WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4173/19**
Applicant: **Marie Galea**
Respondent: **Colourwise Nursery (NSW) Pty Ltd**
Date of Direction: **12 November 2019**
Citation: **[2019] NSWWCC 362**

The Commission determines:

Order

1. The Certificate of Determination dated 25 January 2017 is set aside pursuant to s 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998*.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Marie Galea (the applicant) was employed by Colourwise Nursery (NSW) Pty Ltd (the respondent) and sustained a compensable work injury deemed to have occurred on 17 October 2014.

2. This is an application pursuant to s 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to rescind the Certificate of Determination dated 25 January 2017 issue in proceedings numbered 4918/16 (the prior proceedings).

PRIOR PROCEEDINGS

3. By letter dated 27 April 2016 the applicant made a claim pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) for injury to the left and right arms on 17 October 2014.

4. The letter of claim was accompanied by a report of Dr Deveridge dated 21 April 2016. Dr Deveridge assessed the applicant as having the following whole person impairment (WPI):[1]

    (a) Left upper extremity – 5%;

    (b) Right upper extremity – 7%;

    (c) Skin (Temski) – 2%.

5. Dr Deveridge made no deduction pursuant to s 323 of the 1998 Act.

6. The various individual assessments combined to an aggregate of 14% WPI. The letter of claim sought the amount of $20,350 pursuant to s 66 of the 1987 Act in respect of 14% WPI.

7. An Application to Resolve a Dispute was filed in the Commission (Original Application) pleading a deemed date of injury of 17 October 2014 and claiming the sum of $20,350 for 14% WPI. The Original Application refers to an exchange of offers between the parties.

8. At paragraph 1.1B of the Original Application the applicant sought a referral to an Approved Medical Specialist for lump sum compensation. The applicant had not claimed an assessment of the threshold for work injury damages.

9. The Commission then referred the claim to Dr Gregory Burrows an Approved Medical Specialist (the AMS). Dr Burrows provided a Medical Assessment Certificate dated 6 December 2016 wherein he assessed the applicant as having the following WPI:

    (a) Left upper extremity – 7%;

    (b) Right upper extremity – 5%;

    (c) Skin (Temski) – 0%.

10. These assessments produced a combined WPI of 12%. Dr Burrows made no deduction pursuant to s 323 of the 1998 Act.

[1] Miscellaneous Application, p 20

11. The AMS provided an Amended Medical Assessment Certificate dated 19 January 2017 (the MAC). The amended certificate provided a slight change when Dr Burrows assessed the left upper extremity at 6% which produced a combined WPI of 11%.

12. On 25 January 2017 Arbitrator Farrell issued a Certificate of Determination in accordance with the MAC ordering the respondent to pay s 66 compensation in the sum of $15,400 for 11% WPI (the COD).

THE PRESENT APPLICATION

13. The applicant seeks an order rescinding the COD pursuant to s 350(3) of the 1998 Act so that an appeal against the MAC can be filed pursuant to s 327 of the 1998 Act.

14. The applicant asserts that there has been a deterioration in her condition and that she has an entitlement to appeal the MAC pursuant to s 327(3)(a) and (b) of the 1998 Act.

15. In a statement dated 20 November 2018 the applicant said that she deteriorated following the MAC and had surgery to the left shoulder on 28 February 2017. She stated that she cannot move her shoulders "as much as I used to before my injury and even since I was seen by Dr Burrows on 6 December 2016."[2]

16. The applicant's solicitors qualified Dr New who has provided two reports.

17. In a report dated 3 May 2018, Dr New referred to an examination of the applicant on 30 April 2018.[3] The doctor noted the first assessment of Dr Burrows of 12%. He also referred to the left shoulder surgery and commented that there was "no significant improvement to either side".

18. Dr New assessed upper extremity impairment of the right arm at 17% and upper extremity impairment of the left arm at 22%. He aggregated the upper extremity impairments and converted these to a WPI of 23%.[4] Dr New also assessed 2% WPI for skin. The combined WPI assessed by Dr New was 24%.

19. A further report from Dr New dated 22 January 2019 referred to neck and back pain. The applicant reported that the neck pain had been present since the "shoulder pathology commenced".[5] Dr New did not provide an assessment of WPI for the cervical spine.

20. The respondent qualified Dr Bosanquet who provided an updated report dated 15 May 2019.[6] Dr Bosanquet assessed a 10% WPI of the left upper extremity (shoulder) and a 13% WPI of the right upper extremity (shoulder). The doctor then deducted 50% pursuant to s 323 of the 1998 Act and concluded that the combined WPI was 12%.

21. By letter dated 8 May 2018 the applicant's solicitors wrote to the respondent attaching the report of Dr New dated 3 May 2018.[7] The letter referred to the further assessment of 24% WPI, and acknowledged that the applicant was not entitled to make a further claim pursuant to s 66 of the 1987 Act. It was requested that the respondent concede the threshold for either work injury damages (at least 15%) and/or that the applicant was greater than 20% for the purposes of satisfying the threshold pursuant to s 39 of the 1987 Act.

