WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: **6763/20**
APPLICANT: **Emmanuel Krishna Mani**
RESPONDENT: **Australian Pharmaceutical Industries Limited**
DATE OF DETERMINATION: **24 February 2021**
CITATION NO: **[2021] NSWWCC 63**

The Commission determines:

1. The applicant sustained an injury to his knees arising out of or in the course of his employment on 16 April 2009.

2. The applicant's employment was a substantial contributing factor to his injuries.

3. The applicant was an existing recipient of payments as at 1 October 2012.

4. The applicant was paid weekly compensation until 6 October 2020 when liability was declined on the basis that the degree of permanent impairment was not more than 20%.

5. The applicant is entitled to be referred to an Approved Medical Specialist to assess whether the degree of permanent impairment resulting from the injury sustained to his knees and scarring (TEMSKI) on 16 April 2009 exceeds 20% for the purposes of section 39 of the *Workers Compensation Act 1987.*

The Commission orders:

6. I remit this matter to the Registrar for referral to an Approved Medical Specialist pursuant to section 321 of the *Workplace Injury Management and Workers Compensation Act 1998* for assessment of the whole person impairment of the applicant's right lower extremity (knee), left lower extremity (knee) and scarring (TEMSKI) due to injury sustained on 16 April 2009.

7. The documents to be reviewed by the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attached documents;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents received on 22 January 2021, and
    (d) Application to Admit Late Documents received on 27 January 2021.

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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian
Abu Sufian
Disputes Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Emmanuel Krishna Mani (the applicant) is 61 years old and commenced employment with Australian Pharmaceutical Industries Limited (the respondent) as a storeman in 2000.

2. There is no dispute that the applicant injured his knees when he fell on the way to work on 16 April 2009. He attempted to perform restricted duties in the weeks following the incident, but he eventually ceased work in July 2009.

3. Liability was accepted by the prior insurer, QBE Workers Compensation (NSW) Ltd (QBE). Weekly compensation and medical expenses were paid initially by QBE and then by AAI Ltd t/as GIO (the insurer), who took over the claim.

4. The applicant issued proceedings for lump sum compensation in the Workers Compensation Commission (the Commission) in 2011 (matter no. 8828/11) and in 2016 (matter no. 2641/16). In both proceedings, his injuries were the subject of referrals to an Approved Medical Specialist (AMS), Dr McGroder.

5. In a Medical Assessment Certificate (MAC) dated 29 November 2011, Dr McGroder assessed 2% whole person impairment of the applicant's right lower extremity and 18% whole person impairment of his left lower extremity, for a combined total of 20% whole person impairment. A Certificate of Determination – Consent Orders (COD) was issued on 31 January 2012 in which the applicant was awarded lump sum compensation pursuant to ss 66 and 67 of the *Workers Compensation Act 1987* (the 1987 Act).

6. In a MAC dated 1 July 2016, Dr McGroder assessed 2% whole person impairment of the applicant's right lower extremity and 18% whole person impairment of the left lower extremity, for a combined total of 20% whole person impairment due to injury. He found no whole person impairment due to scarring (TEMSKI).

7. The 2016 MAC was the subject of an appeal to a Medical Appeal Panel (MAP) (matter no. M1-002641/16). On 10 November 2016, the MAP determined that the MAC dated 1 July 2016 should be confirmed. A COD was issued on 15 December 2016 that confirmed that the applicant had no further entitlement to lump sum compensation.

8. On 30 April 2018, the applicant filed an Application for Assessment by an Approved Medical Specialist (the Application) (matter no. 2155/18). His injuries were referred to Dr McGroder to assess whether the degree of permanent impairment was fully ascertainable in accordance with s 319(g) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The AMS was requested to refrain from assessing the degree of permanent impairment if it was in fact fully ascertainable.

9. In a MAC dated 30 May 2018, Dr McGroder advised that the applicant's right knee injury had not reached maximum medical improvement as surgery was anticipated.

10. On 11 March 2019, the respondent filed an Application (matter no. 1158/19) seeking an assessment as to whether the degree of permanent impairment was more than 20% for the purposes of s 319(c) of the 1998 Act.

11. According to an email sent by the Registrar to the parties on 3 May 2019, the applicant opposed the referral because such a referral would represent the applicant's one further assessment as provided by cl 28D of Sch 8 of the Workers Compensation Regulation 2016 (the 2016 Regulation) and s 322A(1) of the 1998 Act.

12. The Registrar confirmed that the applicant's injuries were referred to Dr McGroder to assess whether the degree of permanent impairment was fully ascertainable in accordance with s 319(g) and not s 319(c) of the 1998 Act.

13. In a MAC dated 24 May 2019, the AMS advised that the applicant's right knee injury had not reached maximum medical improvement because he was having revisionary surgery.

14. The respondent qualified Dr Powell, who provided a report on 7 April 2020. He was satisfied that the applicant's condition had reached maximum medical improvement and he assessed 2% whole person impairment of the applicant's right lower extremity (knee) and 18% whole person impairment of the applicant's left lower extremity (knee) for a combined total of 20% whole person impairment. There was no whole person impairment for scarring (TEMSKI).

15. On 19 May 2020, the respondent's solicitor wrote to the Registrar and requested that the matter be referred back to Dr McGroder pursuant to ss 329(1A) and 350(3) of the 1998 Act for reconsideration of his MAC dated 24 May 2019 on the grounds that the applicant's condition had reached maximum medical improvement. The applicant agreed to the referral.

