WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1139/20**
Applicant:	**Tabatha Sharman**
Respondent:	**Chemtools Pty Ltd**
Date of Determination:	**14 July 2020**
Citation:	**[2020] NSWWCC 237**

The Commission determines:

Finding

1. There is a medical dispute within the meaning of s 319 of the *Workplace Injury Management and Workers Compensation Act 1998.*

Order

2. The assessment of whole person impairment is remitted to the Registrar for referral to Dr Hong (the Approved Medical Specialist) in accordance with the referral dated 12 May 2020.

3. The AMS is advised that the respondent has withheld a report on assessment provided by Dr Rastogi and that he is entitled to consider the principles of *Jones v Dunkel* as set out in paragraph 41 of these Reasons.

JOHN HARRIS
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 HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Tabatha Sharman (the applicant) was employed by Chemtools Pty Ltd (the respondent). The applicant commenced proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

2. The applicant served a report of Dr Thomas Clark dated 15 February 2019 who assessed the applicant at 16% whole person impairment (WPI). A subsequent report prepared by Dr Clark and dated 14 February 2020 assessed the applicant at 19% WPI.

3. Dr Rastogi was qualified by the respondent and provided a report dated 9 December 2019. Dr Rastogi did not assess WPI in that report.

4. The matter was listed for telephone conference on 12 May 2020 before Senior Arbitrator Capel who made the following orders:

> "1. The Application to Resolve a Dispute is amended as follows:
>
> a. Type of Injury: Disease
>
> b. Date of Injury: 2012 to 9/10/18 (deemed)
>
> c. Period of weekly compensation: 5/10/19 to date and continuing
>
> d. Past medical expenses: $3,000
>
> 2. An award for the respondent in respect of the claim for weekly compensation.
>
> 3. The respondent to pay reasonable medical expenses up to $3,000 on production of accounts and/or receipts and the Medicare charge pursuant to s 60 of the *Workers Compensation Act* 1987, thereafter an award for the respondent.
>
> 4. Remit the matter to the Registrar for referral to an Approved Medical Specialist for assessment of the whole person impairment due to a psychological injury sustained on 9 October 2018 (deemed).
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> 5. The medical examination can proceed via a video assessment and the parties are aware of the requirements contained in the Commission's e-bulletin 101. The examination is not to be scheduled until after 19 June 2020.
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> 6. The documents to be reviewed by the Approved Medical Specialist are:
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> a. Application to Resolve a Dispute and attachments;
> b. Reply and attachments;
> c. Application to Admit Late Documents received on 17 April 2020;
> d. Application to Admit Late Documents received on 5 May 2020, and
> e. An Application to Admit Late Documents, attaching a further report from Dr Rastogi, to be filed and served by 19 June 2020.
>
> 7. The matter is listed for a further telephone conference before me at 12.00 pm on 12 June 2020."

5. The matter was listed before me on 12 June 2020. The respondent then advised that it had not received a report from Dr Rastogi. That assertion was subsequently clarified later in the conference when it confirmed that it was in possession of a draft report.

6. I then made the following orders:

> "1. Order 6(e) of the Consent Orders dated 12 May 2020 is amended by deleting '19 June 2020' and inserting 'close of business, 18 June 2020'. Otherwise the examination with the AMS is presently proceeding on 26 June 2020.
>
> 2. In the event that the respondent serves a further report from Dr Rastogi then it agrees that all correspondence from and to Dr Rastogi in respect of the preparation of the report be served in the application to admit late documents.
>
> 3. The applicant has liberty to apply for a further telephone conference on or after 19 June 2020 following either service or non-service of the report by Dr Rastogi for the purposes of seeking to revoke the referral to the AMS and requesting the Commission determine the section 66 entitlement."

7. The Commission was subsequently advised that the respondent would not be serving the further report prepared by Dr Rastogi.

8. The matter was then listed for an arbitration hearing on 9 July 2020 principally on the issue of whether there was a "medical dispute" within the meaning of s 319 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

9. At the arbitration hearing the respondent advised that it claimed legal professional privilege over a report provided by Dr Rastogi following the further examination with the applicant on 1 May 2020.

10. The applicant ultimately did not contest the proposition that the respondent could claim legal professional privilege and that it had otherwise not waived privilege over this report by serving a prior report prepared by Dr Rastogi. The applicant sought a *Jones v Dunkel* inference from the respondent's failure to serve the report.

IS THERE A MEDICAL DISPUTE?

Submissions

11. The applicant submits that there is no medical dispute that can be referred to an Approved Medical Specialist (AMS). It submitted that there could only be a medical dispute when an appropriately accredited doctor had provided an assessment of permanent impairment inconsistent with the assessment served by the applicant.

12. The respondent accepts that there must be a medical dispute before the matter can be referred to an AMS. It indicated that the extent of the degree of permanent impairment as a result of injury was disputed in the Reply. In written submissions it contested some of the Psychiatric impairment rating scales (PIRS) as assessed by Dr Clark and otherwise submitted that there should be a s 323 deduction.

