

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 5050/19  
**Applicant:** YVONNE JOY EDDIE  
**Respondent:** WESTPAC BANKING CORPORATION  
**Date of Determination:** 19 MARCH 2020  
**Citation:** [2020] NSWCC 81

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (Orthopaedic Surgeon) (AMS) to determine the extent of the applicant's whole person impairment, if any, which results from injuries to the applicant's left and right upper extremities with deemed date of injury of 9 August 2012.
2. I request the Registrar place before the AMS a copy of the Application to Resolve A Dispute and attachments registered 30 September 2019 (Application), a copy of the Reply and attachments registered 22 October 2019 (Reply), a copy of the Application to Admit Late Documents and attachments filed 23 December 2019 (AALD) 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.

*A MacLeod*

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



## STATEMENT OF REASONS

### BACKGROUND

1. Yvonne Joy Eddie (the applicant) is a 63 year old lady who commenced employment with Westpac Banking Corporation (the respondent) as a teller. The applicant brings proceedings pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) as amended for whole person impairment as a consequence of aggravation or acceleration of underlying degenerative changes in her upper extremities.
2. The respondent concedes that the applicant suffered compensable injury to her upper limbs because of the repetitive work activities to which she was exposed. The respondent in fact paid for operations to the applicant's left upper extremity which occurred on 16 January 2012 and to her right upper extremity which occurred on 9 August 2012. Although the respondent's independent medical examiner Dr R Diebold took the view<sup>1</sup> that the applicant's condition was congenital and not aggravated by her work, that position is not taken by the respondent.

### ISSUES FOR DETERMINATION

3. The parties agree that the applicant's section 66 entitlement should be assessed by an AMS. What is not agreed is the terms of the referral. The respondent asserts that the applicant was exposed to many different incidents of microtraumata and that it is not appropriate for the AMS to be asked to aggregate the two different pathologies (left and right upper extremities) because they occurred at different times.

### PROCEDURE BEFORE THE COMMISSION

4. The matter came for conciliation and arbitration hearing in Tamworth on 12 March 2020. Mr S Hickey of Counsel instructed by Mr M Grady, Solicitor, appeared for and with the applicant. Mr S Hunt of Counsel appeared for the respondent.
5. 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.

### EVIDENCE

#### Documentary evidence

6. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application;
  - (b) Reply, and
  - (c) AALD.

#### Oral evidence

7. No oral evidence was given.

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<sup>1</sup> Report Dr R Diebold 23 December 2014.

## SUBMISSIONS

8. It is unnecessary to summarise in detail the oral submissions provided in this matter as a sound recording is available.

## FINDINGS AND REASONS

9. The applicant in her statement details her work activities and says that the more work she did, there was an increase in pain and paraesthesia in her thumb, index and middle fingers. It is clear that the respondent admits section 4 injury in respect to both upper extremities. The central issue is the extent to which there should be an assessment by the AMS on an aggregated basis.
10. The respondent has raised an argument that the applicant's carpal tunnel syndrome in her left and right wrists and microtrauma to the thumb and finger joints and adjacent soft tissues and aggravation of osteoarthritis occurred due to the applicant's exposure to a series of frank personal injuries. On that argument, it is suggested that there are several dates of injury preventing aggregation because the pathologies are not the same.
11. The report of Dr Oates of 22 October 2018 confirms an extensive history of lifting of heavy bags of coin, numerous key strokes and other repetitive duties and a mechanism involving repeated micro traumata and acceleration of osteoarthritis in the applicant's joints. Dr Oates on examination noted marked weakness of pinch grip and reduced bilateral grip strength and concluded that the applicant had suffered an aggravation of pre-existing degenerative changes in both hands together with carpal tunnel syndrome. Dr Oates concluded that the aggravation had occurred as a result of the applicant's work from 1991 and over a period of time.
12. The applicant underwent an operation to her right upper extremity on 9 August 2012. The left upper extremity operation had earlier occurred on 16 January 2012 with the applicant returning on selected duties for six weeks from 6 March 2012. Normal duties were performed from 20 April 2012 until the applicant's second operation.
13. Assessments have been made by Dr Hopcroft and Dr Diebold as well as Dr Oakes.
14. Section 16 of the 1987 Act relevantly applies as follows:

"16(1) If an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease:

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

(i) At the time of the worker's death or incapacity, or

(ii) if death or incapacity has not resulted from the injury – at the time the worker makes a claim for compensation with respect to the injury....

