

WORKERS COMPENSATION COMMISSION



CERTIFICATE OF DETERMINATION

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

MATTER NO: WCC 9489-2007
APPLICANT: STEPHEN DENIS PENO
RESPONDENT: CYMETAR NO 3 PTY LIMITED

DATE OF DETERMINATION: 18 June 2008

The Commission determines:

1. That the respondent pay to the applicant, as lump sum compensation under section 66 of the *Workers Compensation Act 1987*, \$77,500.00 in respect of 40% permanent impairment assessed as a percentage of whole person impairment, attributable to the injury of 31 August 2005.
2. That the respondent pay the applicant, as lump sum compensation under section 67 of the *Workers Compensation Act 1987*, \$21,250.00 in respect of pain and suffering, such sum to be apportioned as to \$8,750.00 in respect of past pain and suffering and as to \$12,500.00 in respect of future pain and suffering.
3. That the respondent pay the applicant's costs as agreed or assessed.

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

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 PHILIP THEOBALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

For REGISTRAR

Suzanne Wilks
Dispute Assessment Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 31 August 2005 Stephen Denis Peno suffered an injury in the course of his employment with Cymetar No 3 Pty Limited ('the employer').
2. There is no dispute as to the liability of the employer in respect of the injury.
3. Mr Peno suffered whole person impairment as a result of the injury and submitted a claim for lump sum compensation pursuant to ss 66 and 67 of the *Workers Compensation Act 1987*.
4. Mr Peno and the employer were unable to reach agreement as to the amount of lump sum compensation payable to Mr Peno and Mr Peno caused an Application to Resolve a Dispute in the Commission on 12 December 2007.
5. On 23 January 2008, the Registrar referred the dispute to Dr Mark Burns, an Approved Medical Specialist whose speciality is Occupational Medicine to determine the degree of whole person impairment.
6. Dr Burns issued a Medical Assessment Certificate on 2 April 2008 after examining Mr Peno. Dr Burns assessed the degree of whole person impairment as 40%.
7. It was agreed that I should make an award for compensation in respect of 40% whole person impairment as part of my determination of this application.
8. The whole person impairment is sufficient for Mr Peno to pursue his claim under s67 for compensation for pain and suffering.
9. The application was referred to me as Arbitrator to determine the claim for compensation for pain and suffering.
10. As a result of that referral a teleconference was held on 8 May 2008. Mr Peno attended with his solicitor, Mr Grady and the employer was represented by its insurer's solicitor, Mr Alder.
11. The parties did not agree as to the extent of Mr Peno's entitlement to compensation for pain and suffering at the teleconference and agreed that I should determine the matter without the need for a formal hearing.
12. There is no issue as to the Commission's jurisdiction to determine the application.

ISSUES FOR DETERMINATION

13. The parties agree that the only matter in dispute is the amount of compensation payable to Mr Peno for pain and suffering as a result of his injury.

PROCEDURE BEFORE THE COMMISSION

14. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute. The parties were advised of the intention to determine the dispute without holding a conciliation conference or arbitration hearing.
15. The parties have agreed to the determination of the matter without a conference or formal hearing.

EVIDENCE

Documentary Evidence

16. The following documents were in evidence before the Commission and taken into account in making this determination:
- (i) Application to Resolve a Dispute and documents listed at Part 6.1 of the application;
 - (ii) The Reply and documents listed at Part 6.1 of the reply; and
 - (iii) The Medical Assessment Certificate dated 2 April 2008.

Oral Evidence

17. There was no oral evidence.

SUBMISSIONS

18. I invited legal representatives to make written submissions if they wished. They both did so and I have found them of considerable assistance. It is of considerable benefit, not only to the parties but also to me in reaching my determination to have the benefit of carefully drawn submissions from lawyers who clearly have considerable personal experience in representing their clients in these proceedings.

FINDINGS AND REASONS

19. Pursuant to s67 (3) I am required to assess the claim for pain and suffering against a most extreme case. The amount awarded must be reasonably proportionate to the maximum amount payable having regard to the degree and duration of pain and suffering and the severity of the permanent impairment. Quadriplegia is accepted as a most extreme case (*Government Supply Depot v Abbott* (1993) 9 NSWCCR 276).
20. Pain and suffering is defined in s 67(7) as meaning actual pain and distress or anxiety, suffered or likely to be suffered by the injured worker, whether resulting from the permanent impairment concerned or from any necessary treatment.
21. The decision in *Department of Education v Boyd* (1996) 13 NSWCCR 289 is authority for my taking into account any stress experienced by Mr Peno caused by interference with social and other activities resulting from a compensable loss.
22. In *Cooper v Gollel Holdings Pty Ltd* [1990] NSWCC 8 the question of how pain and suffering is assessed was described in the following terms:
- The relevant constituents to be considered in evaluating a sum under the section are the subjective actual past, present and prospective pain per se and the subjective distress and anxiety resulting from the loss. The latter would include such matters as embarrassment, affliction, trouble, sorrow, disappointment, agitation, anguish, depression, concern or upset. Such may emanate from the experience of pain or from any interference with the enjoyment of life, loss of expectation of life or disfigurement. All such is conditional upon it relevantly resulting from the loss. No allowance would be made for the actual loss of the relevant thing nor any actual disfigurement, loss of amenities or loss of expectation. Those elements are compensated in the sum awarded under section 66.*
23. Mr Peno suffers from a post infection fatigue syndrome. This is following an acute infection of leptospirosis. (MAC p4).
24. Dr Burns recounts Mr Peno's description of his symptoms as follows:

I questioned Mr Peno about a typical day and his activities. He stated he would get up between 9 and 9.30am and have breakfast. Following breakfast he would walk every second day for about ten minutes. Following his walk he would return and have a rest for several hours. He stated, though, that he was not actually napping, as he had difficulty going to sleep. He would then have lunch.

In the afternoon he would go into town and look around the shops several times a week. Additionally, over the last eight months he had been learning to play the guitar. He is teaching himself with the aid of a book and a DVD. He stated he would also watch television or watch television.

Prior to developing his illness he was playing golf at least three to four times a week. He stated that since the illness he had played the occasional hole but had difficulty in completing a round. He initially stated that he had not played golf at all for the last 12 months. I pointed out to him that within the documentation supplied was a local paper report from April 2007, which listed at winning a Nearest the Pin competition during 18 holes of golf. I also pointed out that in his statement dated December 2007 he had reported not being able to play golf at all since the illness developed. Mr Peno then conceded that perhaps he had played the occasional round of golf but reported he had used a golf cart and had not been able to walk the course.

He reported that he had a boat and used to enjoy fishing regularly before he developed the illness. He stated that he is not able to take the boat out himself at the current time. Three to four weeks ago a friend came down and helped him to launch the boat. They fished on the lake and both of them took turns driving the boat. (MAC pp3 and 4)

25. Under the heading **Consistency of presentation** on page 4 of the MAC Dr Burns reports:

Mr Peno's presentation was not totally consistent. The history of his activities since developing the infection was not totally consistent with some of the documentation sighted. His memory throughout the history taking was quite vague. This may have been due to his depression at the present time.

26. It is notable that notwithstanding Dr Burns's comments about Mr Peno's presentation he accepts Mr Peno's account of his symptoms in reaching his assessment of whole person impairment after considering his current level of activity.

27. Dr Gliksman, Occupational Physician examined Mr Peno for the purpose of preparing a report on 20 September 2007. He assessed 75% whole person impairment but relevantly he says at page 5 of his report dated 20 September 2007:

The prognosis is guarded. Post leptospirosis chronic fatigue syndrome can have a very prolonged course (stretching out over a decade or more).

Given the period of time which has elapsed since infection was diagnosed and symptoms developed, it is more probable than not that the current condition remain as current for the foreseeable future.

28. In Mr Peno's statement of 4 December 2007 (para 3) he says:

I continually suffer from severe pain in my joints, muscles, extreme headaches, fevers and night sweats . . . (para 3)

29. Mr Peno takes medication for pain (Panadol Extend) (para 4 of statement) but I gather from the medical reports prefers not to. In paragraph 2 of the statement he says:

In August 2005 I started to feel unwell which consisted of becoming fatigued, lethargic and I had a rash on my back. The illness came on abruptly and I was bedridden for weeks. I would describe the level of pain experience as 9 out of 10.

30. Mr Alder in his submissions referred me to the Medical Assessment Certificate and in particular to section 5 where Dr Burns, after detailing his findings on physical examination of Mr Peno says:

Throughout the examination there was no complaint of pain or tenderness in any particular joint or any particular muscle group.

