WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5836/20**
Applicant: **Zeljko Gundelj**
Respondent: **Brighton Australia Pty Limited**
Date of Determination: **21 January 2021**
Citation No: **[2021] NSWWCC 24**

The Commission determines:

1. With the consent of the parties, the Application to Resolve a Dispute is amended as follows:

    (a) the date of injury is changed to "16 December 2014", and
    (b) the description of injury is changed to "further loss of hearing as a result of exposure to loud noise".

2. There is an award for the respondent.

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

Marshal Douglas
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 MARSHAL DOUGLAS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Zeljko Gundelj worked for Brighton Australia Pty Limited (Brighton) as a gyprocker between 1 November 2011 and 7 December 2011 and again on 30 July 2012. His employment was not however terminated until 16 December 2014, but he did not perform any duties in the period between 30 July 2012 and 16 December 2014.

2. On 25 June 2020, he signed a permanent impairment claim form, by which he sought compensation from Brighton for permanent impairment he claimed to have suffered from an injury of further hearing loss. His claim was supported by a report from ear, nose and throat physician Dr Joseph Scoppa dated 27 March 2020.

3. By letter posted to Mr Gundelj on 18 September 2020, Brighton's insurer notified Mr Gundelj under s78 of the *Workplace Injury Management & Workers Compensation Act 1998* (the 1998 Act) that it disputed he was entitled to compensation for permanent impairment from his injury. It did so because, according to it, Mr Gundelj's injury had not resulted in his having a permanent impairment of greater than 10%, which s 66 of the *Workers Compensation Act 1987* (the 1987 Act) requires in order for a worker to be entitled to compensation for permanent impairment from an injury. The insurer relied on a report from ear, nose and throat surgeon Dr Sharad Tamhane dated 14 August 2020.

4. Thereupon Mr Gundelj registered with the Commission an application for determination by the Commission of his disputed claim for compensation (ARD). In its reply to the ARD, Brighton sought to resist Mr Gundelj's claim on the basis that he was not entitled to compensation for his injury by virtue of s 151A(1) of the 1987 Act. It referred to a "deed of settlement and release" made between the parties and Brighton's insurer on 30 January 2017, which it had attached to its reply and which obligated its insurer to pay Mr Gundelj damages for injuries defined in a schedule to the deed. Brighton had not notified Mr Gundelj at any time before it filed its reply that it sought to resist his claim for this reason. At an arbitration held on 26 November 2020, I formed the view that it was in the interest of justice that this previously unnotified matter be dealt with in the present proceedings. Having formed that view, the matter could therefore be dealt with in the current proceedings in accordance with s 298A(4) of the 1998 Act. My reasons for coming to that view were provided orally at the arbitration. Those reasons were recorded and a transcript is available of that recording.

5. I note, also by way of providing background, that Mr Gundelj particularised his injury in the ARD as being hearing loss as a result of exposure to loud noise and particularised the date of injury as being 30 June 2013. Mr Gundelj previously suffered an injury of hearing loss in 2007 whilst employed by someone other than Brighton. At the arbitration he sought that the ARD be amended such that the date of injury be changed to "16 December 2014", which was the last day on which he was employed by Brighton, and that the description of his injury be changed to "further hearing loss as a result of exposure to loud notice". With the consent of Brighton, I directed that those amendments be made to the ARD.

PROCEDURE BEFORE THE COMMISSION

6. Preceding the arbitration on 26 November 2020, the parties participated in a conciliation conference. In both the conciliation conference and arbitration Mr Gundelj was represented by Mr Joseph Hallion of counsel instructed Mr Mario Bechelli. Brighton was represented by Mr Graham Barter of counsel instructed by Mr William Pardy.

7. During conciliation conference I used my best endeavours to assist the parties to reach a settlement of the dispute. I am satisfied that the parties had sufficient opportunity to explore settlement and that they were unable to reach an agreed resolution of the dispute, the consequence of which was that the matter proceeded to arbitration.

ISSUES FOR DETERMINATION

8. The parties agreed at the arbitration that the only issues in dispute are, firstly, whether Mr Gundelj has recovered damages in respect of his injury of further hearing loss and, secondly, the degree of permanent impairment he has from that injury.

9. The second issue only requires resolution if the first issue is decided in favour of Mr Gundelj. If the first issue is decided in favour of Mr Gundelj, the matter will be remitted back to the Registrar so that the second issue can be referred to an Approved Medical Specialist to assess.

