessed in March 2015 as having 31% whole person impairment. A further claim was made on 9 April 2015, which was rejected by the insurer because the applicant had already had her one claim after 19 June 2012 in accordance with s 66(1A) of the 1987 Act. Proceedings were filed in the Commission, but were discontinued. An application seeking leave to appeal the MAC on the grounds set out in s 327(3)(a) and 327(3)(b) of the 1987 Act was rejected by the Commission due to the effects of s 327(7) of the 1998 Act.

101. Ms Habib sought a reconsideration of the COD in February 2016 pursuant to s 350(3) of the 1998 Act so that the claim could be referred back to the AMS pursuant s 329(1)(a) of the 1998 Act on the grounds that Ms Habib's condition was not stable at the time of the original assessment and there had been a deterioration in her condition, or alternatively, the matter could proceed by way of an appeal to a MAP.

102. The Arbitrator was satisfied that the applicant had established a clear basis of deterioration within the meaning of s 327(3)(a) of the 1998 Act. However, Ms Habib had made a further claim in contravention of s 66(1A) of the 1987 Act. The Arbitrator referred to his reasoning in *Lizdenis*, and confirmed that s 66(1A) of the 1987 Act prevented an appeal based on s 327(3)(a) of the1998 Act, consistent with *Cram Fluid*.

103. I followed the Arbitrator's reasoning in *Parsons v Dell Australia Pty Ltd*[8]*.* Mr Parsons sought a reconsideration of a COD so that his claim could be referred to an AMS to assess his whole person impairment due to the psychological injury. The MAP revoked the MAC of the AMS and issued its own certificate. The COD was in respect of the determination of a MAP, not an AMS, as in the present matter.

104. I determined that Mr Parsons had made "one claim" and any further claim was precluded by s 66(1A) of the 1987 Act. Further, s 332A of the 1998 Act restricted Mr Parsons to only one assessment absent an appeal in accordance with the grounds in s 327 of the 1998. My determination was confirmed on appeal in *Parsons v Dell Australia Pty Ltd*[9].

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[6] *Lizdenis*, [115].
[7] [2016] NSWWCC 114 (*Habib*).
[8] [2019] NSWWCC 210, (*Parsons No.1*).
[9] [2020] NSWWCCPD 2 (*Parsons No.2*)

105. In the present matter, the applicant made a claim for lump sum compensation on 19 September 2014. He was assessed by Dr Davis as having 11% whole person impairment. The applicant only lodged an appeal against the MAC of Dr Bryant, and that MAC was confirmed. He elected not to appeal against the MAC of Dr Davis. This is surprising, given the clinical findings reported by Associate Professor Fernandes and because Dr Davis was unable to conduct a thorough examination of the applicant.

106. The applicant made a further claim for lump sum compensation on 18 December 2017. These represented a further claim in accordance with the principles discussed in *Stafford*. No claim was made in respect of a threshold dispute for Work Injury Damages. Not surprisingly, the insurer rejected the claim on 26 February 2019 on the basis that the applicant had already made one claim after 19 June 2012, namely on 19 September 2014.

107. I am satisfied that on the basis of the reasoning in *Cram Fluid*, *Lizdenis*, *Habib* and *Parsons*, the claim made by the applicant on 19 September 2014 constituted the "one claim" and any further claims are precluded by s 66(1A) of the 1987 Act.

108. The applicant also seeks a reconsideration of the COD so that his claim can referred back to Dr Davis pursuant to s 329 of the 1998 Act.

109. Sections 327(6) and 329 of the 1998 Act provide that the Registrar may refer a matter for further assessment as an alternative to an appeal, but only if the matter could have otherwise proceeded on appeal. The applicant only lodged an appeal against the MAC of Dr Bryant, and he chose not to appeal against the assessment provided by Dr Davis.

110. The applicant may have a valid ground for a further assessment by Dr Davis or another AMS, based on a deterioration in his condition pursuant to s 327(3)(a) of the 1998 Act, and this might be possible because s 332A of the 1998 Act is subject to s 327(4) of the 1998 Act, but this does not overcome the problem presented by the restriction in s 66(1A) of the 1987 Act.

