

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: 4326/19
APPLICANT: Kevin Geoffrey Eather
FIRST RESPONDENT: Skillset Limited
SECOND RESPONDENT: Kathleen Anne Eather
THIRD RESPONDENT: Andrew Eather
FOURTH RESPONDENT: Lauren Eather
DATE OF DETERMINATION: 19 May 2020
CITATION: [2020] NSWCC 161

The Commission determines:

1. The applicant's application pursuant to section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* for reconsideration of the orders made in the Certificate of Determination dated 7 January 2020 and the Amended Certificate of Determination dated 9 March 2020 is declined.
2. The orders in the Certificate of Determination dated 7 January 2020 and the Amended Certificate of Determination dated 9 March 2020 are confirmed.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The deceased worker, Bradley Thomas Eather (the deceased), died on 10 November 2015 as a result of injuries sustained in a motor vehicle accident when he was driving home from Bathurst to Clifton Grove after completing his usual duties for Skillset Ltd (the first respondent).
2. Kevin Geoffrey Eather (the applicant) filed an Application to Resolve a Dispute (the Application) that was registered in the Workers Compensation Commission (the Commission) on 23 August 2019, seeking the lump sum death benefit of \$750,000 in accordance with s 25(1)(a) of *Workers Compensation Act 1987* (the 1987 Act).
3. The Application was amended to seek apportionment of the lump sum benefit pursuant to s 29 of the 1987 Act, orders authorising payment of the compensation pursuant to s 85A of the 1987 Act and interest pursuant to s 109 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
4. The deceased's mother, Kathleen Anne Eather, is the second respondent, his brother, Andrew Eather, is the third respondent and his sister, Lauren Eather, is the fourth respondent.
5. A conciliation conference and arbitration hearing were held before me in Orange on 18 December 2019. Submissions were made by the legal representatives regarding the liability dispute and I reserved my decision.
6. On 7 January 2020, I determined that there was a real and substantial connection between the deceased's employment and the fatal accident in accordance with s 10(3A) of the 1987 Act. A Certificate of Determination (COD No 1) was issued on 7 January 2020 in the following terms:

"The Commission determines:

1. The deceased worker, Bradley Thomas Eather, died on 10 November 2015 as a result of injuries sustained in a motor vehicle accident on the way home from work.
2. There was a real and substantial connection between the deceased's employment and the motor vehicle accident.

The Commission orders:

3. The applicant is to file and serve a statement regarding his dependency on the deceased by 21 January 2020.
4. The parties are to file written submissions in respect of dependency, apportionment, payment of the death benefit and interest by 31 January 2020.
5. Any submissions in reply are to be filed and served by 7 February 2020.
6. At the conclusion of the time allowed for submissions, the dispute will be determined 'on the papers'.

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

7. Written submissions in respect of dependency, apportionment, payment of the death benefit and interest were filed by the parties on or before 7 February 2020.
8. On 2 March 2020, I issued a further Certificate of Determination (COD No 2). Upon receipt of submissions from the first respondent's solicitor regarding interest, I reconsidered COD No 2 and issued an Amended Certificate of Determination (COD No 3) on 9 March 2020 in the following terms:

"The Commission determines:

1. The deceased worker, Bradley Thomas Eather, died on 10 November 2015 as a result of injuries sustained in a motor vehicle accident on the way home from work.
2. There was a real and substantial connection between the deceased's employment and the motor vehicle accident.
3. The deceased had no other persons dependent on him.
4. The first respondent is liable for the payment of lump sum compensation and interest.

The Commission orders:

5. The lump sum compensation of \$750,000 payable pursuant to section 25(1)(a) of the *Workers Compensation Act 1987* is to be apportioned in accordance with section 29 of the *Workers Compensation Act 1987* as follows:
 - (a) \$75,000 to Kevin Geoffrey Eather;
 - (b) \$525,000 to Kathleen Anne Eather;
 - (c) \$75,000 to Andrew Eather, and
 - (d) \$75,000 to Lauren Eather.
6. The first respondent to pay interest on the lump sum of \$750,000 at the rate of 5.00% per annum from 23 August 2019 to 3 March 2020 pursuant to section 109 of the *Workplace Injury Management and Workers Compensation Act 1998*.
7. The first respondent to pay lump sum compensation pursuant to section 85A(1)(a) of the *Workers Compensation Act 1987* to the dependants as follows:
 - (a) \$75,000 plus interest to Kevin Geoffrey Eather;
 - (b) \$525,000 plus interest to Kathleen Anne Eather;
 - (c) \$75,000 plus interest to Andrew Eather, and
 - (d) \$75,000 plus interest to Lauren Eather.

