

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6658/19
Applicant: AX
Respondent: AY
Date of Determination: 11 March 2020
Citation: [2020] NSWCC 71

The Commission determines:

1. An award for the respondent.

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 MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, AX, commenced employment as a labourer with the respondent, AY, in 2011.
2. The applicant claims that between 20 June 2018 and 19 September 2018 there were events at work whilst employed with the respondent whereby he sustained a psychological injury by way of an aggravation of a disease.
3. In September 2019 the respondent agreed on a without admission and voluntary basis to pay weekly benefits of compensation to the applicant for a period from 15 January 2019 to 23 July 2019 for a psychological injury caused by the nature and conditions of the applicant's employment with the respondent from 20 June 2018 to 19 September 2018.
4. The applicant has made a claim for 24% whole person impairment for psychological injury which results from a disease injury within the meaning of section 4 (b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act).
5. The respondent disputes that the applicant sustained injury arising out of or in the course of his employment with the respondent in dispute notices dated 31 December 2018 and 22 January 2020.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant sustained injury as a result of a disease injury within the meaning of section 4 (b)(ii) of the 1987 Act, and
 - (b) the respondent puts the applicant's credit in issue.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference and hearing on 28 February 2020. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
8. Ms Grotte appeared for the applicant, instructed by Mr Peisley. Mr Paul Barnes, appeared for the respondent, instructed by Ms Ulmer.
9. I did not allow into evidence a report from Dr 1 dated 19 December 2019 as that was a second independent medical opinion and was contrary to Regulation 44 of the *Workers Compensation Regulation 2016*. I informed the parties that I would not read any references to the report of Dr 1 in the reports of Dr 2 and Dr 3.
10. I did not allow into evidence a report dated 7 February 2020 or DVD of surveillance of the applicant on 2 February 2020 that was sought to be relied upon by the respondent as that material was objected to by the applicant and had only been served on the applicant's solicitors the day prior to the arbitration.

11. I did not allow into evidence letters of instruction to Dr 3, who was retained to provide reports at the request of the respondent, even though those letters were provided to the applicant's solicitors by the solicitors for the respondent. The reason I gave was that those documents were not included in the Application to Resolve a Dispute (ARD) or any late documents filed by the applicant, and were objected to by the respondent.

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) Application to Admit Late Documents filed by the applicant on 11 February 2020, and
 - (d) a letter from Dr 3 dated 28 February 2020.

Oral evidence

13. I allowed some very limited cross examination of the applicant in regard to some surveillance of the applicant in Dubbo on 2 February 2020.

FINDINGS AND REASONS

The applicant's evidence

14. The applicant has provided five signed statements in regard to the psychological injury he claims to have sustained in the course of his employment with the respondent. Those statements are dated 26 June 2018, 14 February 2019, 21 October 2019, 9 February 2020 and undated statement entitled "To whom it may concern."
15. The applicant states that he was employed by the respondent as a labourer for over seven years. He states that he always felt confident about his job, was keen to go to work and felt he could make a difference in the community. He states that this changed after he provided a statement in support of his work colleague, W1, in regard to an incident which occurred between W1 and W2 on 20 June 2018.
16. The applicant states that towards the end of a shift on 20 June 2018 he witnessed a conversation between W1 and W2. W2 was taking a road sign home and the applicant heard W1 say to W2 that he should ask a supervisor before taking the sign home and W2 responded: "You had better watch yourself or I will punch holes in you like this sign." The applicant states that the sign had bullet holes in it.
17. The applicant states that he had a golf ball in his pocket and threw the ball towards W2 as he was walking to his car. The ball missed W2. The applicant gives no explanation as to why he did this.
18. The applicant states that several minutes later he was walking with W1 when W2 drove towards them in his utility truck at a slow speed but struck W1 on the right thigh. The applicant states that W1 and W2 then exchanged words.

19. The applicant states that W2 then drove off but the applicant heard a bang, which he presumes was W1 touching W2's utility. The applicant states that W2 jumped out of his car and walked towards the applicant and said: "Which dickhead done that to my ute?" The applicant states that he told W2 it was not him and walked away but could hear W1 and W2 bickering again. The applicant states that he felt threatened and intimidated by W2's manner towards him.
20. The applicant states that after he provided a statement in support of W1's complaint about the incident on 20 June 2018, he was victimised by the respondent. He states that all overtime hours on a Saturday and every second Friday (which was otherwise his rostered day off) were stopped, whereas before he provided that statement in support of W1 he was offered work every Saturday and second Friday as overtime. The applicant states:

"Each week I would walk into the office and I would ask was there any work for either the Friday and Saturday and whichever supervisor was on at the time on the day I received the same response that there was no overtime available. However it appeared to me that no one else who asked for any overtime was having their overtime reduced or knocked back."
21. The applicant states that he continued to undertake his usual duties until 19 September 2018. He states that on that day he suggested to W2 that a bobcat could be used to push bitumen back into the centre of a roundabout that they were working on rather than shovelling it by hand. The applicant states that another worker, W3, then said to the applicant in a loud, aggressive and intimidating manner: "I told you to get a fucking broom, so go and get a fucking broom, AX."
22. The applicant states that the manner in which W3 addressed him made him feel instantly shocked, belittled in front of his work colleagues, and very upset.
23. The applicant states that he was already feeling under extreme stress in the workplace and began shaking and sweating. He states that he was fearful and upset because of previous abuse by W3. He states that he began to get heart palpitations and chest pain.
24. The applicant states that by the time he arrived home from work that day he felt very depressed and felt as if he had been hit on the head and his thinking was foggy. He states that the anxiety and feeling of sadness and worthlessness seemed to take hold of him to the point where he could not function or think properly.
25. The applicant states that he went to see his doctor and went along to counselling and visits to a psychiatrist.
26. In his statement dated 14 February 2019, the applicant states that despite receiving medical treatment he continues to have feelings of unworthiness and his self-esteem is very low. He states that he always feels on the verge of losing control and unable to handle the slightest issue appropriately.

The medical evidence

27. Following the incidents at work that have been described by the applicant, he had treatment from general practitioners at the local medical centre and Dr 4, consultant psychiatrist. Dr 2, consultant psychiatrist, who examined the applicant on two occasions at the request of his solicitors, records that the applicant also attended Mr X, counsellor, on three or four occasions but I could not locate any report or notes from Mr X in the material made available to the Commission.

28. There is no entry in the clinical notes from the local medical centre regarding the events complained of by the applicant until 24 September 2018, although on 11 September 2018, it is recorded:

“still feels down

.....

Not suicidal

Discussed about psychiatric referral

Pt may return”

29. There is in evidence a referral from the local medical centre to Dr 4, psychiatrist, dated 10 September 2018 which states: “AX suffers with Depression long-term and takes Sertraline. He feels tired and depressed sometimes. I would appreciate if you review him.”
30. There is also in evidence a referral from Dr 7 of the regional medical centre to Dr 4 dated 3 July 2018 requesting opinion and management for the applicant for “multiple compulsions including stealing ... and prostitutes” and also noting that the applicant had suicidal thoughts.
31. The first entry in the clinical notes from the local medical centre after the incident on 19 September 2019, is on 24 September 2018, wherein it is recorded:

“Work related bullying in the workplace
incident occurred at 19/09/18
pt very anxious
unable to cope at work”

The notes record a referral to Dr 4 and the prescribing of Sertra.

32. The referral letter to Dr 4 dated 24 September 2018 refers to the applicant suffering “depression for long term but recently he is distress with work bullying.”
33. There are lengthy notes from Dr 4 following the applicant’s first attendance on 12 October 2018. The notes record the incident which occurred on 19 September 2018 and includes: “Feels boss was aggressive and swore at him.” The notes also include:

“Doesn’t want to go back to work if the situation remains the same feels
he is being bullied and harassed by him”

34. The notes from that first attendance also record a past incident at work of “Rolled into GM’s residence”. Dr 4 also records past problems that the applicant had with drinking alcohol, although the applicant has been sober for the past three years; kleptomania; and compulsively calling prostitutes. Dr 4 records that the applicant’s sleep and appetite is not good but that his mood is usually settled.
35. In the notes for the applicant’s second attendance with Dr 4 on 9 November 2018, it is recorded that the applicant’s sleep is fine with a sleeping tablet, his appetite good but his mood anxious. Dr 4 also records that the applicant was going to Singapore for a holiday. He records that the applicant feels unable to go back to work yet.
36. Dr 4 provides a report to Dr 5 at the local medical centre after that second attendance and writes:

“... He reports suffering from PKAN a rare genetic disorder which affects his colour vision among other things. He got into trouble for accidentally rolling onto the driveway of his General Manager when he was cleaning asphalt off the road as part of a road repair crew. He was unaware it was the home of his General Manager and he did not read the light correctly

to realise he had to stop and not keep going. However, he has been penalised at work for this and his driving licence has been taken. He is currently off work on stress leave as a result and he feels very anxious about returning to work.”

37. Dr 4 writes of the several compulsive behaviours of the applicant identified by Dr 4 in his notes and concludes:

“I have diagnosed with:

- PKAN.
- OCD.
- Behavioural Disorders related to PKAN.”