111. In the circumstances, the applicant's application for reconsideration of the COD dated 3 January 2017 is declined.

Reconsideration

112. In the event that I might be wrong in my interpretation of the limitations imposed by s 66(1A) of the 1987 Act and s 322A of the 1998 Act, it is appropriate to consider the merits of the applicant's application for reconsideration of the COD.

113. Arbitrator Johnstone, as he then was, provided a useful summary of the principles regarding reconsideration of determinations pursuant to s 350(3) of the 1998 Act in *Howell v Stringvale Pty Ltd*[10], where he stated:

> "The subsection and its predecessors have been considered in a number of cases. Having reviewed those cases, the following summary of principles may be made as to its application:
>
> 1. The power to reconsider is unlimited: *Hilliger v Hilliger* (1952) 52 SR (NSW) 105, but discretionary: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.However, it is important to keep in mind the distinction between the existence of the power and the occasion of its exercise: *Hilliger* at 108.

[10] [2005] NSWWCC 64, (*Howell*).

2. The general rule is that public interest requires that litigation should not proceed interminably, and courts must be on their guard to refuse to allow the same matter to be litigated again and again. Nevertheless, it is appropriate to exercise the power.to remedy some manifest injustice: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26].

3. The power applies to both questions of fact and law, and is not limited to changed circumstances or fresh evidence: *Hardaker v Wright & Bruce Pty Ltd* (1960) 62 SR (NSW) 244 at 248 and 249.

4. The section overrides the common law doctrine of estoppel: *Lambidis v Commissioner of Police* (1995) 12 NSWCCR 225, but the discretion should not be exercised where the party has unreasonably refrained from raising the issue in the earlier proceedings: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]. See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

5. New evidence must be distinguished from additional evidence as opposed to fresh evidence: *Maksoudian v J Robins & Sons Pty Ltd* (1993) 9 NSWCCR 642. If the evidence was readily available at the time of the first hearing, this is a factor to be weighed in considering whether or not to exercise the discretion: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [58]. However, any new evidence must be such that it would have been a determining factor in the decision: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.

6. Other grounds for the exercise of discretion include where the original decision maker did not consider an available and possibly determinative argument: *Lasaitis v Email Ltd* (1990) 6 NSWCCR 154 at 171A. But where the Commission does not have jurisdiction to determine the particular matter asserted, the discretion should not be exercised: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.

7. Mistake or inadvertence on the part of legal advisers is an insufficient ground: *Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] 27 WCR (NSW) 29 at 30. But disposal of litigation by legal advisers on a basis contrary to their instructions has been held to be sufficient: *Sorcevski v Steggles Pty Ltd* (1991) NSWCCR 315.

8. An application must be brought without delay and the matter raised must be of such a nature that it would have affected the outcome of the original decision: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]."[11]

114. In *Samuel*, Acting Deputy President Roche, as he then was, cited with approval the Court of Appeal decision in *Schipp v Herfords Pty Ltd* [12], where the court considered the equivalent reconsideration provisions in the *Workers Compensation Act 1926*. He stated:

[11] *Howell*, [27].
[12] [1975] 1 NSWLR 413 (*Schipp*).

"The factors relevant to the exercise of the discretion in section 36 of the 1926 Act were considered by the Court of Appeal in *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413 ('*Schipp*'). The court noted the following factors were relevant in deciding whether the discretion should be exercised in favour of the moving party:

1. delay;
2. whether the worker had a right of appeal from the first decision but failed to exercise that right;
3. waiver or estoppel issues, and
4. rescinding an earlier award will allow a worker to bring fresh proceedings."[13]

115. The Acting Deputy President also had regard to the comments of Bishop CCJ in *Maksoudian v J Robins & Sons Pty Ltd* [14], which dealt with the equivalent provision in the former s 17 of the 1987 Act. He stated:

"In *Maksoudian v J Robins & Sons Pty Ltd* [1993] NSWCC 36; (1993) 9 NSWCCR 642 ('*Maksoudian*') Judge Bishop considered a reconsideration application under section 17(4) of the Court Act. His Honour stated at 645:

'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.'

