WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**4954/14**
APPLICANT:	**LUIGI CICUTO**
RESPONDENT:	**TERRAFIRMA TERRAZZO PTY LTD**
DATE OF DETERMINATION:	**29 October 2015**
CITATION:	**[2015] NSWWCC 296**

The Commission determines:

1. Award for the respondent with respect to the claim pursuant to s67 of the *Workers Compensation Act* 1987

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 ELIZABETH BEILBY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

REGISTRAR

Trish Dotti
By delegation of the Registrar

STATEMENT OF REASONS

1. The parties attended a conciliation and then arbitration on 26 June 2015. 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.

ISSUES FOR DETERMINATION

2. The parties agree that the following issues remain in dispute:

    (a) Is the Applicant entitled to compensation pursuant to section 67 of the *Workers Compensation Act* 1987?

    (b) If so, what is the quantum of the compensation pursuant to section 67?

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute and attached documents;

    (b) Reply to Application to Resolve a Dispute and attached documents;

    (c) Medical Assessment Certificate of Dr Peter Holman dated 19 November 2014.

BACKGROUND

4.
5. The parties agree that the relevant facts are as follows:

    (a) The applicant suffered from a 32 per cent permanent impairment of the back, 35 per cent loss of use of the right leg at or above the knee and a 5 per cent loss of use of the left leg at or above the knee as a result of injuries sustained on 6 November 1997.

    (b) The applicant achieves the threshold for section 67 compensation, if such a section has not been repealed in relation to these injuries.

    (c) Liability was accepted for the injuries by the insurer, Allianz Workers Compensation, and claims for compensation, being medical expenses and time off work, were made and paid prior to 19 June 2012.

    (d) The applicant lodged his first claim for lump sum compensation on 21 November 2013.

6. The essential issue is whether the applicant is entitled to section 67 compensation for a lump sum claim made on or after 19 June 2012.

7. There are two relevant transition provisions in relation this claim. They are as follows:

    (a) Clause 15 of Part 19H of Schedule S provides:

    > "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."

    (b) Clause 11 of Schedule 8 of the Workers Compensation Regulation 2010 which provides:

    > "(1) The amendments made by Schedule 2 to the 2012 Amending Act extended 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."

8. The applicant in these proceedings was represented by Mr McManamey of Counsel. He presented written submissions at the hearing of this arbitration and then further filed submissions following delivery of the decision in *BHP Billiton Ltd v Bailey* [2015] NSWCCPD 48 (*Bailey)* and *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250 (27 August 2015) (*Cram Fluid)* .

9. It was submitted that clause 15 allows for each of the amendments to be considered individually whereas clause 11 of the Regulations does not by use of the singular word "*the*".

10. It was therefore argued that it had been established in *BP Australia Ltd v Greene* [2013] NSWWCCPD 60 that the amendments to section 66 did not apply to injuries occurring before 1 January 2002 and it therefore followed that none of the amendments apply.

11. Mr McManamey carefully submitted in relation to the other amendments in Schedule 2 and submitted that many of the other amendments cannot be applied to the Act as it appeared prior to 1 January 2002. For instance, of the seventeen amendments to the 1987 Act, only three can be imposed on the Act as it was prior to 1 January 2002. It was submitted that this is a strong indication that the amendments were not intended to apply to those injuries.

12. It was further submitted that when the amendments are applied there still remains, in the form of the sections for injuries prior to 1 January 2002 (as notionally amended by the 2012 amendments) three separate references to an entitlement pursuant to section 67 which appear in sections 65 sub-section (3), 66B (1) and 67A (4). It was submitted that those references only have work to do if section 67 has been preserved. It was argued that if it was intended that section s67 was not preserved then the original transitional provisions or the regulations would have operated to delete those references.

13. Mr McManamey in his second set of submissions referred to the decisions of *Cram Fluid* and *Bailey* and submitted that those decisions do not assist the respondent in its claim. In relation to *Cram Fluid* Mr McManamey referred to paragraph 102 of the decision where the Court confirmed that was held that an extant general claim for compensation subsumed a later specific claim for compensation. Paragraph 102;

> "102. In this Court, Basten JA held that the 2012 amendments did not apply to Mr Goudappel's claim under s 66. His Honour reasoned that a worker was not required under the 1987 Act to make a "separate claim" for lump sum compensation payments: see at [11]-[17]. Accordingly, his Honour concluded that an extant general claim for compensation made before 19 June 2012, subsumes a later specific claim under s 66. That however is not the present case. His Honour was not called on to consider the relationship between two specific claims (one resolved) each for permanent impairment compensation."

14. The Court in *Cram Fluid*, it was submitted, did not consider any challenge to the reasoning of Basten JA in *Goudappel v ADCO Constructions Pty Ltd* [2013] NSW CA 94 (*Goudappel)* and therefore it followed that the interpretation of clause 15 explained in *Goudappel* remained good law. That is effectively that as the applicant made a general claim for compensation prior to 19 June 2012, the current claim for permanent impairment is not subsumed in the earlier claim and the applicant's right to section 67 is not affected unless there is another provision that has that effect.