16. On 9 June 2020, a Delegate of the Registrar determined that a further assessment of permanent impairment was not available to the applicant, but he was entitled to be referred back to the AMS to assess whether the degree of permanent impairment was fully ascertainable. He directed that the matter be referred to Dr McGroder for reconsideration as to whether the applicant had reached maximum medical improvement in accordance with s 319(g) of the 1998 Act.

17. The applicant's solicitor qualified Dr Dias on 27 July 2020. Dr Dias was satisfied that the applicant's condition had reached maximum medical improvement and he assessed 24% whole person impairment of the applicant's right lower extremity (knee),18% whole person impairment of the applicant's left lower extremity (knee), and 1% whole person impairment for scarring (TEMSKI).

18. In a MAC dated 25 August 2020, Dr McGroder advised that the applicant's impairment was permanent, and that the degree of impairment was fully ascertainable.

19. In a letter dated 2 September 2020, the insurer advised the applicant that on the basis of the MAC of Dr McGroder dated 25 August 2020 and the report of Dr Powell dated 5 March 2020, his weekly payments would cease on 6 October 2020 in accordance with s 39 of the 1987 Act on the basis that the degree of permanent impairment was not more than 20%.

20. On 14 September 2020, the applicant's solicitor wrote to the Commission and requested that the matter be referred back to Dr McGroder pursuant to ss 329(1A) and 350(3) of the 1998 Act to reconsider the matter and to provide an assessment of permanent impairment in respect of the injures to his knees and scarring. The respondent opposed the application on the basis that the applicant had already had one further assessment of permanent impairment consistent with s 322A of 1998 Act and clause 28D of Schedule 8 of the 2016 Regulation. The application for reconsideration was not pressed.

21. By an Application registered in the Commission on 19 November 2020, the applicant seeks an assessment by an AMS as to whether the degree of permanent impairment resulting from the injury sustained to his knees on 16 April 2009 exceeds 20% for the purposes of s 39 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

22. 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.

ISSUE FOR DETERMINATION

23. The parties agree that the following issue remains in dispute:

    (a) whether the applicant can be assessed by an AMS as to whether the degree of permanent impairment is more than 20% for the purposes of s 39 of the 1987 Act.

Documentary evidence

24. The applicant's solicitor filed Applications for Late Documents on 22 January 2021 and 27 January 2021. No application was made by the applicant's counsel to admit these documents into evidence.

25. The documents include a list of payments dated 2 September 2020 and copies of the CODs issued in 2012 and 2016. These documents are not controversial, and their admission will not be detrimental to either party. In the circumstances, I propose to admit the documents into evidence.

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

    (a) Application and attached documents;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents received on 22 January 2021, and
    (d) Application to Admit Late Documents received on 27 January 2021.

Oral evidence

27. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

Legislation

28. There are various provisions in the legislation that are of relevance to the issue in dispute.

29. Section 39 of the 1987 Act provides:

> "**39 Cessation of weekly payments after 5 years**
>
> (1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.
>
> (2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.
>
> **Note.**
> For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

(3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

30. Section 66 (1A) of the 1987 Act provides:

"(1A) Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury."

31. Section 319 of the 1998 Act defines a medical dispute as follows:

"***medical dispute*** means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:

(a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
(b) the worker's fitness for employment,
(c) the degree of permanent impairment of the worker as a result of an injury,
(d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
(e) the nature and extent of loss of hearing suffered by a worker,
(f) whether impairment is permanent,
(g) whether the degree of permanent impairment of the injured worker is fully ascertainable."

32. Section 322A of the 1998 Act provides:

"**322A One assessment only of degree of permanent impairment**

(1) Only one assessment may be made of the degree of permanent impairment of an injured worker.

(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).

(3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of assessment and a medical assessment certificate under this Part.

(4) This section does not affect the operation of section 327 (Appeal against medical assessment)."

33. Clause 11 of Pt 1 of Sch 8 of the 2016 Regulation provides:

> "**11 Lump sum compensation: further claims**
>
> (1) A further lump sum compensation claim may be made in respect of an existing impairment.
>
> (2) Only one further lump sum compensation claim can be made in respect of the existing impairment.
>
> (3) Despite section 66(1) of the 1987 Act, the degree of permanent impairment in respect of which the further lump sum compensation claim is made is not required to be greater than 10%.
>
> (4) For the purposes of subclauses (1) and (2):
>
> (a) a further lump sum compensation claim made, and not withdrawn or otherwise finally dealt with, before the commencement of subclause (1) is to continue and be dealt with as if section 66(1A) of the 1987 Act had never been enacted, and
>
> (b) no regard is to be had to any further lump sum compensation claim made in respect of the existing impairment:
>
> (i) that was withdrawn or otherwise finally dealt with before the commencement of subclause (1), and
>
> (ii) in respect of which no compensation has been paid, and
>
> (c) section 322A of the 1998 Act does not operate to prevent an assessment being made under section 322 of that Act for the purposes of a further lump sum compensation claim.
>
> (5) The following provisions are to be read subject to this clause:
>
> (a) section 66 of, and clause 15 of Part 19H of Schedule 6 to, the 1987 Act,
>
> (b) section 322A of the 1998 Act,
>
> (c) clauses 10 and 19 of this Schedule.
>
> (6) In this clause:
>
> ***existing impairment*** means a permanent impairment resulting from an injury in respect of which a lump sum compensation claim was made before 19 June 2012.
>
> ***further lump sum compensation claim*** means a lump sum compensation claim made on or after 19 June 2012 in respect of an existing impairment.
>
> ***lump sum compensation claim*** means a claim specifically seeking compensation under section 66 of the 1987 Act."

