

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1959/19
Applicant: MICHAEL ANTHONY COX
Respondent: TWEED HEALTH FOR EVERYONE PTY LIMITED ATF TWEED HEALTH FOR EVERYONE TRUST
Date of Determination: 1 August 2019
Citation: [2019] NSWCC 261

The Commission determines:

1. The Application to Resolve a Dispute is amended to include a claim for section 60 of the *Workers Compensation Act 1987* expenses.
2. The respondent to pay the applicant weekly compensation pursuant to section 37 of the *Workers Compensation Act 1987*:
 - (a) From 1 October 2018 to 31 March 2019 at the rate of \$2145.30; and
 - (b) From 1 April 2019 to date at the rate of \$2177.40.
3. Such payments to continue in accordance with the *Workers Compensation Act 1987*.
4. The respondent is to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses on production of accounts/receipts.
5. The claim for section 66 of the *Workers Compensation Act 1987* lump sum compensation is remitted to the Registrar for referral to an Approved Medical Specialist as follows:
 - (a) Psychiatric/psychological injury on 7 March 2017 (deemed).
6. In addition to the documents annexed to the Application and the Reply the following is to be before the Approved Medical Specialist:
 - (a) Supplementary report of Dr B Ng dated 20 May 2019.
7. The respondent is to file within seven days the supplementary report of Dr B Ng dated 20 May 2019.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic

Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute (the Application) is in respect of a claim for psychological injury on 7 March 2017. The insurer denied the claim in a notice dated 27 October 2018. The Application is for weekly compensation from 1 October 2018; section 60 of the *Workers Compensation Act 1987* (the 1987 Act) medical expenses; and section 66 of the 1987 Act lump sum compensation.

ISSUES FOR DETERMINATION

2. The following issues remain in dispute:
 - (a) Did Mr Cox suffer the aggravation, acceleration, exacerbation or deterioration of a disease? (s 4(b)(ii) and s 16 of the 1987 Act);
 - (b) If so, was the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration?
 - (c) If so, was Mr Cox totally or partially incapacitated for work in the period claimed? (s 36 & 37 1987 Act);
 - (d) Is Mr Cox entitled to be assessed for lump sum compensation? (s 66 of the 1987 Act);
 - (e) Is Mr Cox is entitled to compensation for medical expenses for the claimed injury? (s 60 of the 1987 Act); and
 - (f) Should the claim for lump sum compensation be remitted to the Registrar for referral to an Approved Medical Specialist (s 66 of the 1987 Act)?

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 4 July 2019. 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.

EVIDENCE

Oral evidence

4. There was no oral evidence adduced.

Documentary evidence

5. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) The Application with annexed documents.
 - (b) Reply with annexed documents.
 - (c) Application to Admit Late Documents filed for the respondent dated 6 June 2019 with "list of payments".

- (d) Application to Admit Late Documents prepared for the respondent dated 26 June 2019 comprising documents produced by the applicant (to be filed).
- (e) Supplementary report of Dr Bradley Ng dated 20 May 2019 (to be filed).

SUBMISSIONS

- 6. The representatives made oral submissions at the arbitration hearing. As they were recorded they will not be repeated here, but I have taken them into account, and they are referred to in the discussion below.

Did Mr Cox suffer an injury of the aggravation, acceleration, exacerbation or deterioration of a disease under s 4(b)(ii) and s 16 of the 1987 Act?

- 7. The respondent submits there should be an adverse finding as to Mr Cox's credit due to the false histories he gave the medical practitioners about his pre-existing psychological condition; the opinion of Dr Takyar carries no weight because he took a false history from Mr Cox; and Mr Cox tried to mislead Dr Ng about starting businesses when certified as totally unfit for work. The respondent submits that Mr Cox cannot be accepted as a credible witness and that this is sufficient for the claim to fail.
- 8. In *Federal Broom Co Pty Ltd v Semlich* [1964] HCA 34 Windeyer J said in establishing whether there has been an aggravation, acceleration, exacerbation or deterioration of a disease, "... the answer depends upon whether for the sufferer the consequences of his affliction have become more serious" (at 637). This approach has been followed more recently in *Kelly v Western Institute NSW TAFE Commission* [2010] NSWCCPD 71 in which Roche DP cited *Semlich*, observing,

