WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4622/19**
Applicant: **Maha Elkhaligi**
First Respondent: **Lifestyle Solutions (Aust) Limited**
Second Respondent: **Life Without Barriers**
Date of Determination: **7 April 2020**
Citation: **[2020] NSWWCC 109**

The Commission determines:

1. The applicant suffered psychological/psychiatric injury on 30 July 2012 in the employ of the first respondent and in July 2014, 5 August 2014 and in March/ April 2015 in the employ of the second respondent.

2. As a result of these injuries the applicant has suffered 22% WPI.

3. Award for the applicant against the second respondent in the sum of $54,820 in respect of 22% WPI pursuant to section 66 in respect of the above injuries.

4. Liberty to apply in respect of the calculation above and also in respect of apportionment of compensation between the first and second respondent.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Maha Elkhaligi (the applicant) suffered psychological injury as a result of a series of incidents in the course of her employment as a community support worker. The first incident occurred on 30 July 2012 (the 2012 injury) in the employ of Lifestyle Solutions (Aust) Limited (the first respondent). Subsequently, the applicant suffered further injury in the employ of Life without Barriers (the second respondent) in July 2014, 5 August 2014 and in March/April 2015.

2. The applicant has not worked since 2015 by reason of her psychological condition. She has been paid weekly compensation and medical expenses.

3. By these proceedings, the applicant claims permanent impairment compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act). While the Application to Resolve a Dispute is confusing, one of the claims made by the applicant is for $57,760 "based upon 23% WPI", in accordance with a letter of claim dated 4 February 2019 served by the applicant's solicitor on the respondents.

4. The claim was based on the opinion of Dr Leigh Ingram, a psychiatrist, who in a report dated 31 January 2019, stated that the applicant suffered 23% whole person impairment (WPI) as a result of injury in the employ of both respondents.

5. While the respondents accepted liability in respect of injury, they disputed that the applicant was entitled to the compensation claimed on the basis of a report of Dr Matthew Jones, a psychiatrist, of 30 April 2019. Dr Jones assessed the applicant's WPI at the time of his assessment at 17%. On instructions from the respondents' solicitor, the doctor was asked to express an opinion as to the WPI which arose solely from the 2012 injury and to deduct that percentage from the applicant's overall WPI.

6. Dr Jones carried out a separate assessment of WPI arising from the 2012 injury, in accordance with the Psychiatric Impairment Rating Scale (PIRS) categories prescribed by the *SIRA guidelines for the assessment of permanent impairment 2016*. He expressed the opinion that the applicant suffered 10% WPI as a consequence of the 2012 injury. Deducting that 10% from the applicant's overall impairment, he concluded that the applicant suffered 5% WPI as a result of the psychological injuries in the employ of the second respondent.

PROCEDURE BEFORE THE COMMISSION

7. When the matter came on for a telephone conference in the Commission on 4 October 2019 Mr Newling, solicitor, represented the applicant and Mr Guest, solicitor, represented both respondents. The discussion at the telephone conference revolved around the concept of aggregation in section 322(2) of the *Workers Compensation and Workplace Injury* Management *Act 1998* and the application of the principle in *Trustees of the Roman Catholic Church for the diocese of Parramatta v Barnes* [2015] NSWCCPD 35 (*Barnes*), which states that an impairment may result from two or more injuries.

8. Mr Newling submitted that the matter should be referred for assessment of WPI based upon the injuries in the employ of both the first and second respondent. In accordance with the reasoning in *Barnes*, those injuries could give rise to one impairment. Alternatively, he submitted that the Commission could aggregate the impairments assessed by the Approved Medical Specialist (AMS) for each injury after receipt of the Medical Assessment Certificate (MAC) in accordance with section 322(2),

9. Mr Guest submitted that the facts of this case were different to those in *Barnes*. In *Barnes* there was only one employer and the injuries had occurred in short compass. He also submitted aggregation was inappropriate as it could not be said that the pathology which flowed from the 2012 injury was the same pathology as that which flowed from the subsequent incidents.

10. My initial impression was that Mr Newling's submission was correct and the matter could be referred for assessment of the applicant's psychological impairment on the basis of the injuries suffered by the applicant in the employ of both respondents. Obviously, the question of aggregation pursuant to section 323(2) could only be considered by the Commission after receipt of a MAC as the determination of the nature of the injuries by the AMS would be important, and possibly decisive, in determining whether the applicant suffered from the same pathology as a result of both injuries.

