WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3716/20**
Applicant: **Rajes Pathmanathan**
Respondent: **Pharmaceuticals Pty Ltd**
Date of Determination: **9 September 2020**
Citation: **[2020] NSWWCC 313**

The Commission determines:

1. The applicant has established special circumstances under section 254 (3)(b) of *the Workplace Injury Management and Workers Compensation Act 1998,* which allows her to recover workers compensation benefits.

2. The failure to make a claim within six months after the injury happened was occasioned by ignorance as provided for under section 261 (4) of the *Workplace Injury Management and Workers Compensation Act 1998*.

3. The applicant has sustained an injury which has resulted in serious and permanent disablement as provided for under section 261 (4)(b) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Commission orders:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist as follows:

Date of injury:	22 October 2011
Body Part:	Cervical spine; left upper extremity (shoulder); right lower extremity (knee)
Method of Assessment:	Whole Person Impairment

2. The following documents are to be forwarded to the Approved Medical Specialist:

   (a) Application to Resolve a Dispute with attachments;

   (b) Reply with attachments;

   (a) Application to Admit Late Documents filed by the applicant on 20 July 2020;

   (b) Application to Admit Late Documents filed by the applicant on 7 August 2020;

   (c) Application to Admit Late Documents filed by the applicant on 14 August 2020;

(d) Application to Admit Late Documents filed by the respondent on 27 August 2020, and

(e) Application to Admit Late Documents filed by the applicant on 28 August 2020.

3. The matter is remitted back to an arbitrator following the Medical Assessment Certificate, or any appeal therefrom, to determine the outstanding claim for medical expenses because the extent of any award for the payment of medical expenses is contingent upon the level of permanent impairment determined under Part 7 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* and the effect of section 59A of the *Workers Compensation Act 1987*.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND TO THE DISPUTE

1. The applicant, Rajes Pathmanathan, sustained injury to her cervical spine, left shoulder and right knee in the course of her employment with the respondent, Pharmaceuticals Pty Limited, with a deemed date of injury on 22 October 2011, being the last day she worked for the respondent.

2. The applicant has made a claim for 11% permanent impairment for injury to the cervical spine, left shoulder and right knee, as well as for the payment for reasonable medical expenses for treatment for those body parts.

3. The respondent disputes liability on the grounds that notice of injury had not been given by the applicant as soon as possible after the injury happened and a claim for compensation had not been made within six months after the injury happened.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant can recover compensation on the grounds that notice of injury was not given by the applicant as soon as possible after the injury happened (section 254 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)), and

    (b) whether the applicant can recover compensation on the grounds that a claim for compensation was not made within six months after the injury happened (section 261 of the 1998 Act).

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a conference/hearing on 3 September 2020. 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.

6. Mr Carney appeared for the applicant, instructed by Ms Iwas. Mr Beran appeared for the respondent, instructed by Mr Mitchell and Ms Dunkley. Mr Glavinceski from GIO was also in attendance.

7. The hearing was conducted by telephone in accordance with protocols set out by the Commission due to the coronavirus pandemic.

8. At the commencement of the hearing, Mr Carney discontinued the claim for injury to the thoracic spine and lumbar spine.

9. I advised the parties that in the event that the applicant was successful in overcoming the threshold issues of section 254 and 261 of the 1998 Act and the matter was referred for assessment of permanent impairment by an Approved Medical Specialist (AMS), the claim for medical expenses would be adjourned until after publication of the Medical Assessment Certificate, or any appeal therefrom. This is because the extent of any award for the payment of medical expenses will be contingent upon the level of permanent impairment determined under Part 7 of Chapter 7 of the 1998 Act and the effect of section 59A of the *Workers Compensation Act 1987* (the 1987 Act).

EVIDENCE

Documentary evidence

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

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

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by the applicant on 20 July 2020;

    (d) Application to Admit Late Documents filed by the applicant on 7 August 2020;

    (e) Application to Admit Late Documents filed by the applicant on 14 August 2020;

    (f) Application to Admit Late Documents filed by the respondent on 27 August 2020, and

    (g) Application to Admit Late Documents filed by the applicant on 28 August 2020.

Oral evidence

11. There was no application to adduce oral evidence or cross examine the applicant.

FINDINGS AND REASONS

Background

12. The applicant has provided statements dated 20 April 2020 and 6 August 2020.

13. The applicant states that she has lived in Australia since 1997. She states that she has attained certificates in English, Certificate 2 ESOL from TAFE, and a Certificate 2 in Business.