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

9. On review, I note that I omitted to make a finding regarding the issue of dependency on pages 1 and 12 of COD No 3, as is my usual practice. However, I dealt with the dependency of the applicant and the respondents as follows:

“I am of the view that none of the family members were wholly dependent on the deceased as at the date of his death. The applicant has been employed as a design engineer and he has not suggested in his statement that he relied on financial assistance from his son.

The second respondent worked in two jobs and charged her two sons board when they were in employment, but not when they were unemployed. The third respondent was working at the time of his brother’s death and he was not financially dependent on the deceased. The fourth respondent relied on the deceased for non-monetary assistance.

In the circumstances, I am satisfied that the applicant, the deceased’s mother and his siblings were partly dependent on the deceased at the date of his death.

Further, I am satisfied there were no other persons wholly or partly dependent on the deceased at the date of death.”¹

10. On 7 April 2020, the applicant’s solicitor sent an email to the legal representatives of the respondents and advised that the applicant would be filing an Application for Reconsideration of COD No 1 and COD No 3 pursuant to s 350(3) of the 1998 Act on the grounds that I conducted an apportionment of the lump sum benefit between the dependants when I was not asked to do so.
11. The Application for Reconsideration was registered in the Commission on 28 April 2020. Attached to the Application was a letter from the second respondent’s solicitor dated 22 April 2020, the second respondent’s written submissions dated 22 April 2020 and the applicant’s submissions in reply dated 28 April 2020.

PROCEDURE BEFORE THE COMMISSION

12. Written submissions were filed in the Commission by the applicant on 28 April 2020, the second respondent on 6 May 2020 (similar, but not identical, to those dated 22 April 2020 referred to above), by the first respondent on 11 May 2020 and by the third and fourth respondents on 12 May 2020.

ISSUES FOR DETERMINATION

13. The following issue remains in dispute:
- (a) Whether COD No 1 dated 7 January 2020 and COD No 3 dated 9 March 2020 should be reconsidered - s 350(3) of the 1998 Act.

EVIDENCE

Documentary evidence

14. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application and attached documents;
 - (b) First Respondent’s Reply and attached documents;
 - (c) Second Respondent’s Reply and attached documents;

¹ COD No 3, [45] – [48].

- (d) Third Respondent's Reply and attached documents;
- (e) Fourth Respondent's Reply and attached documents;
- (f) Application to Admit Late Documents received on 5 December 2019;
- (g) Application to Admit Late Documents received on 10 December 2019;
- (h) Statement of the applicant received on 16 January 2020;
- (i) COD No 1 dated 7 January 2020;
- (j) COD No 2 dated 2 March 2020;
- (k) COD No 3 dated 9 March 2020, and
- (l) Transcript of Evidence of received on 1 May 2020.

REVIEW OF EVIDENCE

15. I provided a detailed summary of the evidence that was attached to the Application, Replies and late documents in my decisions. I have reviewed the evidence for the purpose of this determination, and I do not propose to repeat the summary.

APPLICANT'S SUBMISSIONS

16. The applicant's solicitor, Mr Tancred, has provided two sets of submissions, dated 7 April 2020 and 28 April 2020. He identified the grounds for the reconsideration application, but some of the orders sought are interspersed within the submissions. I will attempt to deal with these separately.
17. Mr Tancred submits that the applicant seeks a reconsideration of COD 1 and COD 3 on the grounds that I conducted an apportionment of the death benefit when I was not asked to do so. He submits that the dependants had agreed on equal apportionment, so there was no application for apportionment before me.
18. Mr Tancred submits that I was in error:
- (a) in paragraph 14(c) of COD No 1 and paragraph 10(b) of COD No 3, when I identified that apportionment of the lump sum was in dispute, and
 - (b) in paragraph 51 of COD No 3 where I referred to the parties having reached a "preliminary agreement" as to apportionment.
19. Mr Tancred submits that a reconsideration of COD No 1 and COD No 3 is appropriate in order to deliver a just, quick and cheap outcome in circumstances where I simply misunderstood what I was being asked to consider and I inadvertently determined the question of apportionment when I was not required to do so.
20. In reply, Mr Tancred submits that s 29 of the 1987 Act permits but does not require or mandate a determination of apportionment, given the inclusion of the word "may". He submits that the second respondent does not dispute nor cavil with the proposition that the parties had agreed on apportionment.
21. Mr Tancred submits that *Wratten v Kirkpatrick*² is authority for the proposition that the Commission may not of its own volition conduct an apportionment. He submits that the applicant's application for reconsideration should not be taken as a criticism of the exercise of apportionment undertaken by me, but it is an acknowledgement that I misdirected myself as to what issues were in dispute and what issues the applicant sought to be determined. He submits that it would be a remarkable outcome if the parties were not permitted to have an agreement to a dispute being given full effect.

