

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2055/19
Applicant: Rebecca Monahan
Respondent: R.H Anicich & A.J Deegan & Others
T/AS Sparke Helmore Lawyers
Date of Determination: 5 August 2019
Citation: [2019] NSWCC 265

The Commission determines:

1. The respondent to pay the applicant lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* for 22% whole person impairment resulting from the psychological injury deemed to have occurred on 22 March 2017, in the sum of \$55,550.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Acting Dispute Services Coordinator
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Rebecca Monahan (the applicant) was employed as a solicitor by Sparke Helmore Lawyers (the respondent) from 4 February 2008.
2. On 23 March 2017, the applicant notified the respondent of a psychological injury in the nature of anxiety/depression secondary to workplace bullying. The applicant ceased work as a result of the injury on 22 March 2017. Liability for the injury was apparently accepted by the respondent and payments of compensation made.
3. By email dated 21 January 2019, the applicant, through her representatives, forwarded a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The applicant relied on a report prepared by an Independent Medical Examiner, Dr Jeff Bertucen, a consultant psychiatrist, dated 12 December 2018. Dr Bertucen assessed the applicant as having 22% whole person impairment (WPI) as a result of her injury.
4. On 22 March 2019, the respondent's solicitors requested further particulars of the claim, which were provided on 28 March 2019. Further evidence was provided to the respondent's solicitors on 10 April 2019.
5. On 30 April 2019, the applicant filed an Application to Resolve a Dispute (ARD) in the Commission seeking lump sum compensation pursuant to s 66 of the 1987 Act.
6. On 23 May 2019, the applicant presented herself for assessment by an Independent Medical Examiner, Dr Peter Whetton, at the request of the respondent.
7. At teleconference on 28 May 2019, orders were made granting leave to the respondent to issue directions for production and establishing a timetable for the filing of late documents, including a supplementary report from Dr Whetton. The matter was remitted to the Registrar to be referred to an Approved Medical Specialist (AMS) for assessment of permanent impairment at the conclusion of the aforesaid timetable.
8. A further teleconference was requested by the applicant and held on 10 July 2019. The applicant objected to the referral to an AMS and, barring agreement as to the quantum of the applicant's entitlement to lump sum compensation, requested that the applicant's entitlement be determined by an arbitrator, on the basis that Dr Whetton had also assessed the applicant as having 22% WPI.
9. The respondent declined to resolve the dispute by consent and also objected to me determining the entitlement to lump sum compensation without a referral to an AMS. Brief oral submissions were made and conciliation attempted without the parties reaching agreement. The respondent's solicitor did not agree to determination of the procedural question of how the claim for lump sum compensation should be resolved without the holding of a formal conciliation conference and arbitration hearing.
10. After considering the submissions, I directed the parties to file written submissions and informed them that I would determine the procedural question on the papers.

ISSUES FOR DETERMINATION

11. The following issues remain in dispute and require determination:
- (a) Whether the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act should be determined by the Commission without a referral to an AMS;
 - (b) The degree of permanent impairment resulting from the psychological injury deemed to have occurred on 22 March 2017, and
 - (c) The quantum of the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.

EVIDENCE

Documentary evidence

12. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) ARD and attached documents;
 - (b) Reply and attached documents;
 - (c) Documents attached to two Applications to Admit Late Documents filed by the applicant on 1 July 2019;
 - (d) Documents attached to an Application to Admit Late Documents filed by the respondent on 2 July 2019;
 - (e) Written submissions filed by the respondent on 19 July 2019, and
 - (f) Written submissions filed by the applicant on 25 July 2019.
13. Neither party applied to adduce oral evidence or cross examine any witness.

Dr Jeff Bertucen

14. The applicant relies on medicolegal reports prepared by Dr Jeff Bertucen on 18 June 2018 and 12 December 2018.
15. In his first report, Dr Bertucen took a detailed history of the applicant's injury which was consistent with a written statement prepared by the applicant. Dr Bertucen considered the psychological sequelae, noting that the applicant had been referred to a psychiatrist, Dr Lee Ingram, commenced the antidepressant Lexapro and was admitted to the Northside Clinic Greenwich for three weeks. The applicant had a second admission to the Northside Clinic in May 2018 and had only been discharged about three weeks prior to her interview with Dr Bertucen. Dr Bertucen recorded that the applicant's current psychological management consisted of pharmacotherapy, review by Dr Ingram fortnightly and psychological therapy on a weekly basis with Ms Claudie Larose.
16. Dr Bertucen performed a mental state examination and diagnosed the applicant as suffering from a severe and chronic adjustment disorder with features of depressed mood and anxiety, which had evolved into a major depressive disorder. Dr Bertucen at that point did not consider that the applicant was stable or at the point of maximal medical improvement for the purposes of providing a statement of psychiatric whole person impairment.