10. At the arbitration I directed that the parties file written submissions relating to the first issue. Mr Bechelli, on behalf of Mr Hallion, filed written submissions for Mr Gundelj on 14 December 2020. Brighton's submissions were prepared by Mr Barter, and are undated, but were received by the Commission on 6 January 2021. Mr Gundelj was also directed to file by 8 January 2020 written submissions in reply to Brighton's submissions. He filed those submissions on 15 January 2021, providing no explanation for failing to abide the direction to file them by 8 January 2021. They were also prepared by Mr Hallion but signed by Mr Bechelli on his behalf.

EVIDENCE

11. 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, and

    (c) the documents attached to an Application to Admit Late Documents that Mr Gundelj's solicitor signed on 13 November 2020.

12. Mr Gundelj was not cross-examined. No witness was called to give oral evidence in chief.

FINDINGS AND REASONS

13. The parties agreed on the following facts[1]:

    (a) Mr Gundelj worked for Brighton between 1 September 2011 and 7 December 2011 and again on 30 July 2020. His employment was not terminated until 16 December 2014, but he did not perform any duties for Brighton subsequent to 30 July 2012.

    (b) He suffered an injury of further hearing loss as a result of his employment with Brighton.

    (c) Brighton was the last employment in which he was engaged in which the tendencies, characteristics and incidents of employment gave rise to a risk of hearing loss.

    (d) Mr Gundelj suffered an injury on 31 July 2012 to his low back, neck and shoulders as a result of his employment with Brighton and developed a consequential condition of depression and anxiety.

[1] Transcript page 4 line 11–page 8 line 24; Mr Gundelj's submissions dated 14 December 2020 at [1.1]-[1.7]; and Brighton's submissions at [1].

(e) A medical appeal panel issued a Medical Assessment Certificate on 29 January 2016 certifying that Mr Gundelj had 15% whole person impairment (WPI) as a result of the injury he suffered on 31 July 2012.

(f) On 26 May 2016, Mr Gundelj's then solicitor gave notice under s 281 of the 1998 Act that Mr Gundelj would be pursuing a claim for work injury damages against Brighton. That notice confirmed a claim had been made on Brighton for lump sum compensation for permanent impairment. The particulars provided in the notice related to an injury to Mr Gundelj's lower back, neck and shoulders and consequential depression and anxiety.

(g) In reply to that notice, Brighton served a draft Defence in which it admitted Mr Gundelj had suffered an injury at approximately 12 noon on 31 July 2012.

(h) As at 30 January 2017 Brighton had not paid permanent impairment compensation to Mr Gundelj for his injury of further hearing loss.

14. As mentioned in background to these reasons, on 30 January 2017 the parties and Brighton's insurer executed a Deed. Mr Gundelj was referred to as the "Releasor" within that deed. Brighton was referred to as the "Employer" and it and its insurer were referred to collectively as the "Releasees". The deed included a background, which included the following:

> "C. The Releasor alleges personal injuries (the said injuries') arising out of or in the course of the employment of the Releasor by the Employer as set out in the claim for Work Injury Damages and the Schedule annexed hereto and alleges to have been incapacitated and otherwise suffered loss and damage as a result of the said injuries.
>
> D. The Releasor alleges that the said injuries were caused by the negligence of the Employer and/or its servants or agents or as a result of a breach of statutory duty by the Employer and/or its servants or agents.
>
> E. The Employer denies all liability in respect of the said injuries.
>
> F. The Releasor has agreed to accept as damages the sum of money referred to in the Schedule in full and final settlement and discharge of all actions, suits, claims, costs and demands which the Releasor may now have or at any time hereafter has against the Releasees, their servants or agents arising out of the said injuries."

15. The schedule to the Deed was in the following terms:

> **"Period of employment:** 30 July 2012 to 16 December 2014
>
> **Nature of employment:** Gyprocker / fitter
>
> **Period of insurance:** Whole
>
> **Date of injury:** 31 July 2012
>
> **Nature of injury:** The nature and conditions of employment and any specific injury in the course there of causing or aggravating injury to the head, neck, whole of spine, all of both upper and lower limbs, trunk, chest, disease, all senses, skin and any primary or secondary psychological injury, functional overlay, internal

organs, sexual organs, brain and sequelae excluding latent injuries.

Agreed amount: $430,000 and clear of workers compensation payments paid and payable to 30 January 2017."

(Bold as per original).

16. The operative provisions of the Deed included the following:

"2. Settlement
In consideration of the releases, promises and warranties referred to in this document, without any admission of liability on the part of the Employer, the Insurer agrees to pay the Releasor for and on behalf of the Employer in full and final settlement of the claim, damages in the sum of $430,000.00 – inclusive of any costs of or related to the claim ('the Settlement Sum').

…..

