

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5596/19
Applicant: KENNETH ARTHUR BRICE
Respondent: WORKERS COMPENSATION NOMINAL INSURER
Date of Determination: 5 MARCH 2020
Citation: [2020] NSWCC 64

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) Ear, Nose & Throat Surgeon, to determine the extent of the applicant's binaural loss of hearing in respect of a notional deemed date of injury of 28 February 1965.
2. I request the Registrar place before the AMS a copy of the Application to Resolve a Dispute and attachments (Application), a copy of the Reply and attachments (Reply), copies of various Applications to Admit Late Documents and dated 20 November 2019, 26 November 2019 and 5 December 2019 and a copy of these Reasons for Decision.
3. The medical assessment is to be conducted as an assessment of binaural loss of hearing notwithstanding that the notional date of injury would otherwise involve section 16 of the *Workers Compensation Act 1926*, by reason of Schedule 6, Part 6, Clause 5A of the *Workers Compensation Act 1987*, as amended (1987 Act).
4. The parties are granted leave to apply to the Registrar for restoration of the matter to the list, if necessary, after the Medical Assessment Certificate is received.
5. The following is not a determination of the Commission, however, I note that the parties have agreed: -
 - (a) The issue as to liability remains outstanding.
 - (b) To assist expeditious resolution of the matter it is appropriate that the applicant be assessed for binaural hearing loss by an AMS before finalisation of the liability issue.

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.

A MacLeod

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



STATEMENT OF REASONS

BACKGROUND

1. Kenneth Arthur Brice (the applicant) is an 84 year old man who was allegedly employed by AG Brice and Sons (the respondent) as a farm hand. The applicant alleges that the business for which he worked and was paid was his parents' business and that he worked for his parents between about January 1960 and 31 December 1965. During submissions it was clarified that the applicant last worked with his parents on 28 February 1965.
2. The claim is for binaural hearing loss and digital hearing aids. After 1965 the applicant worked in the Australian Capital Territory in noisy employment for Total Care Industries. From 2005 to 2012 the applicant worked on his own farm in NSW. Accordingly, it is the applicant's contention that his parents were his last noisy employer, albeit that this was 55 years ago.
3. The matter is further complicated because the applicant alleges that he cannot uncover whether his parents had workers compensation insurance. Accordingly, the applicant pursuant to section 142A of the 1987 Act claims that the Nominal Insurer becomes the relevant "insurer" in respect of his claim.

ISSUES FOR DETERMINATION

4. At this stage the only relevant issues for consideration are whether the Commission has jurisdiction to determine the matter and whether the Reply or the Application to Resolve a Dispute should be struck out, either for procedural non-compliance/lack of jurisdiction (the Reply) or pursuant to section 354 of the *Workplace Injury Management and Workers Compensation Act 1998* as amended (1998 Act) (the Application).

PROCEDURE BEFORE THE COMMISSION

5. The matter came for conciliation and arbitration hearing in Newcastle on 18 December 2019. Mr J Hallion of Counsel instructed by Mr M Bechelli, Solicitor, appeared for and with the applicant. Mr D Anderson, Solicitor, appeared for the Workers Compensation Nominal Insurer. There was no separate appearance on behalf of the alleged employers.
6. I am satisfied that the parties to the dispute had ample opportunity to resolve their differences but were unable to achieve settlement. I have used my best endeavours to encourage resolution, however, resolution was not possible and the matter therefore proceeded to arbitration hearing.
7. The parties have filed submissions in relation to the matters raised in paragraph 4 above.

EVIDENCE

Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application and attachments registered 28 October 2019 (Application);
 - (b) Reply and attachments registered 21 November 2019 the subject of the respondent's Application to Admit Late Documents dated 20 November 2019
 - (c) Application to Admit Late Documents and attachments filed by the applicant on 26 November 2019;

- (d) Application to Admit Late Documents filed by the applicant on 5 December 2019 and
- (e) the parties' submissions.