34. Part 2A of Sch 8 of the 2016 Regulation provides:

> "**Part 2A Special provisions for existing recipients of weekly payments—2012 amendments**
>
> **28A Interpretation**
>
> (1) Words and expressions used in this Part have the same meaning as in Part 19H of Schedule 6 to the 1987 Act.
>
> (2) The following provisions are deemed to be amended to the extent necessary to give effect to this Part:
>
> (a) section 39 of the 1987 Act,
>
> (b) Part 19H of Schedule 6 to the 1987 Act,
>
> (c) section 322A of the 1998 Act.
>
> **28B Application and operation of Part**
>
> (1) This Part takes effect on and from 1 October 2012.
>
> (2) This Part applies to an injured worker who is an existing recipient of weekly payments.
>
> **28C 5-year limit on weekly payments**
>
> Section 39 of the 1987 Act (as substituted by the 2012 amending Act) does not apply to an injured worker if the worker's injury has resulted in permanent impairment and:
>
> (a) an assessment of the degree of permanent impairment for the purposes of the Workers Compensation Acts is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or
>
> (b) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20% (whether or not the degree of permanent impairment has previously been assessed).
>
> **28D Further permanent impairment assessments**
>
> (1) This clause applies to an injured worker if the degree of permanent impairment resulting from the worker's injury is or has been assessed for the purposes of the Workers Compensation Acts.
>
> (2) Section 322A of the 1998 Act does not operate to prevent a further assessment being made of the degree of permanent impairment resulting from the worker's injury for the purposes of Part 3 of the 1987 Act.
>
> (3) However, only one further assessment may be made of the degree of permanent impairment resulting from the worker's injury."

APPLICANT'S SUBMISSIONS

35. The applicant's counsel, Mr Stanton, concedes that the applicant had his one further assessment of impairment for the purposes of cl 11(2) of Pt 1 of Sch 8 of the 2016 Regulation on 1 July 2016, but he was still entitled to have one further assessment by reason of cl 28D of the 2016 Regulation.

36. Mr Stanton submits that the assessments undertaken by the AMS in May 2018 and May 2019 were not assessments of permanent impairment, but they concerned whether the applicant's condition had reached maximum medical improvement for the purposes of s 319(g) of the 1998 Act. In May 2018, the AMS was specifically directed not to provide an assessment of permanent impairment. The MAC issued on 25 August 2020 was the catalyst for the present application.

37. Mr Stanton submits that the applicant relies upon cl 28D of Sch 8 of the 2016 Regulation. The applicant has been assessed (cl 28D(1)), s 322A of the 1998 Act does not operate for the purposes of Pt 3 of the 1987 Act which relates to compensation (cl 28D(2)), and the applicant seeks one further assessment of the degree of permanent impairment (cl 28D(3)). The MAC in 2016 does not prevent a further assessment for the purposes of s 39 of the 1987 Act. This was clarified in *Matilda Cruises Pty Ltd v Sweeny*[1].

38. Mr Stanton submits that the MACs that were issued in 2018 and 2019 are irrelevant as the AMS was not requested to assess the degree of permanent impairment. The MAC in 2020 determined that the degree of impairment was ascertainable, but there was no assessment.

RESPONDENT'S SUBMISSIONS

39. The respondent's counsel, Mr Parker, agrees that the applicant was an existing recipient, and he had a further assessment of impairment for the purposes of cl 11(2) of Pt 1 of Sch 8 of the 2016 Regulation on 1 July 2016. The referrals in 2018 and 2019 only related to assessments in terms of s 319(g) of the 1998 Act. The assessment in 2020 determined that the degree of impairment was ascertainable.

40. Mr Parker submits that despite the restriction in s 322A of the 1998 Act, the applicant seeks a further assessment under Pt 2A of Sch 8 of the 2016 Regulation, but this happened in 2018. The Application in 2019 included an assessment pursuant to s 319(c) of the 1998 Act, but the referral was in fact made pursuant to s 319(g) of the 1998 Act. This is consistent with the email of the Registrar dated 3 May 2019.

41. Mr Parker submits that on 9 June 2020, a Delegate of the Registrar determined that a further assessment of permanent impairment was not available to the applicant, but he was entitled to be referred to an AMS to assess whether the degree of permanent impairment was fully ascertainable. It is unclear how the applicant is entitled to yet another assessment.

42. Mr Parker submits that the applicant is only entitled to one further assessment under Part 2A of Sch 8 of the 2016 Regulation, for whatever reason. This is consistent with the reasoning in *Merchant v Shoalhaven City Council*[2] and in *Ali v Access Quality Services*[3].

43. Mr Parker submits that, but for the referrals to the AMS in 2018, the applicant would have been entitled to be assessed under Pt 2A of Sch 8 of the 2016 Regulation. According to *Sweeny*, only one further assessment may be made pursuant to Pt 2A of the 2016 Regulation[4], consistent with s 332A of the 1998 Act. It is not one further assessment for

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[1] [2018] NSWWCCPD 37, [97] (*Sweeny*).
[2] [2015] NSWWCCPD 13, [127], *(Merchant*).
[3] [2019] NSWWCC 79, [37] – [38], [40 – 42], (*Ali*).
[4] *Sweeney*, [96] – [98].

whole person impairment, but one further assessment consistent with s 332A of the 1998 Act.