² (1996) 15 NSW CCCR 32 (*Wratten*), [34].

22. Mr Tancred submits that the following orders should be made:
- (a) The word “apportionment” in paragraph 172 of COD No 1 should be revoked.
 - (b) The words “The Application was amended to seek apportionment of the lump sum benefit pursuant to section 29 of the 1987 Act” in paragraph 3 of COD No 3 should be revoked.
 - (c) The word “preliminary” in paragraph 51 of COD No 3 and the balance of the paragraph should be revoked.
 - (d) Paragraphs 52 to 61 should be revoked.
 - (e) The order in paragraph 84 of COD No 3 should be revoked.
 - (f) There should be an order that the lump sum compensation be apportioned equally between Kevin Geoffrey Eather, Kathleen Anne Eather, Lauren Eather and Andrew Eather.
 - (g) The order in paragraph 86 of COD No 3 should be revoked.
 - (h) There should be an order that the lump sum compensation be paid equally to Kevin Geoffrey Eather, Kathleen Anne Eather, Lauren Eather and Andrew Eather in the amount of \$187,500 plus interest.

SUBMISSIONS OF FIRST, THIRD AND FOURTH RESPONDENTS

23. The first respondent’s solicitor, Ms Bond, submits that any reconsideration of the apportionment of the lump sum benefit is a matter for the Commission.
24. The third and fourth respondents’ solicitor, Mr Messenger, makes no submissions in respect of the applicant’s application, but intends to do so in reply should I decide to vary orders 7 and 9 in the COD No 3. This submission is somewhat unusual, and this will not be possible in the present application. If the third and fourth respondents are aggrieved by my decision, he will need to lodge an appeal or alternatively seek a reconsideration.

SECOND RESPONDENT’S SUBMISSIONS

25. The second respondent’s counsel, Mr Latham, submits that the applicant did not raise the issue of apportionment in the Application, because he requested an order that the benefit be held in trust by the first respondent pending an application by him for an order for Letters of Administration which would permit the payment to be made to him as the deceased’s legal personal representative in accordance with s 32 of the 1987 Act. Such a payment was not possible because the second, third and fourth respondents alleged that they were dependants of the deceased. In those circumstances, an order for apportionment of the death benefit was always required.
26. Mr Latham submits that s 29 of the 1987 Act gives the Commission power to apportion payments between dependants, but it does not make this a requirement. The section confirms that there is no apportionment if there is only one dependant, but s 29(1B) of the 1987 Act makes it clear that apportionment must occur if there are two or more dependents. The power to apportion is brought into play by the application of a party to either the Court or the WorkCover Authority for an apportionment to be made, consistent with the principles discussed in *Wratten*.
27. Mr Latham submits that it is difficult to reconcile the suggestion that the question of apportionment was not before me, given that the Application was amended by the applicant at the arbitration hearing on 18 December 2019 to claim part of the lump sum benefit as a dependant. This was confirmed in the transcript. The written submissions filed on behalf of the applicant were in respect of dependency, apportionment, payment of the death benefit and interest.

28. Mr Latham submits that the principles of a reconsideration are settled in the authorities. The applicant has failed to confront any of the relevant principles. In particular, the applicant does not address the question of finality and does not make any suggestion that there is new evidence that should be considered. Further, the applicant does not provide any reasons as to why an appeal under s 352 of the 1998 Act has not been sought.
29. Mr Latham submits that the applicant's complaint appears to be that I determined the issue on the basis of the submissions and evidence before me, but that is not a sufficient basis to reconsider my decision.
30. Mr Latham submits that at its highest, the applicant can only submit that I did not adopt an agreement between the parties, and I was unconvinced by the evidence of the applicant. He submits that I did not fall into error. At best, the complaint is that the legal representatives for the applicant made a mistake by not providing sufficient evidence as to dependency. This is not a sufficient ground for reconsideration.
31. Mr Latham submits that the applicant has failed to identify any provision within the 1987 Act and/or the 1988 Act that states that an agreement reached between dependants in relation to apportionment is to take priority over the requirement of the Commission to apportion the lump sum.
32. Mr Latham submits that the effect of s 29 of the 1987 Act is that apportionment is an exercise that can only be conducted by the Commission. Whilst the Commission may take into consideration an agreement reached by the dependants in relation to apportionment, it is not bound to apportion the death benefit in accordance with any such agreement and any such action would be contrary to the statutory test.
33. Mr Latham submits that in determining the question of apportionment, I was exercising a discretion, which would not normally lead to a reconsideration in accordance with the authorities. To the extent that the applicant alleges error; such error should be remedied by way of appeal, but there is no such error. The application for reconsideration should be dismissed.

