

President's Welcome

Welcome to e-Bulletin No. 61 of the Workers Compensation Commission.

This bulletin outlines the Court of Appeal decision in *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250

On 27 August 2015, the Court of Appeal (Beazley ACJ, Emmett and Gleeson JJA) handed down judgment in *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250. The decision has legal and procedural implications for further permanent impairment compensation disputes currently before the Commission. A summary of the decision appears below. Practitioners are advised to consider the full text of the decision, available on [NSW Caselaw](#).

Facts

Mr Green suffered a back injury on 24 May 2005. A claim under s 66 of the 1987 Act was made on 14 December 2010 and resolved by way of a complying agreement under s 66A of the 1987 Act (the 2010 claim).

Mr Green's back condition deteriorated and he had surgery in September 2012. On 29 October 2013, Mr Green made a claim for further compensation under s 66 (the 2013 Claim), which the insurer denied. An Arbitrator determined that Mr Green was not precluded from bringing his further claim for permanent impairment compensation. This decision was upheld in a Presidential appeal, which was appealed (by leave) to the Court of Appeal.

Relevant provisions

The Court of Appeal's determination considered the following provisions:

Section 66(1A) of the 1987 Act

“Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury.”

Section 66A(3)(c) of the 1987 Act

“The Commission may award compensation for additional compensation payable...by virtue of a complying agreement if it is established that:

(c) since the agreement was entered into, there has been an increase in the degree of permanent impairment beyond that so agreed.”

Clause 15 of Pt 19H of Sch 6 to the 1987 Act

“15 Lump sum compensation

An amendment made by Schedule 2 to the 2012 amending Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date.”

Clause 11 of Sch 8 of the 2010 Regulation

“11 Lump Sum Compensation

(1) The amendments made by Schedule 2 to the 2012 amending Act extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act.

(2) Clause 15 of Part 19H of Schedule 6 to the 1987 Act is to be read subject to subclause (1).”

Issues

1. Whether s 66(1A) precluded Mr Green from bringing the 2013 Claim?
2. Whether s 66(1A) should be construed to mean that one further claim for permanent impairment compensation can be made after 19 June 2012?

The Court of Appeal also considered the conflict between s 66(1A) and s 66A(3).

Decision

Issue 1

The Court of Appeal (Gleeson JA with whom Beazley ACJ and Emmett JA agreed) held that s 66(1A) disentitled Mr Green from making the 2013 claim. Gleeson JA held that the clear object of cl 11 of Sch 8 to the 2010 Regulation was to extend the 2012 amendments to claims made before 19 June 2012, except where the “claim” specifically sought lump sum compensation. His Honour noted the regulation went no further and said nothing about claims for compensation made on or after 19 June 2012.

The Court held that the 2013 Claim was a different claim to the 2010 Claim, although arising out of the same injury. The references to “claim” in cl 15 of Pt 19H and cl 11 of Sch 8 were held to be clearly directed to the claim under consideration (*Sukkar v Adonis Electronics Pty Ltd* [2014] NSWCA 459 cited with approval). There was no contention before the Court that the 2013 Claim was subsumed by the 2010 Claim.

Once it is accepted that the 2013 Claim is a different claim, the effect of cl 15 of Pt 19H is that the 2013 Claim is subject to the operation of the amending provisions, including the one claim limitation of s 66(1A).

Accordingly, Mr Green had already made one claim for permanent impairment compensation (the 2010 Claim), which had resolved before 19 June 2012, and the further claim for permanent impairment compensation (the 2013 Claim) was not a claim made before 19 June 2012 that specifically sought compensation under s 66 or s 67.

Issue 2

The construction of s 66(1A) to mean that only one “further” claim after 19 June 2012 can be made was ultimately rejected by the Court. It held that such a construction provides words not contained in the provision. The Court held that the reading of an additional word such as “further” into s 66(1A) was not warranted, in view of the plain language used and the evident purpose of the 2012 amendments.

As Mr Green had already made his one claim for permanent impairment compensation (the 2010 Claim), s 66(1A) disentitled him from making the 2013 Claim for further compensation.

Further issue

The conflict between s 66(1A) and s 66A(3) of the 1987 Act was considered. The Court determined that the Commission’s power to award additional compensation under s 66A(3)(c) was not independent of a worker’s entitlement to receive compensation under s 66.

After considering the purpose and language of the 2012 amendments, Gleeson JA held that s 66(1A) was the leading provision, to which the Commission’s power under s 66A(3), being the subordinate provision, must give way. His Honour was of the view that s 66A(3)(c) had limited operation, where the further claim was made before 19 June 2012.

In Mr Green’s case, the 2010 Claim was resolved by a complying agreement. The 2013 Claim was not made before 19 June 2012 as required by cl 11 of Sch 8. Therefore, s 66A(3)(c) did not assist Mr Green.

Implications for Proceedings before the Commission

Practitioners are requested to review dispute applications proposed to be lodged with the Commission, to ensure that an entitlement to permanent impairment compensation exists. The dispute application should clearly identify that any claim for further permanent impairment compensation was specifically sought before 19 June 2012 or that the worker is exempt from the 2012 amendments.

In relation to proceedings currently before the Commission that are for further permanent impairment compensation only, the following procedures will be implemented:

1. In matters not currently listed before Arbitrators, notices will be sent to the parties inviting submissions as to why the matter should proceed.
2. All matters listed before Arbitrators will be dealt with at the respective listing.

Practitioners should also review all current dispute applications before the Commission to ensure that the proceedings are not affected by the 2012 amendments. In cases where there is no entitlement to further permanent impairment compensation, practitioners should discontinue the proceedings at the earliest opportunity.



Judge Greg Keating

President