Workers Compensation Commission

# DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

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| **CITATION:** | **RSM Building Services Pty Ltd v Hochbaum [2019] NSWWCCPD 15** |
| **APPELLANT:** | RSM Building Services Pty Ltd |
| **RESPONDENT:** | Frank Hochbaum |
| **INTERVENER:** | State Insurance Regulatory Authority |
| **INSURER:** | AAI Limited t/as GIO – Agent for the Workers Compensation Nominal Insurer |
| **FILE NUMBER:** | A1-4847/18 |
| **SENIOR ARBITRATOR:** | Ms J Bamber |
| **DATE OF ARBITRATOR'S DECISION:** | 7 January 2019 |
| **DATE OF APPEAL DECISION:** | 18 April 2019 |
| **SUBJECT MATTER OF DECISION:** | Construction of s 39 of the *Workers Compensation Act 1987* |
| **PRESIDENTIAL MEMBER:** | President Judge Phillips |
| **DATE OF APPEAL HEARING:** | 2 April 2019 |
| **REPRESENTATION:** | **Appellant:** Ms B Tronson, of counsel, instructed by Hicksons<br>**Respondent:** Mr R Page, of counsel, instructed by Shine Lawyers<br>**Intervener:** Ms J Davidson, of counsel, instructed by the Crown Solicitor |
| **ORDERS MADE ON APPEAL:** | The Senior Arbitrator's Certificate of Determination dated 7 January 2019 is revoked and the following is substituted in its place:<br><br>"An award for the respondent employer." |

## INTRODUCTION

1. This appeal concerns the application and interpretation of s 39 of the *Workers Compensation Act 1987* (the 1987 Act). Section 39 ceases a worker's entitlement to the payment of weekly compensation after an aggregate period of 260 weeks. This prohibition is lifted if a worker is assessed as having a degree of permanent impairment of more than 20%. The question for determination on appeal is this – if the assessment is made at a point in time after the cessation of the aggregate 260-week period, is the worker entitled to the back payment of compensation between the cessation date and the date of the assessment of permanent impairment greater than 20%?

## BACKGROUND

2. Frank Hochbaum was employed by RSM Building Services Pty Ltd as a labourer.

3. On 1 September 2000, Mr Hochbaum sustained an injury to his right leg when he fell while pushing a wheelbarrow during the course of his employment with the appellant employer. The appellant's insurer, Allianz Australia Workers Compensation (NSW) Limited (Allianz), voluntarily paid weekly payments of compensation.

4. In July 2004, the parties entered into a complying agreement pursuant to s 66A of the 1987 Act, in the sum of $8,750. This agreement resolved Mr Hochbaum's claim for lump sum compensation in relation to the loss of efficient use of the right leg below the knee resulting from the injury in September 2000.

5. In June 2012, Mr Hochbaum was walking when his right leg gave way and he stumbled and fell onto his outstretched right arm. In January 2015, Mr Hochbaum made a claim in respect of a secondary condition to his back and right arm (wrist) due to the September 2000 injury. That claim was denied by the insurer.

6. On 2 April 2013, Allianz made a work capacity decision which found that Mr Hochbaum had no work capacity.

7. On 2 August 2017, the insurer advised that Mr Hochbaum would not be entitled to weekly payments of compensation beyond 25 December 2017 as he would have reached the aggregate 260-week limit pursuant to s 39 of the 1987 Act and he was not a worker of high or highest needs as defined pursuant to s 32A of the 1987 Act.

8. On 25 December 2017, the insurer ceased weekly payments of compensation.

9. On 6 April 2018, Mr Hochbaum made a claim for ongoing payments of weekly compensation based on a report from Dr W G D Patrick, general and vascular surgeon, dated 3 April 2018. Dr Patrick assessed 49% whole person impairment in respect of Mr Hochbaum's impairments.

10. On 24 April 2018, the insurer declined the request for ongoing payments relying, amongst other things, on Dr Robert Breit's assessment, dated 16 March 2017, of 5% whole person impairment in respect of his impairments.

11. On 1 May 2018, Mr Hochbaum lodged an Application for Assessment by an Approved Medical Specialist. He sought an assessment as to whether the degree of permanent impairment was more than 20% for the purposes of s 39 of the 1987 Act (matter no 2198/18). On 18 June 2018, that matter proceeded to conciliation/arbitration before Arbitrator Sweeney.

12. On 19 June 2018, Arbitrator Sweeney issued a Certificate of Determination – Consent Orders. The consent orders recorded an award for the employer in respect of the left and

right upper extremities (shoulders) and thoracic spine arising from the September 2000 injury. The parties agreed to refer the matter to an Approved Medical Specialist (AMS) to certify, for the purposes of s 39, the degree of whole person impairment in respect of the injury to the right lower extremity (ankle and Achilles) on 1 September 2000, with consequential scarring and vascular conditions, consequential medical condition of the right upper extremity(wrist) due to the fall in June 2012, and consequential medical condition of the lumbar spine.

13. On 16 July 2018, Dr Mark Burns, AMS, issued a Medical Assessment Certificate (MAC). The AMS assessed Mr Hochbaum to have a whole person impairment of 21% in respect of the right lower extremity and consequential scarring and vascular conditions and consequential conditions of the right upper extremity and lumbar spine.

14. On 27 July 2018, the insurer advised Mr Hochbaum that it would recommence weekly payments of compensation. The insurer advised that this was because Mr Hochbaum had an ongoing entitlement to weekly payments pursuant to s 39 as his whole person impairment was more than 20%. The insurer recommenced weekly payments of compensation from 16 July 2018.

15. On 16 August 2018, Mr Hochbaum wrote to the insurer seeking weekly payment of compensation from 26 December 2017 to 23 July 2018. This was in respect of the closed period between 25 December 2017 when weekly payments initially ceased and 24 July 2018 (sic, 16 July 2018) when the payments were reinstated, being the date of the MAC.

16. On 1 September 2018, due to a change in workers compensation insurance arrangements, Mr Hochbaum's claim was transferred to GIO – Agent for the Workers Compensation Nominal Insurer.

17. On 17 September 2018, Mr Hochbaum lodged an Application to Resolve a Dispute (the Application) claiming weekly payments of compensation in respect of the injury on 1 September 2000. He sought weekly payments for a fixed period from 26 December 2017 to 23 July 2018. The injury is described as a "[r]upture of right Achilles tendon, compartment syndrome, chronic lymphoedema, right foot, right wrist and lumbar spine." He claimed injury to his right leg, with consequential "scarring and vascular condition" as well as a secondary condition "to right wrist and lumbar spine".

18. On 8 October 2018, the appellant lodged a Reply to the Application. It disputed the claim on the basis that Mr Hochbaum had no entitlement to weekly payments of compensation in the period claimed by operation of s 39.

19. On 26 October 2018, the matter was listed for conciliation/arbitration before Senior Arbitrator Bamber. During the arbitration proceedings the end date of weekly payments claimed was amended to 15 July 2018 by consent, as weekly payments of compensation had been reinstated from 16 July 2018. Following the arbitration hearing, the Senior Arbitrator reserved her decision.

20. On 7 January 2019, the Senior Arbitrator issued a Certificate of Determination. She found, in accordance with Dr Burns' MAC, Mr Hochbaum was assessed to have 21% whole person impairment as a result of injury arising out of or in the course of employment with the appellant on 1 September 2000. She also found that s 39(1) of the 1987 Act did not apply to Mr Hochbaum and in accordance with the "agreed Work Capacity Decision", Mr Hochbaum was awarded weekly payments of compensation from 26 December 2017 to 15 July 2018 (the disputed period).

21. On 4 February 2019, the appellant lodged an Application to Appeal Against Decision of Arbitrator. The appellant challenged the Senior Arbitrator's interpretation of s 39 as having

retrospective application, before an assessment by an AMS of the degree of permanent impairment.

22. On 22 February 2019, the respondent lodged submissions in reply to the Application under cover of a Notice of Opposition to Appeal Against a Decision of Approved Medical Specialist (Form 10A). Following a direction by the Commission, on 25 February 2019, the respondent re-filed the submissions in reply under the cover of a Notice of Opposition to Appeal Against Decision of Arbitrator (Form 9A).

23. On 22 February 2019, the State Insurance Regulatory Authority (the Authority) advised the Commission that it sought to be heard in these proceedings, pursuant to s 106 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

24. On 5 March 2019, I convened a telephone conference between the parties. The purpose of the telephone conference was to discuss the future conduct of the appeal proceedings. Following the telephone conference, I issued a direction amending the timetable of proceedings to enable the Authority an opportunity to put submissions on the record and the parties an opportunity of reply. I set the matter down for hearing on 2 April 2019. I also directed that the parties file and serve submissions on the following matters:

> "(a) whether there was a work capacity decision effective during the period in dispute, and, if so, its relevance to the issues in dispute on appeal;
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> (b) whether the work capacity decision effective during the period in dispute is the letter from Allianz to the respondent worker dated 2 April 2013, as submitted by the appellant employer (that is, the letter attached to the Application to Admit Late Documents dated 19 October 2018, filed by the appellant employer but which was not admitted into evidence by the Senior Arbitrator in the proceedings below);
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> (c) whether Allianz's letter dated 2 April 2013 should be admitted on the appeal;
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> (d) the effect of the common law presumption against retrospective operation, in the absence of a clear statement to the contrary (see *Maxwell v Murphy* [1957] HCA 7; 96 CLR 261), and
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> (e) the relevance of ss 38 and 65 of the *Workers Compensation Act 1987* (the 1987 Act) and any other provisions, in the context of s 39 of the 1987 Act and the circumstances of this matter."

25. The hearing of the appeal took place on 2 April 2019.

**THRESHOLD MATTERS**

26. There is no dispute between the parties that the threshold requirements as to quantum and time pursuant to ss 352(3) and 352(4) of the 1998 Act have been met.

**THE EVIDENCE**

27. This appeal turns on the construction of s 39 of the 1987 Act. There are no disputed facts. However, the facts and the chronology set out above are important.