38. Dr 2, consultant psychiatrist, has provided three reports at the request of the applicant’s solicitors. In his first report dated 20 February 2019, Dr 2 takes a history of the incident involving W1 and W2, that no overtime was offered to the applicant after he supported W1, and the incident in September 2018 when the applicant was sworn at.

39. Dr 2 records that prior to these events the applicant stated, “that he had not experienced psychological symptoms of concern”, that he had not previously consulted with psychiatrists or psychologists, and had not previously been diagnosed with a formal psychiatric disorder.

40. Dr 2 records at that first examination in February 2019 that the applicant revealed a depressed and anxious affect.

41. Dr 2 notes that the applicant has been diagnosed with pantothenate kinase-associated neurodegeneration (PKAN) but opines that there is no evidence that the applicant experienced neurological or psychiatric symptoms from this condition and no evidence that this condition has resulted in a pre-existent depressive disorder.

42. Dr 2 writes:

“AX did previously abuse alcohol but in my opinion this has been in remission for seven years. There is no clinical evidence that his clinical presentation is related to a pre-existent psychiatric or Alcohol Use Disorder. There is also no history of a pre-existent depressive disorder.”

43. Dr 2 also writes:

“It is my opinion that prior to the untoward events that occurred at AX’s place of work he had not experienced a depressive disorder and certainly there was no history of either a Major Depressive Disorder or Dysthymic Disorder, the combination of which is required for a Persistent Depressive Disorder.”

44. Dr 2 opines:

“It is my opinion that AX’s Major Depressive Disorder has been substantially contributed by the untoward events that he has experienced at his place of work and in particular the intimidation of his superior.”

45. Dr 2 assesses the applicant as having 24% whole person impairment, including having moderate impairment in Social Functioning, and Concentration, Persistence and Pace, and total impairment for Employability.

46. In a second report dated 1 October 2019, Dr 2 opines:

“AX continues to demonstrate diagnostic criteria for a Major Depressive Disorder. In my opinion this has been substantially contributed by the untoward events that occurred at his place of work, namely AY.

I found no competing causes for the emergence of AX’s psychiatric condition other than it is a result of exposure to demeaning, bullying and harassing behaviour by his employer.”

47. In a third report dated 6 February 2020, Dr 2 states that he has taken note of two reports of Dr 3 dated 28 October 2019 and 18 December 2019 (who was qualified by the respondent), several reports of Dr 6, a report and notes from Dr 4, and a surveillance report.

48. Dr 2 opines that the psychiatric injuries suffered by the applicant do not relate to the one incident on 19 September 2018 but dates from the incident with W2 on 20 June 2018 and was ongoing until he left work. He opines that he has difficulties in accepting why Dr 3 would exclude events that occurred prior to the one date of 19 September 2018 when Dr 3 makes reference to those incidents in his reports.

49. Dr 2 also confirms that there is no clinical evidence that the PKAN condition that the applicant has would account for the symptomatology the applicant experienced after the untoward incidents which occurred at the applicant’s place of work.

50. Dr 3 has provided two reports at the request of the respondent dated 28 October 2019 and 18 December 2019.

51. In his first report dated 28 October 2019, Dr 3 takes a history of the same incidents which the applicant claims to have caused his psychological injury as that recorded by Dr 2.

52. Dr 3 only attributes the incident on 19 September 2018 as likely to be of any significance but opines that it stretches credibility to accept that the applicant’s mental distress can be attributed to that one incident. Dr 3 considers that swearing or foul language on a road gang may be unpleasant or rude but would not lead to a sustained psychiatric injury.

53. Dr 3 reviews clinical notes from the local medical centre and refers to the prescribing of anti-depressant medication to the applicant during 2017. He also reviews clinical notes from the regional medical centre and refers to psychological problems going back to 2013 due to excess alcohol consumption. Dr 3 writes that those records reveal a clear and significant mental health history dating back to 2013 and that many of the applicant’s psychosocial problems predate September 2018.

54. Dr 3 also considers that the PKAN condition may predispose a person to depression and may have a direct causal effect for depressive episodes irrespective of what else is going on in that person’s life.

55. Dr 3 also considers that the applicant was prone to distorting facts or giving misleading accounts and to exaggeration.

56. Dr 3 concludes:

“There are major pre-existing and non-work-related factors that have been extensively discussed above that contribute to AX’s incapacity for work. These factors are far more long-term and substantial and significant compared to the events on 21 September 2018.”