Legislation

Workplace Injury Management and Workers Compensation Act 1998

34. Section 350 of the 1998 Act deals with the Commission's power to reconsider a decision. It provides:

"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) A decision of or proceeding before the Commission is not:
 - (a) to be vitiated because of any informality or want of form, or
 - (b) liable to be challenged, appealed against, reviewed, quashed or called into question by any court.
- (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."

Workers Compensation Act 1987

35. Sections 29 and 30 of the 1987 Act deal with apportionment of the death benefit between dependants and the review of apportionments. They provide:

“29 Apportionment of payments between dependants (cf former s 59)

- (1) The compensation payable under this Division to each dependant of a deceased worker may be apportioned by the Commission or by the NSW Trustee.
- (1A) The lump sum death benefit payable under this Division is not to be apportioned if a deceased worker leaves only one dependant (whether wholly or partly dependent on the worker for support) and the whole of the lump sum death benefit is to be paid to that one dependant.
- (1B) In apportioning the lump sum death benefit payable under this Division between 2 or more dependants, the whole lump sum death benefit is to be apportioned among those dependants (so that the sum of the apportioned amounts equals the full lump sum death benefit).
- (2) Application for apportionment may be made by or on behalf of a person entitled to the compensation—
 - (a) to the NSW Trustee, or
 - (b) to the Commission (whether or not an application has been made to the NSW Trustee or the NSW Trustee has made a decision).
- (3) The NSW Trustee may decline to deal with an application for apportionment and advise the parties to apply to the Commission.
- (4) The NSW Trustee is not to deal with an application for apportionment of compensation if an application for apportionment of the same compensation is before the Commission.
- (5) A decision by the NSW Trustee to apportion compensation under this Division is subject to any decision made by the Commission with respect to the matter.
- (6) If there are both total and partial dependants of a deceased worker, the compensation may be apportioned partly to the total and partly to the partial dependants.
- (7) If a dependant dies—
 - (a) before a claim under this Division is made, or
 - (b) if a claim has been made, before an agreement or award has been arrived at or made the legal personal representative of the dependant has no right to payment of compensation, and the amount of compensation shall be calculated and apportioned as if that dependant had died before the worker.
- (8) The regulations may make provision for or with respect to the publication of applications for apportionment and any other matter connected with apportionment.

30 Review of apportionment among dependants

- (1) The Commission or the NSW Trustee may, on account of the variation of the circumstances of the various dependants or for any other sufficient cause, vary any previous apportionment among the dependants of a deceased worker of compensation under this Division.
- (2) Application for a variation may be made by or on behalf of the person entitled to compensation to the Commission or the NSW Trustee.
- (3) The NSW Trustee may apply to the Commission for any such variation of a previous apportionment made by the NSW Trustee or by the Commission.
- (4) The NSW Trustee is not to deal with an application for variation of any previous apportionment if an application for variation of the same previous apportionment is before the Commission.
- (5) The NSW Trustee is not to vary an apportionment made by the Commission.”

REASONS

Reconsideration

36. In *Howell v Stringvale Pty Ltd*³, Arbitrator Johnstone, as he then was, provided a useful summary of the principles regarding reconsideration of determinations pursuant to s 350(3) of the 1998 Act. He stated:

“The subsection and its predecessors have been considered in a number of cases. Having reviewed those cases the following summary of principles may be made as to its application:

1. The power to reconsider is unlimited: *Hilliger v Hilliger* (1952) 52 SR (NSW) 105, but discretionary: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192. However, it is important to keep in mind the distinction between the existence of the power and the occasion of its exercise: *Hilliger* at 108.
2. The general rule is that public interest requires that litigation should not proceed interminably, and courts must be on their guard to refuse to allow the same matter to be litigated again and again. Nevertheless, it is appropriate to exercise the power to remedy some manifest injustice: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26].
3. The power applies to both questions of fact and law, and is not limited to changed circumstances or fresh evidence: *Hardaker v Wright & Bruce Pty Ltd* (1960) 62 SR (NSW) 244 at 248 and 249.
4. The section overrides the common law doctrine of estoppel: *Lambidis v Commissioner of Police* (1995) 12 NSWCCR 225, but the discretion should not be exercised where the party has unreasonably refrained from raising the issue in the earlier proceedings: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26]. See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

³ [2005] NSWCC 64, (*Howell*).