14. The applicant states that she commenced employment with the respondent in July 2008 as a packer. She states that her duties were to pack pharmaceutical products into boxes, unpack trays of products from pallets, and scoop powders and tablets into small containers.

15. The applicant states that she injured her neck, right ear, thoracic and lumbar spine, right leg and right knee due to the nature and conditions of her employment from July 2008 to 22 October 2011.

16. The applicant states that her last day of work with the respondent was 22 October 2011 that it was and on or about that date she told her manager, Raj, that she was unable to work because of her pain. She states that two or three days later her husband informed Raj that the applicant would not be returning to work.

17. In her further statement dated 6 August 2020, the applicant states that at no time did Raj tell her she had an entitlement to workers compensation or that he was going to make an incident report.

18. The applicant states that she claimed income protection for two years and then New Start allowance from Centrelink.

19. The applicant states that she saw PK Simpson lawyers in regard to a total and permanent disablement claim and during the progress of that claim she was informed that her injuries were work related and she was entitled to workers compensation. She states that this was the first time she was told this and that PK Simpson began to investigate her workers compensation claim in 2016.

20. The applicant states:

> "I only came to Australia in 1997. English is my second language and this has affected my abilities to know my full entitlements and the reason as to why my claim was made late."

21. The applicant states that she can no longer do her old job or any other job due to her work injury.

22. Emily Kwok has provided statements dated 4 October 2016 and 13 August 2020. Ms Kwok states that she is employed by the respondent as a HR and Payroll Officer.

23. In her statement dated 4 October 2016, Ms Kwok states that no report of injury relating to the applicant was on file, nor any notes pertaining to any injuries sustained by the applicant. She states that no direct supervisor or manager of the applicant is currently employed by the respondent.

24. In her statement dated 13 August 2020, Ms Kwok states that she undertook a search of personnel files held by the respondent in response to the applicant's advice that the full name of 'Raj' was 'Raj Kumar.' She states that the search found two employees named 'Raj Kumar' but both were process workers and not classified as supervisors or managers. She did locate a Production Manager named Rajeshwar Balumuri.

25. The respondent has provided an unsigned statement from Rajeshwar Balumuri, who states that he was employed with the respondent from 2009 to 2014 as a Production Manager but has no recollection of an employee by the name of the applicant.

26. There are several forms included in the Reply which were completed by the applicant as part of her induction and training, and which include her handwritten answers to questions in those forms. Ms Kwok states that the applicant's induction would have included manual handling procedures and the correct procedure for reporting any incidents or injuries, and a form entitled "Standard Operating Procedure" for "General Health, Accidents & Injuries" is included in the Reply. Parts 17 and 18 of that form states:

> "Should an accident occur, the injured person must as soon as practicable notify the nearest person about the accident.
>
> After another person has been notified, the supervisor of the area as well as the injured person's supervisor must be notified about the accident."

Determination

Notice of injury

27. Section 254 of the 1998 Act relevantly provides:

> "(1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
>
> (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.
>
> (3) Each of the following constitutes special circumstances:
>
> (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
> (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,
> (c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
> (d) the injury has been reported by the employer to the Nominal Insurer in accordance with this Act;
> (e) the employer has contravened section 231;
> (f) the injury has been treated in the first aid room at the place of work;
> (g) if the employer is the owner of a mine – the injury has been reported by or on behalf of the employer to an inspector of mines or an inspector under the Work Health and Safety Act 2011."

28. Section 255 of the 1998 Act relevantly provides:

> "(1) A notice of injury must state:
>
> (a) the name and address of the person injured, and
>
> (b) the cause of injury (in ordinary language), and
>
> (c) the date on which the injury happened."

29. The onus rests on the applicant to prove that she did give notice of injury to the respondent as soon as possible after the injury happened, and if not, or there is any defect or inaccuracy in the notice of injury, to establish special circumstances which allow her to recover compensation.

30. The applicant's evidence is that she did give notice of injury to her manager, Raj, but to the extent that this notice was defective or inaccurate, the only special circumstance that is relied upon by Mr Carney in his submissions is "ignorance" in sub-section (3)(b) of section 254.