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[2] Miscellaneous Application, p 1
[3] Miscellaneous Application, p 7
[4] This is incorrect as each arm should have been individually converted to WPI purposes. However, nothing turns upon this error
[5] Miscellaneous Application, p 15
[6] Reply, p 30
[7] Miscellaneous Application, p 293

22. By letter dated 21 November 2018, the applicant again wrote to the respondent and noted that there was no concession concerning the 15% or greater than 20% thresholds. The applicant then indicated that the matter would be referred to the Commission to "have her entitlements determined in regards to both the threshold as well as Section 39."[8]

23. A letter from the respondent dated 6 June 2019 referred to the report of Dr Bosanquet dated 15 May 2019 and his further assessment of 12% WPI.[9] The respondent advised that weekly benefits would cease from 9 June 2000.

24. The Miscellaneous Application was filed in the Commission on 16 August 2019. The applicant then sought to be re-assessed for the purposes of whether she exceeded the respective thresholds.

25. The matter was listed for telephone conference on 16 September 2019 when I directed the parties to file written submissions. The parties were then advised of my previous decisions of *Lizdenis v Centrel Pty Ltd*[10] (*Lizdenis*) and *Habib v Glowmeat Pty Ltd*[11] (*Habib*). Written submissions were filed in accordance with this direction.

26. The documentation before the Commission comprises:

    (a) Miscellaneous Application registered on 16 August 2019 and attachments;

    (b) Reply and attachments;

    (c) Applicant's submissions and further documents filed on 9 October 2019;

    (d) Respondent's submissions filed on 16 October 2019;

    (e) Late Application attaching the report of Dr Stening dated 20 September 2016.

ISSUE – DOES THE APPLICANT HAVE A RIGHT TO APPEAL THE MAC

Submissions

27. The applicant submits that her claim involves a "threshold dispute" and is not caught by the provisions of s 66(1A) of the 1987 Act. The threshold dispute was defined in the submissions as to whether she satisfied ss 39 and 151H of the 1987 Act.[12] That claim was made by letter dated 8 May 2018.

28. The applicant submitted:[13]

> "The MAC was issued only in relation to the Permanent Impairment claim, however as a consequence of s 322A of the 1998 Act, applies to subsequent or further disputes that are ancillary to an injured worker's whole person impairment: *O'Callaghan* (citation omitted) at [99] to [100]."

[8] Miscellaneous Application, p 294
[9] Miscellaneous Application, p 295
[10] [2016] NSWWCC 21
[11] [2016] NSWWCC 114
[12] Applicant's submissions, paragraph 14
[13] Applicant's submissions, paragraph 16

29. The respondent submitted:[14]

> "As the Medical Assessment Certificate did not involve a threshold dispute, there can be no appeal from the Medical Assessment Certificate pursuant to Section 327 as any Appeal is confined to the matters the subject of the initial referral: see *O'Callaghan v Energy World Corporation Limited* [2016] NSWWCCPD 1 at [90]."

30. The respondent also submitted[15] that, pursuant to s 322A(2) of the 1998 Act, that the one assessment extends to any further or medical dispute about the degree of permanent impairment of the worker as a result of injury, citing *Merchant v Shoalhaven City Council*[16] (*Merchant*).

Reasons

31. This aspect of the case was not the subject of detailed submissions. The attention of the parties was directed to my previous decisions of *Lizdenis* and *Habib* so that they could make submissions on whether the applicant had an entitlement under s 327 to pursue an appeal against the MAC to establish any threshold entitlement. The submissions referred to above are the extent to which the parties submitted on this issue. I have repeated within these reasons, portions of my previous decisions.

32. As the plurality stated in *Military Rehabilitation Commission v May*[17], the "question of construction is determined by reference to the text, context and purpose of the Act"; citing *Project Blue Sky Inc v Australian Broadcasting Authority*[18] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[19].

33. In *Grain Growers Limited v Chief Commissioner of State Revenue (NSW)*[20] Beazley P stated[21] that "the starting point and end point is with the text of the provision". Her Honour cited the comments of the High Court in *Alcan* when the plurality stated[22]:

> "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. (Footnotes omitted)
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> See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]."

Relevant Legislation

34. Section 322 of the 1998 Act provides that the assessment of the degree of permanent impairment of an injured worker is to be made in accordance with Guidelines in force at the relevant time.

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[14] Respondent's submissions, paragraph 1.1
[15] Respondent's submissions, paragraph 1.2
[16] [2015] NSWWCCPD 13 at [127]
[17] [2016] HCA 19 at [10]
[18] [1998] HCA 28 [69]-[71]
[19] [2009] HCA 41 (*Alcan*)
[20] [2016] NSWCA 359
[21] at [108], Bathurst CJ and Leeming JA agreeing
[22] at [47]

35. The assessment of whole person impairment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[23] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[24]

36. Section 322A(2) provides:

> "(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)."

37. Section 322A provides that it is subject to the operation of s 327 of the 1998 Act, that is, an appeal against a medical assessment (s 322A(4)).

38. Section 327 of the 1998 Act provides:

> "(1) A party to a medical dispute may appeal against a medical assessment under this Part, but only in respect of a matter that is appealable under this section and only on the grounds for appeal under this section.
>
> (2) A matter is appealable under this section if it is a matter as to which the assessment of an approved medical specialist certified in a medical assessment certificate under this Part is conclusively presumed to be correct in proceedings before a court or the Commission.
>
> (3) The grounds for appeal under this section are any of the following grounds:
>
> (a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,
> (b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
> (c) the assessment was made on the basis of incorrect criteria,
> (d) the medical assessment certificate contains a demonstrable error.
>
> (4) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and any submissions made to the Registrar, at least one of the grounds for appeal specified in subsection (3) has been made out.
>
> (5) If the appeal is on a ground referred to in subsection (3) (c) or (d), the appeal must be made within 28 days after the medical assessment appealed against, unless the Registrar is satisfied that special circumstances justify an increase in the period for an appeal.

