WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **992/20**
Applicant: **Umit Cayir**
Respondent: **Coles Supermarkets Australia Pty Ltd**
Date of Determination: **26 May 2020**
Citation: **[2020] NSWWCC 170**

The Commission determines:

1. Award for the respondent.

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

CAMERON BURGE
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The factual circumstances of this matter are largely unremarkable but give rise to issues of statutory interpretation concerning sections 15 and 16 of the *Workers Compensation Act 1987* (The 1987 Act).

2. While working in the bakery at the Figtree store of Coles Supermarkets Australia Pty Ltd (the respondent), Mr Umit Cayir (the applicant) developed an injury to his left wrist. There is no issue between the parties that the injury is in the nature of a disease process caused by the nature and conditions of his employment, or alternatively an aggravation to that disease process. He later developed similar problems with his right wrist.

3. The applicant worked for the respondent from August 2002 until 16 September 2018, when he left their employ and began working in the bakery at a Woolworths store. He described the onset of bilateral symptoms in his wrists and arms against a backdrop of prolonged heavy and repetitive work with the respondent. He claims his employment with Woolworths job involves a lighter workload than he had with the respondent, albeit he still works as a baker in his new job.

4. The applicant made a claim for permanent impairment compensation by letter from his solicitors to the respondent dated 12 June 2019. He alleged the deemed date of injury to be 1 August 2009, which was the date he apparently reported a gradual onset of left wrist pain to the respondent.

5. On 11 September 2019, the respondent issued a section 78 notice and declined liability. That notice alleged the injuries to each wrist were diseases of gradual process to which the applicant's employment with Woolworths was either employment to which the nature of the disease is due (section 15 of the 1987 Act) or employment to which the nature of the aggravation of the disease process is due (section 16 of the 1987 Act).

6. The section 78 notice also disputed the claimed date of injury and asserted it should be the date on which the applicant made his claim for permanent impairment compensation, namely 29 April 2019.

ISSUES FOR DETERMINATION

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

    (a) What is the nature of the claimed injury and the effect (if any) of employment at Woolworths on it?

    (b) What is the appropriate deemed date of injury?

PROCEDURE BEFORE THE COMMISSION

8. 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.

9. At the hearing before me on 28 April 2020, Mr L Robison appeared for the applicant instructed by Ms K Nichols and Mr T Baker of counsel appeared for the respondent instructed by Mr G Dolan.

EVIDENCE

Documentary evidence

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

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

    (b) Reply and attached the documents;

    (c) Respondent's Application to Admit Late Documents (AALD) dated 6 March 2020.

Oral evidence

11. There was no oral evidence called before the Commission.

FINDINGS AND REASONS

What is the nature of the applicant's injury and the effect (if any) of his work at Woolworths on it?

12. The applicant alleges the intensity of his work at Woolworths is less than that with the respondent. He alleges any issues caused in the course of employment with Woolworths are a discrete aggravation of the disease caused by his work with the respondent, and such aggravation should not be conflated with the disease itself. He submits the case against the respondent is founded on section 15 of the 1987 Act.

13. That section relevantly provides:

    "(1) If an injury is a disease which is of such a nature as to be contracted by gradual process:

        (a) The injury shall, for the purposes of this Act, be deemed to have happened…

            (ii) If the incapacity has not resulted from the injury – at the time the worker makes a claim for compensation with respect to the injury, and

        (b) compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due.

    (4A) In this section, a reference to employment to the nature of which the disease was due includes a reference to employment the nature of which was a contributing factor to the disease."

14. Section 16 of the 1987 Act applies to injuries caused by, *inter alia*, the aggravation or exacerbation of diseases, and relevantly provides:

    "(1) If an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease:

(a) the injury shall, for the purposes of this Act, be deemed to have happened:

(ii) If death or incapacity has not resulted from the injury, at the time the worker makes a claim for compensation with respect to the injury, and

(b) compensation is payable by the employer who last employed the worker in employment that was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration."

15. Given the wording of sections 15 and 16, it is necessary to examine the duties undertaken by the applicant at both workplaces. The nature and extent of the applicant's duties with the respondent are set out in his statement at paragraph 37 as follows:

> "I continued to perform my pre-injury duties as a baker within Coles Figtree until 16 April 2012 surgery such as stock replenishment within weight restrictions, cleaning, working ovens, doughnuts, icing, traying cookies et cetera as outlined in my return to work plan".

In paragraph 4 of his statement, the applicant also indicated that his duties included moving large bakery pans, kneading dough, stock replenishment, cleaning and working ovens.

16. In his supplementary statement found at page 14 of the Application, the applicant further described his duties with the respondent as follows:

> "Duties that I undertook whilst working at Coles included lifting heavy boxes, lifting bags of flour that were 12.5 kg, lifting 35 kg of dough from a large bowl then cutting the dough into 16 kg pieces to be placed into another machine. I would mould and flatten the dough, place it on trays. There were 54 loaves on one rack, weighing up to 4-5 kg including the tins. I was also involved in oven duties where I would have to knock out the tins. This duty used my wrist and caused it pain. While working at Coles there was a severe shortage of staff. At the commencement of my employment there were four staff members in the bakery section which went down to just myself. I was doing a 3-4 person job. My hours at Coles included 8-9 hour days with 30 minutes paid break and 30 minutes unpaid break. I would work around 152 hours per month as a full-time employee".