28. During the arbitration hearing, on 26 October 2018, the Senior Arbitrator referred to the existence of a work capacity decision. Counsel for the employer submitted that, although it was not formally in evidence, the insurer's position is that "there plainly had been a work capacity decision at some point prior to 2017, that was a decision that Mr Hochbaum was entitled to weekly payments of compensation after one hundred and thirty weeks, pursuant to

Section 38."[1] Counsel for the employer also submitted that the "lifting of the bar [in s 39] didn't require another work capacity decision to be made, because one had previously been made by the Insurer and that became operative again once the Section 39 gate was open."[2]

29. The Senior Arbitrator referred to the arbitral decision in *Kennewell v ISS Facility Services Australia Limited t/as Sontic Pty Ltd*.[3] She noted that in that matter the Arbitrator gave the parties liberty to make further submissions in respect of the Commission's jurisdiction. The following exchange then took place:

> "SNR ARBITRATOR: Arbitrator Sweeney in [*Kennewell*] was giving the parties liberty to make further submissions to that jurisdiction but that doesn't arise in this case, because that depends on - - -
>
> MR PAGE: Or concede the jurisdiction.
>
> SNR ARBITRATOR: - - - Section 38 so that's - - -
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> MS TRONSON: We're not raising any issue.
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> SNR ARBITRATOR: - - - so if by chance he makes another decision in that matter, probably don't need to come back to you for further submissions. My decision may well be before that anyway.
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> MS TRONSON: I think in this situation because any decision you make will be consistent with the earlier worker capacity decision made by the Insurer - - -
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> SNR ARBITRATOR: Will not arise.
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> MS TRONSON: - - - I think that's right."[4]

30. The above extracted discussion relates to the Commission's jurisdiction to enter an award, in circumstances where s 43(3) of the 1987 Act (now repealed) provided that the Commission could not enter an award inconsistent with a work capacity decision. It is not disputed that s 43(3) continues to apply to the circumstances of this case as the repeal of the provision pursuant to the 2018 Amendment Act commenced on 1 January 2019. Therefore, when entering an award under s 38 of the 1987 Act, in order to be satisfied that the Commission did not enter an award inconsistent with a work capacity decision, the Senior Arbitrator should have admitted the written work capacity decision into evidence during the proceedings.

31. Following my direction for further submissions, the appellant and respondent both conceded that the only work capacity decision of relevance was the decision of 2 April 2013. There was no subsequent work capacity decision made. This decision was not in evidence before the Senior Arbitrator, because she declined to admit it on the basis of the concession that any decision would be consistent with the work capacity decision. However, the Senior Arbitrator, having found s 39 did not apply to Mr Hochbaum, entered an award for the payment of weekly compensation pursuant to s 38.

32. During the appeal hearing on 2 April 2019, the parties did not object to the admission of the written work capacity decision so as to ensure any order made is not inconsistent with the work capacity decision. I was satisfied that pursuant to s 352(6) of the 1998 Act, a failure to grant leave to adduce this additional evidence could, depending upon the decision I

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[1] Transcript of Proceedings, *Hochbaum v RSM Building Services Pty Limited* [2019] NSWWCC 31, Arbitrator Bamber, 26 October 2018 (T1) 7.1–6.
[2] T1 11.9–13.
[3] [2018] NSWWCC 216 (*Kennewell*).
[4] T1 21.28–22.16.

ultimately reached in this matter, cause a substantial injustice. For these reasons, I received into evidence a copy of the appellant insurer's work capacity decision of 2 April 2013. The work capacity decision was marked Exhibit A1 in the appeal proceedings. Relevantly, the work capacity decision in terms states as follows:

> "Following an assessment of your work capacity, a decision has been made that you currently have no capacity to work."

**THE SENIOR ARBITRATOR'S REASONS**

33. As is the case in this appeal, there were no facts in dispute when this matter was heard before the Senior Arbitrator. The only matter that the Senior Arbitrator was called upon to decide was the proper construction of s 39 of the 1987 Act. In short, this is the same situation now presents itself on appeal.

34. The Senior Arbitrator observed that s 38 is "the section that governs the *entitlement* to weekly compensation after 130 weeks" (emphasis in original).[5]

35. The Senior Arbitrator agreed with the decision in *Kennewell,* which found s 39 "does not provide an entitlement to compensation or enact the means by which compensation is to be ascertained. Rather, it limits the period during which compensation is to be paid pursuant to s 38…"

36. Applying *Kennewell*, the Senior Arbitrator held that s 39 is not a "gateway" provision, but a limiting provision. She observed that such terminology would apply to s 38, as a:

> "worker needs to have proceeded through the 'gateway' in section 38 to get to a point where he has received 260 weeks of weekly compensation, because it is section 38 which governs the entitlement to weekly compensation after 130 weeks. So, every worker to which section 39 will apply, should have necessarily been assessed by the insurer as being entitled to weekly compensation under section 38."[6]

37. The Senior Arbitrator distinguished the arbitral decision in *Taumalolo v Industrial Galvanizers Corporation Pty Ltd*[7] and also said that she was not bound to follow this decision.[8] The Senior Arbitrator observed that in *Taumalolo* there was no evidence of a work capacity decision, but in the present case there was "agreement by the respondent [employer] that the insurer had made a work capacity decision prior to 2017."[9] She added that the employer agreed that if she were to accept Mr Hochbaum's submissions about s 39 then the Commission had jurisdiction to make an order for the payment of weekly compensation for the period in dispute. The Senior Arbitrator observed that this was a proper concession and consistent with the decision in *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd.*[10] She added that the Commission could make an order consistent with a work capacity decision.[11]

38. The Senior Arbitrator referred to the principles of statutory construction, as set out in *Project Blue Sky Inc v Australian Broadcasting Authority,*[12] *Hesami v Hong Australia Corporation Pty*

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[5] *Hochbaum v RSM Building Services Pty Limited* [2019] NSWWCC 31 (Reasons), [33].
[6] Reasons, [34].
[7] [2018] NSWWCC 243 (*Taumalolo*); Reasons, [30], [50].
[8] Reasons, [32].
[9] Reasons, [30].
[10] [2016] NSWWCCPD 54
[11] Reasons, [31].
[12] [1998] HCA 28; 194 CLR 355 (*Project Blue Sky*).

*Ltd*[13], *Wilson v State Rail Authority of New South Wales*[14] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[15] in construing s 39.[16]

39. The Senior Arbitrator referred to and adopted the reasoning in the decision in *Kennewell.* She acknowledged that that decision primarily concerned the construction of cl 28C of Sch 8 to the Workers Compensation Regulation 2016 (the 2016 Regulation).[17] However, she observed that the finding in *Kennewell* that "once section 39 does not apply there is no temporal restriction on the applicant's entitlement to compensation does seem consistent with an examination of the text of the provision."[18] She added:

> "The wording of section 39(2) is quite plain, in my view. It allows for no ambiguity. It provides that '[*t]his section does not apply* to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%'. Here Mr Hochbaum submits he is such an injured person as his injury has resulted in permanent impairment of 21% WPI."[19] (emphasis added)

40. The Senior Arbitrator agreed with Arbitrator Sweeney's reasoning in *Kennewell* that s 39 "does not have a temporal component."[20] She added that it does not contain temporal embargoes like s 59A(2), (3) and (4) of the 1987 Act, and that Parliament evinced an intention in s 59A to treat a worker with an assessment of greater than 20% more favourably.[21] This, the Senior Arbitrator stated, is consistent with the effect of s 39(2) of the 1987 Act. She added, s 39(2) simply states that s 39 "does not apply to an injured worker 'whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%'."[22] She also stated that had "Parliament wished to limit payments to workers, such as Mr Hochbaum, from week 260 until after they had an assessment of greater than 20% WPI, the Parliament could have so provided."[23]

41. The Senior Arbitrator concluded that:

> "…the text of section 39(2) is clear, it is unambiguous. Mr Hochbaum's injury has resulted in permanent impairment more than 20%. *Therefore, in my view, section 39 does not apply to him*."[24] (emphasis added)

42. The Senior Arbitrator referred back to her findings distinguishing the decision in *Taumalolo.*[25] She stated that the employer urged application of this decision and concluded by arguing that "'[i]n fact what Sub-Section (2) is saying is effectively *from the date of that assessment'* (my emphasis). However, this is reading words into sub-section (2), as Arbitrator Sweeney found [in *Kennewell*] there is no temporal concept in that section."[26]

43. The Senior Arbitrator observed that s 39(3) provides the method of assessment, that is the degree of permanent impairment that results from the injury is to be assessed as provided by

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[13] [2011] NSWWCCPD 14.
[14] [2010] NSWCA 198 (*Wilson*).
[15] [2009] HCA 41; 239 CLR 27 (*Alcan*).
[16] Reasons, [35]-[38].
[17] Reasons, [41], [46].
[18] Reasons, [41].
[19] Reasons, [41].
[20] Reasons, [42].
[21] Reasons, [48].
[22] Reasons, [48].
[23] Reasons, [42].
[24] Reasons, [49].
[25] Reasons, [50].
[26] Reasons, [50].

s 65 of the 1987 Act.[27] She added that s 65 refers to that assessment being in accordance with Pt 7 of Ch 7 of the 1998 Act. She further added:

> "It is important that section 39(3) sets out the method of assessment, because it should not be overlooked that workers such as Mr Hochbaum, who were injured before 1 January 2002, cannot have been assessed for lump sum purposes under the whole person impairment regime. Their lump sum entitlement is under the Table of Disabilities. Section 37(3) of the 1987 Act also does not have text of a temporal nature. It does not say 'from the date of that assessment'.
>
> Given section 39 is a limiting section, taking away rights, one would expect the Parliament to use the clearest of language (such as that suggested by the respondent), if that is what Parliament had intended. Applying the principles of statutory interpretation as set out above, particularly as expressed in *Alcan* '[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention.' *I find the text of section 39 to be clear, that if sub-section (2) applies section 39 does not apply*."[28] (emphasis added)

44. The Senior Arbitrator concluded that s 39 did not apply to Mr Hochbaum in the period from 26 December 2017 to 15 July 2018.[29] It followed that Mr Hochbaum was entitled to receive weekly compensation for that period, consistent with the work capacity decision made previously by the insurer.

45. On 7 January 2018, the Senior Arbitrator issued a Certificate of Determination in the following terms:

> "The Commission determines:
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> 1. In accordance with the Medical Assessment Certificate of Approved Medial Specialist Dr Burns the applicant is assessed as having 21% whole person impairment as a result of injury on 1 September 2000 arising out of or in the course of employment with the respondent.
>
> 2. Pursuant to section 39(2) of the *Workers Compensation Act 1987,* section 39(1) does not apply to the applicant.
>
> 3. In accordance with the agreed Work Capacity Decision, the respondent is to pay the applicant weekly compensation from 26 December 2017 to 15 July 2018 at the applicable rate.
>
> A brief statement is attached setting out the Commission's reasons for the determination."