17. In his supplementary report of 12 December 2018, Dr Bertucen recorded that the applicant had persisting psychological symptoms of melancholia, demotivation, lethargy and social phobic anxiety, and impaired attention, concentration and memory. The applicant had continued with her regular mental health treatments and continued to consult Dr Ingram every two weeks. The applicant was undergoing individual therapy sessions with Ms Larose on a fortnightly basis. There had been no further inpatient mental health hospital admissions or presentations since the previous interview. The applicant continued with psychiatric pharmacotherapy.
18. Dr Bertucen made an assessment of impairment in accordance with the Psychiatric Impairment Rating Scales (PIRS) table, assigning the following classes:

CATEGORY	CLASS
Self-Care and Personal Hygiene (A)	3
Social and Recreational Activities (B)	3
Travel (C)	1
Social Functioning (Forming and Maintaining relationships) (D)	3
Concentration, Persistence and Pace (Cognitive Functioning) (E)	3
Adaptation (Employment) (F)	5

19. This assessment resulted in an aggregate score of 18 and a median Class of 3, resulting in 22% WPI.

Dr Peter Whetton

20. The respondent has filed in these proceedings medicolegal reports prepared for the insurer, by Dr Peter Whetton, dated 24 August 2017, 11 September 2017 and 29 May 2019. It was only in the final report that Dr Whetton made an assessment of permanent impairment.
21. Dr Whetton indicated in his final report that he had reviewed a psychometric testing report prepared by a psychologist, Dr Paul A. Phillips (PhD); his own report of 24 August 2017; six reports by Dr Ingram dated between 24 November 2017 and 4 July 2018; the reports of Dr Bertucen; and a factual investigation report prepared by Quantumcorp dated 11 August 2017.
22. Dr Whetton took a history of injury consistent with the applicant's evidence and that taken by Dr Bertucen. Dr Whetton noted that in the last 21 months, the applicant had undergone intensive psychiatric treatment, admission to the Northside Clinic, a change in medication and ECT had been discussed but not implemented. The applicant was taking venlafaxine, mirtazapine and diazepam. The applicant was consulting her psychiatrist at two to four week intervals, participating in phone consultations with her psychologist every two weeks and consulting her general practitioner every four weeks.
23. Dr Whetton noted that his previous examination had led to a diagnosis of major depressive disorder with melancholic features. Dr Whetton considered there had been some level of improvement but the applicant overall continued in a state of severe depression. The diagnosis was maintained.
24. Dr Whetton was asked three questions by reference to the report of Dr Phillips. Dr Whetton responded:

“The claimant’s illness can account for her inability to complete the examination of Dr Philips. She is profoundly unwell, concentrating poorly. She states that the

examination of Dr Philips consisted of an initial interview and then being asked to answer some 500 questions on an iPad which she found overwhelming.”

25. Dr Whetton said the applicant’s cognitive symptoms were not inconsistent with the diagnosis of major depressive disorder.
26. Dr Whetton made an assessment of impairment in accordance with the PIRS table assigning the following classes:

CATEGORY	CLASS
Self-Care and Personal Hygiene (A)	3
Social and Recreational Activities (B)	3
Travel (C)	2
Social Functioning (Forming and Maintaining relationships) (D)	3
Concentration, Persistence and Pace (Cognitive Functioning) (E)	2
Adaptation (Employment) (F)	5

