WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2440/18**
Applicant: **Jasbir Singh**
Respondent: **B & E Poultry Holdings Pty Ltd**
Date of Determination: **26 July 2018**

The Commission determines:

1. The applicant is not entitled to bring this claim for lump sum compensation.

2. The Application to Resolve a Dispute is accordingly dismissed.

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

Deborah Moore
Arbitrator

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

Lucy Golic
Acting Senior Dispute Services Officer
By delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Jasbir Singh, was employed by the respondent, B & E Poultry Holdings Pty Ltd as a delivery driver.

2. On 25 February 2013 as he was lifting boxes of chickens during a delivery he sustained an injury to his back.

3. He eventually came to surgery at the hands of Dr Van Gelder in June 2014.

4. In proceedings in the Commission, matter number 1870/16, Mr Singh made a claim for lump sum compensation in respect of a 13% whole person impairment (WPI).

5. On 12 January 2016 the insurer gave notice under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability.

6. The claim was referred to an Approved Medical Specialist (AMS) Dr SK Cyril Wong, who issued a Medical Assessment Certificate (MAC) on 29 June 2016 wherein he assessed a WPI in respect of the lumbar spine of 14%, and 0% for scarring.

7. The applicant subsequently discontinued those proceedings on 1 July 2016 before any Certificate of Determination (COD) was issued.

8. By these proceedings, Mr Singh now brings a claim for lump sum compensation in respect of a 16% WPI as assessed by Dr Khan. Although a claim for weekly benefits was included in the claim, it was not pressed at the teleconference on 18 June 2018. A threshold claim for work injury damages (WID) was also included.

9. On 6 April 2018 the respondent wrote to the applicant and offered to resolve the matter on the basis of the MAC of Dr Wong. The letter also asserted that the applicant was bound by the MAC of Dr Wong, which the respondent asserts obviated the necessity to issue a s 74 Notice.

10. At the teleconference on 18 June 2018, the respondent objected to the matter being referred to an AMS principally on the grounds that the applicant was bound by the previous assessment of Dr Wong, and could not bring a second claim in respect of the same injury as a result of the provisions of s 66(1A) of the 1998 Act.

11. Accordingly, I directed both parties to file written submissions addressing these issues.

12. Submissions have now been filed by both parties, and in accordance with their agreement at the teleconference, I propose to determine the matter on the papers, having regard to the evidence and submissions before me.

PROCEDURE BEFORE THE COMMISSION

13. The parties have agreed to the determination of the matter without a conference or formal hearing.

EVIDENCE

Documentary evidence

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

(a) Application to Resolve a Dispute and attached documents;
(b) Reply and attached documents;
(c) Applicant's submissions dated 29 June 2018, and
(d) Respondent's submissions dated 4 July 2018.

DISCUSSION

15. The resolution of this dispute hinges upon the interplay of the provisions of ss 66(1A) of the *Workers Compensation Act 1987* (the 1987 Act), regulation 11 of the 2016 Regulations, s 322A and the meaning of 'claim' under ss 260 and 261 of the 1998 Act, and Rule 15.7 of the 2011 Rules. On one view, there appears to be some inconsistencies which I will address in due course.

The Legislative Framework

16. Section 66(1A) of the 1987 Act provides: "Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury."

17. Section 322 of the 1998 Act provides;

> "(1) Only one assessment may be made of the degree of permanent impairment of an injured worker.
>
> (2) The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).
>
> (3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of assessment and a medical assessment certificate under this Part.
>
> (4) This section does not affect the operation of section 327."