Oral evidence

9. No oral evidence was given.

SUBMISSIONS

10. The following written submissions were received:

- (a) written submissions by the applicant dated 13 January 2020;
- (b) respondent's submissions and attachments dated 10 February 2020;
- (c) supplementary written submissions by the applicant (undated, but registered 15 January 2020), and
- (d) further supplementary written submissions by the applicant dated 17 February 2020.

11. It is unnecessary to summarise in detail the extensive written submissions provided in this matter. The general assertions made by each party are summarised under "Findings and reasons" below.

FINDINGS AND REASONS

The jurisdictional issue

12. On 18 December 2019 at the commencement of the arbitration in this matter, the applicant's counsel first raised what was said to be a "jurisdictional issue". The existence of such an issue relies upon a claim by the applicant that:

- (a) the claim is for lump sum compensation (section 66 1987 Act) and medical expenses (section 60 1987 Act);
- (b) the respondent did not comply with the notice provisions contained in the 1998 Act¹;
- (c) the respondent did not admit nor dispute the claim within the times prescribed by the notice provisions² and not until 14 January 2019, namely 35 days after the claim;
- (d) the "request" for particulars of 14 January 2019 was in any event neither relevant nor necessary for the respondent to address the claim. It went to matters concerning post-employment with the respondent, did not arise under section 260 of the 1998 Act, the Regulations³ or the SIRA Guidelines;
- (e) no determination was given to dispute liability within the times specified by the notice provisions, the first section 78 notice having been given in March 2019.

¹ 1998 Act Part 3 ss 279 (1) (medical expenses decision within 21 days; s 281 determine or dispute or seek particulars regarding s 66 claim within 2 months.

² Section 281 (1) 1998 Act.

³ Workers Compensation Regulation 2016.

- (f) compliance with Part 3 of the 1998 Act is mandatory because it is consistent with the object of the legislation⁴ “(f) to deliver the above objectives efficiently and effectively”;
- (g) the expressions “cannot be referred for determination by the Commission” in sections 289 and 289A of the 1998 Act and determination of a dispute “as and when” required by the Act require that the section 78 notice be issued (“as”) and in time (“when”). Failure to give such notice is not a procedural irregularity, but rather a substantive jurisdictional fact which means the Commission has no jurisdiction to even consider whether the respondent’s failure to comply should be forgiven;
- (h) the Commission’s power under section 289A of the 1998 Act is not enlivened: there is no valid dispute and therefore no jurisdiction, and
- (i) it follows that because it did not comply with the section 78 requirement (namely “must give notice”, being a mandatory requirement) the respondent’s Reply should be struck out and the matter should be determined *ex parte*.

13. The respondent’s position in relation to these matters is as follows:

- (a) By reason of section 289 of the 1998 Act the Commission’s jurisdiction is invoked as soon as the insurer disputes liability for the claim or fails to determine the claim as and when required.
- (b) Section 289A allows a respondent to rely upon “previously unnotified matters” if the Commission exercises its discretion to allow this reliance.
- (c) The applicant was notified of matters in dispute before the Application was filed.
- (d) *Tan*⁵ is authority for the proposition that the legislation confers on the Commission “the power to determine whether or not a dispute has arisen or a claim has been made”.
- (e) Because of the long history of the claim including (inter alia) its serial discontinuances, the matter should be struck out under section 354 of the 1998 Act.

The claim

14. A “claim” is defined by section 70 of the 1998 Act as follows:

“70. In this Division:

‘claim’ means *a claim for compensation* under this Act or claim for damages to which a policy of insurance applies, whether the claim was made before or after the commencement of this Division.” (emphasis added)

15. It is noteworthy that the definition begins “In this Division” which might lead one to suggest that whilst the definition applied to the (now repealed) section 74 of the 1998 Act, section 78 is a different matter because section 78 is not “in this Division”. That potential difficulty can, in my view, be overcome by a consideration of section 7 of the Interpretation Act (NSW) 1987:

⁴ Section 3 1998 Act.