44. Mr Parker submits that the manner in which s 332A of the 1998 Act has been interpreted in the authorities is wide and includes all types of referrals that relate to a medical dispute. If it includes maximum medical improvement, then the applicant had his one further assessment on 2018. The present application is not a reconsideration of the MAC. It breaches Pt 2A of the 2016 Regulation and must be dismissed. In the alternative, any referral should be consistent with the previous referrals in respect of the lower extremities (knees) and scarring (TEMSKI).

45. Mr Parker submits that s 332A(3)(a) of the 1998 Act says that a medical dispute about the degree of permanent impairment of a worker cannot be referred for or be the subject of an assessment if the medical dispute has already been the subject of a MAC under Pt 7 of the 1998 Act. The AMS assessed the applicant in 2018 pursuant to s 319(g) of the 1998 Act in 2018. Part 2A of the 2016 Regulation permits one further assessment in respect of any of the matters in s 319 of the 1998 Act.

APPLICANT'S SUBMISSIONS IN REPLY

46. Mr Stanton submits that the question is whether s 322A of the 1998 Act precludes a further assessment. The respondent submits that the applicant can only have one further assessment pursuant to Pt 2A of the 1998 Act, but such an analysis is not correct.

47. Mr Stanton submits that the MACs in 2018, 2019 and 2020 were dealing with s 319(g) of the 1998 Act. The section identifies various disputes. Section 319(c) of the 1998 Act refers to the "degree of permanent impairment", a phrase which is also in s 322A of the 1998 Act. The restriction relates to the assessment by an AMS of the degree of permanent impairment. There is no suggestion of any restriction in relation to an assessment as to whether the permanent impairment is ascertainable. A worker can have multiple referrals except when the referral concerns the degree of permanent impairment.

48. Mr Stanton submits that in 2018, 2019 and 2020, the AMS was not assessing the degree of permanent impairment. This was done in 2016 in accordance with cl 11. The present application is permitted by cl 28D of the 2016 Regulation, which provides that s 332A of the 1998 Act does not apply. Once s 332A of the 1998 Act does not apply, its provisions are irrelevant.

49. Mr Stanton submits that different issues were considered in *Merchant*, and the passage cited in *Ali* referred to any dispute regarding the degree of permanent impairment, and s 332A of the 1998 Act does not apply to any other MAC. This authority can be distinguished from this matter.

REASONS

Can the applicant be assessed by an AMS as to whether the degree of permanent impairment is more than 20% for the purposes of s 39 of the 1987 Act?

50. The matters that I need to determine concern interpretation of the statutory provisions. The principles of statutory construction were discussed by the High Court in *Project Blue Sky v Australian Broadcasting Authority* [5] as follows:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the

[5] [1998] HCA 28; 194 CLR 355 (*Project Blue Sky*).

language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."[6] (citations omitted).

51. In *Hesami v Hong Australia Corporation Pty Ltd*[7], Deputy President Roche provided an excellent summary of the principles for statutory interpretation that were considered by the Court of Appeal in *Wilson v State Rail Authority of New South Wales*[8]:

> "In interpreting this provision, I must apply the principles of statutory construction explained by Allsop P (Giles and Hodgson JJA agreeing) in *Wilson v State Rail Authority of New South Wales*. It is convenient to set out his Honour's statement in point form (excluding citations):
>
> (a) '[i]t is the language of Parliament that must be interpreted and construed';
> (b) 'in construing an Act, a court is permitted to have regard to the words used by Parliament in their legal and historical context';
> (c) '[c]ontext is to be considered in the first instance, not merely when some ambiguity is discerned';
> (d) '[c]ontext is to be understood in its widest sense to include such things as the existing state of the law and the mischief or object to which the statute was directed';
> (e) '[f]undamental to the task, of course, is the giving of close attention to the text and structure of the Act, as the words used by Parliament to effect its legislative purpose;'
> (f) 'general words, informed by an understanding of the context, and of the mischief to which the Act is directed, may be constrained in their effect.'

[6] *Project Blue Sky*, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ).
[7] [2011] NSWWCCPD 14.
[8] [2010] NSWCA 198.

> Applying the above principles, I must interpret and construe the words in s 60AA having regard to their legal and historical context, giving close attention to the text and structure of the Act. I also have regard to the fact that the workers compensation legislation is 'beneficial legislation' and that entitlements under such legislation should not depend on 'distinctions which are too nice' (per Mahony JA in *Articulate Restorations & Developments Pty Ltd v Crawford*. At the same time, the principle that beneficial legislation should be given a liberal construction does not entitle a court to give it a construction that is unreasonable or unnatural (per McColl JA in *Amaca Pty Ltd v Cremer*, citing *IW v City of Perth* per Brennan CJ and McHugh J)."[9] (citations omitted).

52. Further, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*[10], the High Court discussed the importance of context in statutory interpretation as follows:

> "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."[11]

53. Therefore, one needs to look at the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application. In the present matter, this requires an analysis of cl 11 and Pt 2A of Sch 8 of the 2016 Regulation and their interaction with s 322A of the 1998 Act. Reference to the authorities will obviously be of assistance.