57. The applicant states that during the examination which Dr 3 conducted on 16 October 2019, the questions being asked by Dr 3 caused the applicant to have a panic attack and that he did not answer some of the questions asked by Dr 3 truthfully because he had become upset and distraught.
58. Dr 3 states in a further report dated 18 December 2019 that he undertook a standard line of questioning regarding the applicant's family and his day to day activities, and that his line of questioning about the applicant's PKAN condition was serious and legitimate.
59. There is a report in evidence from Dr 8, neurologist, dated 27 March 2013, whom the applicant consulted for his PKAN condition. Dr 8 records that the applicant's "mood is good and he does not have any features to suggest anxiety or depression."
60. The clinical notes from the regional medical centre and have multiple entries between July 2013 and April 2015 of the applicant seeking treatment for alcohol problems and coming to terms with being diagnosed with PKAN. There is a referral letter to Dr 4 dated 29 July 2013 for "opinion and management in relation to regarding alcohol addiction and depression." There is a record of a consultation with Dr 4 on 7 August 2013 which relates to the applicant's alcohol problems and dealing with PKAN and includes a note of: "No psych illness."
61. The clinical notes from the regional medical centre and also include entries by Ms Y between 19 November 2014 and 21 April 2015 which also relates to the applicant's alcohol problems and dealing with PKAN.
62. There are entries in the clinical notes from the local medical centre on 7 August 2015 and 12 February 2016 for "mixed anxiety depression" and the prescribing of Fluoxetine. There are further prescriptions for Fluoxetine between those two dates.
63. There are entries in the clinical notes from the local medical centre on 9 January 2017, 6 February 2017, 22 June 2017 and 16 March 2018, for "mixed anxiety depression" and the prescribing of either Zoloft or Sertra.

Determination

64. In the ARD the "Type of injury" is stated to be: "Aggravation, acceleration, exacerbation or deterioration of a disease June 2018 onwards."
65. Both during and at the end of her submissions, Ms Grotte for the applicant submitted that the evidence supported a finding of the applicant sustaining an injury in the nature of a section 4 (b)(ii) injury.
66. Section 4 (b)(ii) of the 1987 Act provides as follows:

"In this Act:

Injury:

- (b) includes a disease injury, which means:

.....

- (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease."

67. In *NSW Police Force v Gurnhill* [2014] NSWCCPD 12 (*Gurnhill*), DP Roche said in relation to section 4 (b)(ii) at [67]:
- “The critical point is that before a finding can be made that a worker has suffered an aggravation injury under s 4(b)(ii), it is first necessary to establish (among other things) that he or she suffers from a disease (*Semlitch* per Windeyer J at 638).”
68. In *Darling Island Stevedoring & Lighterage Co Ltd v Hussey* [1959] HCA 55; 102 CLR 482 at 496 (*Hussey*), Dixon CJ said that the definition of “a disease” covers “what would ordinarily be regarded as a pathological condition continuing to operate according to its pathological nature.”
69. The fundamental difficulty which the applicant has in succeeding with this claim and which I raised with Ms Grotte towards the end of the hearing on 28 February 2020, is that the only opinion relied upon by the applicant to support his claim that he sustained a psychological injury in the course of his employment with the respondent is from Dr 2, but Dr 2 does not acknowledge that the applicant suffered a disease or opine that the applicant’s employment was the main contributing factor to the aggravation of that disease.
70. Dr 2 records from the applicant that prior to the incidents at his work between June and September 2019 the applicant had not experienced psychological symptoms of concern, had not previously consulted with psychiatrists or psychologists, and had not previously been diagnosed with a formal psychiatric disorder. Dr 2 concludes that there is no clinical evidence related to a pre-existing psychiatric disorder or a history of a pre-existing depressive disorder.
71. The clinical notes from the local medical centre and the regional medical centre reveal that the applicant was dealing with psychiatric problems and symptoms from at least July 2013. The attendances for treatment for those problems and symptoms between 2013 and 2015 were primarily for his misuse of alcohol and dealing with the revelation that he been diagnosed with PKAN. To his credit, it seems that the applicant had beaten the difficulties he was having with alcohol abuse by 2015.
72. There is the record made by Dr 8 in March 2013 that the applicant did not have any features to suggest anxiety or depression. There is the record made by Dr 4 in August 2013 of: “No psych illness”. However, there continued to be regular attendances by the applicant for treatment for anxiety and depression at the local medical centre from 2015 until a few months before the first incident complained of by the applicant at work on 20 June 2018, and those attendances included the prescribing of anti-depressant medication.
73. Before there is any note taken of the incidents complained of by the applicant between June 2018 and September 2018, there is a referral of the applicant to Dr 4 on 10 September 2018 for “Depression long-term” and confirmation of the applicant taking Sertraline. Three months earlier, Dr 7 at the regional medical centre had also prepared a letter of referral to Dr 4 for management due to multiple compulsions including stealing and prostitutes and suicidal thoughts.
74. In my view, the clinical notes from the local medical centre and the regional medical centre, which chronicle a consistent history of attendances for depression and the prescribing of anti-depressant medication, are consistent with what Kitto J in *Hussey* describes as “a pathological condition continuing to operate according to its pathological nature.”
75. There is no indication from the reports from Dr 2 that he was provided with the clinical notes from the local medical centre and the regional medical centre. In his final report dated 6 February 2020, Dr 2 lists various documents and reports that he has received and perused, including a report and notes from Dr 4, but does not refer to clinical notes from the local medical centre and the regional medical centre.