[23] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*
[24] Clause 1.1 of the fourth edition guidelines

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

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

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

39. A medical assessment certificate is conclusively presumed to be correct in respect of the matters provided by s 326.[25] Section 326(1)(a) provides that an assessment as the degree of permanent impairment as a result of an injury is conclusively presumed to be correct.

40. Section 325 of the 1998 Act relevantly provides:

"(1) The approved medical specialist to whom a medical dispute is referred is to give a certificate (a "medical assessment certificate") as to the matters referred for assessment.

(2) A medical assessment certificate is to be in a form approved by the Registrar and is to:

(a) set out details of the matters referred for assessment, and

(b) certify as to the approved medical specialist's assessment with respect to those matters, and

(c) set out the approved medical specialist's reasons for that assessment, and

(d) set out the facts on which that assessment is based."

The distinction between a claim for permanent impairment and for various thresholds

41. The parties appear to accept that a claim for permanent impairment compensation and one for thresholds are separate claims. That acceptance is consistent with the Court of Appeal decision in *JC Equipment Pty Ltd v Registrar of the Workers Compensation Commission of New South Wales*[26] (*J C Equipment*).

42. In *J C Equipment* Tobias JA held:[27]

(a) Section 281 of the 1998 Act contemplates two different claims by the injured work; a claim for compensation pursuant to s 66 of the 1987 Act, and also a claim for work injury damages (at [50]);

(b) Section 281(2B) of the 1998 Act mandates that the employer notify the claimant whether or not it accepts that the degree of permanent impairment of the claimant resulting from injury is "sufficient for an award of damages". This is a reference to the minimum 15 per cent degree of permanent impairment in s 151H(1) of the 1987 Act (at [51]);

[25] *Jaffarie v Quality Castings Pty Ltd (Jaffarie No 2)*
[26] [2008] NSWCA 43
[27] Campbell JA at [81] and Bell JA (as her Honour then was) at [82] agreed

(c) Section 313 of the 1998 Act contemplates a dispute as to whether the degree of permanent impairment of the injured worker is sufficient for an award of damages. Section 314 of the 1998 Act provides a mechanism for determining whether there is any dispute (at [56]);

(d) The statutory regime emphasises the dichotomy between damages and statutory compensation (at [59] – [60]), and

(e) The employer's agreement or acceptance of the degree of permanent impairment, for the purposes of s 66 of the 1987 Act, did not constitute acceptance that the degree of permanent impairment was sufficient to satisfy the s 151H threshold.

43. *J C Equipment* was referred to and applied in *Wilkinson v Perisher Blue Pty Ltd.*[28]

44. In *Wattyl Australia Pty Ltd v McArthur*[29] [2008] NSWCA 326, Beazley JA (as her Honour then was at [59]) questioned the construction of s 326 of the 1998 Act proposed by Tobias JA in *J C Equipment* (at [39]). However, Beazley JA noted that *J C Equipment* was a recent, unanimous decision of the Court of Appeal and should be followed. The portion of the decision questioned by Beazley JA did not impact on the matters set out at paragraph 42 herein.

45. Section 314(3) of the 1998 Act was introduced by the 2012 Amendment Act and is in the following terms:

> "For the purposes of this Part, acceptance by the person on whom a claim for work injury damages is made of the degree of permanent impairment of the injured worker for the purposes of a claim against the person by the injured worker for permanent impairment compensation also constitutes acceptance of the degree of permanent impairment for the purposes of the claim for work injury damages."

46. Section 314(3) expressly accepts the distinction between a claim for work injury damages and a claim for permanent impairment compensation. The sub-section provides that acceptance by a person of the degree of permanent impairment compensation constitutes acceptance of the degree of permanent impairment of the claim for work injury damages. Section 314(3) overcomes the effect of *J C Equipment*. The text of the sub-section reinforces the distinction between the different claims.

47. Other amendments introduced by the *Workers Compensation Legislation Amendment Act 2012* (2012 Amendment Act) support that distinction.

48. Section 39(3) of the 1987 Act requires an assessment pursuant to s 65 of the 1987 Act which itself requires an assessment under Part 7 of the 1998 Act. As the respondent submitted,[30] s 314(2) of the 1998 Act requires an assessment by an Approved Medical Specialist if there is a threshold dispute.[31]

49. Section 322A(1) of the 1998 Act provides that there can be only one assessment "of the degree of permanent impairment of an injured worker". Sub-section (2) provides that the certificate given is used for other purposes.

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[28] [2012] NSWCA 250 at [1], [2] and [107]-[108]
[29] [2008] NSWCA 326
[30] Respondent's submissions, paragraph 5.3
[31] That sub-section is subject to s 314(3) of the 1998 Act

50. In *Merchant v Shoalhaven City Council* [32] Keating P held that the s 322A(2) extended to an assessment for the purposes of whether a worker was "seriously injured" within the meaning of s 32A of the 1987 Act.[33]

51. That decision undoubtedly reads the words in the brackets as examples of how the one certificate is binding for all purposes and not simply for the specific threshold purposes stated in the subsection.

52. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel*[34] as having a "non-beneficial operation" and by the Court of Appeal as disclosing "a cost-savings objective": *Cram Fluid Power Pty Ltd v Green*[35].

53. Accordingly, a claim for permanent impairment compensation is clearly distinct from a threshold claim. Despite the introduction of s 314(3), there remains a distinction between a claim for permanent impairment compensation and a claim for the purposes of establishing the threshold pursuant to s 151H of the 1987 Act. However, the medical assessment certificate can be used for all purposes. In one sense, the distinction articulated in *J C* Equipment has been overridden by legislative amendment.

The Applicant's entitlement to appeal the MAC

54. The applicant did not make a claim in 2016 other than for permanent impairment compensation and now seeks to appeal the original assessment for other purposes, that is, for the purposes of establishing that she has exceeded various thresholds for work injury damages and/or the s 39 threshold.

55. The one assessment is subject to operation of the appeal procedure in s 327 of the 1998 Act 322A(4).

56. Section 325 of the 1998 Act provides that the Approved Medical Specialist is to provide a certificate as to the matters referred for assessment. The respondent submitted that the "new" allegation of injury to the neck could not be included as it was never referred for assessment. Reliance was made to the decision of *O'Callaghan v Energy World Corporation Ltd*[36](*O'Callaghan*).

57. The meaning of "matters referred for assessment" in s 325 was considered in *Aircons Pty Ltd v Registrar of the Workers Compensation Commission (NSW)*[37] (*Aircons*).

58. In *Aircons* the matter was referred to one AMS, Dr Fry who is a plastic surgeon, to assess scarring and skin discolouration and to another AMS, Dr Bodel, to assess restriction of movement. The Court held that the Medical Assessment Certificate issued by Dr Fry contained a demonstrable error because he had not given a certificate as to matters referred to him. During the course of his Reasons, Malpass AJ stated:[38]

> "18 By way of introduction to dealing with the contentions of the parties, it may be helpful to observe that it is a matter of importance that the medical dispute referral, identify with precision the matters that are referred for assessment. A failure to do so may infect the whole assessment process.

[32] [2015] NSWWCCPD 13
[33] at [127]
[34] [2014] HCA 18 (*Goudappel*) at [29]
[35] [2015] NSWCA 250 (*Cram Fluid*) at [122].
[36] [2016] NSWWCCPD 1 at [90]
[37] [2006] NSWSC 322
[38] at [18]-[21]

19 Counsel for the second defendant has contended that the arbitrator was not empowered to make the referrals that were made in this case. This is one of those matters that has not been fully argued. In the light of the minimal argument that has taken place, I am not satisfied that this contention is well founded. In this context, it suffices to observe that the referrals would appear to fall within the compass of, inter alia, (c) of the definition.

20 The prescription contained in subsection (1) of s325 requires the approved medical specialist (AMS) to give a certificate as to the matters referred for assessment. It is significant that the provision appears to distinguish between "a medical dispute" and "the matters referred for assessment". The statutory function of the AMS is to give a certificate as to those matters.

21 I am satisfied that the medical assessment certificate given by Dr Fry contains demonstrable error. He has addressed matters other than those referred to him for assessment. He has not given a certificate as to the matters referred for assessment. This has seen him venture outside that area and one of the consequences is that there is overlapping with the assessment made by Dr Bodel. The supplementary certificate given by Dr Bodel was founded on the correctness of the certificates that both he and Dr Fry had given. Accordingly, the supplementary certificate is infected with the error contained in the earlier certificate of Dr Fry."

59. In *O'Callaghan* the claimant was originally assessed for permanent impairment restricted to the lumbar spine. An application was then made to reconsider the orders of the Commission to enable an appeal to be filed against the medical assessment certificate based on a deterioration in the worker's condition pursuant to s 373(3)(a) of the 1998 Act. This application was dismissed[39] and an appeal against that decision was dismissed, principally on the basis that the threshold requirements under s 352(3) of the 1998 Act had not been made out.

60. Ms O'Callaghan argued that her condition had deteriorated and sought an assessment in respect of the cervical spine. No claim for permanent impairment had previously been made in respect of the cervical spine and the original medical assessment certificate was limited to the assessment of impairment of the lumbar spine.

61. During the course of his Reasons, Roche DP stated:[40]

> "I do not accept that *Aircons* does not relate to the circumstances contemplated by grounds (a) and (b). Once it is accepted, as it must be, that a s 327 appeal is 'against a medical assessment', *Aircons* is directly relevant and binding. As held in that case, an AMS can only give a certificate as to the matters referred for assessment. To say that the Medical Appeal Panel is not restricted to the matters in the original referral to the AMS ignores the fact that a matter does not get to a Medical Appeal Panel unless and until the Registrar is satisfied that, on the face of the application and any submissions made in support of it, at least one of the grounds for appeal specified in subsection (3) has been made out."

62. Roche DP referred to the decision of the Court of Appeal in *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW*[41] as being consistent with this interpretation. The relevant passage in *O'Callaghan* relied upon by the respondent in its submission (set out in full at [**29**] herein) was:[42]

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[39] *O'Callaghan v Energy World Corporation Ltd* [2015] NSWWCC 261
[40] at [84]
[41] [2007] NSWCA 147 per Campbell JA at [94], Hodgson JA agreeing
[42] O'Callaghan at [90]

> "Contrary to Mr McManamey's submissions, s 327(3)(a) does not allow an appeal in respect of all of the consequences of the work injury. It is confined to its terms and has been the subject of binding judicial scrutiny in *Aircons* and *Riverina Wines*."