46. The appellant challenges the Senior Arbitrator's determination.

**GROUND OF APPEAL**

47. The appellant's only ground of appeal is:

> "The Senior Arbitrator erred in her interpretation of s 39 of the *Workers Compensation Act 1987* (1987 Act). Instead, the Senior Arbitrator should have found that, where a worker has been assessed to have a degree of permanent impairment of greater than 20%, s 39 applies to permit weekly compensation payments after the end of the

[27] Reasons, [51].
[28] Reasons, [51]-[52].
[29] Reasons, [53].

aggregate 260 week period only on and from the date of such assessment, and not in the period before such assessment."

**LEGISLATION**

48. The relevant legislation is extracted below.

49. Section 38 of the 1987 Act provides:

> "**38 Special requirements for continuation of weekly payments after second entitlement period (after week 130)**
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> (1) A worker's entitlement to compensation in the form of weekly payments under this Part ceases on the expiry of the second entitlement period unless the worker is entitled to compensation after the second entitlement period under this section.
>
> (2) A worker who is assessed by the insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.
>
> (3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:
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> (a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and
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> (b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least $155 per week, and
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> (c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.
>
> (3A) A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.
>
> (4) An insurer must, for the purpose of assessing an injured worker's entitlement to weekly payments of compensation after the expiry of the second entitlement period, ensure that a work capacity assessment of the worker is conducted:
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> (a) during the last 52 weeks of the second entitlement period, and
>
> (b) thereafter at least once every 2 years.
>
> Note. An insurer can conduct a work capacity assessment of a worker at any time. The Workers Compensation Guidelines can also require a work capacity assessment to be conducted.
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> (5) An insurer is not to conduct a work capacity assessment of a worker with highest needs unless the insurer thinks it appropriate to do so and the worker requests it.

An insurer can make a work capacity decision about a worker with highest needs without conducting a work capacity assessment.

(6) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled under this section after the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − D, or

(b) MAX − D,

whichever is the lesser.

(7) The weekly payment of compensation to which an injured worker who has current work capacity is entitled under this section after the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − (E + D), or

(b) MAX − (E + D),

whichever is the lesser.

(8) A worker's entitlement to compensation under this section may be reassessed at any time."

50. Section 39 of the 1987 Act provides:

"**39 Cessation of weekly payments after 5 years**

(1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.

(2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

**Note**. For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

(3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

51. Section 65 of the 1987 Act provides:

"**65 Determination of degree of permanent impairment**

(1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.

(2) If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division.

**Note**. The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires the impairments that result from those injuries to be assessed together. Physical injuries and psychological/psychiatric injuries are not assessed together. See section 65A."

52. No appeal was lodged against the MAC dated 16 July 2018 and thus it can be taken to be conclusively presumed to be correct as to the matters set out in s 326(1) of the 1998 Act.

**APPELLANT'S SUBMISSIONS**

53. The appellant submits that on the clear words of s 39 of the 1987 Act, during any period in which the bar applies to the worker, that worker cannot recover weekly payments of compensation. However, s 39(2) of the 1987 Act "lifts the bar" in certain circumstances. The appellant submits that:

    (a) during any period when the worker does not have an assessment of permanent impairment that is greater than 20%, the bar in s 39(1) applies and the worker has no entitlement to weekly payments of compensation, but

    (b) once a worker has an assessment of permanent impairment that is greater than 20%, the section (that is, the bar in s 39(1)) does not apply and the worker then has an entitlement to weekly payments of compensation.

54. The appellant also submits that each part of the interpretation operates in a present manner, which is in keeping with the statutory text. There is no room for any "retrospective operation of some entitlement to weekly payments of compensation", as this would lead to a "mis-match between the operation of the provision and the manner in which its speaks." The Senior Arbitrator's finding "will entitle the worker retrospectively to weekly payments of compensation for the period before [the assessment of permanent impairment that is greater than 20%] was received."

55. The appellant further submits that it is critical to "preserve certainty and consistency in the application of a statutory provision." In this regard, the appellant submits that it must be ascertainable on any given day whether s 39 applies to a specific worker. Legislation must be taken to be speaking in the present.[30] While s 39 does not contain any express temporal wording, it has a temporal component in the sense that the period during which it applies can and must be determined applying the usual principles of statutory interpretation.

56. The appellant contends that the only textual analysis provided by the Senior Arbitrator in support of her interpretation of the temporal component was an assertion there was no temporal component and a reference to s 59A(2), (3) and (4) of the 1987 Act. The appellant submits that s 59A(2) and (4) are comparable to s 39(1) rather than s 39(2). The appellant also submits that while s 59A(3) provides express provision for cessation and re-starting of certain entitlements, that express provision is necessary in light of the nature of the termination provision in s 59A(1). Section 59A(3) is addressed to a different problem or mischief than that to which s 39(2) is addressed.

57. The appellant also submits that if s 39 was intended to apply to a time prior to an assessment of a degree of permanent impairment of more than 20% (or satisfaction on the part of the insurer to that effect) the legislature could have done so expressly. Further, the definition of a "worker with high needs" and a "worker with highest needs" in s 32A of the 1987 Act is instructive, as it is an example of where the legislature has "quite clearly, provided that a worker is entitled to the relevant benefits in certain circumstances, even if they have not yet received an assessment of permanent impairment to the relevant degree."

[30] Citing, *Le Mesurier v Connor* (1929) 42 CLR 481, 503 (per Isaacs J); *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, 307-308 (per Dawson, Gaudron, McHugh, Gummow and Kirby JJ).

58. The appellant further submits that s 39, understood in the broader context of the 2012 amendments is "patently non-beneficial".[31]

59. The appellant contends that the Senior Arbitrator's reference to s 39(1) as a limiting provision was incorrect. It submits that "even if the entitlement was a common law right, the intention in s 39(1) to limit or remove that right is patently clear. What is in dispute is the extent to which that right can be, in effect, re-conferred, or conferred following the end of the 260 week period despite s 39(1).

60. The appellant submits that the implications or consequences of the competing interpretations of s 39 are relevant and, in this case, critical. On the appellant's interpretation, and assuming satisfaction of s 38 of the 1987 Act, a worker would be entitled to weekly payments of compensation on and from the date of the assessment on a prospective basis only. However, the appellant submits that the Senior Arbitrator's interpretation of s 39(1) would have "no certainty" when the bar may be lifted. This may result in back payment for what may be a considerable period. That is, a worker would be entitled to:

    (a) "weekly payments of compensation on and from the date of the assessment on a prospective basis; **and**

    (b) backdated weekly payments of compensation during the entirety of the five year period from the end of the 260 period until the date of the new assessment."

    Such an interpretation, so the appellant submits, is an "absurd interpretation" and ought not be adopted.[32] In assessing the consequences of a particular interpretation, regard must be had to those consequences generally.

61. The appellant refers to several authorities on the relevant context for interpreting legislation.[33] The appellant then submits that it is relevant that s 39(3) Act provides for assessment of the degree of permanent impairment in accordance with s 65 of the 1987 Act. Section 65(1) relevantly provides for assessment in accordance with Pt 7 of Ch 7 of the 1998 Act. Section 322 of the 1998 Act provides for the assessment of the degree of permanent impairment, and requires that assessment to be made in accordance with the relevant guidelines. Clause 1.6 of the NSW Workers compensation guidelines for the evaluation of permanent impairment (4th edition) issued in April 2016 provides that an assessment of permanent impairment is an assessment of the claimant on the day of the assessment. (Clause 1.5(a) of the WorkCover Guides for the Evaluation of Permanent Impairment issued by WorkCover NSW and gazetted on 6 November 2008, is in similar terms to cl 1.6, and these guides were in force at the time of the introduction of s 39.)

62. The appellant submits that the guidelines form part of the overall legislative scheme and the legislature must be taken to have understood how permanent impairment is to be assessed pursuant to those guidelines. The concept of an assessment of permanent impairment as an assessment of the worker on the day of an assessment is a relevant part of the context in which the 2012 amendments, including s 39, were passed.

63. In reply to the Direction, the appellant provided further submissions. The appellant submits that the work capacity decision was made on 2 April 2013. It submits that it would not be inappropriate for the Commission to have the benefit of the decision in the appeal proceedings.

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[31] Citing, *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; 254 CLR 1, 16 [29] (per French CJ, Crennan, Kiefel and Keane JJ); 25-26 [62] (per Gageler J) (*Goudappel*).
[32] Citing, *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389, 401-402 (*Agfa-Gevaert*).
[33] Citing, *Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394; 86 NSWLR 142, 156 [69]-[70] (per Bathurst CJ); *Workpac Pty Ltd v Skene* [2018] FCAFC 131; 362 ALR 311, 332-334 [104]-[113].

64. The appellant contends that the language of "present operation" may be more apt than the language of "retrospectivity and prospectivity". The appellant submits:

> "The present operation for which the appellant contends makes the provision simple: on any given day, the question is 'does s 39 apply?' The answer will be a clear yes or no. On the next day, the same question can be asked, and the answer will be clear again. The answer on the second day might be different from the answer on the first day, but it does not change the answer that was given on the first day.
>
> Given that the answer to the question 'does s 39 apply?' has a direct impact on the rights and obligations of the worker, employer and insurer, it is particularly important that there is a certain and consistent answer to it at any given time. The construction urged by the respondent would have the effect that those rights and obligations at any given time would depend upon a future factual position which is unknowable, or at least uncertain."

65. The appellant submits that the approach for which it contends is broadly consistent with the Commission's approach to s 38A of the 1987 Act and s 60AA(1)(c) of the 1987 Act.[34] In *Cleland*, Deputy President Snell accepted that s 60AA was beneficial however found that could not contradict the clear words of the provision. In that case, the entitlement to compensation arose only when, and only from the time, the relevant state of affairs existed: there, an assessment of a degree of permanent impairment of at least 15%.

66. In respect of the application of *ADCO Constructions Pty Ltd v Goudappel,*[35], the appellant submits that the question of whether s 39(2) has a beneficial purpose is to be understood in light of the requirement to interpret the provision in context. The appellant added, that "[t]o find that s 39(2) has a beneficial purpose and interpret it in a manner which is in tension with the overall operation of s 39 … would conflict with the general approach to statutory construction that must be undertaken.'[36]

67. The appellant further submits that the workers compensation system objectives are set out in s 3 of the 1998 Act and include that the system "be fair, affordable, and financially viable".. The scheme is not just directed to the provision of compensation to injured workers but the provision of compensation within a structured framework which must place some limits on that compensation.