"An aggravation or exacerbation of a disease occurs where the experience of the disease by the applicant is increased or intensified by an increase or intensifying of symptoms." (at [66])
- 9. Mr Cox outlines his previous psychological issues before commencing with the respondent from paragraph 88 of his statement. He says he was overwhelmed by a heavy workload with the previous employer and sought assistance from Dr O'Connor. He states he was prescribed Cymbalta 60mg one capsule in the evening and Diazepam 5mg, half tablet at night for sleep. He says he had a mental health plan with a psychologist but only attended one session as he felt he "was dealing with my stress without it". He says he continued to experience "stress and anxiety" in November to late December 2015, when he resigned. He says in February 2016 he was prescribed Venlafaxine 75mg which helped, and he ceased the Diazepam around March 2016. He says he was referred to psychologist Anna Pollock in November 2015 for the work stress but did not proceed to an appointment until 23 March 2017 because, he says, he did not feel his condition was severe.
- 10. The history given by Mr Cox to Dr Takyar and to Dr Greaves is not consistent with his statements, and nor is the history he gave in the workers compensation claim form. The psychological problems from 2015 did not resolve after two months as he told Dr Takyar. The problems prior to the employment with the respondent had been considerably more serious than as described by Mr Cox. However, care must be taken with psychological conditions in weighing credit because of the possible impact on perspective and memory. The relative significance of events may be skewed, and the insight of the patient into their own condition can be very different to the objective medical reality. This is a common situation seen by the Commission in cases of psychological injury. What appears to be an intention to minimise previous problems may be due to the overwhelming intrusion of recent stressful events in the mind of the person affected.

11. This means that Mr Cox's own version of past events must be treated with care, but it does not dictate that he has no credit as a witness on the causative factors of the alleged aggravation with the respondent. In this respect it is relevant that his account of the workplace incidents is generally supported by the other evidence, as discussed below. The respondent submits that Mr Cox cannot be accepted in reporting his own symptoms, but the diagnosis of his condition is a matter to be assessed by the specialists skilled in delving behind the presentation of those suffering psychological conditions.
12. There are a series of Centrelink medical certificates by Dr Adie from Ochre Health Medical Centre certifying Mr Cox as totally unfit for work from 3 November 2015 to 17 October 2016. These certificates do not seem to reflect Mr Cox's actual capacity to work, including his ability to commence with the respondent on 10 October 2016. He was then able to perform efficiently in re-organising the respondent's practice, as reflected in the various policies and procedures that were devised by Mr Cox to that end.
13. The respondent also submits that Mr Cox attempted to suppress the medical history because he did not agree to release his medical records to the insurer. Dr O'Connor's notes of 7 June 2017 suggest Mr Cox had not agreed to release his records to the insurer. The notes indicate that by 21 June 2017 he had agreed to release them. As submitted for Mr Cox the initial lack of consent was in the context of the release of medical records by the insurer to a third party (a director of the respondent's practice) in April 2017, resulting in an apology from Icare Workers Insurance on behalf of the insurer on 7 August 2017. Dr Pollock in her letter of 13 November 2018 refers to what she describes as privacy "breaches" over 18 months in the release of clinical notes to third parties in relation to Mr Cox's claim. In these circumstances I do not draw the inference that Mr Cox was attempting to obscure his medical history, but was concerned about further privacy breaches.
14. Mr Cox in his statements outlines the events that caused him stress, and these are generally corroborated by the other evidence, including the statements of Dr Sterne, Dr Blanckensee, and Dr Soden, and the contemporaneous email correspondence. There are differences in individual accounts of events and who was at fault, but there is no doubt the stressful incidents occurred. The work environment at the respondent's clinic was strained and there had been a history of conflict before Mr Cox's arrival which continued unabated and he became immediately involved in it. He was confronted by long-term divisions in the partnership and unresolved grievances among the staff. They were incidents involving Mr Cox related to this dysfunctional history including opposition to an external investigation he was co-ordinating; incidents of conflict with Dr Blanckensee and Dr Soden; and a major altercation with Dr Conroy resulting in a report by Mr Cox to police of alleged assault and a complaint by Mr Conroy.
15. Establishing there were tensions in the organisation and real incidents affecting him does not depend on Mr Cox's statements, because his account of these events is consistent with the other evidence. The history is consistent on the grievances raised as soon as Mr Cox commenced work and the independent inquiry then arranged by Mr Cox. Similarly, that there were conflicts between Mr Cox and Board members Blanckensee and Soden over the independent inquiry is supported by Dr Sterne and also by Dr Blankensee and Dr Soden themselves in their statements. The key incidents alleged by Mr Cox are not directly disputed. That Dr Blanckensee used the term "misogynist" to Mr Cox is not disputed. The stressful board meeting for Mr Cox on 7 March 2017 is supported by all board members.
16. I am satisfied on the evidence overall that there were incidents of conflict causing stress to Mr Cox in the workplace from the time he started with the respondent.
17. The respondent submits that the opinion of Dr Takyar cannot be accepted because Mr Cox gave an incorrect history as to his previous psychological problems. I do not accept this submission.