27. This assessment resulted in an aggregate score of 18 and a median Class of 3 and 22% WPI.

Respondent’s submissions

28. In written submissions, the respondent disagreed that the applicant had 22% WPI as alleged and said there was a “medical dispute” for the purposes of s 319 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The respondent submitted that the discretion to refer the matter to an AMS for assessment of the degree of permanent impairment ought to be exercised.
29. The respondent conceded that it had served Dr Whetton’s reports but said it did not rely on Dr Whetton’s assessment of WPI, dated 29 May 2019.
30. The respondent confirmed that it did not dispute that the applicant suffered a psychological injury in the course of her employment with the respondent but relied on the reports of psychologist Dr Philips dated 20 May 2019 and 2 July 2019.
31. Broadly speaking, Dr Philips’ evidence identified an inconsistency between the applicant’s reported inability to complete the psychometric tests administered by him and the nature of her work-related psychological injury. Dr Philips concluded that the applicant’s performance in the psychometric testing indicated that she was either potentially malingering or potentially suffering an acquired brain injury. As there was no allegation of brain damage, Dr Philips’ evidence raised an issue as to the consistency of the applicant’s presentation to Dr Bertucen.
32. The respondent submitted that in order to determine WPI, the medical evidence of Dr Philips would need to be weighed against the medical evidence of Dr Bertucen. Given the complexity of the medical issues, the respondent submitted that it was more appropriate that the matter be determined by an AMS as opposed to an arbitrator. The respondent submitted that an arbitrator would not have the requisite expertise to determine whether the assessment of Dr Bertucen provided sufficient evidence of the applicant’s permanent impairment in light of Dr Philips’s evidence. The weight to be applied to the psychometric testing was said to be a medical question.
33. The respondent noted that s 321A(1)(a) of the 1998 Act provided for regulations to be made as to the circumstances in which a medical dispute concerning permanent impairment was

“authorised, required or not permitted” to be referred for assessment. No such regulations had been made.

34. In the absence of the regulations envisioned by s 321A of the 1998 Act, the respondent said the parties and the Commission had no guidance as to the circumstances in which certain permanent impairment disputes may or may not be determined by an arbitrator.
35. The respondent further noted that there were no determinations published by the Commission indicating what considerations ought to be taken into account in determining permanent impairment disputes.
36. The respondent submitted that, broadly speaking, this matter would not be one in which it would be envisioned to be appropriate for an arbitrator to determine. It was submitted that psychological injuries are inherently difficult to assess for whole person impairment. In circumstances where the respondent’s evidence undermined the veracity of Dr Bertucen’s assessment, this task was said to be more difficult.
37. The respondent submitted that in the absence of appropriate regulations, or case law, it would be in the interests of procedural fairness that the matter proceed along the “traditional” path of determination by an AMS.

Applicant’s submissions

38. The applicant has submitted that in circumstances where liability was accepted and the applicant was in receipt of weekly benefits and medical expenses, and having regard to Dr Whetton’s assessment of 22% WPI, an award should be made under s 66 of the 1987 Act in the amount of \$55,550.
39. The applicant noted that arbitrators of the Commission now have power to make a finding where evidence of WPI, properly assessed, exists.
40. The applicant noted that the Workers Compensation Guidelines clearly stated that WPI assessments can only be made by qualified psychiatrists in psychological/psychiatric cases and not by a clinical psychologist, such as Dr Phillips.
41. The applicant submitted that Dr Whetton had considered the psychometric testing report of Dr Phillips and emphatically rejected the thesis promulgated by Dr Phillips.
42. The applicant submitted that the respondent’s submissions should be rejected in their totality.
43. The applicant did not concede that there was a "medical dispute" for the purposes of s 319 of the 1998 Act. The respondent had obtained an Independent Medical Examiner’s report from a psychiatrist for 22% WPI, which was the same as the assessment of the applicant’s expert.
44. The applicant submitted that it was vexatious of the respondent to not accept the decision of its own psychiatrist. It was said to be against the principles of the Workers Compensation Guidelines and the model litigant policy to obtain a report from a suitably qualified psychiatrist, file the report in the proceedings, and then say that there is a medical dispute purely based on the findings of a clinical psychologist, Dr Phillips, who was not qualified to assess WPI. There was no evidence apart from Dr Phillips that the applicant may be malingering.

FINDINGS AND REASONS

45. Section 65(3) of the 1987 Act previously provided that,

“If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist”.

46. Section 65(3) was repealed by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) in schedule 2, clause 2. This schedule commenced on the date of proclamation which was 1 January 2019. Savings and transitional provisions were added by the 2018 amending act and appear in the 1987 Act in Schedule 6, Part 19L and clause 2 provides that an amendment made by the 2018 amending Act extends to an injury received before the commencement of the amendment, and a claim for compensation made before the commencement of the amendment. The repeal of s 65(3) applies to the present case.