In *Maksoudian* the worker failed in his application for a reconsideration because there was an unexplained delay of over three years in bringing the application before the court and, more importantly, the new evidence would not if it had been put before the court at the original hearing have been likely to materially affect the outcome."[15]

116. The Acting Deputy President continued:

"Having regard to the above authorities and the provisions and objectives of the 1998 Act I believe that the following principles are applicable to reconsideration applications under section 350(3) of the 1998 Act:

1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');

[13] *Samuel*, [45].
[14] [1993] NSWCC 36; (1993) 9 NSWCCR 642 (*Maksoudian*).
[15] *Samuel*, [48] to [49].

2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;

3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');

4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');

5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*');

6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act)."[16]

117. I have a wide discretion to reconsider the COD in accordance with s 350(3) of the 1998 Act, but the discretion must be exercised fairly. Accordingly, the matters identified in *Samuel* require some consideration.

Fresh evidence

118. Most of the medical evidence regarding the alleged deterioration in the applicant's condition was obtained after the MAC of Dr Davis was issued to the parties. Such evidence could not reasonably have been obtained before the MAC.

119. Therefore, the first matter to consider is whether the fresh evidence supports a deterioration in the applicant's condition since the MAC issued on 27 May 2016.

120. The applicant bears the onus of showing that there has been a deterioration in his condition since the determination of the MAP. This needs to be discharged before consideration can be given to the application to reconsider the COD.

[16] *Samuel*, [58].

Deterioration

121. In *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission*[17], Campbell JA stated (Hodgson JA and Handley AJA agreeing):

> "Considering that submission involves, first, construing section 327(3)(a). 'Deterioration' of a person's condition is an inherently relational concept. It involves the condition in question having become worse than it previously was, at some particular point in time. In my view, the 'deterioration' that section 327(3)(a) talks of is a deterioration from the degree of impairment that has been certified by the MAC, over the time since the examination or examinations on the basis of which the MAC was issued took place. That conclusion follows from the fact that the appeal in question is, as section 327(2) requires, against a matter as to which the assessment of an AMS certified in a MAC is conclusively presumed to be correct."[18]

122. Handley AJA also indicated that that s 327(3)(a) of the 1998 Act "does not authorise a challenge to the correctness of the certificate as at the date it was given. It is entirely focused on what has happened to the worker since."[19]

123. In *Riverina Wines*, the medical reports of the worker's independent medical experts recorded histories, findings on examination, and opinions that were diametrically opposed to those made by the AMS. This raised issues as to whether there had been any deterioration, as the evidence seemed to suggest that there had been no change in the worker's condition before and after the examination by the AMS.

124. The reports of Associate Professor Fernandes and Dr Gibson are of little probative value regarding the question of deterioration. If anything, they seem to suggest that the applicant's condition has remained much the same. Certainly, there seems little, if any, change in the findings of Associate Professor Fernandes when one compares his report dated 7 March 2016 with his report dated 3 June 2019. These two doctors would be in a best position to comment on any deterioration in the applicant's condition, but remarkably, no supplementary reports have been provided by them.

125. A further opinion was not sought from Dr Ellis, whose views seemed to have been discounted by the AMS. As he examined the applicant prior to the MAC of Dr Davis, he would be in a better position than Dr Powell to comment on any deterioration in the applicant's condition.

126. Dr Powell's history is similar to that of Dr Davis. He recorded signs consistent with CRPS, whereas Dr Davis, like Dr Stephenson, found no such evidence. Of course, Dr Davis was unable to conduct a full examination of the applicant.

127. Dr Powell had not seen the applicant prior to July 2017, so care needs to be taken with his opinion. In his reports, he merely comments on the applicant's present condition. He does not record a history of any deterioration in the applicant's condition since 2016. He does not refer to the other medical evidence or to the MACs of Drs Stephenson, Garvey, Kaufman, Bryant or Davis.

128. The history and the findings of Dr Ellis are somewhat similar to those of Dr Powell, so it is arguable that there has been no deterioration. The history that the applicant kept his left hand in his pocket has been reported by numerous doctors and one would have thought that this had the potential to make the applicant's hand sweaty. No doctor has commented on this.