11. In those circumstances, with the consent of the parties, I chose to refer the matter for assessment of permanent impairment by an AMS before deciding the *Barnes* issue. It was my intention that the form of referral should elicit a certification from the AMS of WPI both as a result of all of the applicant's employment injuries and as a result of injuries in each relevant employment. If, on receipt of the MAC, there was still a dispute as to the applicability of the principle in *Barnes* and/or aggregation, it could be determined at that time.

12. Unfortunately, the language I employed in referring the matter for assessment was ambiguous. The Certificate of Determination of 4 October 2019 included the following orders:

> "1. Remit the matter to the Registrar for referral to an approved medical specialist to certify the degree of whole person impairment, if any, in respect of each of the following psychological injuries:
>
> a) on 30 July 2012 in the employ of the first respondent;
>
> b) in July 2014, 5 August 2014 and in March/ April 2015 in the employ of the second respondent.
>
> 2. Would the AMS also separately certify the whole person impairment as a result of the psychological injuries in paragraphs 1(a) and (b)."

The Determination of the AMS

13. By his MAC dated 31 January 2020, Dr Parmegiani diagnosed that the applicant as suffering from "chronic Post Traumatic Stress Disorder with secondary Major Depressive Disorder." He certified that the applicant's WPI was 22%. He separately assessed the 2012 injury as giving rise to WPI of 3%. He concluded thus:

> "Ms Elkhaligi had a pre-existing impairment of 3%, arising from the injury of 30 July 2012. Impairment attributable to her employment with life without barriers is therefore 22% minus 3% =19%."

14. When the matter came on for a further telephone conference on 6 March 2020, the parties were still unable to agree on the quantum of the applicant's permanent impairment compensation. Mr Newling submitted that the applicant should be compensated on the basis of 22% WPI. Mr Guest submitted that there should be an award of 19% WPI against the second respondent. I directed that both parties lodge written submissions addressing the orders the Commission should make for permanent impairment compensation. 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.

Submissions

15. The submissions of the parties are in writing and I do not propose to reiterate each of the arguments in these short reasons. Mr Guest expanded on his submission that the facts in this case must be distinguished from those in *Barnes*. That case involved an assessment of WPI by reference to spinal surgery arising from three incidents at work. Each of the incidents had caused or materially contributed to the need for surgery. By contrast:

> "In the current matter the AMS has not assessed one impairment arising from multiple injurious events, but rather specifically confirmed that the worker was suffering from impairments arising from the injury with the first respondent on 30 July 2012. Pursuant to S326 (1) of the WIM Act the AMS finding in this respect is conclusively presumed to be correct in this regard."

16. Mr Guest also argued that the fact that the "workers symptoms have become chronic resulting from injuries during the employment with 2nd respondent is supportive of a change in pathology between the two injuries and in accordance with the AMS findings the whole person impairment is divisible."

17. Mr Guest argued that the facts in this case could be distinguished from those in *Strasburger Enterprises Pty Ltd t/as Quix Food Stores v Serna* [2008] NSW CA 354 (*Serna*) as the incidents giving rise to psychological injury in *Serna* occurred during the course of one employment, "happened close together and the worker's incapacity did not arise until after both incidents."

18. Mr Carney of counsel, who prepared the applicant's written submissions and submissions in reply also noted that the psychological injury in this case arose from injuries in different employments. Nonetheless, he submitted that as the claim was for one impairment resulting from the injuries, liability to pay the entirety of the permanent impairment compensation should fall upon the second respondent. In these circumstances, section 22 of the 1987 Act contemplated that there could be an apportionment between respondents by agreement or by the Commission, if either of the respondent's sought that relief.

Legislation

19. Insofar as it is relevant, section 322 of the 1988 Act is as follows:

> "(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker."