68. The differential treatment of a worker in the respondent's position to a worker who is able to take advantage of cl 28C of Sch 8 to the 2016 Regulation is not a sufficient reason to depart from the appellant's construction. That is because, the differential treatment arises from the clear words of the legislation and cl 28C would only entitle a worker to an exemption from s 39 from the date the AMS declined to make the assessment until an assessment was made. The same temporal approach to the interpretation of cl 28C should be taken, as applies in relation to s 39(2).

69. The appellant otherwise agrees with and adopts the Authority's submissions.

70. In the hearing before me, on 2 April 2019, the appellant confirmed its written submissions on appeal. The appellant submitted that the Senior Arbitrator's interpretation essentially deems s 39(2) as including the words "that it be taken to have applied at an earlier stage".[37] The Senior Arbitrator reads words into the section.

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[34] Citing, *Cleland v Carter* [2016] NSWWCCPD 29 (*Cleland*), [91]-[95].
[35] [2014] HCA 18 (*Goudappel*).
[36] Citing, *Project Blue Sky* at 381-382 [70] (McHugh, Gummow, Kirby and Hayne JJ).
[37] Transcript of Appeal proceedings of 2 April 2019 (T2), 19.29.

71. The appellant put the question simply; does s 39(2) apply? That, the appellant submitted:

> "can be answered quite simply yes or no. Is there an assessment demonstrating a degree of permanent impairment greater than 20 per cent, yes or no?
>
> Tomorrow we might ask the same question; again, it can be answered yes or no. That answer tomorrow might be different from today's answer but on the employer's construction the fact of tomorrow's answer being different from today's doesn't change the answer that is given today. On the Senior Arbitrator's construction the fact of tomorrow's answer being different would change the answer given today and that's essentially the crux of the present operation, if you like."[38]

72. The appellant further submitted that the language in s 39 is all in present tense, which fits the concept of a present operation. The appellant then addressed on context. In respect of the concept of beneficial or non-beneficial construction in relation to s 39, the appellant submitted that the beneficial purpose only takes the interpretive task so far. The appellant further submitted that when "one looks at section 39 understood as a whole it is not a beneficial provision" as it puts an end to the statutory compensation paid on a weekly basis, unless one can take advantage of the exemption in s 39(2).[39]

73. The appellant submitted that work capacity tends to be the primary determinant of entitlement but s 39 is an example of the use of permanent impairment as one of the modifiers of an entitlement to weekly compensation.[40] Therefore, so it submitted, it cannot be said that work capacity is always the determinant. It added that where there is a work capacity decision, it remains undisturbed in the present case until s 39(1) comes into effect and stops the entitlement. The appellant further added that the work capacity decision has effect or continues to have effect subject to the unavailability of the entitlement as a consequence of s 39(1) until the assessment, in which case s 39(2) applies.

**RESPONDENT'S SUBMISSIONS**

74. The respondent submits that the Senior Arbitrator did not err and her decision should be confirmed. He submits that s 39(1) of the 1987 Act is temporal in nature since it has effect at the expiration of 260 weeks of weekly compensation. He also submits that "[w]ithout anything further it would be clear that the intention of the legislation was to prevent payment of weekly compensation to **any** injured worker beyond the 260 week limit." However, s 39(2) ameliorates the operation of s 39(1) in very limited circumstances.

75. The respondent also submits that the words "does not apply" in s 39(2) of the 1987 Act are clear in their meaning. The respondent submits:

> "Section 39(1) does not operate in the circumstances specified in sub-section (2). The words 'results in permanent impairment' and 'resulting from the injury' are not limited in any way as to their effective operation. If the requirement of more than 20% permanent impairment is attained sub-section (1), no matter when the 260 week period is reached, has no operation. It does not apply."

76. The respondent contends that had Parliament intended to restrict the operation of s 39(2) as the appellant submits "it could easily have expressed such limitation in the sub-section."

77. The respondent further submits that the overall purpose of the 1987 Act is to provide compensation to injured workers. Section 39(1) is not beneficial in nature, as its effect is to bring an end to an entitlement that had existed for at least 260 weeks. However, s 39(2) "can

[38] T2 21.20–21.34.
[39] T2 24.7.
[40] T2 47.1.

in no way be said to be non-beneficial in nature. Since its effect is to provide weekly compensation it reflects a beneficial purpose and requires a beneficial construction."[41]

78. The respondent adds:

> "There being no expressed temporal restriction in s 39(2) and giving the section '*a fair, large and liberal interpretation*' in line with the purpose of the Act, being the provision of compensation, the sub-section must operate to create a right to weekly compensation *even if such right may have a retrospective character*."[42] (emphasis in original and added)

79. The respondent refers to s 33 of the *Interpretation Act 1987* (Cth) and states that the purpose or object of the Act is the provision of compensation to injured workers. He adds that the "denial of weekly compensation for a period of time does not promote that purpose or object" and therefore s 39(2) must be read as having "where necessary a retrospective operation."

80. The respondent also refers to the appellant's submissions on certainty, in the sense that it could be years after the 260 weeks expired before the worker attains a greater than 20% assessment. The respondent submits:

> "This may indeed occur although the employer would of course be aware of the injury and would as a matter of common sense be aware that there is a possibility that the injury could at some point be assessed at greater than 20%. It is in effect little different to where a worker fails to give notice of injury until some years later because of ignorance or mistake and because of that fact can claim compensation by virtue of the provisions of s 61(b) of the Workplace Injury Management Act 1998 (WIM Act.) [sic]"

81. The respondent submits that s 39(3), s 65, Pt 7 of the 1998 Act and the WorkCover Guides for the Evaluation of Permanent Impairment "are combined, a procedure used to make an assessment". That assessment is then to be applied to s 39(2).

82. The appellant's interpretation of s 39 would have the "possible unusual result that a worker in the position of the respondent could prove to be in a significantly less beneficial position than a worker who, by virtue" of cl 28C of Sch 8 of the 2016 Regulation retains the right to receive weekly compensation after an aggregate period of 260 weeks.

83. In reply to the Direction, the respondent provided further submissions. He submits that the words "results in" in s 39(2) are indicative of some future position following an injury. He adds:

> "It does not specify a time but in its terms contemplates that at some point there may be a permanent impairment. If that does occur and provided the degree reaches more than 20% then the section does not apply. The wording in section 39(2) is clear, its intention is to remove the operation of section 39(1). If the operation of section 39(2) can be characterised as retrospective in effect, its terms being clear, the common law presumption against retrospectivity does not arise."

84. The respondent also submits that s 39(3) does not seek to define the words "the degree of permanent impairment that results from an injury" but sets out the "method to be adopted in assessing and calculating the percentage of impairment." He accepts that there has to be a "date specified for the assessment and the only practical time is when the clinical examination takes place."

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[41] Citing, *Goudappel*, [29].
[42] Citing, *IW v City of Perth* [1997] HCA 30; 191 CLR 1, 12 (*IW*); *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 611G, 618A, 631E (*West*).

85. The respondent contends that s 39, on a proper construction taking into account its beneficial nature, should be given "a broad meaning to the extent that it removes the operation of section 39(1) irrespective of when the assessment of permanent impairment takes place."

86. The respondent submits that the insurer assessed the worker as having no current work capacity in the work capacity decision dated 2 April 2013. There is no evidence that the insurer made another work capacity decision after 2 April 2013. It also submits that it should be admitted on the appeal to ensure any order is not inconsistent with the work capacity decision.

87. Following the work capacity decision the insurer continued to pay weekly compensation until the expiry of the 260 week period and recommenced weekly payments of compensation following the MAC dated 16 July 2018. Therefore, so the respondent submits, s 38 is relevant as "it creates an entitlement to continuing weekly compensation. In the absence of section 39 that entitlement would continue subject to the respondent continuing to satisfy the provisions of section 38(2). This position is confirmed in the Note in section 39."

88. The respondent also submits that while s 39(1), when taken in isolation, removes the entitlement to any ongoing weekly compensation for all workers, s 39(2) retains the entitlement under s 38 where the worker has a permanent impairment resulting from the injury of greater than 20%.

89. In the hearing before me, on 2 April 2019, the respondent submitted on the structure of the 1987 Act. The respondent submitted that the entitlement to compensation flows from the event of the injury. The respondent then provided an overview of the weekly payments provisions. He then turned his mind to s 39. He submitted:

> "Then we get to section 39, subsection (1) which in its terms is an absolute bar to further compensation after receiving 260 weeks of compensation. Without anything further it would bring to an end - no matter what assessments you have or anything it would bring to an end any entitlement you have but then we have section 39(2) which, in my submission to you, entitles him to the continuing payment of weekly payments because he satisfies the previous requirements under section 38 and in this instance 38(2).
>
> In terms of section 38(2) we then reach this unusual provision where we get to he's got to have 20 per cent or more than 20 per cent whole person impairment which again, a bit like section 60AA, has really no relationship to the question of his work capacity and you addressed the question of primacy in dealing with section 38.
>
> In my submission to you, you must look at section 38 and what its intention is, that is the provision of income support where a person's work capacity is such as in here where he has no work capacity but it continues. It's an unusual situation where one's permanent impairment assessment should then take away an entitlement as suggested by the appellant, the intervenor, take away an entitlement that existed, in any event."[43]

90. In response to my question "what do you say the effect of s 39(1) on the work capacity decision is, if anything?", the respondent submitted:

> "It doesn't have any effect on the work capacity decision at all, its effect is to say irrespective of the work capacity decision you're not entitled to weekly compensation, it's just like a guillotine."[44]

[43] T2 33.15–34.7.
[44] T2 36.28–31.