4. Workers compensation payments
The settlement sum is clear of any payments made by or on behalf of the releasees under the provisions of the *Workers Compensation Act* 1987 and/or the *Workplace Injury Management and Workers Compensation Act* 1998, up to the date of this deed, together with the following:

(a) In addition, the releasees acknowledge they are liable to meet outstanding expenses properly falling under s60 of the *Workers Compensation Act* 1987 incurred prior to the date of this Deed, provided that such accounts or receipts are received by the Insurer's solicitors within 14 days from date of this Deed.
(b) In addition, the releasees agree to continue paying any currently accepted ongoing weekly compensation benefits (subject to ongoing medical certification and any other statutory requirements) covering the periods up to the date that the cheque for the settlement sum herein is drawn.

5. Release
The Releasor releases the Releasees from all obligations, sums of money, actions, suits, causes of action, proceedings, claims, demands, accounts, costs and expenses whatsoever at law, in equity or pursuant to statute which the Releasor now has, could, would or might have against the Releasees, its employees or agents arising out of or in any way related to the injuries or employment referred to in the Schedule.

6. Entire agreement
This document contains the entire agreement between the parties in respect of the subject matter of this document and it supersedes all prior understandings and representations between the parties with respect to the subject matter of this document.

……

9. Independent legal advice
The Releasor warrants that he has received independent legal advice as to his entitlements in relation to the injuries, employment and termination thereof and the terms of this document and acknowledges that the Releasees rely upon this warranty in the execution of this document."

17. The Deed included a certificate from Mr Gundelj's then solicitor to the effect that he had explained to Mr Gundelj the meaning of the Deed and that he was satisfied that Mr Gundelj understood the meaning, contents and effect of the Deed.

18. Brighton contends, essentially, that because the injury described in the schedule to the Deed included an injury to Mr Gundelj's senses that was caused by the nature and conditions of his employment, the payment of $430,000 that its insurer made on its behalf to Mr Gundelj as damages means that Mr Gundelj has recovered damages in respect of his injury of further hearing loss. Consequently, according to Brighton, by force of s 151A(1) of the 1987 Act, Mr Gundelj has no entitlement for compensation for his injury of further hearing loss.

19. Paraphrasing Mr Gundelj's submissions, his case is that the Deed cannot be construed such that Brighton's insurer was required to pay damages to him with respect to his injury of further hearing loss. He contends that it is not sufficient for s 151A(1) to be engaged that he recovered damages for any injury, and what is required for s 151A(1) to be engaged so as to disentitle him to receive compensation for his injury of further hearing loss is that he recovered damages for that specific injury.

20. Mr Gundelj highlights that before the parties entered into the Deed, and consequently prior to his receiving a payment of damages from the insurer, neither party had complied with any of the procedural requirements within chapter 7 of the 1998 Act with respect to his claiming compensation or work injury damages for his injury of hearing loss. Relying on *Gardiner v Laing O'Rourke Australia Constructions Pty Limited*[2] and *Wattyl Australia Pty Limited v McArthur*[3], he contends that because the parties had not complied with the procedural requirements of the 1998 Act with respect to his injury of further hearing loss, neither Brighton nor its insurer had a liability to pay him damages for an injury of further hearing loss and he did not have an entitlement to receive damages for such an injury.[4] He contends, because of that circumstance, that insofar as the payment of $430,000 relates to an injury of hearing loss, it cannot have the character of damages, but rather is in the nature of an ex gratia payment.

21. Mr Gundelj contends that a payment of damages to him for an injury, in regards to which neither he nor Brighton or its insurer had complied with the procedural requirements of the 1998 Act, would contravene s 234 of the 1998 Act, which stipulates that the 1998 Act and 1987 Acts apply despite any contract to the contrary. In other words, as I understood his written submissions, because the 1998 Act stipulates mandatory procedures that a worker and employer or insurer must abide with respect to making a claim and paying compensation or paying work injury damages for an injury, then the consequence of s 234 of the 1998 Act if he and Brighton and its insurer had not complied with those procedures with respect to his injury of further hearing loss is that he could have no entitlement under the Deed for damages for that injury and Brighton and its insurer had no obligation under the Deed to pay him damages for that injury. If it were otherwise, then according to Mr Gundelj the Deed would be a contract contrary to the 1998 Act and the 1987 Act in that it permitted non-compliance with the mandatory procedural requirements of the legislation, and in particular s 280B of the 1998 Act. The Deed could not displace the legislation in terms of what procedures the parties were required to abide under the legislation with respect to claiming damages and paying damages for Mr Gundelj's injury of further hearing loss.