15. In relation to the decision in *Bailey*, it was submitted by the applicant that Mr Cicuto's case could be differentiated on the basis that no claim had been made in respect of the injury prior to 19 June 2012. That is, in the decision of *Bailey* the date of injury was deemed by section 17 to be 24 June 1998, and there had been no claim made in respect of the injury prior to 19 June 2012. Accordingly, it was submitted that clause 15 operated to make the claim subject to the amendments unless it was concluded that the repeal of section 67 did not apply. That is, because there had been no prior claim, the Deputy President only considered the operation of clause 15 and he found that where the clause applies that there had been a repeal of section 67. Effectively, it was submitted that the decision does not determine cases where clause 15 does not apply, which is what Mr Cicuto's case involves. Further, in the *Bailey* decision there was no consideration of clause 8 of Schedule 8 of the Regulations other than reference to the comments by the High Court in *Goudappel* that the purpose of clause 11 was to apply if the amendments to permanent impairment compensation had not been the subject of a claim that specifically sought compensation under the old section 66 prior to 19 June 2012. In addition, it was submitted that the Deputy President did not have the opportunity to examine the entirety of the amendments made by Schedule 2 and failed to consider the result of applying those amendments to the former section 66 preserved by Part 18C. It was submitted that if the Deputy President had been afforded that opportunity he would have found strong indications that section 67 had not been repealed because of the continuing reference to the section elsewhere in the division as set out in Mr McManamey's earlier submissions.

16. The respondent's submissions have been confined to oral submissions that were made at the arbitration in this matter and to short submission by email dated 26 October 2015. Mr Baker of Counsel appeared for the respondent in this matter at the Arbitration.

17. Mr Baker submitted that it was clear that the amendments made by Schedule 2 of the Amending Act extended to a claim for compensation made before 19 June 2012 but not to a claim that specifically sought compensation under section 66 and section 67 of the 1987 Act. The respondent then pointed to the second part of clause 11 which read that clause 15 of 19H of Schedule 6 of the 1987 Act needs to be read subject to clause 1. The effect of that is that it is clear that clause 15 of 19H is circumscribed to an effect where the applicant who had not made a claim for sections 66 and 67 before is caught by the amending provisions.

18. It was submitted that where the singular is used and that is the word *"the"* it matters little in respect of these circumstances. The effect of clause 11 of Schedule 8 is that it is all circumscribed and that is made clear by the second paragraph of the clause. It was further submitted that Schedule 2 was directed at the Act as it existed around June 2012 and when read that way all the amendments of course make adequate sense of the amendment. That is, really, that everything must be read subject to when the claim was made. Ultimately, it was submitted, that there was a very clear intention made by Parliament to omit s67 and that I should be persuaded by the intention of Parliament.

19. Mr Baker of Counsel referred me to the comments of Gallagher J in *Goudappel* which were as follows:

> "A contrary intention sufficient to displace section 30 of the interpretation Act (which would normally preserve those rights) must ordinarily appear with the same reasonable certainty as is needed to displace the general common law rule. A contrary intention need not be expressed and its implication, although sometimes referred to as 'necessary implication' has not been confined to those extreme circumstances in which alteration of existing right or liability cannot be avoided without doing violence to the language of the enactment. The cases, rather, demonstrate that a contrary intention will appear with the requisite degree of certainty if it appears 'clearly' or 'plainly' from the text and context of the provision in question that the provision is designed to operate in a manner which is inconsistent with the maintenance of existing right or liability."

20. I have considered the submissions made by both parties and I have been persuaded by the respondents arguments that it appears clear that the intention of Parliament was to omit an entitlement to s67 compensation. I accept the respondents submission outlined in paragraph 16 of this decision.

21. The applicants 'novel' argument in relation to the singular usage of the word "the" is one that needs to be considered in light of the transparent intention of Parliament. In those circumstances I am not persuaded by the submission.

22. I have further considered the decision of *Bailey* and I find that I am bound by that decision. *Bailey* is a decision of Deputy President O'Grady concerning a claim made pursuant to section 67.

23. Mr Bailey was employed by the respondent as a supervising chemist. He was injured in the course of employment (boilermakers deafness) with an agreed date of deemed injury being 24 June 1988. No claim was made for compensation until 4 December 2014. At paragraphs 59 and 60, Deputy President O'Grady finds:

> "59. Reliance was placed by Mr Bailey upon the protective provisions of s30(1)(c) of the *Interpretation Act* 1987 when argument was advances that the 2012 amending Act should not be taken to 'retrospectively' adversely affect his accrued right to a s67 lump sum.
> 60. In my opinion, s30(1)(c) must, as demonstrated by the reasoning of the plurality in Goudappel, be read together with s5(2) of that Act which addresses the question as to the existence of a 'contrary intention' expressed by the legislature. In my view such contrary intention is to be found in cl15 (read with cl11). As earlier stated, at [53] above. Mr Baileys claim is caught by the relevant appeal.

24. I find that, at the time the applicant makes his claim for lump sum compensation under section 67 of the 1987 Act clause 11 of Schedule 8 of the transitional regulations operates to further confine the applicant's lack of entitlement after 19 June 2012 to claim lump sum compensation under the former section 67 of the 1987 Act. At an arbitral level, the Commission is bound to apply the decision, whilst it is quite open to the applicant in this matter to make a formal submission that *Bailey* was incorrectly decided, I am bound to follow it.

25. I have also considered the decision in *Cram Fluid*, which indicates that with interpreting the 2012 amendments focus is required to be given to the date of the claim made for lump sum compensation.

CONCLUSION

26. I have considered the expressed wording of the 2012 amendments and to the operation of clause 11 of Schedule 8 of the transitional regulations which have been recently considered and interpreted by the Court of Appeal in *Cram Fluid* and by Deputy President O'Grady in *Bailey*. After further consideration of the arguments before me, it seems to me that the only decision that I can make in these circumstances is that the applicant's post 19 June 2012 claim for compensation pursuant to section 67 is caught by the 2012 amendments.

ORDER

27. Award for the respondent in respect to the applicant's claim for lump sum compensation pursuant to section 67 of the 1987 Act.