54. Clause 11 (formerly cl 11A) was inserted into the Workers Compensation Regulation 2010 (the 2010 Regulation) by Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015. It commenced on 13 November 2015.

55. The explanatory note described the reasoning behind the amendment as follows:

> "**Explanatory note**
>
> The object of this Regulation is to make further transitional arrangements consequent on the enactment of the *Workers Compensation Legislation Amendment Act 2012* with respect to claims for permanent impairment compensation. The Regulation will enable a worker who made a claim before 19 June 2012 for permanent impairment compensation in respect of an injury to make one further claim for compensation in respect of the permanent impairment that results from the injury.
>
> This Regulation is made under the *Workers Compensation Act 1987*, including section 280 (the general regulation-making power) and Parts 19H and 20 of Schedule 6."

56. This clause is not contingent on a worker being an existing recipient of weekly payments. It allows workers who made a claim before 19 June 2012 to make one "further lump sum claim" in respect of an "existing impairment" as defined in cl 11(6) of the 2016 Regulation. The clause excludes the operation of s 332A of the 1998 Act in respect of such a claim.

57. The applicant is one such worker and he was entitled to, and in fact made, one further claim for the purposes of cl 11(2) of Pt 1 of Sch 8 of the 2016 Regulation. This materialised in the MAC issued on 1 July 2016.

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[9] *Hesami*, [43] – [44].
[10] [2009] HCA 41; 239 CLR 27 (*Alcan*).
[11] *Alcan,* [47].

58. Part 2A of the 2016 Regulation was inserted by the Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016 on 16 December 2016.

59. The explanatory note described the reasoning behind the amendment as follows:

> "**Explanatory note**
>
> The object of this Regulation is to make further transitional arrangements in respect of the application of certain amendments made by the *Workers Compensation Legislation Amendment Act 2012* to injured workers receiving weekly payments of workers compensation immediately before 1 October 2012. Those amendments limited the entitlement to weekly payments of compensation to an aggregate period of 260 weeks (except in the case of workers assessed as having more than 20% permanent impairment) and provided that an injured worker may have only one assessment of permanent impairment. The Regulation provides that:
>
> (a) the 260-week limit on entitlement to weekly payments of compensation does not apply to certain injured workers whose degree of permanent impairment has not been assessed or has been determined by an insurer to be more than 20%, and
>
> (b) an injured worker whose degree of permanent impairment has been assessed may have one further assessment of permanent impairment for the purposes of determining the worker's entitlement to benefits under the *Workers Compensation Act 1987*.
>
> This Regulation is made under the *Workers Compensation Act 1987*, including section 280 (the general regulation-making power) and Parts 19H and 20 of Schedule 6."

60. The clause applies to workers who were existing recipients as at 1 October 2012, and it restricts the application of s 39 of the 1987 Act in respect of the circumstances identified in the clause. The applicant was an existing recipient as at 1 October 2012, so he falls within cl 28D(1) of Sch 8 of the 2016 Regulation.

61. Mr Stanton submits that the applicant is entitled to have one further assessment of permanent impairment by reason of cl 28D(2) of Sch 8 of the 2016 Regulation for the purposes of Pt 3 of the 1987 Act, which includes weekly compensation.

62. Mr Parker submits that Part 2A of Sch 8 of the 2016 Regulation restricts the applicant to one further assessment of impairment for whatever reason, consistent with the decisions in *Merchant*, *Ali*, and *Sweeny*. The one further assessment must be consistent with s 332A of the 1998 Act. This assessment occurred in 2018.

63. The authorities are important points of reference and a number have been cited by counsel in this matter. In the circumstances, it is appropriate to review those authorities and determine whether they are of relevance to the current dispute.

64. The matter of *Merchant* concerned the question of aggregation of injuries to different body parts caused by separate injurious events to enable the worker to be characterised as a "seriously injured worker" as defined in s 32A of the 1987 Act.

65. Mr Merchant settled a claim in the Compensation Court of New South Wales in June 2002 in respect of injuries to his back and legs on 25 October 1989, 6 April 1992 and the nature and conditions of employment from 26 October 1988.

66. In September 2012, he filed proceedings in the Commission for further lump sum compensation in respect of the injuries sustained to his back and legs on 25 October 1989. His claim was referred to an AMS, and a MAC issued on 16 January 2013, which entitled him to further compensation.

67. In further proceedings filed in 2013, Mr Merchant claimed weekly compensation and medical expenses in respect of his back and leg injuries, and lump sum compensation in respect of an injury to his right upper extremity on 5 August 2010. His claim was again referred to an AMS, who assessed 9% whole person impairment, and he was awarded lump sum compensation.

68. In 2014, Mr Merchant filed a Miscellaneous Application in the Commission, seeking an assessment as to whether the degree of permanent impairment was more than 30%. The dispute centred on the whether the injuries from separate injurious events could be aggregated for the purposes of s 32A of the 1987 Act. The worker failed in his substantive application and on appeal.