63. The Deputy President stated that the matters referred for assessment were the body parts, not whether it was it was an assessment based on a claim for permanent impairment or a threshold claim.

64. That conclusion is otherwise consistent with the contextual language. Section 325(2) provides that the medical assessment certificate is to set out the "details of the matters referred for assessment" (s 325(2)(a)) and certify "with respect to those matters (s 325(2)(b)).

65. The appeal under s 327 is an appeal against "a medical assessment" (s 327(1)) limited to "a matter as to which the assessment of an approved medical specialist certified in a medical assessment certificate under this Part is conclusively presumed to be correct."

66. Consistent with the provisions of ss 326 and 327 of the 1998 Act, an Appeal Panel may confirm the original certificate or revoke that certificate and issue a new certificate "as to the matters concerned" (s 328(5)).

67. These provisions, when read to together, show that the appeal under s 327 is with respect to the degree of permanent impairment of the various matters or body parts referred for assessment.

68. Section 322A was introduced as part of the changes introduced by the 2012 Amendment Act. Portions of the 2012 amendments have been described by the High Court in *ADCO Constructions Pty Ltd v Goudappel*[43] (*ADCO Constructions*) as having a "non-beneficial operation" and by the Court of Appeal as disclosing "a cost-savings objective": *Cram Fluid Power Pty Ltd v Green*[44] (*Cram Fluid*). The issues of interpretation in those cases involved the entitlement to only make one claim for permanent impairment compensation under s 66(1A) of the 1987 Act.

69. I accept that the introduction of s 322A(1) had a similar purpose to those discussed in *ADCO* and *Cram Fluid*. Whilst not the subject of submission, I am conscious that of the observations of both the High Court and the Court of Appeal concerning purpose with respect to these amendments. Section 322A was not a beneficial provision.

70. I agree with that part of the respondent's submission, that the neck is a new allegation and was never previously assessed.[45] That body part was not a matter referred for assessment and cannot now be the subject of an appeal.

71. I disagree with the respondent's submission that as the threshold dispute was never claimed in the Original Application then the MAC cannot be appealed to establish that threshold. I accept that the applicant has an entitlement to appeal the MAC for the purposes of establishing a threshold such as that provided by s 39 and/or s 151H of the 1987 Act. Having examined the statute based on text, context, purpose and decided caselaw, the applicant has an entitlement to appeal the MAC for the following reasons:

    (a) The one medical assessment certificate is used for all purposes (s 322A(2));

[43] [2014] HCA 18 (*Goudappel*) at [29]
[44] [2015] NSWCA 250 (*Cram Fluid*) at [122].
[45] Respondent's submissions, paragraph 1,1 (last sentence)

(b) The applicant's statutory right to appeal the medical assessment certificate pursuant to s 327 is protected by s 322A(4) of the 1987 Act;

(c) There is no time limit to appeal a medical assessment certificate if the grounds for appeal are based on s 327(3)(a) and/or (b);

(d) The applicant's entitlement to appeal is restricted to the matters referred for assessment. Those matters were the various body parts assessed by the AMS;

(e) Despite the fact that the applicant had not made a threshold claim when the MAC was issued, the MAC determined that issue. Consistent with the clear statutory language which provides for an appeal against a medical assessment certificate, the MAC can be appealed for the purposes of any threshold issue.

The power under s 350(3)

72. Section 327(7) of the 1998 Act provides that a medical assessment cannot be appealed which has been the subject of determination by a court or the Commission. The applicant has moved to set aside the COD pursuant to s 350(3) of the 1998 Act so that appeal right may be exercised. Section 350(3) confers power on the Commission to reconsider any decision made by the Commission and is in the following terms:

> "**350 Decisions of Commission**
>
> (1) Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is final and binding on the parties and is not subject to appeal or review.
> (2) …
> (3) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission."

73. The reconsideration power exercised by the Compensation Court, expressed in almost identical terms to s 350(3) of the 1998 Act, has been the subject of comment by the Court of Appeal in a number of decisions.

74. In *Hatfield Engineering Pty Ltd v Fitzgerald*[46] Santow JA described the discretion in s 17 of the Compensation Court Act (the predecessor to s 350) as "a discretion virtually without limit."[47]

75. In *Reodica v State Rail Authority*[48], Tobias JA stated:[49]

> "It is well established that s.17(4) of the Court Act confers a discretionary authority upon the Compensation Court itself to review, and correct, errors of both fact and law: *Hardaker v Wright & Bruce Pty Limited* (1960) 62 SR(NSW) 244 at 248, 249; *Schipp v Herfords Pty Limited* (1975) 1 NSWLR 412 at 424. The width of the subsection was described by Owen and Walsh JJ in *Hardaker* (at 249) in the following terms:

[46] [2003] NSWCA 345
[47] at [36], Hodgson JA and Ipp JA agreeing at [1] and [54]
[48] [2003] NSWCA 112
[49] at [30], Mason P and Handley JA agreeing at [1] and [2]

> 'Such reconsideration was not necessarily limited to an examination of changed circumstances or fresh evidence concerning the original circumstances. It may, in a proper case, extend to considering whether an error had been made, whether of fact or of law, and to making such new or altered award as the circumstances, when thus reconsidered, appeared to require.
>
> This passage was cited with approval in *Schipp* by Mahoney JA at 438.'"