91. In respect of beneficial construction, the respondent submits that s 39(1) is a non-beneficial provisions but s 39(2) is a beneficial or primary beneficial section:

> "… that says in the vernacular, well, hang on, this all seems a bit hard, we shouldn't do this, we'll make sure that you continue to receive your weekly compensation provided you've reached this other percentage assessment and my submission to you there is no matter when that occurs you will get the benefit of section 38 continuing irrespective of when that occurs."[45]

92. In response to my question, even if s 39(2) is beneficial "does it do what you say it does?", the respondent submitted:

> "Well, I say it does because two things. The words 'does not apply' is mandatory. In other words, if the requirements of section 39(2) are met then 39(1) has no application as if it did not exist."[46]

93. The respondent also submitted that the overall Act is beneficial but there are parts that are not beneficial and parts that are clearly beneficial. It adds on any reading of s 39(2) it "is still a beneficial provision because it provides compensation that without the section would not – there would be no entitlement to that compensation."[47]

94. During the hearing, I asked the respondent whether he agreed that the only assessment that was contemplated under s 39 was Dr Burns' assessment of 16 July 2018. In response, the respondent submitted:

> "That's true. I accept the submission today that must be the assessment done at the time of the actual clinical examination and I think I've put that in my submissions. It's the only logical approach because you cannot have an assessment based on something before. You could but it would be exceedingly difficult and impractical." [48]

95. The respondent submitted that the section anticipates that at some point a worker's injury will reach a state where it can be assessed and it may be that the worker subsequently gets worse. Section 39 anticipates that "…it's going to apply at some time in the future and that … future time could be post the 260-week period because the very term 'results in' is anticipated for the future."[49]

96. The respondent then submitted on the purpose of the Act. The purpose is to provide injured workers with income support during incapacity, payment for permanent impairment or death and payment for reasonable treatment and other related expenses. The respondent added that another purpose is to be fair, affordable and financially viable. Applying the principle of fairness it "would only be fair that any worker who comes within that greater than 20 per cent requirement should be entitled to compensation."[50] In respect of an affordable and financially viable scheme, the respondent submitted that this is addressed by premiums imposed on employers. He added that "[t]he premium is not set on the basis that some worker may or may not have an assessment greater than 20 per cent in the future to entitle them … to ongoing payments … but there is a possibility that a worker will suffer a permanent impairment of greater than 20% and will have no work capacity…"[51]

97. The respondent also submitted briefly on the decision in *Cleland*. The respondent submitted that that case is not the same as the present. He submitted that:

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[45] T2 37.9–16.
[46] T2 38.27–30.
[47] T2 39.18–20.
[48] T2 40.12–18.
[49] T2 41.24–28.
[50] T2 24.18–22.
[51] T2 43.1–14.

> "… [it] is not the same as we have here where the 20 per cent comes in at some subsequent time. It is not the threshold requirement. So the submission I make to you is that the case of *Cleland* in terms of the legislation can be excluded from dealing with that which is covered by section 39."[52]

**SUBMISSIONS ON BEHALF OF THE AUTHORITY**

98. The Authority intervenes in this appeal pursuant to its right in s 106 of the 1998 Act. Section 106 confers on the Authority all the rights of a party in the proceedings.

99. The Authority submits that reading s 39(3) with s 39(2), "s 39(2) restores the entitlement to weekly payments providing that the worker's degree of permanent impairment has been assessed in accordance with s 65 at more than 20%." It submits that if there has been no such assessment and during the period there is no such assessment in existence, there is no entitlement to weekly compensation. However, if there is such an assessment the worker's entitlement to weekly compensation will be restored from the "date of the favourable assessment, but not in relation to the period between 260 weeks and the favourable assessment."

100. The Authority submits that the Senior Arbitrator's finding "rather begs the question in dispute between the parties as to whether s 39(1), which removes a worker's entitlement to weekly payments of compensation after 260 weeks, had ever applied to the worker" in the present matter.

101. The Authority contends that the text of s 39(2) is in the present tense: "[t]his section does not apply …". The Authority submits:

> "It adopts a term, 'the degree of permanent impairment resulting from the injury' that is given meaning (for the purpose of s 39) by s 39(3). Section 39(2) thus assumes the existence of an assessment in accordance with s 65 in order to determine whether or not the degree of permanent impairment is over 20%. Section 39(2) should be read together with s 39(3), because the term 'the degree of permanent impairment resulting from the injury' is, in effect, defined for the purposes of s 39(2) by s 39(3)."

102. The Authority also contends that the function of s 39(3) is to "identify some element of an operative provision and thus define its scope of operation."[53] The relevant operative provision is s 39(2) and s 39(3) provides the meaning of "the degree of permanent impairment resulting from the injury" for the purpose of s 39. Therefore, the Authority submits, it is "appropriate to apply s 39(3) by substituting the 'definiens with the definiendum', in other words, to read s 39(3) into s 39(2)."[54] The effect of this is to direct attention to whether there is an assessment as provided by s 65 of the 1987 Act, of the degree of permanent impairment that is greater than 20%. Only if there is such an assessment will s 39(2) be "triggered to restore entitlements to weekly payments of compensation and s 39(1) will not apply." The Authority adds that "[t]he fact of such an assessment having come into existence triggers the operation of s 39(2)."

103. The Authority accepts that the language of s 39 does not contain equivalent language to s 59A(2)-(4) of the 1987 Act, which the Senior Arbitrator characterised as imposing "temporal embargoes". However, the Authority submits, the question for the purposes of construction of s 39 is "does the text of that section, read in context, mean that the 'critical statutory question

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[52] T2 44.12–14.

[53] Citing, *Hastings Co-operative Ltd v Port Macquarie Hastings Council* (2009) 171 LGERA 152, [16] (per Basten JA (Allsop P agreeing)) (*Hastings*).

[54] Citing, *Kelly v R* [2004] HCA 12; 218 CLR 216, 253 (per McHugh J) (*Kelly*); *San v Rumble (No 2)* [2007] NSWCA 259, [43] (per Campbell JA, Ipp JA agreeing and Beazley JA agreeing) (*San*); *Hastings*, [16] (per Basten JA, Allsop P agreeing); *Sydney Local Health Network v QY and QZ* (2011) 83 NSWLR 321, [49] (*QY and QZ*).

is whether a criterion was or was not met at a particular date.'"[55] If so, the Authority submits, the section should be regarded as having a temporal component. The Authority submits:

> "The use of the present tense in s 39(1) ('… a worker has no entitlement …') and 39(2) ('This section does not apply … the degree of permanent impairment resulting from the injury is …') supplies a 'temporal component' to the operation of s 39. The operation (or otherwise) of the section turns on the existence of an assessment of the kind referred to in s 39(2), read with s 39(3). That conclusion is reinforced by the contextual considerations …"

104. The Authority submits that its construction of s 39 does not "read words into" s 39(2), but simply provides that s 39(1) either operates or does not, depending on whether the degree of permanent impairment has been assessed in accordance with s 65 as being greater than 20%. It contends that it is not necessary, as the Senior Arbitrator suggested in respect of the appellant's construction of s 39(2), to read the words "from the date of that assessment" into s 39(2) in order to conclude that the section does not alter the operation of s 39(1) prior to the point in time at which an assessment of the kind referred to in s 39(2) comes into existence.

105. The Authority argues that the entitlement to compensation in question is a statutory right, and does not attract the operation of the principle of legality insofar as it concerns the abrogation of fundamental common law rights and freedoms.[56]

106. The Authority refers to the Senior Arbitrator's comments about workers obtaining an assessment of a degree of permanent impairment of greater than 20% "many years later" and then claiming weekly compensation dating back to the 260 week date reflected a situation that was unlikely to be a common occurrence and was perhaps an "unintended consequence" of the proper construction of s 39(2) that could be addressed by legislative amendment. The Authority cautions that care is required in dismissing a consequence of the construction of statutory language as unintended or anomalous.[57]

107. The Authority submits that the text of s 39(2) does not support an operation of the section that is retrospective, that is, that alters rights and obligations in effect prior to the coming into existence of an assessment of a degree of permanent impairment resulting from the injury of greater than 20%.[58] However, there is available a construction of s 39 which would give it only a future action on past events. That construction is consistent with the text of s 39 and should be preferred. It also submits that if s 39(2) is construed in the manner advocated by the respondent it arguably would have a prior effect on past events, because it would change a worker's entitlement to compensation with effect prior to the time at which the worker was assessed in accordance with s 65 as having a degree of permanent impairment greater than 20%. The Authority submits that such a construction would treat an injured worker as if he or she had a right to weekly payments of compensation after 260 weeks, during a period before an assessment in accordance with s 65 of a degree of permanent impairment greater than 20% existed (that is, before s 39(2) was triggered). The Authority argues that s 39 should not be construed to have that effect without clear language rebutting the presumption against retrospectivity.

108. The Authority contends that the context of s 39 reinforces its submission that s 39(2) does not operate to restore an entitlement to weekly payments of compensation in respect of a

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[55] Citing, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [101] (per Hayne and Heydon JJ)) (*Shi*).
[56] Citing, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [19] (per Gleeson CJ).
[57] Citing, *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511, 518-19 (per Black CJ and Sundberg J).
[58] Citing, *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194; *Robertson v City of Nunawading* [1973] VR 819, 824; *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27, 31; *Goudappel*, [26].

period prior to the coming into existence of an assessment of the degree of permanent impairment of the requisite kind. This, the Authority submits, is reinforced because of the statutory recognition within the 1987 and 1998 Acts of the potential for a worker's degree of permanent impairment as assessed to vary over time, such as due to a deterioration in the worker's condition. The Authority further submits that reading s 39(2) with s 39(3), the entitlement to weekly payments of compensation after 260 weeks under s 39(2) flows from the degree of permanent impairment as assessed under s 65, rather than from the fact of the injury or some other feature.

109. The Authority also submits that meeting the requirements of s 38 is simply a "pre-requisite to the receipt of compensation pursuant to s 39". Section 38 envisions multiple assessments of a worker's entitlement to compensation that may yield differing results over time.

110. The Authority also refers to the provisions of the legislative scheme as introduced when s 39 was enacted in 2012 to provide another contextual indicator in support of its approach to the construction of s 39. It submits that at the time s 39 was introduced, s 38 did not refer to a "worker with highest needs" but it referred to a "seriously injured worker". The legislature in enacting s 39, at the same time as the definition of "seriously injured worker", could have continued the entitlement to payments of weekly compensation after 260 weeks under s 39 to those falling within categories under the definition of a "seriously injured worker" of a worker who has the degree of permanent impairment has been assessed to be more than 30% or the insurer is satisfied that the degree of permanent impairment is likely to be more than 30%. Further, those workers who were not existing recipients of weekly payments of compensation before the 2012 amendments and therefore not entitled to the application of cl 28C of Sch 8 to the 2016 Regulation were subject to the operation of s 39 and their ongoing entitlement to weekly compensation depended on the existence of an assessment, in accordance with s 65, of the requisite degree of permanent impairment. The general position (excluding those covered by cl 28C of Sch 8 to the 2016 Regulation) after the time of the 2012 amendments was that persons whose degree of permanent impairment was not fully ascertainable were not entitled to weekly payments after 260 weeks.