13. The respondent submitted that the applicant's submission was reading words into the section.

Reasons

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

> "'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."

15. As the plurality stated in *Military Rehabilitation Commission* v *May*[1], the "question of construction is determined by reference to the text, context and purpose of the Act"; citing *Project Blue Sky Inc v Australian Broadcasting Authority*[2] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[3].

16. Section 319 refers to a "dispute" between the parties pertaining to a number of those matters. It is a dispute about those specified matters which constitutes a "medical dispute".

17. The respondent in its Reply has disputed the degree of permanent impairment.

18. In *Hochbaum v RSM Building Services Pty Ltd*[4] Brereton J referred to and rejected the respondent's argument that an assessment was required by an AMS to satisfy the criteria in s 39 of the 1987 Act. His Honour stated:[5]

> "Moreover, it is at least opaque what mechanism is available for obtaining an assessment under Pt 7 of Ch 7 of the 1998 Act where there is no dispute about the degree of impairment, as in those circumstances there can be no 'medical dispute' within the meaning of Pt 7 of the 1998 Act, and thus nothing to be referred to an approved medical specialist for assessment."

19. His Honour adopted the language of the statute in noting that where there was "no dispute" then there was no "medical dispute" as defined in that Part. The section refers to "dispute" between the parties and when that "dispute" relates to certain matters, it is defined to be a medical dispute. The section does not require that there be a "medical dispute" based on competing assessments of WPI.

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[1] [2016] HCA 19 at [10].
[2] [1998] HCA 28 [69]-[71].
[3] [2009] HCA 41 (*Alcan*).
[4] [2020] NSWCA 113.
[5] *Hochbaum* at [48], White JA agreeing.

20. The test for reading words into a statutory provision is articulated in *Taylor v The Owners-Strata Plan No 11564*[6] where the plurality stated:[7]

> "The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'."

21. The principles set out in *Taylor* have been applied by the Court of Appeal in two appeals concerning the construction of the 1987 and 1998 Acts: *State of NSW v Chapman-Davis*[8] and *Cram Fluid Power Pty Ltd v Green*.[9]

22. There is no basis to reads words to limit the concept of a dispute to the circumstances articulated by the applicant. In my view the reading of those words does not satisfy the test for reading words into the section.

23. In *Uelese v Minister for Immigration and Border Protection*[10] the plurality (French CJ, Kiefel, Bell and Keane JJ) cited *Legal Services Board v Gillespie-Jones*[11] and stated that "a construction that 'appears irrational and unjust' is to be avoided where the statutory text does not require that construction". These observations are equally apposite to the construction proposed by the applicant.

24. A respondent may not have obtained a medical assessment because it had not given appropriate notice within the relevant time frame set out in the legislation that it required a medical examination.[12] In those circumstances I do not accept that the respondent would be bound by the assessment provided by the applicant.

25. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[13] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[14] The fourth edition guidelines have been held to have the force of delegated legislation.[15]

26. There is no reason why other evidence, including treating medical evidence may be relevant in determining the assessment of WPI. Various orthopaedic assessments depend on primary information, such as surgical reports or scan evidence to determine the precise pathology or nature of the surgery in assessing the degree of permanent impairment.

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[6] [2014] HCA 9 (*Taylor*).
[7] At [38].
[8] [2016] NSWCA 237 at [1] and [49].
[9] [2015] NSWCA 250 at [1], [12], [88] and [131].
[10] [2015] HCA 15 at [45].
[11] [2013] HCA 35 at [48].
[12] See s 282 of the 1998 Act.
[13] The 4th edition guidelines are issued pursuant to s 376 of the 1998 Act.
[14] Clause 1.1 of the fourth edition guidelines.
[15] *Ballas v Department of Education* [2020] NSWCA 86 at [97].

27. One example is set out in *Secretary, Department of Education v Jacobs*[16] where the dispute related to the number of levels subject to the surgical procedure. The resolution of that dispute depended upon the clinical notes of the operating surgeon. Not unusually a qualified doctor will provide an assessment otherwise in accordance with the fourth edition guidelines and/or otherwise inconsistent with underlying facts.

28. This conclusion is consistent with paragraph 1.47 of the fourth edition guidelines which provides:

> "The report should contain factual information based on all available medical information and results of investigations, the assessor's own history-taking and clinical examination. The other reports or investigations that are relied upon in arriving at an opinion should be appropriately referenced in the assessor's report."

29. Apart from the general provision in paragraph 1.47, paragraph 11.6 of the fourth edition guidelines, which appears in the chapter for psychological injury, provides that consideration be given to medical reports and feedback from treating professionals.

30. Consistent with these provisions, an AMS is required to consider treating opinions in forming his opinion. In these circumstances it is logical that a dispute could be based on treating opinions contrary to the conclusions reached by the doctor relied upon by the applicant.