76. In *Hardaker v Wright & Bruce Ltd*[50] Owen and Walsh JJ noted[51] the observations of Street CJ in *Hilliger v Hilliger*[52] (*Hilliger*) concerning the wide discretion in s 71 of the *Landlord and Tenant (Amendment) Act 1948* which included the power to vary or rescind as "it may seem proper" and keeping in mind the "distinction between the existence of the power and the occasion of its exercise" and stated "that these observations are applicable" to the exercise of the discretion to vary an award of the Commission.

77. The question of the width and exercise of the power of reconsideration of an award was also discussed in *Schipp v Herfords Pty Limited* (*Schipp*).[53]

78. In *Atomic Steel Constructions Pty Ltd v Tedeschi*[54] (*Tedeschi*) Roche DP echoed similar comments to Street CJ in *Hilliger* when he stated:[55]

> "The discretionary power conferred by the reconsideration power is in 'extremely wide terms' (*Hardaker v Wright & Bruce Pty Ltd* [1962] SR (NSW) 244 at 248). It is important, however, to remember the distinction between the existence of the reconsideration power and the occasion of its exercise, and that courts should not lose sight of the general rule that the public interest requires that litigation should not proceed interminably (Street CJ in *Hilliger v Hilliger* (1952) 52 SR (NSW) 105 at 108). Nevertheless, as Street CJ further observed, it is clear that the legislature intended to leave with certain tribunals the power of reviewing the decision to see "that justice is done between the parties".

Submissions

79. The parties made submissions on the respective merits of the applicant's allegation that there had been a deterioration in her condition. These submissions are considered later in these reasons.

80. The applicant otherwise submitted that she underwent surgery following the issuing of the COD and could not have known of a poor outcome. She submitted that the power under s 350(3) is to do justice between the parties and the failure to set aside the COD would could "irreversible prejudice"[56] of she was prevented from exercising an opportunity to make claim for work injury damages.

81. The applicant otherwise submitted that the respondent is not unfairly prejudiced because it has had the opportunity to have the applicant re-examined and has access to the relevant medical records by virtue of its status as the Insurer which approved the surgery.[57]

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[50] (1960) 62 SR (NSW) 244
[51] at 248
[52] (1952) SR (NSW) 105
[53] (1975) 1 NSWLR 412; Samuels JA (at 424 – 426) and Mahoney JA (at 437 – 440)
[54] [2013] NSWWCCPD 33 (*Tedeschi*)
[55] at [83]
[56] Applicant's submissions, paragraph 26
[57] Applicant's submissions, paragraph 29

82. The respondent submitted that it was "not possible to revoke" the COD without revoking the orders in relation to payment of permanent impairment. It was submitted, relying on my previous decision of *Lizdenis* that this is "a factor against the exercise of power".[58]

83. The respondent submitted that the applicant has delayed in bringing this application. The applicant was aware of the deterioration when she obtained the report from Dr New in May 2018 but did no articulate the present application until the telephone conference on 13 September 2019.[59]

84. It was submitted by the respondent that the applicant was aware of the likelihood of requiring surgery and made a forensic decision to proceed with the assessment before the AMS, "therefore accepting the prospect that the outcome of the procedure would be unknown".[60]

Merits of the argument that there has been a deterioration

85. The issue of "deterioration" in s 327(3)(a) was considered in *Riverina Wines* when Campbell JA stated at [94] (Hodgson JA and Handley AJA agreeing at [1] and [115]):

> "94. Considering that submission involves, first, construing section 327(3)(a). 'Deterioration" of a person's condition is an inherently relational concept. It involves the condition in question having become worse than it previously was, at some particular point in time. In my view, the 'deterioration' that section 327(3)(a) talks of is a deterioration from the degree of impairment that has been certified by the MAC, over the time since the examination or examinations on the basis of which the MAC was issued took place. That conclusion follows from the fact that the appeal in question is, as section 327(2) requires, against a matter as to which the assessment of an AMS certified in a MAC is conclusively presumed to be correct."

86. The AMS assessed the applicant as having a 7% WPI of the left upper extremity and a 5% WPI of the right upper extremity. The scar was assessed at 0% WPI. The AMS made no deduction pursuant to s 323 of the 1998 Act.

87. In mid-2018 Dr New assessed the applicant as having a combined upper extremity impairment of 23% and a further 2% for scarring. He made no deduction pursuant to s 323 of the 1998 Act.

88. Dr Bosanquet assessed the applicant in mid-2019 as having a 10% WPI of the right upper extremity, a 13% WPI of the left upper extremity and 0% in respect of the scar. The doctor made a 50% deduction pursuant to s 323.

89. There is no real difference in the respective assessments between Dr Bosanquet and Dr New save that Dr Bosanquet assessed a 50% deduction pursuant to s 323 of the 1998 Act. These assessments are subsequent to the observations made by Dr Sundaraj in November 2017 that there was some improvement in function following the 2017 surgery.[61] To the extent that the respondent referred to this opinion[62], it must be considered in the context that both Dr Bosanquet and Dr New recorded a significantly greater loss of function.

[58] Respondent's submissions, paragraph 1.3
[59] Respondent's submissions, paragraph 3.1
[60] Respondent's submissions, paragraph 4.1
[61] Miscellaneous Application, p 18
[62] Respondent's written submissions at 2.3.7

90. The applicant submitted that Dr Bosanquet's s 323 deduction is inconsistent with his previous assessment and inconsistent with the assessment made by the AMS.[63] It was also submitted that "the deduction could not have changed"[64] since the original assessment.