31. Mr Carney referred to the decision of *Gregson v L & M R Dimasi Pty Ltd* [2000] NSWCC 47; 20 NSWCCR 520 (*Gregson*) wherein Burke CCJ said at [61]:

> "The ignorance referred to is ignorance of the rights deriving from the Act and the obligations imposed by it. Effectively the Court is required to be satisfied that the applicant was unaware of those rights and obligations and thus failed to make the requisite claim."

32. I note that LexisNexis Butterworths, *Mills Workers Compensation New South Wales,* Service 151 at [WIM 254.20] states: "The decision in *Gregson* is in respect of s 61 but ss 61 and 254 are in substantially the same terms."

33. Mr Beran submits that available evidence cannot support a finding that the applicant did give notice of injury. The applicant has identified the full name of the manager she claims to have given notice to as 'Raj Kumar', but a review of the respondent's personnel records has failed to locate a manager by that name.

34. Mr Beran submits that if, however, "ignorance" is relied upon by the applicant, that this special circumstance is not established by the applicant as there is evidence that the applicant underwent occupational health safety training at the start of her employment with the respondent and the applicant would have been provided with form entitled "Standard Operating Procedure" for "General Health, Accidents & Injuries" as part of her induction.

35. Mr Beran also submits that the applicant cannot claim ignorance due to limited English because the evidence reveals that she had completed courses in English prior to her employment with the respondent.

36. The applicant's evidence is that she told her manager on or about 22 October 2011 that she could not work because of her pain, but she does not state which parts of her body were painful. However, that complaint does coincide with contemporaneous medical evidence. There are entries in the clinical notes of Wentworthville Medical Centre on 13 October 2011 and 31 October 2011 of right knee pain for the past three months. On 31 October 2011, Dr Kathirgamanathan issued a medical certificate stating that the applicant's symptoms of right knee pain were being investigated and that the applicant found it difficult to stand for long hours.

37. There is no reason for me to doubt the evidence from the applicant regarding the information that she did give to her manager, especially in light of the contemporaneous medical evidence, except for the uncertainty of the identity of her manager, whom the applicant has named as 'Raj Kumar.' However, I would not expect that the applicant would know with precision the full and proper name of her manager. Ms Kwok states that the respondent has a high level of staff turnover, and that 200 staff can come and go each year. Ms Kwok states that currently the respondent has about 400 staff working in production across three sites.

38. The special circumstances provided by section 254 (2) and (3) apply not just to a failure to give notice of injury but also any defect or inaccuracy in that notice. I accept from my review of the evidence that the applicant did provide notice to her manager that she was experiencing pain at the workplace and she was unable to work, but that this notice was defective and inaccurate, and certainly did not meet the requirements of section 255 of the 1998 Act. I regard this notice as being occasioned by ignorance.

39. Mr Beran contends that the claim of ignorance cannot be sustained given the information and material provided to the applicant upon her induction with the respondent and which is included in the Reply. There is no direct evidence that the applicant was given the "Standard Operating Procedure" for "General Health, Accidents & Injuries" form, but I consider it reasonable to infer that this did occur. The Reply includes several documents completed by the applicant regarding her suitability to undertake the work required of her by the respondent. It is apparent that the respondent did have procedures in place to ensure that employees were aware of the importance of health and safety in the workplace.

40. However, neither the "Standard Operating Procedure" for "General Health, Accidents & Injuries" form or any other form in the Reply refers to "rights derived" or "obligations imposed by" workers compensation legislation (as per *Gregson*). Parts 17 and 18 of the "General Health, Accidents & Injuries" form state that an employee should notify the nearest person as soon as practicable, and then to the supervisor of the area, as well as her own supervisor. However, there is no reference to the requirements of workers compensation legislation in those directions. I do not accept that the information provided to the applicant was sufficient to identify rights derived from, and obligations imposed by, workers compensation legislation.

41. I also consider it important to note that when Dr Panjratan examined the applicant in February 2020, he found the applicant "had difficulty expressing herself properly" and that her husband provided assistance at that consultation. This is consistent, in my view, with a lady who was able to provide some notice of injury to a representative of the respondent, but not to the extent that was required by workers compensation legislation.

42. I therefore accept that the defective and inaccurate notice of injury provided by the applicant was occasioned by her ignorance, and that this meets a special circumstance provided for by sections 254 (2) and (3) of the 1998 Act.

The claim for compensation

43. Section 261 of the 1998 Act relevantly provides:

> "(1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.
>
> …..
>
> (4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either:
>
> (a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or
>
> (b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker."