18. Regulation 11 in Schedule 8 provides:

> "**Lump sum compensation: further claims**
>
> (1) A further lump sum compensation claim may be made in respect of an existing impairment.
>
> (2) Only one further lump sum compensation claim can be made in respect of the existing impairment.
>
> (3) Despite section 66 (1) of the 1987 Act, the degree of permanent impairment in respect of which the further lump sum compensation claim is made is not required to be greater than 10%.
>
> (4) For the purposes of subclauses (1) and (2):

(a) a further lump sum compensation claim made, and not withdrawn or otherwise finally dealt with, before the commencement of subclause (1) is to continue and be dealt with as if section 66 (1A) of the 1987 Act had never been enacted, and

(b) no regard is to be had to any further lump sum compensation claim made in respect of the existing impairment:

(i) that was withdrawn or otherwise finally dealt with before the commencement of subclause (1), and

(ii) in respect of which no compensation has been paid, and

(c) section 322A of the 1998 Act does not operate to prevent an assessment being made under section 322 of that Act for the purposes of a further lump sum compensation claim.

(5) The following provisions are to be read subject to this clause:

(a) section 66 of, and clause 15 of Part 19H of Schedule 6 to, the 1987 Act,
(b) section 322A of the 1998 Act,
(c) clauses 10 and 19 of this Schedule.

(6) In this clause:

existing impairment means a permanent impairment resulting from an injury in respect of which a lump sum compensation claim was made before 19 June 2012.

further lump sum compensation claim means a lump sum compensation claim made on or after 19 June 2012 in respect of an existing impairment.

lump sum compensation claim means a claim specifically seeking compensation under section 66 of the 1987 Act."

19. Rule 15.7 of the 2011 Rules provides:

"**Discontinuance**

(1) An applicant may discontinue any proceedings, or any part of any proceedings, as against any or all of the other parties to the proceedings, at any time.

(2) The applicant and any other party to any proceedings may agree to the discontinuance of the proceedings (or any part of the proceedings) as against that other party at any time.

(3) A discontinuance referred to in subrule (1) or (2) takes effect when a notice of the discontinuance, stating the limits (if any) of the discontinuance, is lodged and served on all parties to the proceedings who are not parties to the discontinuance. (4) A party against whom proceedings are discontinued and who has not agreed to the discontinuance may, within 7 days after the discontinuance takes effect, lodge and serve an application to the Commission for an order for payment of the party's costs of the proceedings incurred before the discontinuance."

The applicant's submissions

20. The applicant's principal submission is that, in line with the principles established in *Avni v Visy Industrial Plastics Pty Ltd* [2016] NSWWCCPD 46, (*Avni*)[i] he is entitled to re-commence his claim.

21. As President Keating noted [ii]:

> "Rule 15.7 of the Workers Compensation Commission Rules 2011 allows a worker to discontinue proceedings and he/she is free to recommence that claim at any time without penalty.
>
> The mere issuing of a MAC does not resolve the issues in dispute and a MAC issued in one set of proceedings does not bind parties in subsequent proceedings.[iii]
>
> A dispute is not determined unless the Commission…issued a Certificate of Determination.[iv]"

22. A MAC is only binding in relation to the proceedings in which it was issued, (*Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158) and there is no estoppel in circumstances capable of change (*Railcorp NSW v Registrar of the WCC of NSW* [2013] NSWSC231).

23. Thus in theory, if an applicant discontinues, he or she could legally come back tomorrow with a new claim, but they would face issues in relation to ss 66(1A) and 322A. It could also be argued that such conduct would constitute an abuse of process, unless of course new evidence was available.

24. The only binding determination is a COD.

25. The applicant also submits that no s 74 Notice was served by the respondent in response to the applicant's letter of claim pursuant to s 66 dated 2 February 2018 and further, that no s 74 Notice was issued in response to the WID claim made in the same letter.

26. It is submitted that the respondent is relying upon a s 74 Notice dated 12 January 2016 addressed to the applicant's former solicitors which does not form part of the evidence in the current proceedings.

27. The applicant continued:

> "It is assumed that the respondent is arguing that the letter from the former solicitor dated 17 December 2015 is a claim for section 66 benefits which enlivens Chapter 7 of the 1998 Act…"

28. This, it is submitted, brings into play the principles set out by Deputy President Roche in *Woolworths Ltd v Stafford* [2015] NSWWCCPD36,[v] (*Stafford*) where he said:

> "To suggest that, prior to the resolution or determination of the claim, by making a demand for permanent impairment compensation for a certain level of impairment, the worker is permanently locked into that claim, and cannot amend it, is untenable and contrary to all principles of justice."