5. New evidence must be distinguished from additional evidence as opposed to fresh evidence: *Maksoudian v J Robins & Sons Pty Ltd* (1993) 9 NSWCCR 642. If the evidence was readily available at the time of the first hearing, this is a factor to be weighed in considering whether or not to exercise the discretion: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [58]. However, any new evidence must be such that it would have been a determining factor in the decision: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.
6. Other grounds for the exercise of discretion include where the original decision maker did not consider an available and possibly determinative argument: *Lasaitis v Email Ltd* (1990) 6 NSWCCR 154 at 171A. But where the Commission does not have jurisdiction to determine the particular matter asserted, the discretion should not be exercised: *Galea v Ralph Symonds Pty Ltd* (1989) 5 NSWCCR 192.
7. Mistake or inadvertence on the part of legal advisers is an insufficient ground: *Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] 27 WCR (NSW) 29 at 30. But disposal of litigation by legal advisers on a basis contrary to their instructions has been held to be sufficient: *Sorcevski v Steggles Pty Ltd* (1991) NSWCCR 315.
8. An application must be brought without delay and the matter raised must be of such a nature that it would have affected the outcome of the original decision: *Southern Tableland Health Service v Solomon* (1999) 19 NSWCCR 235 at [26].⁴

37. In *Samuel v Sebel Furniture Limited*⁵, Acting Deputy President Roche, as he then was, cited with approval the Court of Appeal decision in *Schipp v Herfords Pty Ltd*⁶, where the court considered the equivalent reconsideration provisions in the *Workers Compensation Act 1926*. He stated:

“The factors relevant to the exercise of the discretion in section 36 of the 1926 Act were considered by the Court of Appeal in *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413 (*‘Schipp’*). The court noted the following factors were relevant in deciding whether the discretion should be exercised in favour of the moving party:

1. delay;
2. whether the worker had a right of appeal from the first decision but failed to exercise that right;
3. waiver or estoppel issues, and
4. rescinding an earlier award will allow a worker to bring fresh proceedings.”⁷

38. The Acting Deputy President continued:

“Having regard to the above authorities and the provisions and objectives of the 1998 Act I believe that the following principles are applicable to reconsideration applications under section 350(3) of the 1998 Act:

1. the section gives the Commission a wide discretion to reconsider its previous decisions (*‘Hardaker’*);

⁴ *Howell*, [27].

⁵ [2006] NSWCCPD 141 (*Samuel*).

⁶ [1975] 1 NSWLR 413 (*Schipp*).

⁷ *Samuel*, [45].

2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');
4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');
5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*');
6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;
7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun*');
8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and
9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of the 1998 Act)."⁸

39. Further in *New South Wales Police Force v Winter*⁹, Deputy President O'Grady confirmed that following the amendment to s 352 of the 1998 Act, the principles discussed in *Samuel* still applied. He stated:

"...The principles enunciated in *Samuel*, properly considered, demonstrate that the exercise of the wide discretion is tempered by the need to take into account those matters noted at sub paragraphs (3), (4), (7), (8) and (9) [SIC] of [58]. Those matters, in my view, represent the substance of any constraint that must be exercised when the provision is invoked."

⁸ *Samuel*, [58].

⁹ [2014] NSWCCPD 70 (*Winter*).

40. I have a wide discretion to reconsider COD No 1 and COD No 3 in accordance with s 350(3) of the 1998 Act, but the discretion must be exercised fairly. When one considers the matters raised in *Samuel* and *Howell*, the only relevant matters in the present case seem to relate to indefinite litigation, but more importantly, the interests of justice between the parties. There is no fresh evidence to justify a review in general terms or in accordance with s 30 of the 1987 Act, and there was no major delay in bringing the present application. There are no issues of estoppel and no apparent mistake by a legal advisor.

Indefinite litigation

41. The finality of litigation must be weighed against the interests of justice and the wide discretionary power of the Commission.
42. A claim for the death benefit was served by the applicant's solicitor on Allianz Australia Workers Compensation (NSW) Ltd (the insurer) on behalf of the deceased's estate on 14 March 2017. The insurer disputed the claim in the notice issued pursuant to s 74 of the 1998 Act on 24 May 2017. Proceedings were not filed by the applicant as the legal personal representative of the deceased until early 2018 (matter no 6667/18), but they were discontinued at the arbitration hearing before me in Orange on 1 May 2019.
43. The present Application was registered in the Commission on 23 August 2019 by the applicant as the legal personal representative of the deceased. At the arbitration hearing on 18 December 2019, the Application was amended because the applicant wished to make a claim as a dependant in respect of the death benefit. As there was no evidence as to the applicant's dependency, the only issue that could be addressed related the liability dispute as to whether there was a real and substantial connection between the deceased's employment and the motor vehicle accident. This meant that the claim could not be finalised at the arbitration hearing on 18 December 2019. COD No 1 was not issued until 7 January 2020 due to the closure of the Commission over Christmas.
44. The respondents have been put to the expense and inconvenience of dealing with two sets of proceedings, multiple telephone conferences, two hearing dates, delays occasioned by the need to file and serve written submissions and now the present Reconsideration Application. It is unclear whether the dependants have received their entitlements. This application has prolonged the finalisation of the claim and it may have deprived the second, third and fourth respondents of their entitlements in accordance with my determination in COD No 3.
45. The respondents had no issue with COD No 1 and COD No 3. The third and fourth respondents have made no submissions in support of the applicant's reconsideration application. The second respondent opposes the application.
46. If COD No 1 and COD No 3 are reconsidered, the orders rescinded, and fresh orders made in accordance with the applicant's submissions, there is the potential that the second respondent might lodge an appeal, which would result in further litigation.
47. In the circumstances, it would not be in the public interest to reconsider COD No 1 and COD No 3 on the basis of principles associated with indefinite litigation.