16(3) In this section, a reference to an injury includes a reference to a permanent impairment for which compensation is payable under Division 4 of Part 3".
15. The purpose of section 16 is not to create a liability to pay compensation. Rather, the section pre-supposes that "injury" within the meaning of section 4 and section 9 of the 1987 Act has been established<sup>2</sup>. Notably, section 16 applies in the case of the aggravation, acceleration, exacerbation or deterioration of a disease and has no part to play in terms of personal injury simpliciter pursuant to section 4(a) of the 1987 Act.<sup>3</sup>

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<sup>2</sup> *Crisp v Chapman* (1994) 10 NSWCCR 492.

<sup>3</sup> *Rail Services Australia v Dimovski* [2004] NSWCA 267.

16. It is clear from the medical evidence that the applicant has experienced long standing osteoarthritis, namely an underlying disease. It is also clear that the nature of the applicant's tasks at work have, on her own evidence and the evidence of the majority of the medical practitioners, gradually aggravated and/or accelerated that underlying condition. That being the case, section 16 creates a deemed date of injury for the purposes of the applicant's condition.
17. Section 16(1)(a)(i) deems the applicant's injury to have happened at the time of her incapacity. It is clear that the applicant suffered incapacity on and from 16 January 2012 (left wrist operation) and also 9 August 2012 (right wrist operation).
18. Section 65(2) is in the following terms:
  - (2) If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division".
19. For the purposes of section 65(2), it was held by His Honour Nielsen J in *Lyons*<sup>4</sup> that "injury" means the pathology, which in this case is the carpal tunnel syndrome and aggravation of the osteoarthritis. The question then becomes whether the two pathologies arise "out of the same incident".
20. In *Findlay*<sup>5</sup> Deputy President Roche observed the following:
  51. Last, I agree that the Arbitrator erred in finding the deemed date of injury in respect of the cervical spine injury to be 4 February 2008. Having found the injury to be an aggravation of a disease, the injury shall be deemed to have happened at the time of the worker's death or incapacity....
  - 52...
  53. The fact that there are two deemed dates of injury raises the question of whether the assessments for the whole person impairment resulting from the cervical spine injury and from the lumbar spine injury can be assessed together for the purpose of reaching the threshold for compensation for pain and suffering under s 67 of the 1987 Act. The Commission considered that question in *Department of Juvenile Justice v Edmed* [2008] NSWCCPD 6, where it was held that, if a worker suffers the same injury (pathology) from separate injurious incidents, or two separate injuries (pathologies) from the same injurious incident, those injuries are to be assessed together when calculating lump sum compensation. The parties made submissions on this point at a teleconference on 10 November 2011.
  54. Ms Findlay's solicitor submitted that the injury (pathology) to the worker's cervical spine is the same as the injury (pathology) to her lumbar spine and she is entitled to have those injuries assessed together under s 322(2) of the 1998 Act. The Department's solicitor submitted that the injuries are different and that, as there is no evidence, apart from Dr Giblin's, of what caused the condition in Ms Findlay's cervical spine, it cannot be said that they have resulted from the same injurious event or incident under s 322(3). He submitted that the impairments should be assessed separately and cannot be added together.

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<sup>4</sup> *Lyons v Master Builders of NSW* (2003) 25 NSWCCR 423.

<sup>5</sup> *Department of Ageing Disability & Home Care v Findlay* [2011] NSWCCPD 65 at [51-60].

55. While the injury to Ms Findlay's cervical spine may well be the same as the injury to her lumbar spine, I prefer to base my decision on the fact that the injuries (whether or not they resulted in the same pathology) have resulted from the same injurious incident, namely, the heavy repetitive duties Ms Findlay performed with the Department since 1997".

21. It is clear from the decision in *Findlay* that for the purposes of section 65(2) "incident" in the applicant's matter can be regarded as the whole of the activities performed by the applicant during her work. The "incident" is the whole of the activities performed by the applicant in the course of her employment over a long period of time.
22. The pathologies in my view must have been considered to have occurred on the same date in accordance with *Findlay*, namely 9 August 2012. The fact that they are not identical pathologies does not necessarily mean that there are two or more separate dates of injury. Section 65 (2) would have no work to do if separate pathology necessarily meant separate incident. In my view it is appropriate that the AMS be requested to assess whole person impairment in respect of each and both pathologies on a combined whole person impairment basis with deemed date of injury being the later/most recent period of commencement of incapacity, namely 9 August 2012.

## **ORDERS**

23. The matter is remitted to the Registrar for referral to an AMS (Orthopaedic Surgeon) to determine the extent of the applicant's whole person impairment, if any, which results from injuries to the applicant's left and right upper extremities with deemed date of injury of 9 August 2012.
24. I request the Registrar place before the AMS a copy of the Application, a copy of the Reply, a copy of the AALD and a copy of these Reasons for Decision.