18. It is necessary for an expert witness to provide more than an opinion. The expert must give an explanation for the conclusion¹. The history given by Mr Cox as a psychiatric patient was not crucial to Dr Takyar's opinion as to causation. An experienced psychiatrist is adept at discerning the medical reality from unreliable histories likely given by patients suffering serious psychological injury. Dr Takyar not only had the clinical history before him, but he addressed that history in detail in his report. It is apparent that Dr Takyar did not simply accept Mr Cox's subjective report of the pre-existing condition. On the contrary, he combed through the actual medical history, and did not accept that the previous condition had been "slight",

"In terms of prior psychiatric history, while he reported that he had only suffered a mild grade anxiety episode in 2015 for two months duration I noted that the medical information in the file detailed a longer history of a condition commencing then; having reviewed the clinical file I note that there is a documented history of depressive and anxiety symptoms objectively recorded across reviews until the time of the work Injury and although there is a record of a call from Mr Cox reporting improvement and his decision to reduce his antidepressant from 150mg to 75mg, with a view to weaning.

Despite there being a record of some, presumably milder pre-existing symptoms, the review of his GP in late December did record improvement in mental state but with continuing anxiety. Mr Cox's personal statement also made reference to workplace bullying or difficulty at a prior employer, North Queensland PHN, which appears to correlate to the milder, previous symptoms before his current work injury.

This suggests that while there was a pre-existing anxiety and depression, the condition has worsened significantly as a result of the work-related Injury - that is, it has been aggravated. As a result, he now presents with quite significant symptoms that appear entrenched, as noted, and these symptoms are highly impairing - he has no capacity for employment because of the severity of his psychiatric symptoms."

19. It is clear that Dr Takyar did not accept Mr Cox's characterisation of the earlier problems as "slight", but has instead taken full account of the evidence of the clinical records. He discusses these records including treatment up to and beyond the commencement of the employment with the respondent. He notes,

"The review entry of 30.12.16 did describe him as appearing better in his mental state and reported that he felt happy and appreciated at work. However the improvement appeared to relate to depression, as he was still described as having some anxiety."

20. The respondent relies on Dr Ng who, like Dr Takyar, does not accept Mr Cox's presentation of his medical history at face value. In his report of 28 August 2018 he takes a history of events in the employment with the respondent that is consistent with the other histories including Mr Cox's statement. Dr Ng refers to the inaccurate history given by Mr Cox about the earlier medical issues and treatment. He then gives attention to a decision of the Fair Work Commission that was in the material before him including an adverse finding made by the Commission on Mr Cox's credit.

¹ *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11

21. The Fair Work proceedings in Queensland were in relation to an application by Mr Cox seeking an order to stop bullying, pursuant to s.798FC of the *Fair Work Act 2009*. The main issue was a jurisdictional question as whether the employment had ceased. Those proceedings are of limited value for the issues in dispute here. Dr Ng extracts parts of the decision on Mr Cox's credit. There is no reference to the nature of Mr Cox's psychological condition and how it might have affected his evidence. Dr Ng extracts a reference in the decision to Mr Cox's medical state,

"Further, there is insufficient evidence upon which I could be satisfied that Mr Cox was affected by a medical condition so that his conduct in leaving the meeting and sending an email resigning his employment was involuntary."