⁵ *Tan v National Australia Bank Ltd* [2008] NSWCA 198 at [38] per Basten JA and Bell JA.

“7 COGNATE WORDS

If an Act or instrument defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings”.

16. If I am incorrect in relying upon section 7 to support this view, I would nonetheless conclude in any event that “claim” for the purposes of section 78 means a claim for compensation such as has been made in the present matter. As was stated in *Project Blue Sky Inc v Australian Broadcasting Authority*⁶, (per McHugh, Gummow, Kirby and Hayne JJ):

“The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’.”

17. Because “claim” is defined by section 70 of the 1998 Act, it is not an unreasonable conclusion that this definition extends to other Parts of the legislation, including section 78 of the 1998 Act.

Dispute liability

18. The words “dispute liability”, “disputing liability” and “dispute” are variously used in different sections of the legislation⁷. It has been held that liability may be disputed even though there is no application for compensation filed⁸. It has also been observed⁹ that a reasonable interpretation of “notice of dispute” for the purposes of the legislation is the notice required to be given by section 74 (for our purposes, section 78).

19. Section 288 of the 1998 Act provides:

“288 (1) Any party to a dispute about a claim may refer the dispute to the Registrar for determination by the Commission...”

20. This section as well as sections 289 and 289A of the Act contemplate that a dispute will exist at a time before any application is filed. The sections accept, therefore, that jurisdiction of the Commission is invoked, or is at least able to be invoked, before this time.

21. The claim in this matter was made by letter dated 29 November 2018. It is of relevance that the claim is against an allegedly uninsured employer. This is because an interpretation of what are “relevant particulars” will be different to a claim against an insured employer. The existence or absence of insurance becomes an issue¹⁰. There appears no doubt that the claim was not, at least initially, accompanied by any evidence from the applicant concerning attempts to locate an insurer. In those circumstances in my view it was appropriate for iCare to have written to the applicant’s solicitors on 14 January 2019 to advise that all relevant particulars had not been provided. In this regard, section 282 (1) (a) of the 1998 Act requires that “relevant particulars” are full details sufficient to enable iCare (as the insurer) to make a proper assessment of the injury allegedly sustained by the applicant. “Injury” in this regard is not limited to the section 4 1987 Act definition¹¹. “Injury” is a highly relevant component of the operation and indeed the utility of section 17 of the 1987 Act, which imports special deeming provisions relevant to industrial deafness claims.

22. The identity of post-employment employers and particulars of the applicant’s exposure or non-exposure to noise in subsequent employment are in my view highly relevant to the issue of “injury”. In other words, who is the “last noisy employer”?

⁶ [1998] HCA 28 at [69].

⁷ For example, sections 78, 279, 281, 287, 289, 289A 1998 Act.

⁸ *Divertie v Startrack Express Pty Limited* [2008] NSWCCPD 45 per Keating P.

⁹ *Department of Corrective Services v Bowditch* [2007] NSWCCPD 244 per Roche DP.

¹⁰ Sections 140, 142A 1987 Act.

¹¹ Section 282 (4) 1998 Act.