91. The respondent's submission that the deterioration of the applicant's condition is "due to natural progression"[65] is made in the absence of any medical evidence to support that submission. Dr Bosanquet did not opine that the deterioration on the entire assessment was due to natural progression. In any event, the subsequent deterioration following injury would not amount to a s 323 deduction: *Johnson v NSW Workers Compensation Commission*[66].

92. There is no estoppel in a changing situation.[67] However I observe that the existence of a s 323 of 50% when the AMS made no such deduction some three years would be unusual. Further the applicant was employed for approximately 10 years[68] and the injury arose from the duration of her employment as it involves a deemed date. Any s 323 deduction would have to arise prior to the period of employment: *Cullen v Woodbrae Holdings Pty Ltd*[69]

93. In these circumstances it is difficult to see how the applicant would be assessed on the basis of any s 323 deduction. Given the similar assessments between Dr Bosanquet and Dr New (save as to the s 323 deduction) it is my clear view that the applicant has a strong case in showing a deterioration in her assessment of permanent impairment and attaining at least the s 151H threshold and real prospects of the s 39 thresholds.

94. Based on the updated medical opinion, I accept that the applicant has real prospects of establishing an impairment of at least 15% for the purposes of bringing a claim for common law damages and an arguable claim of attaining over 20%. I have real doubts that there is any s 323 deduction and certainly not one in the order of 50% as opined by Dr Bosanquet. That opinion has difficulties arising from the nature of the deemed date of injury which occurred over a 10-year period and the fact that the extent of the deduction is otherwise grossly inconsistent with the previous decision of the AMS who made no deduction.

95. My comments on the strength of the applicant's allegation that there has been a deterioration in her condition that results in an increase in the degree of permanent impermanent are not binding on any future Appeal Panel. They are made because the strength of the applicant's claim, as the parties have submitted, must be a relevant factor in determining whether the COD should be set aside.

Other considerations in relation to the exercise of the discretion

96. The respondent noted that the onus was on the applicant to establish a basis for reconsideration. I accept that submission.

97. The respondent referred to the delay in filing the present application. I observe that the present application was raised in a letter dated 8 May 2018. The respondent denied the request in a letter dated 24 August 2018[70]. When the matter was again raised by the applicant in further correspondence in November 2018 the respondent appears to have then organised an updated report with Dr Bosanquet.

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[63] Applicant's submissions, paragraph 36
[64] Applicant's submissions, paragraph 37
[65] Respondent's submissions, paragraph 2.3.10
[66] [2019] NSWSC317 at [66]-[68]
[67] See the authorities collected in *Abou-Haidar v Consolidated Wire Pty Ltd* [2010] NSWWCCPD 128 at [66]
[68] See Miscellaneous Application at p 30 (11 years) or Reply, p 23 (10 years)
[69] [2015] SC 1416 at [56]
[70] Reply, p 8

98. I accept that there has been delay by the applicant's legal representatives in pursuing this application which is a factor weighing against the exercise of the discretion.

99. I do not accept that there is any prejudice to the respondent from this delay. None was identified by the respondent and none is apparent from the face of the material. I note that the respondent paid for the surgery and has continued paying the applicant her weekly compensation entitlements as the s 38 has not expired. The end of the s 38 period and the bar to further weekly entitlements, subject to satisfying the threshold in s 39, is 8 June 2020.[71]

100. The respondent has not identified or submitted that it has suffered any relevant prejudice from any delay. During the delay it has otherwise obtained a medical opinion to contest the applicant's allegations of deterioration.

101. The respondent submitted that at the time the COD was issued the applicant was aware of the likelihood of further surgery and "nonetheless made a forensic decision to allow the matter to proceed to the Medical Assessment Certificate dated 16 November 2016, therefore accepting the prospect that the outcome of that procedure would be unknown".[72]

102. I agree that there were indications in the evidence identified by the Respondent that future shoulder surgery was contemplated.

103. I observe that the Respondent does not suggest that the condition was likely to deteriorate, merely that it was "unknown". Assessments of impairment from shoulder injury are generally done on the basis of loss of range of movement. That is what AMA 5 and the fourth edition guidelines provide and how the applicant was assessed by the various experts.

104. It is not to be assumed that the applicant's condition would deteriorate following surgery. The likely inference from undergoing surgery is that there would be an improvement of the condition as that is the normal intention of any medical treatment. Whilst I agree that it was unusual for surgery to be undertaken so soon after the issuing of the MAC, I do not believe that this factor is particularly adverse to the applicant's request to set aside the COD.

105. I accept that finality of litigation is a relevant consideration. This argument must be weighed against the interests of justice and the wide discretionary power in s 350 of the 1998 Act.

106. The finality of litigation should be considered in the context that s 327(3)(a) does not specify a time limit in which to file an appeal based on deterioration. This is contrasted with an appeal pursuant to either s 327(3)(c) and/or (d) where any application must be filed within 28 days of the MAC (see s 327(5) of the 1998 Act). An appeal based on deterioration will usually arise after a Certificate of Determination has been issued and is unlikely to arise in the short time between the assessment and the issuing of the Certificate by the Commission.