31. The respondent has referred to various opinions concerning the applicant's employability in raising what is a dispute about the appropriate scale for employability. In its written submissions, consistent with the opinion expressed by Dr Rastogi in the report it served, the respondent submitted that the applicant warranted a class for employability lower than that assessed by Dr Clark.

32. I accept that a dispute could be properly founded upon treating medical reports in this case which are inconsistent with that expressed by the only qualified doctor assessing permanent impairment.

FURTHER CONDUCT

33. I have formed the opinion that I will not be determining permanent impairment despite the respondent not serving the recent report of Dr Rastogi.

34. The parties accepted that the future disposition is within my discretion: s 354 of the 1998 Act. Whilst there is power for the Commission, as opposed to an AMS, to determine WPI, that power must be exercised in appropriate cases.

35. Having determined to refer the matter to an AMS and noting that the assessment will be made by another person and subject to separate appeal rights, I add some comments about the respondent's written submissions on s 323.

36. The respondent's submissions on s 323 were wrong in law and contrary to the decision of Beech-Jones J in *Cullen v Woodbrae Holdings Pty Ltd*.[17]

37. It was clear that the respondent was unaware of *Cullen* and its brief submissions that the decisions may be incorrect was not based on any legal analysis. The principle articulated in *Cullen* is otherwise consistent with the recent Court of Appeal decision in *Secretary, Department of Education v Johnson.*[18]

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[16] [2020] NSWWCCMA 39.
[17] [2015] NSWSC 1416 (*Cullen*) at [57].
[18] [2019] NSWCA 321 at [109].

38. The respondent otherwise conceded that there was no evidence of any pre-existing condition or abnormality prior to the period of the injury to justify any s 323 deduction. There is no evidence that the applicant had a pre-existing illness or abnormality prior to the period of employment causative of the accepted primary psychological injury.

39. In these circumstances the respondent's written submissions will not be referred to the AMS.

40. I also observe that the respondent accepted that there was no secondary psychological injury and that the Consent Orders should be read consistent with acceptance of a primary psychological injury.

Jones v Dunkel

41. The respondent's failure to serve the report of Dr Rastogi raises a clear *Jones v Dunkel* inference. Given the respondent's conduct in this matter I believe it is appropriate to direct the AMS on this issue.

42. The relevant principles in relation to the drawing of a *Jones v Dunkel* inference were discussed by Roche DP in *University of New South Wales v Brooks*[19] which adopted the discussion by the Court of Appeal in *MSPR Pty Ltd v Advanced Braking Technology Ltd* [2013] NSWCA 416. Roche DP stated[20]:

> "60. The principles that arise when a party takes a *Jones v Dunkel* point were succinctly summarised by Macfarlan JA (Ward and Gleeson JJA agreeing) at [53] in *MSPR Pty Ltd v Advanced Braking Technology Ltd* [2013] NSWCA 416. It is convenient to set out his Honour's summary in point form:
>
> (a) '[a] *Jones v Dunkel* inference may be drawn against a party where the party would be expected to, but does not, call a witness who could give evidence on a relevant matter and that failure is unexplained (*Payne v Parker* [1976] 1 NSWLR 191 at 201)' (*Payne*) (two other preliminary points identified in *Payne*, as being necessary before a *Jones v Dunkel* point arises, were that the witness's evidence would elucidate a particular matter and that his or her absence is unexplained);
>
> (b) '[t]he inference to be drawn in these circumstances is not that the witnesses' evidence would have been adverse to the party, but simply that it would not have assisted the party's case (*Kuhl v Zurich Financial Services* [2011] HCA 11; 243 CLR 361 at [64]; *ASIC v Hellicar* [2012] HCA 17; 247 CLR 345 at [168] and [232])' (*Hellicar*);
>
> (c) '[t]he inference permits the Court to make a finding unfavourable to the party with greater confidence (*Hellicar* at [232])';
>
> (d) 'for a *Jones v Dunkel* inference to be drawn, there must be evidence that the party against whom it is to be drawn is required to explain or contradict (*Schellenberg v Tunnel Holdings Pty Limited* [2000] HCA 18; 200 CLR 121 at [51])', and

[19] [2014] NSWWCCPD 68.
[20] At [60]-[62].

(e) ‘to base a judgment against a party simply upon his or her failure to call evidence would involve the erroneous drawing of an inference that the party’s evidence would have been positively adverse to his or her interests’.

61. To the above points may be added that the failure to call a witness a party would normally be expected to call does not mean that the court applies ‘some indeterminate discount to the cogency of whatever evidence was called’ (*Hellicar* at [155]). In other words, other evidence may establish the party’s case, even without the missing witness.

62. Significantly, where *Jones v Dunkel* applies, other evidence may, not must, be accepted and inferences drawn more readily (*Galea v Bagtrans Pty Ltd* [2010] NSWCA 350 at [2] and [52]–[62]). The drawing of an inference is not mandatory and, ‘generally speaking, these inferences only become material where the balance of the evidentiary record is equivocal’ (*Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [79]).”

CONCLUSION

43. The findings and orders are set out in the Certificate of Determination.