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[17] [2007] NSWCA 149 (*Riverina Wines).*
[18] *Riverina Wines* [94].
[19] *Riverina Wines* [122].

129. Despite the assessment of Dr Powell, the evidence of deterioration is by no means persuasive. More weight would be given to the evidence of doctors who saw the applicant before and after the MAC was issued. The reports of Associate Professor Fernandes and Dr Gibson do not address the question of deterioration.

130. Therefore, when one has regard to this further evidence and my analysis above, I am not satisfied that there is sufficient evidence to support a deterioration in the applicant's condition that would result in a different assessment of whole person impairment by Dr Davis or another AMS, if a further referral was an option.

Delay

131. In *Maksoudian v J Robins & Sons Pty Ltd*[20], Bishop CCJ stated that after the fresh evidence is obtained, "the application for reconsideration has to move with appropriate speed and diligence to bring that matter to the Court's attention". In this matter, one could not say that the applicant and his solicitor have moved with "appropriate speed and diligence" to seek a reconsideration of the COD issued on 3 January 2017.

132. The applicant only lodged an appeal against the MAC of Dr Bryant. His MAC was confirmed on appeal by a MAP. The applicant chose not to appeal the MAC of Dr Davis. The applicant's solicitor did not qualify any doctor to assess any deterioration in his condition after 27 May 2016 or after the COD issued on 3 January 2017.

133. It was not until 7 December 2017 that the applicant made a further claim for lump sum compensation based on the report of Dr Powell. Allianz disputed liability on the grounds that the applicant had exhausted his rights for lump sum compensation. Similarly, the new insurer, Employers Mutual Ltd, disputed liability on the same grounds in dispute notices issued on 6 February 2019 and 12 June 2019.

134. The two applications for reconsideration lodged by the applicant's solicitor in August 2019 and September 2019 were rejected for procedural reasons. It was not until 6 November 2019 that a valid application was made.

135. There is no explanation from the applicant or his solicitor why an application for reconsideration was not made in 2017 after the report of Dr Powell was made available.

136. In *Maksoudian*, the worker failed in his application for a reconsideration because of an unexplained delay of over three years and because it was unlikely that the new evidence would have materially affected the outcome.

137. In this matter, the MAC of Dr Davis was issued in May 2016, and was not the subject of an appeal. No further evidence was obtained before Dr Powell's report was commissioned by the insurer 12 months later. It was another 18 months before the applicant's application for consideration of the COD was filed in the Commission.

138. In the circumstances, whilst it is true that a reconsideration on the grounds of a deterioration has no time limits, the lack of evidence regarding the delay in bringing this application does not persuade me to exercise my discretion to reconsider the COD. I will now discuss other factors.

Estoppel and indefinite litigation

139. As far as I am concerned, there are no major estoppel issues, and neither party have made any submissions in that regard.

[20] [1993] NSWCC 36; (1993) 9 NSWCCR 642 (*Maksoudian*)

140. The finality of litigation must be weighed against the interests of justice and the wide discretionary power of the Commission. This is particularly so, when one has regard to the prolonged history of the matter that concluded with the issue of the COD on 3 January 2017, more than two years ago. The COD would have been issued earlier, but for the unsuccessful appeal against the MAC of Dr Bryant. So, it has been almost four years since the applicant was examined by Dr Davis.

141. The insurer has been put to the added expense of dealing with the original lump sum proceedings, an appeal to a MAP, a notice of claim for lump sum compensation in December 2017 and potential proceedings for Work Injury Damages.

142. If the COD is reconsidered and revoked, the respondent will then be required to deal with a further referral to Dr Davis or another AMS. It could not be said that it is in the public interest to prolong the litigation.

143. The authorities confirm that it is in the public interest that litigation should not proceed indefinitely. In my view, it would not be in the public interest to reconsider the COD so that further litigation can be undertaken.

Fairness and justice

144. This leaves a consideration as to whether it is in the interests of justice that the COD should be rescinded because there is some "practical unfairness or injustice" in allowing it to stand.