FINDINGS AND REASONS

Section 323(2)

20. In *Department of Juvenile Justice v Edmed* [2008] NSWWCCPD 6 (*Edmed*) the following appears:

> "This situation is partly addressed in section 322(2), which provides that 'Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker' (emphasis added). The reference to 'the same injury' in section 322(2) cannot be a reference to 'the same incident' because that situation is dealt with in section 322(3). The expression 'the same injury' is not defined but it follows that if 'injury' in section 322(3) means 'pathology' (as it must), then, for the section to be logically consistent, it must mean the same in section 322(2). If 'injury' in section 322(2) means 'pathology' then, for section 322(2) to be consistent with section 322(3), impairments resulting from the 'same injury' (the same pathology) are to be 'assessed together' regardless of whether they arise from the same 'incident' or separate incidents."

21. Deputy President Roche referred to the Macquarie Dictionary, second edition, and noted that "same" was defined as "identical" or "corresponding", although having a different name.

22. While the reasoning in *Edmed* is not without difficulty, as far as I am aware it has not been contradicted by any other presidential decision or overruled by the Court of Appeal. Accordingly, I am bound by the decision.

23. Certainly, the principle is confined by the amendments made to section 66 by the *Workers Compensation Legislation Amendment Act 2012*, which precludes the making of more than one claim for permanent impairment as a result of an injury. Obviously, *Edmed* will have less work to do following the amendment than it did under the previous dispensation. Once a claim has been made for permanent impairment the worker's entitlement to permanent impairment compensation is spent. Impairment flowing from the injury cannot be aggregated with any other injury.

24. In this case, there has been no previous claim for permanent impairment compensation in respect of injury with either respondent. At the telephone conference, Mr Newling emphatically made the point that his primary claim was for 23% WPI as a result of injuries in the employ of both respondents. Thus, section 66 of the 1987 Act cannot preclude the claim.

25. In my opinion, the evidence establishes that the applicant suffered from the same "pathology" as a result of the incidents in the employment of both respondents. It is true that her condition has waxed and waned over the years, gradually improving after the 2012 injury and significantly worsening during her employment with the second respondent. Nonetheless, the medical evidence overwhelmingly leads to a conclusion that she has always suffered from post-traumatic stress disorder with varying levels of depression.

26. Dr Parmegiani, the AMS, diagnosed the applicant as suffering from post-traumatic stress disorder with secondary major depressive disorder. It is evident that he attributed this condition both to the 2012 injury and the subsequent injury/injuries in the employ of the second respondent. That conclusion is consistent with all of the treating medical evidence and the opinion of Dr Ingram. It is not entirely at odds with the opinion of Dr Jones who concluded that the applicant's condition could be diagnosed as "a persistent depressive disorder with anxious distress". He explained that this condition was "a natural progression of her previous chronic post-traumatic stress disorder with comorbid depressive symptoms."

27. Dr Parsonage is the applicant's treating psychiatrist. He initially saw her in 2012 and continued to provide medical reports addressing the applicant's condition until recently. He also records some variation in the applicant's condition over the years and an exacerbation of that condition during her employment with the second respondent. Nonetheless, his diagnosis of the applicant's condition has not wavered over this time. Throughout his reports, he consistently affirms that it is post-traumatic stress disorder. I have no hesitation in accepting the evidence of Dr Parsonage, who is in the best position of all the doctors to diagnose the applicant's pathology by reason of his specialty and his long acquaintance with her.

28. Over the long period since the 2012 injury, the applicant has seen the one general practitioner, Dr Kylie Lucas. In a medical report, dated 14 December 2015, the doctor said this:

> "In my opinion Ms Elkaligi's condition is related to her work place injury sustained 30 July 2012 as this is when her symptoms first began and she has never been free of symptoms since. In my opinion Ms Elkaligi's exacerbation of her symptoms are due to repetitive ongoing life threating incidents which occurred during her employment with Life With Out Barriers."

Dr Lucas has also had the advantage of treating the applicant over a long period. Additionally, she has had access to the reports of all of the treating medical professionals to whom she has referred the applicant for therapy. In my opinion, her evidence is entirely consistent with the applicant suffering from the one pathology throughout this period of treatment.

29. In other circumstances, there may be some force in the respondent's arguments relating to the length of time between the two injuries but in this case it is quite clear that the applicant remained with some symptoms of post-traumatic stress disorder throughout the entirety of the period between the 2012 incident and the cessation of her work with the second respondent.

30. In my opinion, the evidence establishes that the applicant suffered from post-traumatic stress disorder following the injury in 2012 and she continues to suffer from that condition. I reiterate that the fact that a condition waxes and wanes does not necessarily detract from a finding that the pathology remains the same. It follows that the suffers from the same pathology as a result of injuries in the employ of both respondents.