111. The Authority contends that this aspect of the historical context of s 39 indicates the emphasis placed by the legislature following the 2012 amendments on the existence of an assessment in accordance with s 65 as a prerequisite to the availability of weekly payments of compensation after 260 weeks.

112. In the hearing before me, on 2 April 2019, the Authority confirmed its submissions in writing. The Authority submitted that s 39(2):

> "… assumes the existence of an assessment in accordance with section 65 in order to determine whether or not the degree of permanent impairment resulting from the injury is over 20 per cent. And so [sub-sections 39(2) and (3)] need to be read together because the term the degree of permanent impairment resulting from the injury is only given meaning for the purposes of section 39 by section 39(3).
>
> … the effect of section 39(3) is to identify some element of the operative provision, that is section 39(2) and thus, define its scope of operation. So the element of the operative provision is obviously the degree of permanent impairment resulting from the injury which is critical to the operation of section 39(2) and to the restoration of the rights in terms of weekly payments."[59]

113. The Authority also submitted that the question for s 39 is does the "text of that section read in context mean that the critical statutory issue is whether or not a criterion was met a particular

[59] T2 5.20–6.6.

date."[60] The Authority relied on the High Court decision in *Shi*, in relation to the question of legislation having a temporal element.

114. The Authority further submitted that the text of s 39 is in the present tense, "[i]t is invoking a notion of currency, that is present currency of that assessment [of the degree of permanent impairment resulting from the injury that is greater than 20%] for the purposes of restoring the entitlement and that … supplies a temporal component to the operation of section 39."[61] Reading s 39(2) and s 39(3) together leads to a position where the operation or otherwise of s 39(2) will turn on or be triggered by the existence of the particular type of assessment, gives support to reaching the view that there is a temporal component to the operation of s 39(2). Section 39(2) does not alter the operation of s 39(1) prior to that point. The Authority also provided detailed oral submissions further addressing text and context.

**PRINCIPLES ON APPEAL**

115. In this matter, a single ground of appeal is advanced by the appellant and it alleges that the Senior Arbitrator made an error of law in construing s 39 of the 1987 Act. The principles pertaining to appeals can be found in s 352(5) of the 1998 Act. This provision provides:

> "An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing."

**DISCUSSION**

116. The Senior Arbitrator set out at length the principles of statutory construction as disclosed in the leading cases.[62] In terms of the process of reasoning undertaken by the Senior Arbitrator, it is worth examining *Project Blue Sky* and *Alcan* to determine whether the appropriate approach to statutory construction was undertaken and applied by the Senior Arbitrator.

117. In *Project Blue Sky,* the High Court stated:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. *Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*

[60] T2 7.7–10.
[61] T2 8.28–32.
[62] Reasons, [35]–[38].

> Furthermore, a court construing a statutory *provision must strive to give meaning to every word of the provision.* In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was a known rule in the interpretation of Statutes that *such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent*."[63] (citations omitted, emphasis added)

118. In *Alcan,* the High Court stated:

> "This Court has stated on many occasions that the task of statutory construction *must begin with a consideration of the text itself*. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. *The meaning of the text may require consideration of the context*, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[64] (emphasis added)

119. The Senior Arbitrator applied the above leading authorities to make her ultimate findings. The ratio decidendi of the Senior Arbitrator's decision is that once "[s 39(2)] applies section 39 does not apply".[65] This statement is repeated throughout the Senior Arbitrator's reasons.[66] Having considered the Senior Arbitrator's reasons as a whole, it is clear that this construction focuses almost exclusively on the words in s 39(2) "[t]his section does not apply …"

120. In reaching the ultimate finding the Senior Arbitrator relied significantly on the decision in *Kennewell.* The decision in *Kennewell* concerned the application of s 39 and cl 28C of Sch 8 to the 2016 Regulation. Clause 28C provides that s 39 does not apply to an injured worker if the worker's injury resulted in permanent impairment and an assessment of the degree of permanent impairment is pending because the worker has not reached maximum medical improvement and the degree of permanent impairment is not fully ascertainable or the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%. Relevantly, cl 28C only applies to an injured worker who is an existing recipient of weekly payments.[67] The Senior Arbitrator in the current matter acknowledged that cl 28C did not apply to Mr Hochbaum in the circumstances.

121. The language of "does not apply" in s 39(2) was considered in the decision in *Kennewell.* The reasoning in *Kennewell,* as to the effect of the phrase "does not apply" was followed by the Senior Arbitrator in this matter. Indeed, the Arbitrator in *Kennewell* accepted the submission that weekly payments of compensation continue "as if the section was nugatory."[68] *Kennewell* does not grapple with the entirety of the text of s 39 nor does it attempt any assessment of the tense of the section, which for the reasons discussed below, I have found is in the present. Whilst *Kennewell* and this matter deal with different aspects of s 39, and I am not called upon to express judgment on cl 28C, the findings in *Kennewell* had a persuasive effect on the Senior Arbitrator in the current matter. To the extent that the Senior Arbitrator applied *Kennewell* to support her findings, I do not accept that that was an appropriate approach to her task at hand.

122. Section 39 of the 1987 Act provides as follows. Section 39(1) imposes an absolute bar with respect to the entitlement to receive weekly payments of compensation once an aggregate period of 260 weeks has been paid to the injured worker. Section 39(2) and s 39(3) then provide the means by which the s 39(1) bar might be lifted. Section 39(2) is the operative provision in that it expresses itself thus: "[t]his section does not apply …" when the particular

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[63] *Project Blue Sky*, [69]–[71] (per McHugh, Gummow, Kirby and Hayne JJ).
[64] *Alcan,* [47].
[65] Reasons, [52].
[66] Reasons, [41], [43], [49].
[67] 2016 Regulation, cl 28B of Pt 2A of Sch 8.
[68] *Kennewell,* [47].

criterion referred to in subs (2) is achieved. The criterion which is set out in s 39(2) is that of "permanent impairment resulting from the injury is more than 20%". The question in this case is when is the criterion in s 39(2) met. As the High Court in *Shi* found if the "critical statutory question is whether a criterion was or was not met at a particular date"[69] then the section should be regarded as having a temporal component. The particular date is important because this supplies the relevant temporal component to the operation of s 39(2). That is, whether the lifting of the bar under s 39(1) depends on the existence of the permanent impairment assessment as provided for in s 39(3). Section 39(3) is the definitional provision which supplies the only process by which permanent impairment can be assessed in s 39(2).

123. The Senior Arbitrator found that s 39 did not have a temporal component.[70] In support of her finding that s 39 did not have a temporal component, the Senior Arbitrator said that the section did not contain temporal embargoes like s 59A. She added that had Parliament wished to limit payments of weekly compensation from expiration of the 260th week until after an assessment of permanent impairment greater than 20%, it would have done so. It is correct that the plain words of s 39 do not disclose a temporal component. It is also correct that s 59A contains temporal embargoes, in s 59A(2), (3) and (4). It is further correct that s 39 does not contain equivalent language to s 59A(2)-(4). However, as the appellant submitted, s 59(2) and (3) are comparable to s 39(1), rather than s 39(2) which I am construing. I also accept the appellant's submission that s 59A(3) is addressed to a different problem or mischief than that to which s 39(2) is addressed. While it is possible to find support for construction of s 39(2) as advanced by the appellant and also the respondent, in the end reference to other provisions in an Act, such as s 59A, as an aid in the process of statutory construction are only contextual considerations and cannot be used to displace the clear meaning of the text.[71]

124. Notwithstanding the finding that the provision lacked a temporal component, the effect of the decision reached by the Senior Arbitrator was in fact to create a temporal component. Namely, that notwithstanding the fact that the relevant criterion, satisfying the requisite degree of permanent impairment by way of the defined process as provided for by s 39(3), the entitlement to weekly compensation is then awarded for a period *prior* to that relevant criterion being achieved. I accept the Authority's submissions that s 39 should not be construed as having this effect absent clear language.[72]

125. Given that I have found s 39(2) of the 1987 Act is speaking in the present tense (see paragraph [140] of this decision), the Senior Arbitrator did not have jurisdiction to enter an award which had the effect of restoring an entitlement to weekly payments of compensation (subject of course to satisfying the requirements of s 38) before the relevant criterion was met.

126. The definition of how permanent impairment is to be assessed for the purposes of s 39 is supplied in subs (3), which is a comprehensive definitional provision. Consequently, s 39 operates in the following manner. At the end of receiving an aggregate period of 260 weeks' of weekly compensation, a bar is imposed unless the worker had already otherwise qualified as a person to whom this section does not apply. However, if at the time the bar is imposed, the worker does not fall within an exemption to the disentitling provision, the bar remains in place. In the circumstances of this case, that bar remains in place until the assessment takes place in accordance with s 39(3), which imports s 65 of the 1987 Act and Ch 7 of Pt 7 of the 1998 Act. Once that process is complete and injury results in a permanent impairment of greater than 20%, s 39(2) is enlivened to lift the bar.

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[69] *Shi*, [110] (per Heydon and Hayne JJ).
[70] Reasons, [42].
[71] *Alcan*, [47].
[72] Written submissions by the Authority dated 19 March 2019, [18]; written submissions by the appellant dated 4 February 2019, [21]–[22].

127. The Senior Arbitrator failed to give close consideration to the effect of s 39(3) and its reference to the particular assessment which can only take place as provided by s 65. Little attention is paid by the Senior Arbitrator to the s 65 process and to Ch 7 of Pt 7 which sets out the process in detail. It is only by a consideration of the definition in subs (3) that meaning is provided to subs (2) and thus the raising of the bar in s 39(1). The Senior Arbitrator's ultimate finding was clearly reached following a focused consideration, as described above, on the phrase "this section does not apply...". Given that s 39(2) expresses itself as "[t]his section does not apply …" when the particular criterion referred to in subsection (2) is achieved, it is clear that the entirety of the section and its text must be considered in arriving at the true meaning of the provision.