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[2] [2020] NSWCA 151 (*Gardner*).
[3] [2008] NSWCA 326 (*Wattyl*).
[4] Mr Gundelj in his submissions uses, confusingly in my view, the term "jurisdiction" when referring to the parties' power or ability to negotiate and compromise a claim for damages for an injury. Broadly speaking, the term "jurisdiction" refers to the power that is invested in a Court or Tribunal to hear and determine disputes, and not to the power of citizens or corporations to negotiate, settle and compromise any dispute between them.

22. Mr Gundelj also submits, relying on *Meat Carter Pty Limited v Melides*[5], that at the time the Deed was made he had not received an injury of hearing loss and accordingly had no entitlement to work injury damages for such an injury at the time the Deed was made. This is because, according to Mr Gundelj, his injury was not received until his entitlement to compensation for his injury of hearing loss was known and this did not occur until the extent of his hearing loss had been assessed by Dr Scoppa, which did not occur until 27 March 2020.

23. Mr Gundelj, relying upon *J&C Equipment Hire Pty Limited v The Registrar of the Workers Compensation Commission of NSW*[6], also submits that he was not entitled to receive work injury damages for his injury of hearing loss until his permanent impairment from that injury had been assessed as being at least 15% WPI, and this is because having at least 15% WPI from an injury is a legislative threshold to claiming work injury damages and to an award being made to work injury damages.

24. Mr Gundelj also submits that his injury of further hearing loss was, at the time the Deed was made, a latent injury that did not become known until 25 March 2020, which is when Dr Scoppa assessed his hearing loss. Consequently, Mr Gundelj says that his injury of further hearing loss is excluded from the definition of injuries in the schedule to the Deed. Mr Gundelj further submits that the Deed, when read fairly, revealed that the payment he received was for a frank injury that occurred on 31 July 2012 and was not for an injury he suffered as a consequence of noise exposure.

The Authorities

25. It is convenient to discuss at this point some of the authorities on which Mr Gundelj has relied.

Wattyl

26. *Wattyl* involved a worker who had suffered an injury on 24 March 2000 in a motor vehicle accident that occurred during the course of his employment. The worker commenced proceedings in the District Court Motor Accidents List in 2003 but following decisions of the NSW Supreme Court of Appeal and the High Court that placed limitations on the damages he could recover, that was unacceptable to him, he pursued a claim for work injury damages under the 1987 Act. The worker had not complied with and could not comply with s 280A of the 1998 Act. His employer filed a Notice of Motion in the District Court on 26 October 2006 seeking that the worker's claim for work injury damages be dismissed for failure to comply with several provisions of the 1998 Act and the 1987 Act. Her Honour Judge Balla dismissed the motion. The Court of Appeal (Beazley JA, Young CJ in EQ and Grove J) allowed the employer's appeal against the orders of Balla DCJ, and set aside her orders and ordered in lieu thereof that the worker's claim for work injury damages be dismissed because the worker had not complied with s 280A of the 1987 Act, which reads:

> "A claim for work injury damages in respect of an injury cannot be made unless a claim for lump sum compensation in respect of the injury is made for or at the same time as the claim for work injury damages".

27. Beazley JA, Young CJ in EQ and Grove J provided separate judgments. Each held that compliance with s 280A was required in order that a worker can pursue a claim for work injury damages. That is, a worker was required to make a claim for lump sum compensation either at or before the time that the worker made a claim for work injury damages.

[5] [2020] NSWCA 307 (*Melides*).
[6] [2008] NSWCA 34 (*J&C Equipment*).

28. Beazley JA, after reviewing several authorities, including *Berowra Holdings Pty Limited v Gordon*[7] and the *Commonwealth v Mewett*[8], held in obiter that a worker's right to pursue an employer for damages was not extinguished if the worker failed to comply with s 280A. Her Honour held that the worker's ability to recover damages potentially could be defeated if the worker's employer pleaded non-compliance with the legislation in defence to the worker's claim for work injury damages.[9] In other words, absent an employer taking issue with a worker's failure to comply with s 280A (and in *Wattyl* the employer did take issue), a worker has a right to pursue his or her employer for work injury damages and potentially could recover work injury damages from the employer in proceedings the worker instituted against the employer.

29. Young CJ in EQ and Grove J did not deal with that particular issue and hence there is nothing inconsistent in their judgments with the obiter of Beazley JA.

30. Beazley's JA obiter, that is a worker's failure to comply with s 280A does not prevent the worker from pursuing work injury damages against the worker's employer and will not prevent the worker recovering damages in the circumstance where the employer does not take issue with that failure, extends and applies to the other processes stipulated by the 1998 Act and 1987 Act that place obligations on workers and employers relating to a worker accessing compensation and work injury damages. In other words, a failure by a worker or an employer to comply with provisions such as ss 280B(1), 315, 318A and 322A of the 1998 Act and ss 151D, 151H and 151G of the 1987 Act does not extinguish a worker's right to pursue an employer for damages for a workplace injury, but potentially could result in the worker's right being defeated but only if the employer took issue with the failure to abide these obligations.