31. The findings of the AMS in respect of the WPI does not preclude aggregation pursuant to section 322. The caselaw is quite clear that aggregation is entirely a matter for the Commission and I undoubtedly have the jurisdiction to aggregate losses and impairments in respect of separate injuries if the prerequisites of the section are met.

The Principle in *Barnes*

32. The reasoning of Deputy President Roche in *Barnes* affirms is that a single incapacity, loss or impairment can result from multiple injuries. If there is difficulty with the reasoning in *Edmed*, the same cannot be said of *Barnes*. It rigorously applies the approach of the courts and the Commission prior to the 2012 Amending Act. As discussed above, the amendments to section 66 modifies this approach in respect of permanent impairment compensation but does not eliminate it.

33. While the reasoning in *Barnes* relied primarily upon the decisions of the Court of Appeal in *Serna* and *Leppington Pastoral Co Pty Ltd* v *Juweinat* (2002 (NSWCA) 228 16 July 2002, there is ample modern authority for the proposition that incapacity may result from more than one injury. These include decisions of the High Court of Australia and the Privy Council. In a much-quoted passage from the judgment of Brennan J, with whom each other member of the court agreed, in *Accident Compensation Commission v CE Heath Underwriting & Insurance (Aust) Pty Ltd* (1994) 121 ALR 417, the following appears at 421:

> "Liability to make weekly payments or to pay a lump sum is imposed on any employer liable in respect of an injury which caused or materially contributed to the incapacity."

And

> "Similarly, liability under the Act to make weekly payments during incapacity or to pay a lump sum in redemption of that liability arises from each of the injuries which caused or materially contributed to the incapacity. Any employment in the course of which the worker sustained an injury causing or materially contributing to his incapacity attracts liability to the employer and to the insurer on risk at the time of the injury." (footnote omitted)

34. In *Sutherland Shire Council v Baltica General Insurance Co Limited* (1996) 39 NSWLR 87 (*Sutherland Shire*) Clarke JA said this at [97]-[98]:

> "In the light of the judgment in *Accident Compensation Commission v CE Heath*, I do not think there is any impediment to my acceptance of the view that the common law test applies and that the relevant inquiry directs attention to whether the injury caused or materially contributed to the incapacity. Accordingly, the approach evident in *Morris v George*, which reflected the restrictions imposed by the search for a proximate or direct cause should, in my view, no longer be regarded as sound."

35. Prior to 2012, a finding that the applicant suffered a loss or an impairment as a result of multiple injuries would not have raised an eyebrow. In the circumstances of this case, I have no doubt that the applicant's psychological impairment arose as a result of injuries in the employ of both respondents. As the applicant made one claim for permanent impairment resulting from these injuries and has not made a previous claim in respect of any injury, *Barnes* and the previous case law dictate that she should be compensated accordingly.

36. The one difficulty that might confront such an outcome arises from Mr Guest's submission that the finding of the AMS as to what impairment has arisen from each injury is binding on the Commission by reason of section 326(1)(a) of the 1998 Act. That submission is undoubtedly correct. However, in my opinion the MAC of Dr Parmegiani also certifies that the applicant has 22% WPI as a result of her injuries with the first and second respondents. There is no suggestion in this case of any cause other than employment for the applicant's impairment. Therefore, in my opinion, a finding of 22% WPI does not contravene the injunction in s326(1) of the 1998 Act. It is open to an arbitrator. I propose to order that the second respondent pay compensation on that basis.

37. The format of the MAC results from the questions which I posed for the AMS in the orders in the Certificate of Determination, which I have set out above. With the benefit of hindsight, the Certificate of Determination could have been worded differently. On the other hand, Mr Guest may have not consented to any different formula.

SUMMARY

38. I find that the applicant suffered injury on 30 July 2012 in the employ of the first respondent and in July 2014, 5 August 2014 and in March/ April 2015 in the employ of the second respondent.

39. I propose to make an award for the applicant against the second respondent pursuant to section 66 in the sum of $54,820 in respect of 22% WPI.

40. I propose to give liberty to apply in respect of the calculation above and also in respect of apportionment of compensation between the first and second respondents.