128. Section 39(3) is considered by the Senior Arbitrator only to be dismissed. The Senior Arbitrator found "[s]ub-section (3) *just provides a method of assessment*, that is the degree of permanent impairment that results from the injury is to be assessed as provided by section 65"[73] (emphasis added). The terms of s 39(3) and its reference to the assessment as provided for by s 65 is not the subject of detailed consideration in terms of its text in accordance with *Project Blue Sky* which directs the decision maker to "strive to give meaning to every word of the provision".

129. At the hearing of the appeal, counsel for the respondent worker properly accepted that the only assessment contemplated under s 39(3) was that contained in Dr Burns' MAC dated 16 July 2018 and that assessment was undertaken at the time of the actual clinical examination.[74] This is an assessment conducted in accordance with s 65 and is not just any method of assessment.

130. What was required in this matter in terms of the proper construction of s 39 was to construe the provision and its text as a whole.[75] For the reasons discussed below, I agree with and accept the submissions of the Authority and appellant that it is appropriate to read s 39(3) into s 39(2) in order to discern its true meaning.[76] It is clear that s 39(2) requires the definition of permanent impairment and how it is assessed as set out in s 39(3) for the provision to be given its intended effect. Section 39(3) is not a mere method of assessment, rather it defines the particular and only assessment which is relevant for the purposes of s 39(2). As was properly acknowledged by counsel for the respondent during the appeal hearing, this is an assessment which takes place at a point in time, namely at the time of the actual clinical examination of the worker. This is then consistent with the present tense nature of s 39(2) "[t]his section does not apply …", with the relevant criterion of a permanent impairment of greater than 20% being met at that time.

131. The Senior Arbitrator's description of s 39 as "a limiting section, taking away rights", such that Parliament would be expected to have used "the clearest of language" if it intended the appellant's construction, was perhaps a distraction.[77] As the appellant submitted, the rights being affected by s 39(1) are statutory rights, not common law rights and so the presumption underlying the Senior Arbitrator's finding is not particularly apt. Given that the right to workers compensation is a statutory right, s 39(1) removes that entitlement, the balance of the section provides the means by which entitlements to weekly payments are restored, subject of course to satisfying s 38 of the 1987 Act. However, it seems that the Arbitrator's finding in this regard is in error in that it is used to discount the proposition being advanced by the appellant. The Senior Arbitrator was equating the right to weekly compensation to that of a common law right. Therefore, the Senior Arbitrator was imposing the common law test to this circumstance which was to the effect that had Parliament intended to lift the bar only from the date of the relevant assessment, since it was affecting existing rights, it was required to

[73] Reasons, [51].
[74] T2 40.6–23.
[75] *Project Blue Sky*.
[76] Written submissions by the Authority dated 19 March 2019, [10]–[11].
[77] Reasons, [52].

explicitly so provide. The express intention of s 39 is to remove the statutory right to receive weekly compensation after the expiry of the aggregate 260-week period, unless certain circumstances are met.

132. The Senior Arbitrator erred by focusing on the phrase "[t]his section does not apply" in s 39(2), and by doing so failed to strive to give meaning to all the words of s 39.[78] In particular, the Senior Arbitrator failed to give meaning to s 39(3), in construing s 39(2). That was an error of law. Additionally, this failure has meant that where the context surrounding s 39 was sought to be considered to support the construction favoured by the appellant, this element of the task of construction was absent. It follows that this matter must be re-determined. In the circumstances, it is appropriate that I re-determine the matter.

**DECISION**

133. In view of the above findings, it falls to the Commission on appeal to consider whether or not the respondent worker is entitled to payment during the disputed period and this requires construing the text of s 39 in accordance with principle.

134. The appropriate enquiry to be embarked upon in accordance with principle is a consideration of the text of s 39 as a whole. Section 39 of the 1987 Act must be construed so that it is consistent with the language and purpose of the statute. The first step in the process of statutory construction is a consideration of the ordinary grammatical meaning of the text as contained in s 39. This is the modern approach to statutory interpretation.[79]

135. Section 39(1) of the 1987 Act provides that a worker has no entitlement to weekly payments of compensation in respect of an injury after an aggregate period of 260 weeks in respect of which weekly payments have been paid or are payable in respect of the injury. It is not disputed that this provision removes a worker's statutory entitlement to weekly payments of compensation after an aggregate period of 260 weeks. It is also not disputed that this sub-section is plainly non-beneficial. I will turn to the issue of beneficial construction later.

136. Section 39(2) restores a worker's statutory entitlement to weekly payments of compensation beyond the aggregate period of 260 weeks, in certain circumstances. It is the operative provision. It provides that s 39 "does not apply" to a worker whose injury results in permanent impairment if the "degree of permanent impairment resulting from the injury is more than 20%".

137. The respondent asserted that:

> "There being no expressed temporal restriction in s 39(2) and giving the section '*a fair, large and liberal interpretation*' in line with the purpose of the Act, being the provision of compensation, the sub-section must operate to create a right to weekly compensation even if such right may have a retrospective character."[80] (emphasis in original)

Therefore, I must turn to the text to evaluate whether the respondent's submission has any basis.

138. The tense of s 39(2) is relevant to determining the proper construction of the provision. The tense employed by the legislature is often a "significant indicator to the proper construction" of a statute.[81] For the reasons discussed below, the plain words of the text in s 39(2) are expressed in the present tense.

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[78] *Project Blue Sky.*
[79] *Project Blue Sky; Alcan.*
[80] Citing, *IW*, 12; *West*, 611G, 618A, 631E.
[81] *Cronulla Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (1990) 23 FCR 82, 89, 116.

139. The High Court in *Re Dingjan*[82] stated that:

> "… present tense may be used descriptively or it may be used to signify contemporaneity. Although there is no fixed rule, the use in a statute of the present tense, simpliciter, generally indicates that it is being used descriptively (the 'simple present'), whereas 'is' followed by a present participle (the 'continuous' or 'progressive' present) usually indicates contemporaneity."[83]

140. I make the following comments knowing that caution should be given to placing emphasis on individual words and phrases to give a provision a meaning that is not available on a plain reading of the text and context of the provision.[84] The words "does not" in "[t]his section does not apply … " in s 39(2) are a negative contraction in the simple present tense. The word "does" is an auxiliary verb which is of present tense application. It is not expressed in the past tense, such as "did". Further, the word "is", in "if the degree of permanent impairment resulting from the injury is more than 20%" in s 39(2) is also expressed in the simple present tense. It has been held that there is "some awkwardness in construing the present tense 'is' as a reference to a state of affairs which existed at an antecedent time."[85] The words "does" and "is" in s 39(2) strongly indicate the present tense application of the provision. That is, s 39(2) is directed to a circumstance existing at the time a worker's injury results in permanent impairment of more than 20%. I will return to this further below.

141. The application of s 39(2) is contingent on the worker satisfying the requisite degree of "permanent impairment resulting from the injury". The words "permanent impairment" are given meaning, for the purpose of s 39, by s 39(3). Section 39(3) provides a detailed definition which sets out how the operative provision in s 39(2) is to operate.[86] As the Authority submitted, the function of s 39(3) is to supply the statutory definition for the operation of s 39(2). It is therefore, as the Authority submitted, "appropriate to apply s 39(3) by substituting the 'definiens with the definiendum'".[87] That is, to read s 39(3) and s 39(2) together, or as the Authority submitted, read s 39(3) into s 39(2) to give effect to the operative provision.

142. The respondent's approach to statutory construction of s 39, that "… if the requirements of section 39(2) are met then 39(1) has no application *as if it did not exist*."[88] (emphasis added) would arguably result in s 39(1) and (3) having no work to do. As a matter of statutory construction, effect must be given to all words of an Act.[89] Indeed, as the High Court in *Project Blue Sky* said, a court construing a statutory provision "must strive to give meaning to every word of the provision". To this end, s 39(3) must be given some work to do and that is achieved by reading s 39(3) into s 39(2), to give meaning to the phrase "permanent impairment". It follows that I do not accept the respondent's submission that s 39(1) is to be treated as if it did not exist. Section 39(1) has work to do until it is displaced by achievement of the relevant criterion in s 39(2).

143. The critical question in this matter is at which point does s 39(1) not apply? To answer this question it must be determined whether s 39(2) supplies a temporal component to the operation of s 39. As discussed above, in determining whether a provision contains a

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[82] *Re Dingjan and Ors Ex Parte Wagner and anor* [1995] HCA 16; 183 CLR 323 (*Re Dingian*).
[83] *Re Dingjan*, [23] (per Gaudron J, Mason CJ agreeing).
[84] *Agfa-Gevaert*, 396-397 (per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[85] *Rogers v Police* [2011] SASC 215; 111 SASR 370, [25] (per White J).
[86] *Hastings*, [16] (per Basten JA, Allsop P agreeing).
[87] *Kelly v R* [2004] HCA 12; 218 CLR 216, 253 (per McHugh J); *San*, [43] (per Campbell JA, Ipp JA and Beazley JA agreeing); *Hastings*, [16] (per Basten JA, Allsop P agreeing); *QY and QZ*, [49].
[88] T2 38.28–30.
[89] *Project Blue Sky; Wilson*.

temporal component, the "critical statutory question is whether a criterion was met or not met at a particular date."[90]

144. It follows that s 39(2) directs attention to the application of s 39(3). Section 39(3) provides, for the purpose of s 39, that "the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)". The effect of s 39(3) is to direct attention to whether there has been an assessment for the purposes of s 65 of the 1987 Act. Section 65 provides an assessment of permanent impairment that results from an injury is to be assessed as provided by this section and Pt 7 of Ch 7 of the 1998 Act. Part 7 "Medical Assessment" of Ch 7 "New Claims Procedures", spans ss 319–331 and provides for arrangements concerning medical assessments. Relevantly, s 322 provides that an assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with the Workers Compensation Guidelines. Such an assessment, contained in a MAC, is conclusively presumed to be correct as to the matters set out in s 326(1) of the 1998 Act.

145. It was not disputed by the parties that the relevant assessment of the degree of permanent impairment was Dr Burns' assessment contained in his MAC dated 16 July 2018. Indeed, in response to a question I posed during the appeal hearing whether the only assessment in the current matter contemplated by s 39 was Dr Burns' assessment of 16 July 2018, the respondent's counsel responded "That's true".[91] His counsel also stated that the "only practical time" the assessment of the degree of permanent impairment is to take place is when the "clinical examination takes place" as it was "the only logical approach because you cannot have an assessment based on something before."[92] This is supported by reference to the Workers Compensation Guidelines, which provide assistance to understanding the overall context of the legislative scheme.