31. In my view, what that means is that, contrary to what Mr Gundelj has submitted, his failure and Brighton's failure prior to 30 January 2017 to comply with any of the procedural requirements of the 1987 Act or the 1998 Act with respect to his injury of further hearing loss did not extinguish his right to damages for such an injury and did not extinguish his right to pursue Brighton for damages at that time and consequently did not prevent him from recovering damages for his injury at that time.

Gardiner

32. In *Gardiner*, the appellant worker lodged a complaint with the Anti-Discrimination Board, following the termination of his employment on 12 March 2008, about discrimination and victimisation he considered had occurred during the course of his employment with the respondent employer. A conciliation conference was held, during which an agreement was reached to settle his complaint on terms that required the employer to pay him a sum of money. The worker and his employer executed a Deed of Release in Court on 5 December 2018 incorporating the terms upon which they had settled the worker's complaint.

33. Prior to that settlement being reached, the worker had claimed compensation against the employer under the 1987 Act for a psychological injury he suffered in the course of his employment. It is obvious from the judgements of the Court of Appeal (Basten and Leeming JJA and Emmett AJA) in *Gardiner* that that claim had not been resolved by the time the worker and his employer had reached settlement of the complaint he had made to the Anti-Discrimination Board.

34. It is also obvious from the Court of Appeal's judgements that following the worker and the employer entering into a Deed of Release, the employer denied it was liable to pay the worker the compensation he had claimed on the basis that the worker was precluded by s 151A(1) of the 1987 Act from receiving compensation. The employer contended the worker

[7] [2006] HCA 32; (2006) 225 CLR 364.
[8] [1997] HCA 29; (1997) 191 CLR 471.
[9] Wattyl per Beazley JA [63]-[87].

had recovered damages for his injury pursuant to the settlement reached with respect to the complaint made to the Anti-Discrimination Board. An arbitrator entered an award in favour of the employer in the proceedings in the Commission. The worker then appealed to the Commission constituted by a Presidential Member. That appeal was dismissed.

35. The worker then filed an appeal with the Court of Appeal, which allowed his appeal and set aside the orders of the Commission. The Court of Appeal remitted the matter to the Commission for determination of the remaining matters in dispute.

36. Basten JA, Leeming JA and Emmitt AJA delivered separate judgments. Each held, essentially, that the payment that the employer made to the worker pursuant to the Deed of Release, which settled the complaint the worker made to the Anti-Discrimination Board about his employer could not be characterised as damages for the workplace injury the worker had suffered.

37. Basten JA held that the case depended upon the characterisation of the payment the employer made to the worker, and that task was to be done by reference to the legislation under which it was paid, namely the Anti-Discrimination Act. His Honour held that the Deed that the parties made involved the settlement of a complaint brought under the Anti-Discrimination Act and that the payment that was made by the employer to the worker was not intended by the parties to settle any claim for workers compensation or work injury damages. Consequently, s151A(1) did not preclude the worker from pursuing compensation for his injury.

38. Basten JA observed that the legislative purpose of s 151A was to ensure a worker did not get workers compensation and damages with respect to the one injury. His Honour also observed that Chapter 7 of the 1998 Act sets out a detailed, prescriptive and comprehensive regime for making a claim for workers compensation and work injury damages. His Honour observed that if the payment the employer made to the worker to settle the worker's complaint to the Anti-Discrimination Board was also payment of damages for the purpose of s 151A, then that payment would have contravened s 280B(1) of the 1998 Act which stipulates that an injured worker cannot recover damages for an injury unless and until permanent impairment compensation to which the worker is entitled for the injury has been paid. His Honour made that observation, it seems to me, for the purpose of enabling him to characterise the nature of the payment that had been to the worker.

39. On my reading of the judgment of Basten JA, there is nothing within it that contradicts the obiter of Beazley JA in *Wattyl*, that is that a failure to comply with the prescriptive procedural requirements of the 1998 Act with respect to a claim for compensation or a claim for work injury damages does not extinguish a worker's right to pursue damages for an injury, but potentially might result in the realisation of that right being defeated were an employer to take issue with the failure to comply with the procedural requirements.