The respondent's submissions

29. The respondent's principal submission is that pursuant to s 66(1A) and Clause 11 of Schedule 8 of the 2016 Regulations, "the applicant is disentitled from making a second claim by reason of the first claim for lump sum compensation not having been made before 19 June 2012."

30. In addition, the respondent submits that *Avni* "pays insufficient attention to the meaning and effect of 'claim' under sections 260 and 261 of the 1998 Act as it is construed by the Court of Appeal in *Tan v National Australia Bank Ltd* [2008] NSWCA 198 (*Tan*) and by Deputy President Roche in *Stafford."*

31. The respondent accepts that *Avni* is correct insofar as the issuing of a MAC is not a final determination of a claim, and further that a discontinuance under rule 15.7 of the Rules preserves a workers' right to recommence proceedings.

32. However, the respondent submits that "to the extent *Avni* permits an applicant who has made a claim and who discontinues after the giving of a MAC in relation to the injury on which the claim was made, to make a new claim, it is wrong."

33. The respondent's submissions on this point may be summarised as follows:

    (a) The 2012 amendments made the concept of "claim" central to the construction of the availability of relief under s 66.

    (b) Section 66 (1A) permits one, but only one, further claim in respect of an injury where the first claim has been made prior to 19 June 2012.

    (c) The concept of "claim" is not defined in the legislation: *Tan* at [31].

    (d) A very broad range of conduct, falling well short of the requirements of s 260, may amount to the making of a claim: *Tan* at [43].

    (e) A "claim" means a valid claim. As Deputy President Roche said in *Stafford* [at 73]:

        > "Different considerations would apply if a worker made a claim for permanent impairment compensation based on an 11% whole person impairment, but an AMS assessed the impairment at 10% and issued a valid MAC to that effect. In that situation, the claim would fail and there would be an award for the employer. That is because a valid MAC is conclusively presumed to be correct as to the degree of permanent impairment of the worker as a result of an injury…Section 66(1A) does not say 'one claim that results in the payment of permanent impairment compensation' and it is not open to interpret it in that way."

    (f) Nowhere in the legislation or case law is it suggested that a 'claim' has only been made if it is finally determined. *Tan* and *Stafford* are consistent in construing 'claim' as one that has been made, in preference to one that has been determined. To adopt a contrary construction leads to the result that a worker may make multiple claims in respect of the same injury at any time before a final COD is issued, a deleterious consequence of this construction of the word 'claim' which is obvious.

34. The respondent, as I said, acknowledges that the rules of the Commission provide an applicant with the procedural opportunity to discontinue proceedings.

35. More to the point, it is submitted, the prohibition on more than one claim post 19 June 2012 is a matter of substantive law, the constitutionality of which was approved by the High Court in *ADCO Constructions Pty Ltd v Goudappel* (2014) 308 ALR 213.

36. Further, the terms of s 322A(2) of the 1998 Act are also a matter of substantive law, as is the conclusive correctness of the MAC under s 326.

37. The conclusion contended by the applicant has the effect of investing a procedural rule with the power to subvert the substantive law of Parliament.

38. In summary, the respondent submits that the proper operation of the rule of discontinuance is, as Keating P said in *Avni* [at 72], to "preserve" the applicant's "rights" so that he or she may "recommence." In short, a procedural discontinuance operates only to allow a worker to cease prosecuting a case. Having discontinued, a worker may "recommence" a claim, not commence a fresh claim.

39. The later the discontinuance the less scope there is for a worker to substantially alter his or her claim. Any other construction destroys the plain intention of the 2012 amendments, which were found in *Goudappel* to be plainly not beneficial to workers.

40. On the current facts, it is submitted, having delayed until after the issuing of the MAC, the applicant is limited to recommencing subject to the MAC of 29 June 2016, which is the only certificate that can be used in relation to his injury.