44. I accept that it was ignorance which was also the reason for the applicant for failing to make a claim for compensation within six months after the injury happened. I accept that it was only when the applicant was instructing solicitors in regard to a total and permanent disablement claim that she was told she could claim compensation for the injuries that she was suffering from.

45. However, Mr Beran submits that the applicant does not get the benefit of section 254 (4) of the 1998 Act because the injury she has sustained has not resulted in serious and permanent disablement.

46. In *Griffin v Qantas Airways Ltd* [2020] NSWWCCPD 22 (*Griffin*), DP Roche identified at [228] the leading authorities on the issue of serious and permanent disablement to be *Broken Hill Proprietary Company Ltd v Kuhna* (1992) 8 NSWCCR 401 (*Kuhna*) and *Gregson*.

47. In *Kuhna,* Mahoney JA said at [402B]:

> "No doubt the word 'disablement' primarily refers to disablement in respect of capacity to perform work. But provided the disablement or interference with capacity is 'serious', the provision may be satisfied notwithstanding that other work may be undertaken and even undertaken more remuneratively."

48. In *Gregson,* Burke CCJ said at [78]:

> "In this matter the question becomes whether Mr Gregson suffers a serious and permanent disablement. Does he have a disability, is it serious, is it permanent, does it impinge adversely upon his capacity to work? If all questions were answered in the affirmative then he would satisfy that requirement. The basic question then presenting is the degree of the applicant's incapacity and losses before a considered answer to those previous questions is available."

49. The applicant states that she was totally unable to work after her injury with the respondent. She states that she can no longer do her old job or any other job due to her work injury. She states that she has pain in her right knee all the time.

50. Dr Maniam, orthopaedic surgeon, treated the applicant mainly for her right knee condition, and in a report dated 15 July 2013 opined that the applicant was not totally disabled and she had the capability to return to full time work but avoiding repetitive bending, prolonged standing, repetitive climbing and repetitive squatting.

51. Dr Bodel, orthopaedic surgeon, who examined the applicant in November 2017 at the request of her solicitors, opined in his report dated 21 November 2017 that the applicant was capable of part time light duty work, avoiding prolonged sitting or bending, twisting or heavy lifting, and being able to change position frequently throughout a working day. He also opined that the applicant's prognosis was guarded, and that while her symptoms had improved, they had not completely resolved.

52. Dr Panjratan, orthopaedic surgeon, who saw the applicant at the request of the respondent, does not provide any opinion on the applicant's capacity for work in his report dated 10 February 2020, although he opines that the effect of the repetitive work which the applicant did with the respondent should have settled down now and that she only has soft tissue involvement, with no objective signs.

53. Mr Beran refers to the most recent report of Dr Bodel dated 20 June 2020, wherein Dr Bodel writes that he has no knowledge of the applicant's current status. Mr Beran submits that the applicant has not met the onus of proof required on this issue because the report from Dr Panjratan is the only medical evidence that is currently available and that does not support a finding of serious and permanent disablement.

54. Dr Bodel's statement that he does not have any current knowledge of the applicant's current status does not mean that the restrictions he placed on the applicant's work capacity three years ago should be disregarded. The applicant had been suffering the effects of her injury for some five years when she was examined by Dr Bodel. Given that Dr Bodel considered the applicant's symptoms had not completely resolved, and that he had assessed some permanent impairment of the right knee, left shoulder and cervical spine, I consider it reasonable to conclude that the applicant does have a disablement, and that this disablement is permanent. Furthermore, Dr Panjratan does not dispute that the applicant has some permanent disablement, only that it is relatively minor.

55. To apply what was said by Burke CCJ in *Gregson* to this dispute:

    (a) the applicant does have a disability because she has continued to experience symptoms in the right knee, left shoulder and cervical spine;

    (b) the applicant's disability is serious because it has had an effect upon the applicant's capacity to work;

    (c) the conditions suffered by the applicant are permanent because her symptoms have continued for nearly nine years now and there are doctors who have assessed the applicant as having some level of permanent impairment; and

    (d) the injury sustained by the applicant has adversely impacted her capacity to work.

56. I am therefore satisfied that the failure by the applicant to make a claim for compensation within six months after the injury happened was occasioned by ignorance, and that the injury has resulted in the applicant suffering serious and permanent disablement.