40. Leeming JA held that the claims the parties compromised by the Deed were not for the injury the worker had suffered. Leeming JA also observed that had the amount been paid as damages for the injury then it would contravene s 280B of the 1998 Act. Again, on my reading of his Honour's judgement, Leeming JA made that observation by way of providing support for the conclusion to which he had come that the payment was not damages for the workplace injury. Again, on my reading of Leeming's JA judgment, his Honour did not say anything that contradicted the obiter of Beazley JA in *Wattyl*.

41. Similarly, in my view, Emmett AJA in his judgment did not say anything that contradicted the obiter of Beazley JA in *Wattyl*.

J&C Equipment

42. The issue in *J&C Equipment* was whether an employer who had agreed to the degree of permanent impairment a worker had from an injury for the purpose of a claim the worker had made for compensation for permanent impairment could dispute the degree of the worker's permanent impairment for a subsequent claim the worker made for work injury damages.

43. The worker in that case suffered an injury to his back on 23 November 2003. He made a claim on 31 August 2005 against his employer for compensation under s 66. It is apparent from the judgment of Tobias JA, with whom Campbell and Bell JJA agreed, that the worker's claim for compensation was supported by a report of Dr Searle, who had assessed the worker's degree of his permanent impairment to be 16% WPI. The employer's insurer accepted that assessment and agreed to pay compensation to the worker under s 66 for that permanent impairment. The parties could not agree on the compensation to which the worker was entitled under s 67 for pain and suffering that resulted from his permanent impairment, which led to the worker registering with the Commission an Application to Resolve a Dispute. Ultimately, the parties settled that matter and subsequently registered a s 66A agreement on 24 March 2006.

44. On 14 March 2006 the worker served on the insurer a claim for work injury damages. On 24 March 2006, the insurer requested that the worker be examined by Dr Machart. The worker abided that request and on 5 May 2006 Dr Machart reported that he had assessed the worker's permanent impairment was 12% WPI. The insurer then advised the worker's solicitor by letter dated 22 June 2006 that the insurer did not accept that the worker's degree of permanent impairment was at least 15%.

45. Section 151H(1) of the 1987 Act provides that no damages can be awarded with respect to an injury unless that injury results in a degree of permanent impairment that is at least 15%. The insurer's solicitor also advised the worker's solicitor in its letter of 22 June 2006 that the worker would need to obtain a medical assessment certificate in accordance with s 313 and s 314(2)(b) on the 1998 Act. Section 313 of the 1998 Act stipulates, in effect, that where there is a dispute regarding whether a worker's degree of permanent impairment exceeds 15%, then the worker cannot commence court proceedings for the recovery of damages or serve a pre-filing statement unless the degree of permanent impairment has been assessed by an Approved Medical Specialist. Section 314(1) stipulates that there is a dispute regarding whether the degree of a worker's permanent impairment exceeds the threshold of 15% where the employer or its insurer against whom the claim has been made does not accept the degree of permanent impairment is at least 15% or the degree of permanent impairment of the worker is not fully ascertainable. Section 314(2) stipulates that there is no dispute regarding whether the degree of the worker's permanent impairment exceeds 15% if the employer or its insurer has accepted the worker's degree of permanent impairment is at least 15% or an Approved Medical Specialist has issued a medical assessment certificate certifying that the worker's permanent impairment is at least 15%.

46. Following despatch of the insurer's letter of 22 June 2006, the worker's solicitor served on the insurer's solicitor a pre-filing statement pursuant to s 315(1) of the 1998 Act, as a precursor to commencing court proceedings. The insurer's solicitor then wrote to the worker's solicitor advising that the pre-filing statement was defective. The worker's solicitor then sought a determination by the Registrar pursuant to s 317(2) as to whether his pre-filing statement was defective. A delegate of the Registrar issued a direction recoding a determination that s 314(2)(a) of the 1998 Act had been satisfied by the filing of the s 66A agreement.[10]

[10] *J&C Equipment* at [6].

47. The employer then filed a summons in the Supreme Court seeking declarations as to the invalidity of the Registrar's determination and an order that the determination be quashed. Associate Justice Malpass dismissed the employer's summons.[11]

48. The judgement of Tobias JA on appeal, with which Tobias and Campbell JJA agreed, was that agreement or acceptance by an employer of the degree of a worker's permanent impairment for the purposes of a compensation claim operated only as acceptance with respect to that claim. The corollary of that was that it did not operate as acceptance or bind the employer for a separate claim by the worker for work injury damages. The Court of Appeal accordingly allowed the employer's appeal, set aside the orders of Associate Justice Malpass and quashed the determination of the Registrar and remitted the question of whether the pre-filing statement was defective to the Registrar for redetermination.

49. On my reading of the judgment of Tobias JA, there is nothing within it to support Mr Gundelj's contention to the effect that there must be a "lump sum assessment" before there can be an award of work injury damages. That would only be required, in accordance with s 313 of the 1998 Act, if an employer disputed that the degree of a worker's permanent impairment from an injury was more than 15%.