76. Given that Dr 2 does not acknowledge the history of the applicant's psychological symptoms and treatment for depression which pre-date the incidents which the applicant claims to have occurred at the work between June and September 2018, I find that I cannot rely upon the opinion expressed by Dr 2. Furthermore, that opinion, flawed as it is, runs counter to the case made by the applicant that the incidents at work between June and September 2018 were the main contributing factor to the applicant's psychological disease.
77. There is no other medical evidence which assists the applicant in establishing that what he has sustained is in the nature of a section 4 (b)(ii) injury. There is no report from any doctor from the local medical centre, in particular Dr 5, who the applicant attended from June 2018 onwards. Dr 5 does record the incident on 19 September 2018 but not the incident on 20 June 2018 or the applicant's complaints of being deliberately denied overtime.
78. Dr 5 does not provide an opinion as to whether the incident on 19 September 2018 or any alleged bullying materially contributed to the aggravation of the applicant's longstanding depression. In his referral letter to Dr 4 dated 24 September 2018, Dr 5 does refer to long term depression and recent distress due to work bullying but that is not enough for me to be satisfied that the bullying complained of (which Dr 5 only records in his notes as being the incident on 19 September 2018) was the main contributing factor to the aggravation of the applicant's psychological disease.
79. There is no opinion provided by the applicant's treating psychiatrist, Dr 4. The report that Dr 4 does provide to Dr 5 after two consultations which the applicant had with Dr 4 makes no mention of the incident on 19 September 2018 or any other of the incidents complained of by the applicant between 20 June 2018 and 19 September 2018. That may have been an oversight in a summary of those two consultations. However, it might also be that Dr 4, in his clinical judgment, considered that the incident on 19 September 2018 was of little importance in comparison to other reasons for the applicant's psychological symptoms, particularly given that his diagnoses of PKAN, OCD and behavioural disorders associated with PKAN bear no direct relation to the applicant's employment with the respondent.
80. It may be that one or more of the incidents that the applicant complains of between June 2018 and September could have been the main contributing factor to the aggravation of the applicant's psychological disease but there is no treating doctor who provides this opinion. Nor is it the basis for the opinion expressed by Dr 2 because that opinion is based on there being no disease to start with. Furthermore, as I have already observed, Dr 2's opinion is flawed as he has given no consideration to the applicant's pre-existing psychological symptoms in regard to the applicant's overall psychological condition.
81. The principal submission made by Mr Barnes for the respondent is that the applicant should not succeed as he is not a witness of truth. There is certainly some force to the argument. I have already referred to the applicant's denial to Dr 2 of experiencing any psychological symptoms of concern prior to June 2018, when the clinical notes reveal that he was prescribed anti-depressant medication on several occasions between 2015 and 2018, and that he had not previously consulted a psychiatrist or psychologist, despite seeing Dr 4 in 2013 and seeing a psychologist between 19 November 2014 and 21 April 2015.
82. There is also the record made by Dr 3 that the applicant had said he did not travel overseas and rarely left his house, only to concede that he travelled to the USA for a week in June and July 2019. Although the applicant has complained about certain aspects of the examination conducted by Dr 3, the applicant does not dispute this record made by Dr 3. The applicant states that he was having a panic attack and his confusion had skyrocketed but provides no explanation as to why he did not answer Dr 3 truthfully.
83. The record made by Dr 3 that the applicant said he had not gone shopping for a year despite he and his wife having separated for the previous six months also strains credibility.

84. However, the applicant fails with this claim primarily because there is no medical opinion to support the case made at the arbitration that the applicant's employment has been the main contributing factor to the aggravation, acceleration, exacerbation or deterioration or acceleration of a psychological disease, and that the only opinion relied upon by the applicant failed to consider and take into account evidence of a psychological disease which pre-dated the events which the applicant complained of between 20 June 2018 and 19 September 2018.
85. There will be an award for the respondent.