22. The Fair Work proceedings were for a specific purpose unrelated to the medical and legal elements being considered in this dispute. Dr Ng was somewhat distracted by the comments about Mr Cox's credit in that decision and this appears to me to have coloured his opinion. Dr Ng says,

"Given the documents I have received and today's assessment, I am very reluctant to arrive at a psychiatric diagnosis.

Even if we were to assume that Mr Cox was being accurate and truthful about his symptoms then the diagnosis of a major depressive episode would be reasonably appropriate, but there is also a strong narcissistic personality disorder or traits. There are clear pre-existing depressive and anxiety symptoms in the period prior to him joining Tweed Health for Everyone. Given the short period of him reporting symptoms and then finding a job and reporting himself as well, one cannot confidently say that any pre-existing psychiatric condition was in sustained remission. Not only were there pre-existing symptoms but there were ongoing stressors completely unrelated to his work as a chief executive officer. Finally, there is a major dispute about whether or not the actions at work would constitute bullying and harassment. Therefore, in my opinion, even if he does fulfil the criteria for a major depressive episode at this point in time, it will not be considered a workplace injury."

23. The final two sentences of the above extract from Dr Ng reflect a misconception as to the legal requirements. Whether the stressful incidents can be described as "bullying and harassment" is irrelevant to whether there has been a workplace injury. It is also not clear as to what Dr Ng is referring regarding "ongoing stressors completely unrelated to his work as chief executive officer". The weight of the evidence is that there were real events in the respondent's workplace that caused stress to Mr Cox, as found above, and these events worsened his anxiety and depression.

24. Dr Ng also says in answer to a question as to whether there has an aggravation, exacerbation, acceleration or deterioration, "... of that pre-existing psychological condition in employment with Tweed Health for Everyone?",

"A pre-existing psychological condition was accelerated during Mr Cox's employment with Tweed Health for Everyone. During his employment, there were other personal matters and workplace disputes."

25. By contrast, Dr Takyar delves into the medical history and arrives at a measured opinion based on the objective evidence, notwithstanding Mr Cox's subjective view of the history. Dr Takyar was able to work through the medical history and arrive at a diagnosis and the relative significance of the pre-existing condition. This analysis and explanation amply provides a "fair climate" for Dr Takyar's opinion.²

² *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58

26. The evidence is that Mr Cox was functioning effectively in his employment with the respondent prior to his inability to continue in March 2017. This is consistent with the medical evidence of some improvement in his condition noted in consultations with his GP on 7 November 2016 and 30 December 2016 after commencing with Tweed Health for Everyone on 10 October 2016. It is also consistent with the psychologist's pre-employment report for the respondent in which, among similarly unremarkable points, it was reported that, "He is a reasonably well-balanced individual emotionally (although he can find it difficult to relax)."
27. This is not to say that there was not a continuing psychological condition. Dr Takyar addresses this and concludes that there was pre-existing anxiety and depression, but that this was aggravated by the work with the respondent and "worsened significantly", being diagnosed by Dr Takyar as "generalised anxiety disorder and major depressive disorder". I accept this as consistent with the other evidence. For these reasons I prefer Dr Takyar's opinion overall to that of Dr Ng to the extent they differ.
28. For his supplementary report of 20 May 2019 Dr Ng says his opinion had not changed. However, he did say on this occasion that his opinion is that the pre-existing condition was aggravated by the employment with the respondent. This is an opinion addressing s 4(b)(ii) of the 1987 Act.
29. On the evidence overall I am satisfied that there was a worsening of Mr Cox's condition due to his employment with the respondent in terms of the principle in *Semlitch*.
30. For the above reasons I find that Mr Cox suffered the aggravation, acceleration, exacerbation or deterioration of a psychological disease pursuant to s 4(b)(ii) and s 16 of the 1987 Act.

Was the employment the main contributing factor to the psychological injury?