50. Moreover, in my view, there is nothing within the judgment of Tobias JA that contradicts the obiter of Beazley JA in *Wattyl*. In my view, consistent with Beazley's JA judgement in *Wattyl*, in a circumstance where there has been no assessment of the degree of a worker's permanent impairment, and where there is a dispute between the worker and the worker's employer regarding whether the employer's degree of permanent impairment exceeded 15%, the worker's entitlement to recover work injury damages from the worker's employer is not extinguished. A worker's failure to have an assessment of permanent impairment in such circumstance potentially could result in the worker's entitlement to recover damages being defeated but as to whether that scenario would eventuate would depend on whether the employer in any proceedings commenced by the worker took issue with the degree of the worker's permanent impairment not having being assessed by an Approved Medical Specialist. In other words, it would not be a barrier to the worker recovering work injury damages if the employer did not plead that issue in defence to the worker's claim.

Has Mr Gundelj received damages for his injury?

51. Section 151A(1) of the 1987 Act, insofar as it is relevant, reads as follows:

> "If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then...:
>
> (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid)."

52. I do not accept the submissions of Mr Gundelj to the effect that the parties' failure to comply with the prescriptive procedural requirements of Chapter 7 of the 1998 Act, and in particular the parties' failure to comply with s 280B, had the consequence that, firstly, Mr Gundelj had no entitlement for and could not consequently receive damages for his injury and, secondly, Brighton or its insurer had no liability to pay him work injury damages. The failure of the parties to comply with the procedural requirements of the 1998 Act did not extinguish Mr Gundelj's entitlement to recover damages for his injury or his right to pursue Brighton for damages. It was open to the parties to negotiate and settle any claim or allegation that Mr Gundelj made against Brighton for work injury damages for such an injury notwithstanding that neither Mr Gundelj nor Brighton and its insurer had complied with the prescriptive

[11] J*&C Equipment Hire Pty Ltd v Registrar of the Workers Compensation Commission of NSW & Anor* [2007] NSWSC 342.

procedural requirements of the legislation. If the situation had arisen whereby Mr Gundelj litigated a claim for work injury damages for his injury by instituting proceedings, then in such a hypothetical situation, his failure or Brighton's failure to comply with any of the procedural requirements stipulated by the 1998 Act with respect to such a claim potentially could have resulted in his claim being defeated. But that would only be the case if Brighton had sought to defend his claim by raising as an issue his failure to comply with the procedural requirements. To repeat, this is a hypothetical situation, and will forever remain a hypothetical, because in my view Mr Gundelj has received damages for his injury of further hearing loss from Brighton by his receipt of the damages of $430,000 that Brighton was obligated to pay him pursuant to the Deed it made with him on 30 January 2017.

53. Notwithstanding neither party had complied with the prescriptive procedural provisions of the legislation with respect to Mr Gundelj claiming or Brighton paying damages to Mr Gundelj for his injury of further hearing loss, because it was still open to Mr Gundelj to pursue Brighton for damages for his injury of hearing loss, and because it was open to them to negotiate and compromise a claim for damages or any allegation by Mr Gundelj relating to his having hearing loss, their agreement requiring Brighton's insurer to pay damages to Mr Gundelj for such an injury is not, in my view, inconsistent with s 234 of the 1998 Act.

54. Mr Gundelj's submission, relying on *Melides*, that he did not receive an injury of further hearing loss until the extent of his further hearing loss had been assessed by Dr Scoppa on 27 March 2020 must also be rejected. An entitlement to compensation for an injury rests upon the occurrence of injury even though the entitlement with respect to the injury may not be immediately ascertainable.[12] Liability for compensation and for work injury damages dates from the occurrence of injury. *Melides* did not hold to the contrary, and indeed supports that position.[13] As is often the case, there will be dispute regarding the quantum of a worker's entitlement arising from an injury, but that matter will always be resolved by reference to the evidence each party gathers and an evaluation of that evidence. In the event that the parties with respect to a claim for permanent impairment compensation or work injury damages cannot agree on the degree of a worker's permanent impairment then in the normal course of events evidence would be gathered by each party relating to that to support their respective positions and failing their reaching agreement on that issue then potentially the matter may require assessment by an Approved Medical Specialist. Nevertheless, it is a matter than can be negotiated and, consistent with what I have said above when discussing *J&C Equipment*, the fact that the parties do not agree on the degree of a worker's permanent impairment and the parties failing to have the medical dispute relating to the degree of a worker's permanent impairment assessed by an Approved Medical Specialist, will still not pose an impenetrable barrier to a worker recovering damages from the worker's employer in the event that the employer does not take issue with that omission.