146. The NSW Compensation Guidelines for the Evaluation of Permanent Impairment (4th ed), are the relevant guidelines as in force at the time of Dr Burns' assessment. These guidelines provided that the assessment of permanent impairment involves clinical assessment of the worker as he or she presents on the day of the assessment. That is, the guidelines contemplate an assessment at the time of clinical presentation.

147. Where the worker ceases to be paid weekly payments of compensation due to s 39(1), it is only if a worker has been assessed, for the purpose of s 65, to have a degree of permanent impairment of greater than 20%, that s 39(2) is engaged to determine whether the worker's entitlement to weekly payments of compensation may be restored. The worker having undertaken the process of an assessment of permanent impairment as defined in s 39(3) and having achieved the criterion set out in s 39(2) is then relieved of the bar provided for in s 39(1). The bar is lifted at the point in time of the assessment of permanent impairment of greater than 20%. The phrase "[t]his section shall not apply" set out in s 39(2) is dependent upon the completion of this process and the achievement of the criterion. The operation of s 39(2) is subject to the existence of an assessment of the degree of permanent impairment, as set out in s 39(2) when read with s 39(3). A worker's entitlement to weekly compensation, beyond the aggregate period of 260 weeks remains dependent on satisfying the preconditions for payment of weekly compensation pursuant to s 38 of the 1987 Act. This is confirmed by the note to s 39(2).

**Is section 39(2) beneficial?**

148. The respondent submits that s 39(2) is a beneficial provision. To give effect to the beneficial purpose of s 39(2), so the respondent submits, the provision must be construed to mean that

[90] *Shi*, [101] (per Heydon and Hayne JJ).
[91] T2 40.12.
[92] T2 40.15–16.

once the requisite degree of permanent impairment is met under s 39(2) then s 39(1) has no application, as if it never existed.[93] This approach to construing s 39(2) is consistent with the Senior Arbitrator's findings in the current matter and the decision in *Kennewell* which was substantially relied on by the Senior Arbitrator in her ultimate findings.

149. In order to consider this submission, the question arises as to the true nature of s 39(2), is it beneficial or is it something else? Section 39 was introduced by the 2012 amending Act. The 2012 amending Act introduced several limitations on a worker's entitlement to compensation for an injury resulting in permanent impairment. In particular, s 39 imposed a threshold for the first time that a particular percentage level of permanent impairment must be achieved in order to create an ongoing entitlement to weekly compensation payments after the expiry of the aggregate period of 260 weeks. For reasons discussed below, s 39(2) could more appropriately be characterised as an exception to the absolute bar in s 39(1).

150. In *Rose v Secretary, Department of Social Security*[94] the full Federal Court said:

> "We were referred in argument to various principles of construction of statutes including the principle that remedial legislation should be construed beneficially. The Act is a remedial provision in that it gives benefits to persons and thereby remedies Parliament's perceptions of injustice. It calls for no narrow or pedantic construction; but, as mentioned earlier, it contains both enabling and excepting provisions which do not therefore necessarily require beneficial interpretation. It depends on the particular statutory provision and an analysis of its language and purpose."[95]

151. Clearly the overall parliamentary intention in introducing s 39 was to bring an end to compensation payments after an aggregate period of 260 weeks. An exception is provided for a subset of workers who achieve a greater than 20% permanent impairment assessment (as defined and provided for). Looked at in this way, if s 39(2) is truly an excepting provision, it does not warrant a beneficial interpretation.

152. However, if I am wrong and s 39(2) is beneficial in its effect, a beneficial interpretation of this provision cannot be applied if it is contrary to the textual considerations which I have referred to above. As the High Court stated in *Bull v Attorney-General (NSW)*:

> "This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow." [96]

153. The respondent accepted that if the text of the provision has a clear meaning, a beneficial purpose or interpretation cannot lead to a different result from that provided by the proper construction of the text.[97] This is consistent with the Commission's approach to such matters.[98]

154. Given what I have found about the meaning of the text of s 39, if one were to apply the beneficial interpretation urged by the respondent worker, this would produce a result which is contrary to that textual construction. Additionally, I am not convinced that a beneficial construction of a provision such as s 39(2) which has the effect of creating a retrospective entitlement to compensation is an available beneficial construction absent very clear legislative intent. Indeed, the respondent has not directed me to any authority in support of this proposition.

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[93] T2 38.29–30.
[94] [1990] FCA 59; 21 FCR 241 (*Rose*).
[95] *Rose*, 244 [13].
[96] [1913] HCA 60; 17 CLR 370, 384 (per Isaacs J); see also *Cleland*, [91]-[95].
[97] T2 44.20–25.
[98] *Cleland*, [91]–[95].

155. The 2012 amendments have been the subject of discussion by the High Court of Australia in *Goudappel* and by the Court of Appeal in *Cram Fluid Power Pty Ltd v Green,*[99] with respect to other provisions introduced by the 2012 amendments.

156. In *Goudappel* the High Court considered the application of cl 11 of Sch 8 of the then Workers Compensation Regulation 2010, to determine whether a worker was entitled to a subsequent claim for permanent impairment compensation where he had not made a claim specifically seeking compensation under s 66 or s 67 (repealed) of the 1987 Act prior to the 2012 amendments. Relevantly, in construing these provisions the High Court stated notwithstanding the Workers Compensation Act's remedial character, the provision or amendment under consideration "was patently not beneficial".[100] The High Court said:

> "It can be accepted, as was put by counsel for Mr Goudappel, that the [1987 Act's] remedial character reflects a beneficial purpose which requires a beneficial construction, if open, in favour of the injured worker. But to accept the beneficial purpose of the [1987 Act] as a whole *does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially*. The purpose of the provision must be identified. The evident purpose of cl 5 was to expand the regulation-making power so as to allow regulations to be made which could affect pre-existing rights. The purpose of cl 11, made pursuant to cl 5(4), was clear enough. It applied the new s 66 to entitlements to permanent impairment compensation which had not been the subject of a claim made before 19 June 2012 that specifically sought compensation under the old s 66. Its purpose was patently not beneficial."[101] (footnotes omitted, emphasis added)

157. The decision of the Court of Appeal in *Cram Fluid* concerned the application of s 66(1A) of the 1987 Act, as introduced by the 2012 amending Act. Section 66(1A) introduced the "one claim" limitation, that is, only one claim can be made under the 1987 Act for permanent impairment compensation in respect of permanent impairment that results from an injury. The decision turned on the interaction between s 66(1A) and s 66A(3), the latter of which provides for the Commission to award additional compensation in certain circumstances. In construing these provisions, the Court of Appeal relevantly stated:

> "It should be accepted that the *2012 amendments disclose a cost-savings objective*. Part of the reforms to the existing scheme under the 1987 and 1998 Acts was to disentitle workers from making more than one claim for lump sum compensation. The Court must give effect to this legislative intention, *notwithstanding the detrimental impact on injured workers*.[102] (emphasis added)

158. Section 39 in its terms clearly reveals a similar cost saving intention as was discussed in *Cram Fluid*. It brings to an end a worker's entitlement to compensation after 260 weeks. This provision is then subjected to an exception which is found in s 39(2), which provision excepts from the bar a subset of those injured workers, namely, in the circumstances of this matter, those who are relevantly assessed as having a permanent impairment of greater than 20%.

159. Whilst these observations in *Goudappel* and *Cram Fluid* referred to provisions other than s 39, the provision which we are now concerned with, s 39, was introduced into the legislation as part of the 2012 amendments. Section 39(1), in particular, warrants close attention in that it, for the first time, introduces a 260 week cap on a worker's entitlement to receive weekly payments of compensation, notwithstanding the otherwise beneficial purposes of other provisions of that legislation. Indeed, counsel for the respondent worker at the hearing acknowledged that s 39(1) "is a non-beneficial or an anti-beneficial provision".[103] This

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[99] [2015] NSWCA 250; 13 DDCR 281 (*Cram Fluid*).
[100] *Goudappel*, [29].
[101] *Goudappel,* [29].
[102] *Cram Fluid*, [122].
[103] T2 37.3–4.

construction sits comfortably with the comments of the Court of Appeal in *Cram Fluid* which were to the effect that the 2012 amendments disclose a cost saving objective. This context is consistent with what I have found the text means.

**The role of the work capacity decision**

160. At the hearing of the appeal, counsel for the respondent asserted that the entitlement to weekly payments of compensation was based on a worker's current work capacity. The respondent's counsel asserted:

> "In terms of section 38(2) we then reach this unusual provision where we get to he's got to have 20 per cent or more than 20 per cent whole person impairment which again, a bit like section 60AA, has really no relationship to the question of his work capacity and you addressed the question of primacy in dealing with section 38."[104]

161. The respondent asserted that the entitlement for continuing compensation always relied on an assessment of a worker's current work capacity and that this is reiterated in the note in s 39 that s 38 must be complied with. Accepting that the entitlement to compensation under s 38 depends on an assessment of a worker's current work capacity, it is clear that the legislature has not chosen the assessment of work capacity in terms of the operation of s 39. Rather, the legislature has clearly imposed a regime which is different to work capacity, namely, it has imposed the criterion of permanent impairment at a particular level as being the entry (or not) to compensation beyond the end of the second entitlement period as provided for by s 38. As was acknowledged by counsel for the respondent worker, s 39(1) does not have any effect on the work capacity decision, rather it acts like a guillotine.[105] So to use the respondent's words, s 39(1) has this guillotine effect without affecting the assessment of work capacity at all. That assessment remains undisturbed until the worker receives a favourable permanent impairment assessment in terms of s 39(2). In this circumstance, the bar is lifted and the work capacity decision continues to have effect thereafter.

162. Ultimately, however, the work capacity decision itself or the asserted primacy of s 38 (as maintained by the respondent) does not alter or affect the consideration of the text of s 39. For these reasons, I do not accept the respondent's submission on the primacy of the role of the work capacity decision or s 38 as having a bearing on the construction or operation of s 39.

[104] T2 33.26–32
[105] T2 36.28–31.

**CONCLUSION**

163. For the reasons outlined above, the award in favour of the respondent worker cannot stand. The Senior Arbitrator's decision is attended upon by relevant error and will therefore be set aside.

**DECISION**

164. The Senior Arbitrator's Certificate of Determination dated 7 January 2019 is revoked and the following is substituted in its place:

> "An award for the respondent employer."

Judge Phillips
**PRESIDENT**

18 April 2019