107. The respondent submitted that it was not possible to revoke the COD without also revoking orders in relation to the payment of permanent impairment compensation "which is a factor against the exercise of power"[73]. My decision of *Lizdenis* is cited as authority for this submission although no specific paragraph is mentioned in the submission and I could not find where I reached that conclusion.

[71] See letter from Respondent dated 6 June 2019, Miscellaneous Application, p 3
[72] Respondent's submissions, paragraph 4.1
[73] Respondent's submissions, paragraph 1.3

108. I previously held that it was unnecessary to revoke a certificate of determination to pursue an appeal based on the threshold. That is a different matter and something I return to later in these reasons.

109. The applicant has clearly stated in her written submissions that she is not asserting a further entitlement to s 66. That claim has been made and resolved. That approach, that she does not have a further entitlement to permanent impairment compensation by reason of s 66(1A) of the 1987 Act, is consistent with my earlier decisions.

110. I accept that submission from the applicant's legal advisors as binding on her in the exercise of my discretion to set aside the COD. Any higher assessment from an Appeal Panel does not amount to an entitlement by the applicant to additional s 66 compensation. I make this clear in the event that the applicant subsequently suggests to the contrary. I consider the applicant's submission that she has no additional entitlement to s 66 claim as binding on her in relation to any future conduct.

111. I have concluded that the applicant has a proper legal basis for filing an application to appeal the MAC based on s 327(a) and (b) of the 1998 Act. Had the applicant not identified a legal basis to appeal the MAC then I would have dismissed the application on the basis of lack of utility.

112. I have considered the applicant's delay and the principles concerning finality of litigation. However, given the applicant has real and strong prospects of establishing a deterioration in the assessment of her permanent impairment, I accept, in the interest of justice, that there should be reconsideration of the COD so that she have the right to prosecute an appeal against the MAC.

113. In my previous decisions of *Lizdenis* I concluded that it was unnecessary to set aside the certificate of determination as that is "not issued with respect to the threshold claim"[74] and the threshold claim was not determined by the issuing of a certificate of determination.

114. That view may have been an unnecessary restrictive of the interpretation of s 327(7) which, on its face, prevents an application to appeal against a medical assessment certificate from proceeding. The COD entered by the Commission records that the assessment of the permanent impairment is in accordance with the findings by the AMS of 11%. If the COD stands in the way of an appeal being lodged, which it may, then the prudent course is to set it aside.

115. My orders setting aside the COD are made on the applicant's acceptance of the condition that the s 66 claim has been resolved and that claim cannot be relitigated.

Can the assessment be determined by an Arbitrator?

Submissions

116. The applicant submitted that the repeal of s 65(3) "now permits the Commission to determine an injured worker's whole person impairment without requiring the degree of permanent impairment to be assessed by an AMS."[75]

117. The respondent submitted that the applicant was only entitled to one assessment pursuant to s 322A(1) of the 1998 Act. Further, ss 313 and 314 required a determination by an Approved Medical Specialist if there was a threshold dispute.

[74] Lizdenis at [150]
[75] Applicant's submissions, paragraph 33

Reasons

118. The applicant's submission[76] that the Commission can assess the applicant's entitlements under the appeal provisions are misconceived.

119. The one assessment has been made by an Approved Medical Specialist pursuant to s 322A. The applicant's submissions indicate that she wishes to appeal the MAC pursuant to s 327(3)(a).

120. There is no statutory basis to appeal a MAC to a Commission Arbitrator.

121. The applicant has stated that she intends to file an appeal pursuant to s 327 of the 1998 Act which applies to an appeal against an assessment by an Approved Medical Specialist. Section 352 provides for an appeal to to a Presidential member from a decision by an Arbitrator.

122. Pursuant to the *Workers Compensation Legislation Amendment Act 2018* (2018 Amendment Act) the Commission now has power to make an assessment of permanent impairment. However, the Commission's power to make an assessment is not in addition to the assessment process undertaken by an AMS. Section 322A(3), enacted as part of the 2018 Amendment Act, provides that a medical dispute cannot be separately assessed by an Approved Medical Specialist and the Commission.

123. Consistent with these provisions, the assessment of the degree of permanent impairment has been referred to an AMS and cannot now be referred to the Commission.

124. I otherwise do not accept the applicant's bare reference to the repeal of s 65(3) of the 1987 Act as providing the power that the applicant otherwise contends.

125. Whilst it is unnecessary to decided, I otherwise tend to agree with the respondent's submission that the establishment of a threshold for s 39 and/or s 151H of the 1987 Act requires a medical assessment certificate. That would be an independent reason why it would be inappropriate to adopt the course suggested by the applicant.

126. I otherwise observe that the applicant was not assessed for permanent impairment of the cervical spine. That body part was previously not a matter for assessment and cannot be the subject of an appeal against the MAC. I have not considered the cervical spine as a relevant factor in my determination that the COD should be set aside.

127. For these reasons I will not be assessing the matter.

CONCLUSIONS

128. The findings and orders are set out in the Certificate of Determination. The applicant now has the entitlement to file an application to appeal the MAC pursuant to s 327(3)(a) and (b) of the 1987 Act. Those rights are determined in accordance with s 327(4) of the 1998 Act, that is by the Registrar being satisfied that a ground of appeal has been made out.

129. I cannot order the applicant to file an appeal within any period. However, if the applicant does not exercise this entitlement with proper expedition then I will hear any further application by the respondent to reconsider these orders.

[76] Applicant's submissions, paragraph