55. Given all that, in my view the issue as to whether Mr Gundelj has recovered damages for his injury of further hearing loss reduces to construing the Deed that he made with Brighton and its insurer on 30 January 2017. That is done by reference to what a reasonable person would understand by the language that they used in the Deed having regard to the context in which the words appear and the purpose and object of the transaction.[14]

56. The transaction settled by the parties, as recorded in the Deed, was the allegations that Mr Gundelj had made of suffering injuries as set out in his claim for work injury damages, which included the injuries to his low back, neck and shoulders that occurred on 31 July 2012, and the injuries that were set out in the schedule of the Deed that also included an injury to his head, neck, whole of spine, all of both upper and lower limbs, trunk, chest,

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[12] See *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical & Further Education Commission t/as TAFE NSW* [2020] NSWCA 113 at [52].
[13] *Melida*, in particular [18].
[14] *Sydney Attractions Group Pty Ltd v Frederick Schulman* [2013] NSWSC 858, sited with approval in *Heidtmann v Rail Corporation NSW* [2018] NSWWCC PD23 and *Neuroscience Research Australia v De Rone* [2019] NSWWCC PD13.

disease, all senses, skin and any primary or secondary psychological injury, functional overlay, internal organs, sexual organs, brain and secular excluding latent injuries, arising from the nature and conditions of his employment and any specific injury within that time. In my view, the allegation of Mr Gundelj with respect to an injury to his senses, when objectively considered, includes an injury to his sense of hearing. That is, it includes any injury arising from the nature and conditions of his employment with Brighton that affected the function of his hearing organs. Hence, it includes his further loss of hearing for which he seeks compensation from Brighton in the present proceedings.

57. To my mind, there is no ambiguity about that, such that, for the purpose of interpreting the language of the Deed, regard could be had to the surrounding circumstances known to the parties at the time they entered into the Deed. But even if there were some ambiguity, which to repeat I consider there is not, then the evidence before me with respect to the surrounding circumstances consist only of the documents relating to the claim for work injury damages that Mr Gundelj's then solicitors sent on 30 May 2016 to Brighton's solicitors and the pre-filing defence and draft defence that Brighton's solicitors thereafter served upon Mr Gundelj's solicitors. There is no evidence with respect to what happened thereafter in the period to 30 January 2017, when the Deed was made, relating to negotiations that obviously occurred between the parties. The injuries as defined in the Deed are far more extensive than the injuries that were the subject of the claim made on 30 May 2016. That evidence that is before me on the circumstances surrounding the making of the Deed does not assist in interpreting what the parties' objective intentions were with respect to the subject of their agreement. What is clear, by virtue of the definition of injury within the Deed being more extensive than that to which reference is made in the notice of claim, is that the transaction involved Mr Gundelj receiving damages for injuries in addition to that which was the subject of the notice of claim.

58. In any event, as I have said, in my view there is simply no ambiguity regarding what, when objectively considered, the parties intended by the word "senses".

59. I also reject Mr Gundelj's submission that his injury of further hearing loss was a latent injury that is excluded from the definition of injuries in the schedule to the Deed. Indeed, the evidence relating to Mr Gundelj's injury of further hearing loss leads to the inference that he was aware as at the time he entered the Deed with Brighton and its insurer that his injury had manifested. Dr Scoppa when he examined Mr Gundelj on 25 March 2020 for the purpose of providing his report to Mr Gundelj's solicitors on 27 March 2020 obtained a history that Mr Gundelj was aware of progressive hearing loss for many years and that his hearing loss had deteriorated due to further occupational noise exposure since previously being compensated for his initial injury of hearing loss of 2007. Dr Tamhane also obtained a history when he examined Mr Gundelj on 6 August 2020 that Mr Gundelj had been aware of gradual deterioration in his hearing "for the past many years". There is simply no basis to conclude that his injury of further hearing loss was a latent injury that did not manifest until after he entered into the Deed with Brighton and its insurer.

60. The payment of damages of $430,000 that was made by Brighton's insurer to Mr Gundelj in accordance with obligation under Clause 2 of the Deed was a payment to Mr Gundelj for injuries that Mr Gundelj suffered during his employment including his injury of further hearing loss. Consequently, Mr Gundelj has recovered damages in respect of that injury from Brighton. Mr Gundelj is consequently, in accordance with s 151A(1) not entitled to compensation for permanent impairment for that injury.

61. I accordingly make an award for the respondent with respect to Mr Gundelj's claim for compensation for permanent impairment resulting from his injury of further hearing loss.