17. At paragraph 5 of his supplementary statement, the applicant contrasted those duties with those at Woolworths. He said:

> "Coles would make up to $65,000.00 sales running the bakery whilst Woolworths only makes up to $18,000 - $22,000 sales store wide. Woolworths had very different systems of work that help me with the daily load such as:
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> (a) reducing repetitive tasks due to more employees;
> (b) reduced heavy lifting;
> (c) longer break periods; and
> (d) smaller and less busy store to enable recovery time during the day.
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> I saw Dr Bodel on 29 April 2019. The symptoms I was experiencing at that time were the same symptoms that I had when I was employed at Coles. I do not believe that the position at Woolworths has in any way contributed to my injury as I had all of the symptoms prior to taking up the new employment with Woolworths. The position at Woolworths has assisted me to continue to work and manage the pain."

18. A further indication of the nature and extent of the tasks carried out by the applicant with the respondent are found in the task analysis in the respondent's AALD. No such documents are in evidence from Woolworths.

19. There is a long line of authority which has dealt with the meaning of the phrase "employment to the nature of which" a disease injury was due. In *Hay v Commonwealth Steel Company Pty Ltd* [2018] NSWWCCPD 31 (31 July 2018) (Hay), Deputy President Wood dealt with the phrase "employment to the nature of which" a disease is due in the context of a hearing loss claim.

20. The Deputy President noted the purpose of sections 15 and 16 is "to avoid unnecessary litigation, simplify the assignment of liability and remove the debate about "true causation". In such a case, it is not appropriate to look behind the nature of the employment to "true causation" (see also the decision of Roche DP in *StateCover Mutual Ltd v Cameron* [2014] NSWWCCPD 49 (Cameron). In both *Hay* and *Cameron*, it was held that to approach the question of causation of a disease injury (in those cases hearing loss) by reference to an inquiry as to actual causation as opposed to that required by the statute is "fundamentally wrong."

21. In *Hay*, Wood DP referred to the High Court decision in *Smith v Mann* (1932) 47 CLR 426. That case dealt specifically with the phrase at issue in this matter, namely a disease arising "from the nature" of employment. Starke J in that matter took the view that:

> "It must arise, no doubt, from the nature of the employment. But it is not necessary that it should arise 'out of the particular service of the particular employer sued': it is enough if the disease is 'incidental to that class of employment so that it can be attributed to service therein'."

22. In *Commonwealth v Bourne* (1960) 104 CLR 32 the High Court further considered the meaning of the phrase in s 10(1)(b) of the 1926 Act "due to the nature of the employment in which the employee was engaged". The Court concluded that the phrase referred to is not concerned with the particular activity with a particular employer, but rather the results which are incidental to the class of employment by virtue of its tendencies, incidents or characteristics. It is not concerned directly with something arising out of the particular service of the particular employee.

23. Dixon CJ said that the phrase "due to the nature of the work" was used:

> "to provide for ready recourse by the employee to the latest employer who employed him in work to the nature of which his complaint was due independently of the question of whether working for that particular employer contributed at all to his condition ... It was accordingly necessary to make the nature of the work the test and not the actual work done or the employment as it actually affected the man ...
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> The word 'nature' is a wide as well as a vague word and one must be careful not to narrow its application or attempt to reduce it to too much precision. But it does seem to refer to a connection between the 'disease' in the defined sense and the description of employment by virtue of its tendencies, incidents or characteristics."

24. Applying the above line of authority, it is not necessary to delve into the specific work carried out by the applicant after leaving the respondent's employ. Rather, it is simply enough that the employment is to the nature of which the disease is due. On the applicant's own case, he continues to carry out work as a baker. There is no basis upon which to draw sufficient distinction between the work with the respondent and with Woolworths. Notwithstanding a reduction in heavy tasks and lifting, longer breaks and a less busy store the relevant enquiry for the Commission is whether the work with Woolworths is employment "to the nature of which" the disease is due.

25. This is not a matter where the applicant has transferred from work as a baker into a completely sedentary role or a role with completely different duties. Rather, his own evidence is he carries out essentially the same duties, albeit they are somewhat less strenuous in nature. It is therefore difficult to see how the applicant can contend his employment with Woolworths is not of the same *nature* to that which he carried out with the respondent which, on his own case, has caused the disease injury.

26. Dr Bodel provides an opinion that the work with Woolworths is no more than a temporary aggravation, however, given the injury is accepted by the applicant as being a disease of gradual process, as already indicated the work with Woolworths need only be in the nature of that which has caused the injury. The applicant's work at Woolworths is as a baker, a position he also had with the respondent. Dr Bodel acknowledges the applicant's current work has caused an aggravation of the disease and that is, in my opinion enough to satisfy me that Woolworths is the employer who last employed the applicant in employment to the nature of which the disease and/or the aggravation of the disease is due.

Issue 2 – What is the correct date of injury?

27. In my view, the correct deemed date of injury in this matter is the date the applicant's solicitors made a claim for permanent impairment compensation.

28. Both parties accept the injury is one which is a disease of gradual process. This being so, authorities such as *SAS Trustee Corporation V O'Keefe* [2011] NSWCA 326 stand for the proposition that the date of injury in matters relating to disease injuries to which section 15 applies is the date of claim, in this instance 12 June 2019.

29. Mr Baker noted the claim is made in relation to both the left and right upper extremities. He noted, and I accept, the right arm symptoms only arose relatively recently.

30. For these reasons, in my view the applicant's correct date of injury is 12 June 2019, by which time he was employed with Woolworths who, I have found is the employer who last employed the applicant in employment to the nature of which the disease is due.

31. As Woolworths is not a party to these proceedings, no findings can be made against them, nor can there be any issue of apportionment between the respondent and Woolworths. This being so, the orders which follow from the findings which I have made is simply there be an award for the respondent in this matter.

SUMMARY

32. For the above reasons, there will be an award for the respondent.