23. In my view, the respondent's issue of a section 78 notice on 15 March 2019 was within the time specified by section 281 (2) of the 1998 Act. This is because the respondent had two months to determine the claim by accepting it or disputing it. Relevant particulars were still outstanding as at 14 January 2019. Accordingly, the two month time limit had not commenced to run whenever relevant particulars were outstanding. The respondent does not require leave to rely upon the matters referred to in its section 78 notice. Jurisdiction of the Commission having been invoked by the existence of a dispute, the Commission may consider exercising its discretion under section 289A of the 1998 Act.
24. If I am incorrect about this conclusion, I nonetheless take the view that the decisions of *Gauci*¹² and *Manning*¹³, as the respondent submits, emphasise the broad nature of the discretion under section 289A (4) of the 1998 Act. That section provides a discretion to consider the "interests of justice" in determining whether to hear or deal with "a dispute relating to previously unnotified matters".
25. In view of the fact that the Reply contains the whole of the respondent's arguments (save for one matter concerning intention to create legal relations) it is in my opinion clear in accordance with the criteria set out in *Mateus*¹⁴ that it is in the interests of justice that the Reply be allowed into evidence. If there were any delay in the giving of notice, it is explained by the absence of information provided by the applicant. The applicant was aware of the matters in the section 78 notice in March 2019 and is not prejudiced by the respondent's arguments, having in particular been aware of them from March 2019 and not objecting to them at teleconference. Additionally, the Commission's duty under section 354 (3) of the 1998 Act is to act "...according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".
26. In summary, I rely upon the following reasons:
- (a) iCare's request for relevant particulars was made on 14 January 2019 in response to a claim for compensation made on 29 November 2018. In terms of the section 66 claim, this determination/request was made within the time required by section 281 (2) of the 1998 Act.
 - (b) The effect of section 281 (2) (b) of the 1998 Act is that the Nominal Insurer (iCare) had two months after receipt of "relevant particulars" to determine the section 66 claim.
 - (c) "Relevant particulars" in an industrial deafness matter includes by reason of section 282 (1) (a) particulars regarding the injury. In an industrial deafness claim, because of section 17 of the 1987 Act, determining "injury" includes determining who is liable, that is to say who is the last noisy employer?
 - (d) The respondent disputed liability by section 78 notice before two months had expired after relevant particulars (I would add that on one view "relevant particulars" have still not been provided).
 - (e) Regardless of the above, the jurisdiction of the Commission is enlivened when a "dispute" arises, regardless of whether the dispute is notified within time. This is one of the purposes of section 289A (4) of the 1998 Act, according to the authorities¹⁵.

¹² *Arcade Pharmacy Pty Limited v Gauci* [2009] NSWCCPD 107 at [47] per O'Grady DP.

¹³ *The Office of the Public guardian v Manning* [2008] NSWCCPD 94 at [71] per Snell ADP.

¹⁴ *Mateus v Zodune Pty Limited (t/as Tempo Cleaning services)* [2007] NSWCCPD 227 per Roche DP.

¹⁵ *Gauci, Manning*, op cit.

- (f) If I am incorrect about (d) above, it is in the interests of justice that the respondent be permitted to argue the matters referred to in the latest Reply, including the argument concerning intention to create legal relations. There is no prejudice in the latter regard to the applicant as the applicant has adequate notice of the arguments.
- (g) The respondent's application to strike out the Application is unsuccessful because the respondent has not produced at this stage any evidence to refute the applicant's claims concerning last noisy employment and substantive liability matters have not yet been the subject of submissions.

FINDINGS AND REQUESTS

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

- (a) The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) Ear, Nose & Throat Surgeon, to determine the extent of the applicant's binaural loss of hearing in respect of a notional deemed date of injury of 28 February 1965.
- (b) I request the Registrar place before the AMS a copy of the Application, a copy of the Reply, copies of various Applications to Admit Late Documents dated 20 November 2019, 26 November 2019 and 5 December 2019 and a copy of these Reasons for Decision.
- (c) The medical assessment is to be conducted as an assessment of binaural loss of hearing notwithstanding that the notional date of injury would otherwise involve section 16 of the Workers Compensation Act (NSW) 1926, by reason of Schedule 6, Part 6, Clause 5A of the Workers Compensation Act (NSW) 1987 1987 Act, as amended (1987 Act).
- (d) The parties are granted leave to apply to the Registrar for restoration of the matter to the list, if necessary, after the Medical Assessment Certificate is received.

28. The following is not a determination of the Commission, however, I note that the parties have agreed:

- (a) The issue as to liability remains outstanding.
- (b) To assist expeditious resolution of the matter it is appropriate that the applicant be assessed for binaural hearing loss by an AMS before finalisation of the liability issue.