Fairness and justice

48. I now need to consider whether it is in the interests of justice that the COD No 1 and COD No 3 should be rescinded because there is some "practical unfairness or injustice" in allowing them to stand.

49. The basis of the applicant's application is that I apportioned the death benefit when I was not requested to do so. He submits that the dependants had agreed on equal apportionment, so apportionment of the lump sum payment was not in dispute, and presumably, this was not my concern.
50. The present Application, which was registered in the Commission on 23 August 2019, was filed by the applicant as the legal personal representative of the deceased. It identified the deceased's mother and two siblings as respondents and potential dependants. The applicant claimed the lump sum benefit and did not seek apportionment or any orders for payment out.
51. In Part 5.1 of the Application, the applicant indicated that he was not aware of any other person who may have been dependent for support upon the deceased worker at the time of death or who may be claiming to be dependent.
52. In Part 5.2 of the Application, the applicant sought an order that, should liability for the payment be established, the benefit be held in trust by the first respondent pending an application by him for an order for Letters of Administration to then permit the payment to be made to him as legal personal representative of the estate. In other words, he was seeking a payment of the lump sum in accordance with s 32 of the 1987 Act.
53. Even though the deceased's mother and siblings were identified as respondents in the Application, one could infer from the pleadings that there was a dispute between the parties regarding dependency and apportionment of the death benefit. The Replies filed on behalf of the respondents do not give any guidance.
54. A review of the transcript of the recording of the arbitration hearing on 18 December 2019 provides further information regarding the nature of the dispute as follows:

“ARBITRATOR... So, the first aspect that we will be dealing with in the current matter is the liability issue as to whether there was a real and substantial connection between the deceased and employment and the accident. There are further issues that will require clarification. Firstly, I've been informed by Mr Morgan that Kevin Eather wishes to make a claim on the lump sum benefit on the basis that he was partially dependent on the deceased at the date of the death. At this stage we don't have a statement from Mr Eather, so I propose to today deal with the liability issue and then depending on the outcome, set up a timetable for submissions regarding, firstly, the filing of the statement by the applicant solicitor regarding the dependency. Also, the parties can then make some submissions regarding the dependency of each of the parties and apportionment [SIC] of the lump sum. And I have amended the Application to include paragraphs 5 - part 1, paragraph 1.5 and 1.6 regarding payment out and that may have, 1.5 may have relevance if I determine that Mr Kevin Eather was partially dependent. Then [SIC] it may well be the estate might have the entitlement. I don't know that at the moment. That's something I'll hear submissions about ultimately, but not at the present time. That's the full extent of matters. Everyone in agreement with that?”¹⁰

55. Counsel retained by the parties did not take any issue with my summary of the matters in dispute.
56. In COD No 1, I noted that the applicant intended to make a claim on the death benefit as a dependant¹¹, and I identified the matters in dispute, consistent with discussions referred to in the transcript above, as follows:

¹⁰ Transcript of Proceedings, *Eather v Skillset & Ors* [2020] NSWCC 11, Senior Arbitrator Capel, 7 January 2020, T 4.33 – 5.22

¹¹ COD No 1, [9].

“The parties agree that the following issues remain in dispute:

- (a) was there a real and substantial connection between the deceased’s employment and the accident? – s 10(3A) of the 1987 Act;
- (b) whether there were any persons wholly or partially dependent on the deceased – s 25 of the 1987 Act;
- (c) apportionment of the lump sum of \$750,000 payable – s 29 of the 1987 Act;
- (d) orders in relation to payment of the compensation – ss 85 and 85A(1)(a) of the 1987 Act, and
- (e) whether the first respondent is liable for the payment of interest – s 109 of the 1998 Act.”¹²