69. Although the facts differ from the present application, President Keating made some important observations regarding the interpretation of s 322A of the 1998 Act. He stated:

> "Mr McManamey argued in reply that s 322A(2) 'limits the operation of the section to disputes about claims for permanent impairment compensation, commutations and work injury damages but not to disputes about whether the worker is seriously injured'. He added 'the failure to mention seriously injured worker in section 322A is consistent with section 32A not being so restricted'. I disagree. The limitation on the number of assessments in s 322A applies to '**any** further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury...' (s 322A(2)) (emphasis added). Whilst the matters referred to by Mr McManamey are certainly included as matters to which the limitation applies, the sub-section expressly applies to any further assessment."[12]

70. Therefore, President Keating determined that the limitation on the number of assessments in s 322A applied to any further medical disputes about the degree of permanent impairment as a result of an injury. When one considers the definition of a "medical dispute" in s 319 of the 1998 Act, this would include applications made for the purposes of ss 319(c) and 319(g) of the 1998 Act. However, the President's determination was issued before Pt 2A was inserted into the 2016 Regulation. In those circumstances, this decision can be distinguished from the present matter.

71. In *Ali*, the worker made a claim for lump sum compensation in 2017 in respect of an injury sustained in March 2014. He was assessed by an AMS as having 14% whole person impairment. The proceedings were discontinued before a MAC was issued by the Commission.

72. In September 2018, Mr Ali made a claim for lump sum compensation that included a consequential condition that did not form part of the previous claim. Shortly after the lump sum claim was served, the employer's insurer advised Mr Ali that his weekly payments would cease on 24 February 2019 at the conclusion of 260 weeks in accordance with s 39 of the 1987 Act. The employer subsequently disputed that Mr Ali was entitled to make a further lump sum claim for the purposes of s 39 of the 1987 Act. He had already been assessed by an AMS, and he was only entitled to one assessment in accordance with s 332A(2) of the 1998 Act.

73. Mr Ali filed an Application seeking an assessment for the purposes of s 39 of the 1987 Act in respect of his accepted injury as well as the consequential condition.

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[12] *Merchant*, [127].

74. Senior Arbitrator Bamber had regard to the reasoning of President Keating in *Merchant* referred to in paragraph 67 above, and she concluded that the 2017 MAC was the only one that Mr Ali could rely upon in regard to any further dispute, which included the medical dispute about his degree of impairment for the purposes of s 39 of the 1987 Act.

75. The Senior Arbitrator, consistent with the reasoning in *Merchant*, determined that the words in parentheses in s 322A(2) of the 1998 Act were not exhaustive and were not limited to the expressed examples, which were merely by way of illustration.

76. In respect of cl 28D of Pt 2A of Sch 8 of the 2016 Regulation, the Senior Arbitrator stated:

> "The Parliament has provided for an exception to the operation of section 322A of the 1998 Act relating to 'existing recipients of weekly payments'. This phrase is defined in Schedule 6, Part 19H clause 1 of the 1987 Act as meaning 'an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.' Mr Ali's injury was on 3 March 2014 so he is not an existing recipient. This was conceded by his counsel.
>
> Parliament has provided in Schedule 8, Part 2A, clause 28D of the *Workers Compensation Regulation 2016* for section 322A not to operate to enable an existing recipient of weekly payments to obtain one further assessment of the degree of permanent impairment for the purposes of Part 3 of the 1987 Act. This provision would not have been necessary if section 322A(2) is given the meaning urged by Mr Ali's counsel, if the words in parentheses in section 322A(2) were an exhaustive list. The fact that clause 28D was enacted, in my view, supports the interpretation that the words in parentheses in section 322A(2) are not an exhaustive list."

77. The Senior Arbitrator determined that as Mr Ali had already had his one assessment of the degree of permanent impairment, he was prevented from having a further assessment by an AMS. Of course, Mr Ali was not an existing recipient, unlike the applicant. In those circumstances, Pt 2A of Sch 8 of the 2016 Regulation did not apply to him.

78. In *Sweeny*, Deputy President Snell considered whether the worker could be assessed by an AMS pursuant to Pt 2A of Sch 8 of the 2016 Regulation even though he had already been assessed pursuant to cl 11 of Pt 1 of Sch 8 of the 2016 Regulation.

79. Mr Sweeny suffered a right knee injury in 2004. He was assessed as having 12% whole person impairment by an AMS in 2007 and was awarded lump sum compensation. He brought a further claim in May 2012. He was assessed as having 7% whole person impairment by the AMS and 12% by a Medical Appeal Panel.

80. Mr Sweeny issued further proceedings in 2017, and his claim was referred to the AMS for the third time. The AMS again assessed 12% whole person impairment. As the assessments in the MACs issued in 2012 and 2017 did not exceed the previous assessment, Mr Sweeny was not entitled to further lump sum compensation.

81. In January 2018, Mr Sweeny filed a Miscellaneous Application in the Commission, seeking an assessment as to whether the degree of permanent impairment was fully ascertainable pursuant to s 319(g) of the 1998 Act. There was no dispute that the worker had his one further assessment that was allowed in accordance with cl 11 of Pt 1 of Sch 8 of the 2016 Regulation. The worker succeeded with his application and the Arbitrator remitted the matter for referral to an AMS to assess the degree of whole person impairment.

82. On appeal, Deputy President Snell discussed the historical context of the current cl 11 of Pt 1 and Pt 2A of the 2016 Regulation and their interaction with s 322A of the 1998 Act. He concluded that the assessment permitted pursuant to cl 11 could not be used for a purpose beyond the further lump sum claim[13].

