

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5738/19
Applicant: FRANCIS GERARD DILLON
Respondent: NATIONAL DISTRIBUTION CENTRE SERVICES PTY LIMITED
Date of Determination: 7 February 2020
Citation: [2020] NSWCC 35

The Commission determines:

1. The applicant in the course of his employment with the respondent on 10 December 2014 suffered injury in the nature of disease or exacerbation of a disease within the meaning of sections 4 (b) (i) and/or 4 (b) (ii) of the *Workers Compensation Act 1987*, namely primary psychological injury.
2. I remit the matter to the Registrar for referral to an Approved Medical Specialist to determine the extent of the applicant's whole person impairment, if any, which results from primary psychological injury which occurred on 10 December 2014.
3. I request the Registrar place before the Approved Medical Specialist a copy of the Application, a copy of the Reply and a copy of these Reasons for Decision.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Francis Gerard Dillon (the applicant) is a 57 year old man who was employed by National Distribution Centre Services Pty Limited (the respondent) in about 2012 to assist with the manufacture and distribution of windows and other aluminium products.
2. On 10 December 2014, in the course of his employment the applicant was assisting to lift a number of glass panels from a bin when the panels fell towards him, trapping his body and in particular his legs and in breaking, lacerating his legs and causing him to strike his head on a concrete floor.
3. In relation to physical injuries, these are not in dispute and in fact are the subject of a Medical Assessment Certificate issued by Approved Medical Specialist (AMS) Dr Mastroianni in December 2019 certifying 14% whole person impairment.
4. The parties are not able to presently agree whether or not the applicant's psychological condition is a primary or a secondary psychological injury. Additionally, it is common ground that the applicant suffered a pre-existing (pre 10 December 2014) psychological condition. The parties differ in their submissions concerning the diagnosis as well as causation.
5. The applicant seeks a finding that he suffered a primary psychological injury. The respondent has submitted that the applicant suffered a secondary psychological injury in the sense that it arose from pain/disability consequent upon physical injury or that the applicant's symptoms such as auditory hallucinations were a consequence of pain relief medication. The applicant claims that he suffered post traumatic distress disorder (PTSD) and/or exacerbation of his pre-existing psychological injury which had been in significant remission.
6. The applicant requests that this Commission remit the matter to the Registrar for referral to an AMS to determine the extent of the applicant's whole person impairment (WPI), if any, which results from primary psychological injury in the course of his employment on 10 December 2014.

ISSUES FOR DETERMINATION

7. The central issue for determination is whether the applicant suffered any primary psychological injury in respect of his injury of 10 December 2014.

PROCEDURE BEFORE THE COMMISSION

8. The matter came for conciliation and arbitration hearing in Newcastle on 28 January 2020. Mr S Grant of Counsel instructed by Mr D Twohill appeared for the applicant. The applicant and his wife were present. Ms K Balendra of Counsel appeared for the respondent.
9. The matter proceeded to conciliation and various arguments were put on behalf of each party. I was satisfied that the parties understood the issues in the proceedings and the nature of the evidence before the Commission. I was satisfied that the parties had ample opportunity to discuss potential resolution of the matter but despite my best endeavours were unable to resolve their differences. The matter accordingly proceeded to an arbitration hearing.

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 and attachments registered 4 November 2019 (Application);
 - (b) Reply and attachments registered 26 November 2019 (Reply);

Oral evidence

11. No oral evidence was given.

THE APPLICANT'S SUBMISSIONS

12. It is common ground that the applicant had experienced a pre-existing psychological injury. There is evidence for a current diagnosis of aggravation of a pre-existing condition or the onset of a new condition. Whichever proposition is found is a matter for an AMS to decide. If there is some secondary component to the diagnosis, again this is a matter for an AMS to take into account.
13. The applicant in his statement details his previous psychological condition. His former psychiatrist, Dr Morice, was aware of this condition and in fact records it in May 2015¹. So too does Dr Bertucen on 27 June 2017². This prior condition, however, was well under control. The applicant was in a job for 32 years as an assistant draftsman and was functioning well up until 10 December 2014. His attendances upon his general practitioner in the months up until 10 December 2014 record primarily physical problems.
14. The applicant's injury was a quite frightening event. His symptoms, including auditory hallucinations, were very contemporaneous.
15. The only evidence going to diagnosis which might be said to be against the applicant is that of Dr G Vickery. Although Dr Vickery opines that the applicant's depressive condition relates to his pre-existing condition, he nonetheless accepts that the events of 10 December 2014 exacerbated the applicant's condition³. Dr Vickery concludes that the exacerbation has substantially resolved.
16. Dr Morice⁴ comments that it is fairly obvious that the applicant's current problems date from the 10 December 2014 incident and that the applicant has suffered post-traumatic stress disorder. This view is supported by both Dr Cohen⁵ and Dr Bertucen⁶ with the latter adding that the applicant is suffering a new clinical disorder, namely PTSD, over and above the underlying pre-existing symptoms. This is because the applicant was in a quite stable state of remission for about two years before 10 December 2014.

¹ Application page 178

² Application page 105

³ Reply pages 43ff

⁴ Application page 179

⁵ Application page 209

⁶ Application page 106

17. Dr Bertucen addresses the opinion of Dr Vickery⁷. The medical evidence concerning exacerbation of the applicant's condition is all one way, including the opinion of Dr Vickery.