- 57. The legal representatives filed written submissions. Each of them acknowledged that the submissions were in relation to dependency, apportionment, the payment of the death benefit and interest, consistent with orders 4 and 5 in COD No 1.
- 58. Mr Tancred submits that I was in error when I suggested that apportionment of the lump sum was in dispute. No party questioned the accuracy of these matters identified by me as being in dispute at the arbitration hearing or at the time that the COD was issued on 7 January 2020. Mr Tancred also submits that I misdirected myself as to what issues were in dispute and what issues the applicant sought to be determined.
- 59. If there was an error in my decision, then the appropriate procedure to challenge my determination was for the applicant to lodge an appeal to be determined by a Presidential member in accordance with s 352 of the 1998 Act. He failed to do this.
- 60. The parties first became aware of my views as to apportionment in COD No 2 that was issued on 2 March 2020. COD No 3 was only issued to address an error in my calculation of interest. In other respects, the findings and orders were identical. Therefore, there was ample time for the applicant to lodge an appeal within 28 days of 9 March 2020.
- 61. Counsel for the second, third and fourth respondents submitted that agreement had been reached between the parties that the lump sum payment be apportioned equally amongst them. They did not suggest that I was obliged to accept their agreement, which was described by me as “preliminary” in COD No 3. Perhaps, I should have used the term “proposed” or “acceptable” agreement between the parties.
- 62. Mr Tancred made the following submission regarding apportionment:

“3. The Applicant’s position has at all times been that it was appropriate for the surviving family members to agree on distribution, inter parties, of any death benefit payable. Counsel for the Applicant Mr Morgan informed the Senior Arbitrator at the Hearing of the proceedings in Orange on 18 December 2019 that the parties had reached agreement that the death benefit should be payable equally between the surviving family members. This agreement is recorded in the submissions filed on behalf of the Third Respondent Andrew Eather at paragraph 10. The Applicant’s position is that the Senior Arbitrator would be satisfied that each surviving family member is dependent, and that payment of the death benefit should be made in accordance with the inter parties’ agreement.”

¹² COD No1, [14].

63. Section 29 (1A) of the 1987 Act provides that there is to be no apportionment of the lump sum benefit if there is only one person wholly or partly dependant on a deceased worker at the time of his or her death.
64. Section 29(2) of the 1987 Act provides that the application for apportionment may be made by or on behalf of a person entitled to the compensation to the Commission, meaning that the Commission has an important role to play regarding the apportionment and distribution of the death benefit.
65. Section 29 (1) of the 1987 Act provides that the compensation payable to each dependant of a deceased worker may be apportioned by the Commission, so the Commission has a discretion. Therefore, I agree with Mr Tancred that the section allows the Commission to apportion the lump sum benefit, but it does not require or mandate it. I am also mindful of the fact that the section gives no guidance as to how one should apportion the death benefit.
66. It is true that Mr Tancred has not identified any provision in the legislation that provides that an agreement between dependants is to take priority over the requirement of the Commission to apportion the lump sum as required under s 29 of the 1987 Act. He has cited no authority in support of his submissions, nor has he addressed the relevant matters regarding reconsideration applications identified in *Howell* and *Samuel*.
67. I agree with Mr Latham that apportionment can only be conducted by the Commission, or the NSW Trustee, and it is not bound by any agreement between the parties as to apportionment. If Mr Tancred was correct, then s 29(1) of the 1987 Act would have no work to do, and I consider that this would not have been the intention of the legislators.
68. Mr Latham is also correct when he submits that I apportioned the lump sum benefit in the exercise of my discretion. Discretion is not a relevant matter identified in *Howell* and *Samuel*.
69. Mr Tancred submits that *Wratten* is authority for the proposition that the Commission may not of its own volition conduct an apportionment, however, such a submission seems misguided.
70. In *Wratten*, CCJ Egan was required to apportion the lump sum benefit after the WorkCover Authority had apportioned the benefit “in a manner which clearly demonstrated that it did not properly deal with the matter in procedure or substance”. His Honour noted that “A ‘standard’ simple mathematical formula was relied upon, a course for which I can find no justification and in respect of which no supportive submissions were made”.¹³
71. His Honour discussed s 29 of the 1987 Act, and stated:

“It appears to me that the intention of legislature was that the power to apportion is brought into play by the application of a party to either the Court or WorkCover Authority for an apportionment to be made. This was not the case here. The WorkCover Authority apparently of its own volition proceeded to apportion.

The apportionment of the benefits involves the exercise of applying the law to the facts in each case. The exercise of power to determine the correct amount to be apportioned to each dependant requires an examination of all relevant facts including the extent of past dependence, the anticipated future dependence, the ages of the dependants, their health, special needs, lifestyle etc.

But there is more. The fact finding exercise must be carried out with due notice to those who may be entitled to share, and they must each be afforded an opportunity to present submissions in relation to the apportionment.”¹⁴

¹³ *Wratten*, [33].

¹⁴ *Wratten*, [33] – [34].