31. Mr Ardle submits that on the basis of Dr Burns observations *there is significant no entitlement to compensation for 'actual pain' as there is no evidence that the applicant continues to suffer from actual pain as required by Section 67(7) of the Act.*
32. With respect to Mr Ardle I reject that submission. There is nothing in Dr Burns's report to indicate that Dr Burns had questioned Mr Peno about pain as recorded in Mr Peno's statement. In my opinion I can only conclude from Dr Burns 's report that Mr Peno did not complain of pain during the examination. Mr Peno's pain. I find from the evidence is episodic. It is at times severe and at times he does not require medication. When present it is severe. None of the medical evidence calls into question the complaint of pain from time to time by Mr Peno.
33. I find therefore that Mr Peno does suffer actual pain from time to time and that it can be severe but I also consider that there is a difference between episodic pain and continual pain as may be experienced in, for instance orthopaedic injuries.
34. I have carefully read all the medical reports and Mr Peno's statement and I have considered the submissions made by both legal representatives. I am left with a picture of Mr Peno suffering from fatigue. He is not in physical pain and the medical evidence does not indicate severe depression. I interpret Dr Gliksman as being of the view that the fatigue, although long term will pass.
35. Mr Peno was, in the past an active man who enjoyed both his work and his sport. He enjoyed playing with his daughter, he is now restricted in his parental activities. I accept that the inability to enjoy the parental, social and employment activities of the past cause him distress and will continue to do so.
36. Objectively, he can hope to enjoy them again but in his situation, he has to live in the present and hope that Dr Gliksman is correct. In view of the history to date he could be excused for being pessimistic.
37. His situation is different from that of an applicant who has suffered a severe physical injury (for instance a lumbar spine injury) with no hope of eventual recovery and pain on movement every day of his or her life.
38. Nevertheless he has suffered from pain, anxiety, anguish and depression (as he sees it) since August 2005. He has had to move from Scone, where he lived alone to Tamworth to be near his parents for assistance as a result of his injury. Dependence on parents or relatives for assistance is, I accept, demeaning, embarrassing and worrying as parents are a finite resource and Mr Peno must be conscious of the difficulty he will face in the inevitable event that they are not available and he is forced to rely on the less sympathetic disability services of the state for assistance.
39. He has been assessed by an Approved Medical Specialist as being quite severely permanently impaired. He is partially dependent on his parents and friends who assist him with his household activities and driving. He must as a result suffer anxiety about his future and he is a relatively young man of 35 years of age.
40. There is no evidence that his condition will deteriorate.
41. In *Tyler v Marsden Industries* [2001] NSWCCR 194 the principles for determining an application under s67 were outlined:

(1) The test is subjective, unlike the test under s 66 of the Act, which is primarily objective. The relevant consideration is the individual claimant's actual past and present experience of pain and suffering, having regard to his or her capacity to express such experience, and the claimant's likely future experience of it.

(2) The assessment of the quantum is based on a comparison of the degree and duration of the individual's pain and suffering together with the severity of his or her loss with a, not the, most extreme case.

(3) The pain and suffering must result from the loss or impairment and not merely from the injury: see s 67(1A) of the Act.

(4) Pain and suffering is compensable from the date of the relevant injury and not from the date on which the loss or impairment is crystallised or becomes assessable.

(5) The age of the claimant is relevant to the expected duration of any pain and suffering but each case must be determined on its own merits due to the potential for the same injury to affect different workers differently.

42. I have taken into account the submissions made on behalf of both parties by their representatives. Mr Grady said everything he could possibly say to convince me that I should make an award in the range of 80 - 90% of a most extreme case. After reviewing all the evidence I reject that submission as in my opinion, an award in that range would not recognise the episodic nature of Mr Peno's pain on an everyday basis and the possibility that Mr Peno's chronic fatigue may improve, even disappear over time as suggested by Dr Gliksman. Mr Peno's success at golf and his recent fishing trip give cause for optimism for the future.
43. Mr Ardle submitted that an award based on a range of one quarter to one third of a most extreme case would be appropriate. I reject that submission also. In my opinion an award equating to one third of a most extreme case would not recognise the pain that Mr Peno has suffered in the past and is likely to suffer, as I have found, in the future and also does not recognise the degree of suffering that Mr Peno will endure as a result of the debilitating nature of his injury.
44. I appreciate that the whole person impairment assessment was 40% but there is no relationship between the objective determination under s66 and the subjective test under s67.
45. I accept that the applicant's past pain and suffering and his probable future pain, distress and suffering, particularly after taking into account that the injuries leave him partially dependent on others for day to day activities, are significant though, in my opinion after carefully considering all the evidence considerably less than a most extreme case.
46. This injury has clearly affected Mr Peno severely and it will continue to do so but not necessarily for the rest of his life.
47. I also take into account Dr Burns's remarks as to inconsistency in presentation.
48. I accept that the indeterminate length of time during which Mr Peno will suffer chronic fatigue syndrome with its accompanying episodic pain, inconveniences, humiliations and restrictions on his ability to enjoy life and care for himself is in itself a further cause of suffering and anxiety for him.
49. I find that the applicant, who is now 35 years of age, has on one view at least ten years of suffering and anxiety ahead of him and possibly more although I only have Dr Gliksman's evidence to guide me.
50. I find, after considering Mr Peno's situation both in the past and as it is likely to be in the future, that it would not be unreasonable to assess his pain and suffering in this case as

42,5% of a most extreme case being 17.5% in respect of the past and 25% in respect of the future. I shall issue a certificate of determination to that effect.

51. No application or submissions were made in respect of costs but in the circumstances I propose to make the usual order.