THE RESPONDENT'S SUBMISSIONS

18. The respondent's section 78 notice relies on Dr Vickery's report⁸. Dr Vickery thought that the applicant's condition was exacerbated but had substantially resolved. The applicant's very distressing psychological injuries including hallucinations arose as a result of the applicant being placed on various pain medication. The hallucinations continued after the applicant's discharge from hospital⁹ but these symptoms arose secondary to treatment and hospitalisation.
19. The applicant in his statement¹⁰ confirms that his nightmares and auditory hallucinations arose after his discharge from hospital. Although the applicant says that he was functioning at a high level before 10 December 2014, the applicant was receiving psychiatric assistance with severe symptoms and this fact provides the basis for Dr Vickery's opinion.
20. Dr Cohen has noted a stability in symptoms by 9 May 2019¹¹. It is noted that the applicant's pain was significantly contributing to his psychological symptoms¹². By 15 November 2016, the applicant's condition was stable such that he could be treated by his general practitioner¹³.

APPLICANT'S SUBMISSIONS IN REPLY

21. If there was an element of secondary psychological injury then an AMS can make allowance for that. Dr Cohen notes that the applicant presented with symptoms of PTSD as the applicant had recurring daytime hallucinations of glass falling onto him. The symptoms of PTSD came on very fast and Dr Vickery does not explain how the applicant's pain levels resulted in his secondary condition.

REASONS

22. At issue is the extent to which section 65A of the 1987 Act applies in that the required analysis is to consider the factual and medical evidence to determine the nature of the applicant's psychological injury. In this regard, it is not the function of the Commission to determine whether the applicant is no longer suffering from any permanent impairment, because that is the task of the AMS¹⁴.
23. Dr Vickery, as Mr Grant submits, is the only doctor who takes the view that the applicant's presentation is because of his pre-existing psychological history. But Dr Vickery also accepts that the applicant's underlying condition was exacerbated by the accident of 10 December 2014 and so much so is clear from his report. Because of the decision in *Peric* it does not, in my view, matter even if the effects of the exacerbation have passed. The correct approach is to consider all of the evidence, consider whether the doctors were aware of all relevant history and the timing of the onset of symptoms, among other things, whilst applying a "common sense" test of causation¹⁵.

⁷ Application page 111

⁸ Reply page 39

⁹ Application page 80

¹⁰ Statement paragraph 28

¹¹ Application page 225

¹² Application page 215

¹³ Reply page 380

¹⁴ *Peric v Chul Lee Hyuang Ho Shin Jong Lee & Mi Ran t/as Pure and Delicious Healthy* [2009] NSWCCPD 47 (*Peric*) at [80]-[81].

¹⁵ *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452

24. At paragraph 13 of his statement, the applicant says in reference to his pre-accident psychological treatment: -

“Despite this treatment, until my workplace injury on or about 10 December 2014, I remained very high functioning. I held consistent employment, working with on employer for 32 years. I was in a loving marriage with regular sexual intercourse and I maintained a good group of friends. I also engaged in hobbies, such as bush walking. I was healthy, active, relatively happy person”.

25. At paragraphs 28 to 30 of his statement, the applicant says:

“28. When I was discharged from hospital, I was still experiencing auditory hallucinations such as screaming, however I was having more trouble dealing with flashbacks of the workplace incident, particularly the glass falling on me and nightmares about the incident. The nightmares I experienced recalling the incident included ones where I would see blood, and remembered my body hitting the ground and waiting for the horrific injuries to hit me. I still recall being pinned by the glass, unable to move, until colleagues removed the glass off me. Due to these intrusive dreams about the incident, I struggled to sleep due to being scared of my dreams. 29. I remained very fearful around glass and objects more generally that they would call on me. I was petrified of re-injuring myself. I remained very scared when walking in public or even around the house that something was going to fall on me. I used a cane to reassure myself s I was very afraid of falling due to the flashbacks and nightmares of me falling during the incident. I was often having flashbacks to the incident. As a result of these symptoms, Dr Barnfield referred me to consult Ms Gaye Colwell, psychologist of Wyong. I remain under Ms Colwell’s care”.

26. Some matters appear clear from the applicant’s statement. First, although he had received some pre-accident psychological treatment including medication as at December 2014, he was functioning well. Second, his hallucinations and flashbacks did not commence after his discharge from Gosford Hospital-rather, he was “still” experiencing them after discharge. Third, there is no suggestion that the applicant’s pain and disability post-accident made him depressed, rather the evidence is uncontroverted that he experienced fairly contemporaneous hallucinations, nightmares and flashbacks in respect of what must have been in human experience a frightening event.

27. The applicant’s statement, together with the medical evidence of Drs Morice, Bertucen and Cohen, mean that I am comfortably satisfied on the balance of probabilities that the applicant suffered primary psychological injury which results from the accident of 10 December 2014. The reasons for this conclusion are:

- (a) I accept the applicant’s evidence concerning the symptoms he was experiencing both before and after he left Gosford Hospital;
- (b) I accept that the applicant was in fact functioning well from a psychological viewpoint before his injury;
- (c) The circumstances of the injury were very frightening and the applicant feared for his life;
- (d) Three doctors accept that the applicant suffered PTSD;
- (e) Dr Vickery supports that the applicant’s psychological condition was exacerbated by the event.

FINDINGS AND REQUESTS

28. It follows that I make the following findings and requests:

- (a) The applicant in the course of his employment with the respondent on 10 December 2014 suffered injury in the nature of disease or exacerbation of a disease within the meaning of sections 4 (b) (i) and/or 4 (b) (ii) of the 1987 Act.
- (b) I remit the matter to the Registrar for referral to an AMS to determine the extent of the applicant's whole person impairment, if any, which results from primary psychological injury which occurred on 10 December 2014.
- (c) I request the Registrar place before the AMS a copy of the Application, a copy of the Reply and a copy of these Reasons for Decision.