72. The filing of the Application in the present matter brought into play the power of the Commission to apportion the lump sum benefit. According to *Wratten*, apportionment requires an examination of all relevant facts, and the dependants must each be afforded the opportunity to make submissions regarding apportionment.
73. There is nothing in the decision to suggest that the Compensation Court, or in this case, the Commission, was bound by those submissions. In this matter, the parties made submissions, namely that they had reached an agreement that the death benefit be apportioned equally, without explaining why that apportionment was appropriate in the circumstances.
74. In COD No 3, I expressed my concerns about the “preliminary agreement” as to apportionment, particularly when one had regard to the evidence in respect of the alleged dependency of the applicant¹⁵. I summarised the applicant’s evidence as follows:

“The applicant issued proceedings in 2018 and 2019 as the legal personal representative of the deceased, not as a dependant. His ex-wife and children were not identified as respondents until I raised this at the first telephone conference. He only made the claim as a dependent at the conciliation conference and arbitration hearing on 18 December 2019. His initial statement did not address any level of dependency.

In his supplementary statement, the applicant indicated that the deceased helped him move to a new house when he left the marital home in about June 2014. He did not say that the deceased helped him at any other time prior to his death in 2015, only that he had an expectation that he would have assisted in the future as he aged.

The applicant claimed that he had regular dinners with his children on Sunday nights, but this is not corroborated by any of the other dependants. Curiously, his partner, Jayne Dell, indicated that she had met the deceased on only about three occasions. Of course, the evidence is silent as to the duration of the applicant’s current relationship. Nevertheless, I have some concerns about the applicant’s evidence of dependency.

It seems that the applicant and his two younger children depended on the deceased for emotional support prior to his death. The deceased also assisted his siblings in several other ways, such as helping around the house, ferrying them places and helping as one would expect of an elder brother in a single parent home.”¹⁶

75. I was also concerned about the agreed apportionment and stated:

“Whilst the parties have obviously put some thought into reaching a preliminary agreement, I am not satisfied that this represents a fair and appropriate apportionment of the death benefit in respect of the deceased’s mother, when one considers the facts and weighs this up with the dependency of each of the other dependants.”¹⁷

76. Mr Tancred submits that it would be a remarkable outcome if the parties to a dispute, having agreed on an issue, were not permitted to have that agreement given full effect. With all due respect to Mr Tancred, the agreement was not a proper reflection of the evidence and clearly advantaged the applicant and the third and fourth respondents to the detriment of the second respondent.

¹⁵ COD No 3, [51].

¹⁶ COD No 3, [53] – [56].

¹⁷ COD No 3 [58].

77. Prior to the enactment of the 1987 Act, a judge of the Compensation Court had to approve any settlement that redeemed a worker's rights to compensation. Proposals were placed before the judges, medical evidence was tendered, and workers gave oral evidence. Counsel would often be called upon to justify the amount of the settlement, and if the judge was not satisfied with the agreement between the parties, the redemption application would be rejected. It was not a situation where the agreement between the parties was merely rubber stamped. The judge had to be satisfied that the settlement was appropriate and that the settlement was in the worker's interests.
78. Even now under the 1987 Act, a commutation application has to meet with the approval of SIRA, who must be satisfied that certain preconditions have been met. If approved, the commutation agreement must be registered by the Commission.
79. The power to apportion liability is discretionary and I am not bound by the agreement, particularly when it is at odds with the relevant facts regarding past and anticipated future dependence, the ages of the dependants, their special need and other factors. The legal representatives provided no compelling reasons why the death benefit should be apportioned equally, and such a proposal does not reflect the evidence. Indeed, on one view of the evidence, one might consider that the applicant was fortunate to have received 10% of the lump sum benefit.
80. I am obliged to do justice between the parties according to the substantial merits of the case. One must have regard to s 354(3) of the 1998 Act, which provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case". I have a wide discretion, but I must be fair, and justice must be done between the parties.
81. Any reconsideration of my decision as to apportionment will be prejudicial to the second respondent and, in my view, this outweighs the prejudice to the applicant and his children.
82. On the basis of the evidence currently before me, in the interests of justice and having regard to the greater prejudice that the second respondent will suffer, I am not satisfied that the applicant's application for reconsideration of COD No 1 and COD No 3 should be granted.
83. Accordingly, the applicant's application for reconsideration of COD No 1 and COD No 3 is declined.

ORDERS

84. The applicant's application pursuant to s 350(3) of the 1987 Act for reconsideration of the orders made in COD No 1 dated 7 January 2020 and COD No 3 dated 9 March 2020 is declined.
85. The orders in COD No 1 dated 7 January 2020 and COD No 3 dated 9 March 2020 are confirmed.