83. The Deputy President observed that as Mr Sweeny was an existing recipient of weekly payments, cl 28D(1) of Pt 2A of the 2016 Regulation applied. He noted:

> "Clause 28D(2) provides that s 322A does not prevent a further assessment for the purposes of Pt 3 of the 1987 Act. Part 3 deals with benefits, including weekly payments, medical and related expenses, and lump sum compensation. However, the provisions of the Workers Compensation Acts that are 'deemed to be amended' by Pt 2A are s 39 of the 1987 Act, Pt 19H of Sch 6 of the 1987 Act (the transitional provisions applying to the 2012 Amending Act) and s 322A of the 1998 Act."[14]

84. The Deputy President noted that the term "further assessment" appeared in cl 28D(2) and cl 28D(3), but the wording was slightly different. These words were not present in cl 11(4)(c), and this meant that there was a distinction between the between an assessment permitted by cl 11 of Sch 8, and a 'further assessment" within the meaning of Pt 2A.

85. In respect of cl 28(D)(3) of the of Sch 8 of the 2016 Regulation, which is of relevance to the current dispute, the Deputy President provided his views regarding the interpretation of the clause as follows:

> "It is apparent that care must be taken, in dealing with the extent to which the beneficial nature of workers compensation legislation impacts upon its construction. The provisions of the Regulation, at issue in the current appeal, ameliorate the application of certain amendments made by the 2012 Amending Act. These are subss (1) and (1A) of s 66 of the 1987 Act, and s 322A of the 1998 Act (regarding lump sum compensation), and s 39 of the 1987 Act and s 322A of the 1998 Act (regarding weekly compensation beyond 260 weeks). These are the purposes of cl 11 and Pt 2A of the Regulation. This is consistent with the relevant Explanatory notes, and the provisions themselves. These provisions are, to that extent, beneficial. This is supportive of the construction which I apply.
>
> The preferable construction of subcl 28D(3) is that 'only one further assessment may be made' pursuant to Pt 2A of the Regulation. This construction is consistent with the object of Pt 2A, as described in the Explanatory note concerning the Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016, which inserted Pt 2A in the Regulation. It is consistent with a worker who is an 'existing recipient', who has previously been assessed, being entitled to one further assessment for the purposes of determining his or her entitlement to benefits. It follows that the respondent was entitled to the referral for further assessment made by the Arbitrator, unless he had previously had a further referral on the basis of Pt 2A."[15]

86. The Deputy President confirmed that the referral to the AMS in 2017 was based on cl 11(4)(c) of Sch 8 of the 2016 Regulation, and Mr Sweeny was entitled to a further assessment pursuant to Pt 2A of Sch 8 of the 2016 Regulation.

87. In this matter, there is no dispute that the applicant had his one further assessment of impairment for the purposes of cl 11(2) of Pt 1 of Sch 8 of the 2016 Regulation on 1 July 2016.

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[13] *Sweeny*, [72] – [73].
[14] *Sweeny*, [76].
[15] *Sweeny*, [95] – [96].

88. The assessments undertaken by the AMS in May 2018 and May 2019 were undertaken with the view of determining whether the applicant's permanent impairment was fully ascertainable in accordance with s 319(g) of the 1998 Act. They did not concern an assessment of the degree of permanent impairment in accordance with s 319(c) of the 1998 Act.

89. The email from the Registrar dated 3 May 2019 explained that the respondent sought an assessment pursuant to s 319(c) of the 1998 Act, which was opposed by the applicant. The Registrar advised that the referral was instead made pursuant to s 319(g) of the 1998 Act in order to preserve the applicant's entitlement to one further assessment of the degree of permanent impairment. The MAC that issued in August 2020 was in respect of a referral in accordance with s 319(g) of the 1998 Act.

90. In the decision dated 9 June 2020, the Delegate of the Registrar stated that "based on the submissions attached to the Response, as outlined above, a further assessment of permanent impairment is not available to Mr Mani and that question appears irrelevant for an independent medical expert to answer."[16]

91. The Delegate did not provide any detailed reasons why he came to that conclusion other than it was based on the employer's submissions. His decision is also at odds with the Registrar's email dated 3 May 2019. I do not agree with the Delegate's reasoning.

92. Given the restriction provided in cl 28D(2) of Sch 8 of the 2016 Regulation regarding the application of s 332A of the 1998 Act in respect of existing recipients, care needs to be taken regarding the weight that can be given to *Merchant* which predated the 2016 amendments.

93. The decision in *Ali* can be distinguished from the present matter because Mr Ali was not an existing recipient, so Pt 2A of Sch 8 of the 2016 Regulation did not apply.

94. The issue in *Sweeny* was similar to the dispute in the present matter, but the worker was seeking an assessment as to whether the degree of permanent impairment was fully ascertainable pursuant to s 319(g) of the 1998 Act. In the present matter, the applicant had three such assessments before the current application.

95. The Deputy President observed that cl 28D(2) of Sch 8 of the 2016 Regulation provided that s 322A of the 1998 Act did not prevent a further assessment for the purposes of Pt 3 of the 1987 Act, namely weekly payments, medical and related expenses, and lump sum compensation, and there was a distinction between an assessment pursuant to cl 11 and the further assessment in accordance with Pt 2A of Sch 8 of the 2016 Regulation.

96. The Deputy President concluded that the preferable construction of cl 28(D)(3) of Sch 8 of the 2016 Regulation was that an existing recipient, who has been previously assessed, is entitled to one further assessment pursuant to Pt 2A of Sch 8 of the 2016 Regulation for the purpose of determining his or her entitlement to benefits.