47. In the second reading speech in relation to the Bill relating to the 2018 amending Act it was stated:

“Schedule 2 to the bill provides for the Workers Compensation Commission to award permanent impairment compensation without referral to an approved medical specialist.

This amendment recognises that, in certain circumstances, the requirement to refer all permanent impairment disputes to an approved medical specialist was unduly delaying proceedings in the Workers Compensation Commission. The amendment will allow arbitrators to make determinations of permanent impairment by removing section 65 (3) from the 1987 Act, which requires all permanent impairment disputes to be referred to an approved medical specialist prior to the Workers Compensation Commission awarding permanent impairment compensation.¹”

48. In many cases, it will still be appropriate for an arbitrator to remit the matter for referral for an assessment by an AMS. I have considered whether this is the appropriate course in the present case in light of the parties’ submissions and have decided that it is not, for the reasons that follow.

49. There is in this case no dispute that the applicant sustained a psychological injury as a result of events in the workplace. The injury is deemed to have occurred when the applicant first became incapacitated on 22 March 2017.

50. In the Reply filed by the respondent on 21 May 2019, a number of jurisdictional issues were raised. Those matters were resolved by way of the granting of leave to issue directions for production and the establishment of a timetable for the admission of late documents. The only dispute remaining related to the quantum of the applicant’s entitlement to the lump sum compensation claimed.

51. In order to address the applicant’s claim, the respondent required the applicant to present herself for examination by psychiatrist, Dr Whetton. The applicant complied with that requirement and Dr Whetton provided an assessment of WPI. The report in which that assessment was made was served and filed and forms part of the evidence admitted in these proceedings.

¹ Legislative Council 19 September 2018, Second Reading Speech of the Hon. David Clarke

52. The history taken by both Dr Whetton and Dr Bertucen was consistent, including with regard to the treatment received by the applicant in respect of her psychological injury. Their mental state examinations were comparable. Both experts provided detailed and reasoned opinions. The histories taken by the experts and their findings were also broadly consistent with the evidence from the applicant's treating psychiatrist and general practitioner.
53. It may be noted that Dr Bertucen and Dr Whetton's assessments varied slightly in relation to Categories C and E of the PIRS table but their aggregate scores, median classes and WPI assessments were identical.
54. Notwithstanding that Dr Whetton's most recent report has been filed in the proceedings by the respondent, in written submissions, the respondent takes the unusual position of saying it does not rely on it. This leaves Dr Bertucen's report as the only qualified opinion on permanent impairment.
55. The only basis on which the respondent has submitted that Dr Bertucen's report should not be relied upon in making a determination under s 66 of the 1987 Act, is the evidence of Dr Phillips. Dr Phillips, as a psychologist, is not qualified under the Guidelines to assess permanent impairment resulting from a psychological injury.
56. There is no liability dispute before me, the injury having been accepted. I also have no dispute as to ongoing incapacity resulting from the injury or a dispute as to whether it is reasonably necessary that medical treatment be provided as a result of the injury. The evidence contained in Dr Phillips' reports does not persuade me that there is not a fair climate of fact for the acceptance of Dr Bertucen's opinions and assessment of permanent impairment. Whilst it is not apparent that Dr Bertucen has considered Dr Phillips' report, it has been considered by Dr Whetton and Dr Whetton's opinions are in evidence before me. Dr Whetton has explained that the applicant's performance in the psychometric testing administered by Dr Phillips is not inconsistent with her diagnosed psychological injury.
57. It has not been suggested that the report of Dr Bertucen fails to comply with the Guidelines for assessment of permanent impairment. I am satisfied that Dr Bertucen was qualified to make the assessment that he has.
58. In circumstances where there is no qualified evidence as to the degree of permanent impairment to contradict the assessment of Dr Bertucen, I am satisfied that his assessment provides an appropriate and reliable basis on which to determine the applicant's entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.
59. I consider that this is an appropriate case for an award of compensation to be made without a referral to an AMS. The matters raised by the respondent, including the absence of regulations made pursuant to s 321A of the 1998 Act, do not persuade me that the further delay and costs associated with a referral to an AMS are warranted. This is so particularly in a case such as the present where to require the applicant to be examined by a third independent examiner has the potential to cause the applicant further, unwarranted, distress.
60. Accordingly, I order that the respondent pay the applicant lump sum compensation pursuant to s 66 of the 1987 Act for 22% WPI in relation to the injury deemed to have occurred on 22 March 2017, in the sum of \$55,550.