FINDINGS AND REASONS

41. The applicant essentially relies upon the decision in *Avni* as it relates to an entitlement to recommence proceedings (after a MAC has issued) in accordance with Rule 15.7.

42. But that is not the end of the matter.

43. In my view, the terms of s 66(1A) do not necessarily prevent a worker recommencing proceedings in circumstances where no COD was issued, as in the present case.

44. The more problematic question as I see it is the operation of s 322A. A MAC was issued on 29 June 2016, and as I interpret that section, the applicant simply cannot obtain a further MAC. The terms of that section are quite clear:

> "The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned…"

45. In addition, s 66(1A) imposes a further restriction in that, in the absence of a claim made prior to 19 June 2012, the claim for lump sum compensation is the only claim that may be made by the applicant in respect of the injury, in this case occurring on 25 February 2013. It was thus not possible for any claim to have been made prior to 19 June 2012.

46. The only relief which the applicant may have had available was to seek a reconsideration of the MAC in accordance with the terms of s 329 of the 1998 Act. That can only be done by the Registrar as an alternative to an appeal against the assessment or by the Commission, which has power to refer a matter to an AMS for further assessment notwithstanding that the matter has previously been the subject of a determination by a Medical Appeal Panel. However, that section does not allow for an 'appeal' in circumstances in which no appeal is allowed. Such a referral must be used in accordance with the legislation and should not be used in an unrestrained or unlimited way. (*Milosavljevic v Medina Property Services Pty Ltd* [2008] NSWWCCPD56).

47. This section was also considered by Deputy President Snell in *Pidcock Panel Beating Pty Ltd v Nicolia* [2017] NSWWCCPD32 where the worker sought reconsideration of a MAC, but in that case, the worker was subject to the "one further claim" provision in the Regulations but had exhausted that right.

48. Again, the applicant in this case may well suffer the same considerations.

49. Having carefully considered the submissions and the legislation, regulations and rules, I am not persuaded that the applicant has established an entitlement to proceed with this current application.

50. I say that because although the applicant may, as a matter of procedure, discontinue his claim at any time before a COD issues, he faces two obstacles. Firstly, he remains bound by the terms of s 66(1A) since, in the absence of a claim made before 19 June 2012, the claim for lump sum compensation is the only claim that may be made by him in respect of his injury. Secondly, he is equally bound by the terms of s 322A in that the MAC of 29 June 2016 is the only assessment of the degree of permanent impairment in respect of the injury.

51. In my view *Avni* does not assist the applicant in this case for the reasons set out above. That case essentially focussed on the question as to whether a MAC is a final determination of proceedings. Keating P determined that it was not, but more particularly, his findings on the application of Rule 15.7 were to the effect that Rule 15.7 simply preserved a worker's rights to recommence, but as I interpret it, that right must be subject to the legislation referred to above.

52. I accept the respondent's submission that the word "claim" is not a claim that has been finally determined. It is a claim that has been made in accordance with the requirements of ss 260 and 261 of the 1998 Act, as construed in *Tan* and *Stafford*.

53. In summary, I do not accept that a proper construction of the legislation as it applies to the circumstances of this particular case entitles an applicant, who has made a claim, and who discontinues after a MAC has issued in relation to the injury on which the claim was made is entitled to make a new claim and obtain a new MAC.

54. Finally, I should mention the submissions made by the applicant as regards section 74 of the 1998 Act. I accept the respondent's submission that, having made an offer to resolve the claim, there was no basis for the issuing of such a notice since the matter had previously been the subject of an agreement to refer the claim to an AMS.

55. In any event, even if I am wrong on this point, the substantive issue for determination was whether the applicant was entitled to bring this claim having regard to the legislation, rules and regulations to which I have referred.

SUMMARY

56. The applicant is not entitled to bring this claim for lump sum compensation.

57. The Application to Resolve a Dispute is accordingly dismissed.

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[i] *Avni*
[ii] *Avni* at 72
[iii] *Avni* at 65
[iv] *Avni* at 66
[v] At 91