97. Of course, the facts in the present matter differ from those in *Sweeny*. In the present matter, the applicant was assessed for the purpose of lump sum compensation in 2011 and 2016. The assessment in 2016 was permitted by reason of cl 11(4)(c) of Pt 2A of the 2016 Regulation which excluded the operation of s 332A of the 1998 Act in respect of a claim for "further lump sum compensation". The clause does not refer to the words "further assessment". Therefore, the applicant satisfies cl 28D(1) of Pt 2A of Sch 8 of the 2016 Regulation. The clause applies to a worker whose degree of permanent impairment "is or has been assessed". There is no restriction as to the number of times a worker has been assessed.

[16] Reply, p 108.

98. According to cl 28D(2) of Pt 2A of Sch 8 of the 2016 Regulation, s 322A of the 1998 Act does not prevent existing recipients from seeking a "further assessment" of permanent impairment for the purposes of Pt 3 of the 1987 Act. This part of the 1987 Act concerns weekly compensation, medical expenses, and lump sum compensation, so it includes s 39.

99. The applicant's claim relates to an assessment that will determine his entitlement to weekly compensation. The present application does not concern a claim for further lump sum compensation in terms of cl 11 of Sch 8 of the 2016 Regulation.

100. The referral for the in 2016 was permitted by reason of cl 11(4)(c) of Sch 8 of the 2016 Regulation. The referrals in 2018, 2019 and 2020 were on the basis of determining whether the degree of permanent impairment was fully ascertainable. They did not concern an assessment of permanent impairment for the purposes of s 319(c) of the 1998 Act or Pt 3 of the 1987 Act.

101. The AMS was not asked to assess the degree of permanent impairment. He was asked to assess whether the applicant's degree of permanent impairment was fully ascertainable.

102. In 2018 and 2019, the AMS found that the degree of permanent impairment was not fully ascertainable. As a consequence of cl 28C of Pt 2A of Sch 8 of the 2016 Regulation, s 39 of the 1987 Act did not apply and the applicant continued to receive weekly compensation after the 260-week limit had elapsed. This outcome was beneficial to the applicant.

103. In the 2020 MAC, the AMS found that the degree of permanent impairment was fully ascertainable, and given that the respondent had a report that assessed the applicant as having 20% whole person impairment, it ceased payments in accordance with s 39 of the 1987 Act.

104. The restrictions in s 332A of the 1998 and cl 11 of Sch 8 of the 2016 Regulation were introduced to restrict the number of claims for lump sum compensation that an injured worker might make, rather than prevent access to weekly compensation and medical expenses if certain requirements were met.

105. Part 2A of Sch 8 of the 2016 Regulation must be read as a whole and not in a piecemeal fashion. This provision was intended to give some protection to existing recipients following the 2012 amendments. It provides them with an entitlement to a further assessment for the purpose of lump sum compensation and also in relation to a medical dispute relating to their entitlement to weekly compensation.

106. Clause 28C(a) provides that "an assessment is pending and has not been made because an AMS has declined to make the assessment" as maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable. In other words, there has been no "assessment of the degree of permanent impairment" that is contemplated in cl 28D(1) and cl 28D(2).

107. Clause 28D(2) of Pt 2A of Sch 8 of the 2016 Regulation restricts the operation of s 332A of the 1998 Act and permits one further assessment of the "degree of permanent impairment" for a worker who was an existing recipient.

108. According to cl 28D(3) of Pt 2A of Sch 8 of the 2016 Regulation, this is restricted to "only one further assessment of the degree of permanent impairment" in order to determine the worker's entitlement to ongoing benefits after the 260 week period has elapsed.

109. I agree with the Deputy President in *Sweeny* that Pt 2A of Sch 8 of the 2016 Regulation should be interpreted as a beneficial provision. I consider that it would not have been Parliament's intention to deprive an injured worker, who might well be a seriously injured individual, from access to weekly compensation, merely because the degree of permanent impairment was previously not ascertainable. It is only when a worker has reached maximum medical improvement that an assessment of the degree of permanent impairment can be made, and the assessment is no longer "pending".

110. Given the large discrepancy in the assessments of Dr Dias and Dr Powell, a referral to an AMS will achieve the object of the legislation and bring some certainty to the parties regarding the applicant's entitlement to weekly payments.

111. In the circumstances I am satisfied that the applicant is entitled to be referred to an AMS to assess the degree of permanent impairment for the purposes of s 39 of the 1987 Act.

FINDINGS

112. The applicant sustained an injury to his knees arising out of or in the course of his employment on 16 April 2009.

113. The applicant's employment was a substantial contributing factor to his injuries.

114. The applicant was an existing recipient of payments as at 1 October 2012.

115. The applicant was paid weekly compensation until 6 October 2020 when liability was declined on the basis that the degree of permanent impairment was not more than 20%.

116. The applicant is entitled to be referred to an AMS to assess whether the degree of permanent impairment resulting from the injury sustained to his knees and scarring (TEMSKI) on 16 April 2009 exceeds 20% for the purposes of s 39 of the 1987 Act.

ORDERS

117. I remit this matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of the whole person impairment of the applicant's right lower extremity (knee), left lower extremity (knee) and scarring (TEMSKI) due to injury sustained on 16 April 2009.

118. The documents to be reviewed by the AMS are:

    (a) Application to Resolve a Dispute and attached documents.
    (b) Reply and attached documents.
    (c) Application to Admit Late Documents received on 22 January 2021, and
    (d) Application to Admit Late Documents received on 27 January 2021.