145. I have indicated that I am not satisfied that the evidence is sufficient to show that there has been any deterioration in the applicant's condition. It merely shows that Associate Professor Fernandes found evidence of CRPS before the examination by the AMS, and this was observed by Associate Professor Fernandes and Drs Powell and Gibson after the COD issued on 3 January 2017. According to Dr Ellis, the applicant exhibited signs of CRPS in 2014. There was inactivity on the part of the applicant and his solicitor, so it could not be said that anything unfair or unjust arose because of their inaction.

146. If the applicant's application is granted, there is the prospect that the respondent will lodge an appeal either against my decision or any further AMS assessment or both. This will delay the finalisation of the matter in the Commission and will prevent the insurer and its solicitor from finalising their files. They will also be put to the added expense and inconvenience associated with further proceedings in circumstances where a successful outcome is unlikely.

147. There was an unacceptable delay in bringing the application for reconsideration. There will be some delay in the finalisation of the litigation if the application for reconsideration is granted. The applicant had the opportunity to lodge an appeal against the MAC of Dr Davis in 2016, but he elected not to do so. The is no evidence to explain why this did not occur.

148. I am obliged to do justice between the parties according to the substantial merits of the case. There is the possibility that the applicant may suffer prejudice if I decline to reconsider the COD. However, a further assessment might not achieve the desired outcome for the applicant. Even if the reconsideration is granted, the Registrar might still refuse to refer the matter to another AMS or back to Dr Davis to reconsider his MAC.

149. One must have regard to s 354(3) of the 1998 Act when considering the rights of each party. It provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case".

150. It is clear from the authorities that I have a wide discretion, but I must be fair to all parties. Matters of relevance include the extent of and reasons for any delay in bringing an application, whether a party had a right of appeal following the issuing of the AMS decision and whether rescinding the COD will result in further proceedings. Most importantly, justice must be done between the parties.

151. On the basis of the evidence currently before me, in the interests of justice and having regard to the prejudice that the respondent will suffer, I am not satisfied that the applicant's application for reconsideration of the COD dated 3 January 2017 should be granted.

CONCLUSION

152. The applicant fails in his application for reconsideration due to the operation of s 66(1A) of the 1987 Act and s 322A of the 1998 Act. Therefore, any reconsideration will be of no effect. This is consistent with my reasoning in *Parsons*, which was the subject of an appeal.

153. In *Parsons No.2,* the applicant's solicitor focused his submissions on the issue of delay and did not properly address the primary determination regarding the operation of s 66(1A) of the 1987 Act and s 322A of the 1998 Act.

154. Deputy President Wood noted:

> "The Senior Arbitrator firstly and primarily determined that because of the operation of s 66(1A) of the 1987 Act and s 322A of the 1998 Act, the appellant was prevented from bringing a further claim for lump sum entitlements and prevented from further assessment of his WPI. On that basis, he declined to reconsider the COD, as it would be of no effect.
>
> The Senior Arbitrator proceeded *in the alternative* to consider the factors of delay, the absence of an appeal having been brought against the MAP, the weight of the new evidence before him and the interests of the parties. That process was entered into by the Senior Arbitrator who expressly did so on the condition that his primary decision not to exercise his discretion because the further claim was precluded was wrong.
>
> There is no appeal before me that challenges the Senior Arbitrator's primary decision not to exercise his discretion because there could be no further lump sum claim. It follows that the Senior Arbitrator's decision must stand, regardless of the outcome of the grounds of appeal brought by the appellant."[21]

155. The outcome in this matter mirrors that in *Parsons No.1*. The applicant's application fails due to the restrictions imposed upon him by reason of s 66(1A) of the 1987 Act and s 322A of the 1998 Act. The applicant would also fail in the alternative, if my primary determination was wrong.

ORDERS

156. The applicant's application pursuant to s 350 of the 1998 Act for reconsideration of the orders made in the COD dated 3 January 2017 is declined.

157. The orders in the COD dated 3 January 2017 are confirmed.

[21] *Parsons No. 2*, [145] to [147].