31. Section 4(b)(ii) of the 1987 Act also requires that the employment be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease for it to be compensable. It is important to note that the section requires the employment to be the main contributing factor to the aggravation, acceleration, exacerbation or deterioration only; not to the disease itself.
32. I have referred above to Dr Ng's comments as to "other personal issues and workplace disputes". These other issues are not identified. I note the insurer's Notice issued under s 74 of the 1998 Act asserts,

"... you used your work email account for a number of personal matters throughout the course of your employment. These personal emails revealed that you had purchased a unit in October 2016 and there were a number of rectification works to be completed, that you were offering an apartment for rent through Airbnb and coordinating stays accordingly in January 2017, that a family member passed away in December 2016, that there was legal action on foot relating to an estate and that you had lodged complaints with a hospital in Wales and the Police relating to care received by a relative. These possible stressors were not reported to Dr Greaves."

33. At another point in his report Dr Ng refers to the materials provided,

"I have received also assorted documentation from the workplace. Included in this documentation were emails from Mr Cox where he conducted personal business with regard to an investment property from his work email and also had sent various correspondence to parties involved in some type of major legal battle involving extended family in the United Kingdom."

34. This may be what Dr Ng is referring to. There is no other evidence on these “possible stressors”. Certainly there is no evidence that these events were contributing factors in the aggravation of Mr Cox’s condition. Dr Ng does not take the vague reference to supposed personal issues any further and it not possible to conclude that the above issues asserted, even if correct, aggravated Mr Cox’s condition at all. There does not appear to me to be any factor other than the work incidents with the respondent that aggravated the pre-existing anxiety and depression.
35. In his supplementary report of 20 May 2019 Dr Ng was asked again about whether the employment was the main contributing factor to the aggravation and his answer was on this occasion, “In my opinion the aggravation was not related to his employment and my reasons have been noted above.” This may refer to Dr Ng’s further reference to “personal issues” under question 2 in the report, with no analysis additional to his first report, which takes his opinion no further on “main contributing factor”.
36. I have already preferred Dr Takyar over Dr Ng in general, and I also prefer Dr Takyar on this element. Dr Ng’s conclusion about the work not being the main contributing factor to the aggravation is based on assertions of vague issues that are not capable of reducing the work to something less than the main contributing factor.
37. I am satisfied it was the respondent’s workplace turmoil and the incidents of conflict arising that caused distress to Mr Cox sufficient to aggravate his condition. I find that the employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of Mr Cox’s psychological condition.

Is Mr Cox totally or partially incapacitated for work?

38. Dr Takyar is of the opinion that Mr Cox is totally incapacitated. Dr Ng thinks he is capable of some work. I prefer the view of Dr Takyar, who gave a diagnosis. His view is that, “he has no capacity for employment because of the severity of his psychiatric symptoms.” Treating psychologist Dr Pollock notes symptoms of “major depression and severe anxiety” together with suicidal ideation in her report of 13 November 2018. The certificates of Dr Goodman up to 8 March 2019 certify Mr Cox as totally unfit. There is no evidence that this situation has changed. Dr Takyar is of the view that the condition has reached maximum medical improvement. I find Mr Cox was totally incapacitated for work in the period claimed.
39. It was common ground that the applicable weekly rates in the periods claimed if total incapacity was found are governed by the statutory maximum: from 1 October 2018 to 31 March 2019 the rate is \$2145.30 per week; and from 01 April 2019 to date and continuing the rate is \$2177.40. As some payments have been made in the periods claimed there is to be credit to the respondent insurer for those payments.

Section 60 of the 1987 Act medical expenses

40. It follows from the above findings that Mr Cox is entitled to be paid his medical expenses for the psychological injury.

Section 66 of the 1987 Act lump sum compensation

41. It also follows that the claim for lump sum compensation is to be remitted to the Registrar for referral to an Approved Medical Specialist. I note that the date of injury is a notional date given the aggravation occurred over the period of the employment with the respondent, and this should be amended accordingly at Part 5.6 to “7 March 2017 (deemed)”.

SUMMARY

42. Mr Cox suffered psychological injury in the form of the aggravation, acceleration, exacerbation or deterioration on 7 March 2017 (deemed) pursuant to s 4(b)(ii) and s 16 of the 1987 Act.
43. Mr Cox is entitled to weekly compensation for total incapacity in the period claimed.
44. There is to be an order for s 60 of the 1987 Act expenses for the compensable injury.
45. The claim for s 66 of the 1987 Act lump sum compensation is to be remitted to the Registrar for referral to an Approved Medical Specialist.