

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5423/20
Applicant: HELOISE LABIT
Respondents: UNIVERSITY OF NSW
Date of Determination: 4 January 2021
Citation No: [2021] NSWCC 1

The findings of the Commission are as follows:

1. Award in favour of the applicant pursuant to section 37 of the *Workers Compensation Act, 1987*, as amended, (1987 Act) for weekly payments from 17 August 2020 to date and continuing.
2. Award in favour of the applicant being a general award with respect to section 60 expenses.
3. There having been no submissions on capacity and economic loss, nor the reasonable necessity of the proposed operative procedure, liberty is granted to the parties to apply in respect of these matters in the event that they cannot be resolved by the parties directly.

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. Heloise Labit (the applicant) is a 33 year old lady who was employed by the University of NSW (the respondent) as a lecturer. She alleges bilateral carpal tunnel syndrome and ulnar neuritis with a deemed dated of injury of 10 January 2020.
2. The claim is for weekly payments and past and future (section 60) medical expenses. The weekly payments claim is from 17 August 2020, although it would appear for many weeks after that date the applicant was able to receive some earnings.
3. The submissions of the parties made it clear that the significant contest was the diagnosis and extent of the applicant's medical condition. No arguments were made in relation to capacity for work nor proposed operative procedures. Significant issues concerned pleadings and causation.

ISSUES FOR DETERMINATION

4. The issues for determination are whether the applicant can rely upon the "nature and conditions" (for want of a better expression) of her employment as supporting her claim; if so whether her condition is in the nature of carpal tunnel syndrome resulting from her employment. Finally, there are issues concerning whether the applicant would benefit from proposed surgery and the liability in general terms for section 60 expenses..

PROCEDURE BEFORE THE COMMISSION

5. The matter came for conciliation and arbitration hearing on 14 December 2020. Mr W Carney of counsel instructed by Mr J Kambas appeared for and with the applicant. Mr P Macken, solicitor, appeared for the respondent.
6. At the outset the parties entered into conciliation but despite my best endeavours the matter could not be resolved. I am satisfied that the parties understand the nature of the dispute and the various evidence submitted. The matter proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

7. The following documentary evidence was before the Commission:
 - (a) Application to Resolve a Dispute filed on 21 September 2020 and attachments (Application);
 - (b) Reply filed on 8 October 2020 and attachments (Reply);
 - (c) Application to Admit Late Document (AALD) filed by the applicant on 12 October 2020 and attachments;
 - (d) AALD filed by the applicant on 30 November 2020 and attachments, and
 - (e) AALD filed by the respondent on 9 December 2020 and attachment.
8. Documents the subject of all AALDs were admitted into evidence, without objection.

Oral evidence

9. No oral evidence was given.

SUBMISSIONS

10. It is unnecessary to summarise in detail the submissions provided in this matter as all submissions were sound-recorded and a copy of the recording is available to the parties upon request.

DISCUSSION AND REASONS

11. The applicant in her statement confirms that she commenced employment with the respondent in 2016 as a research fellow. In December 2019 it was noted that she experienced carpal tunnel syndrome with ulnar nerve entrapment. Soreness in her hands and wrists commenced, however, somewhat earlier and with the applicant developing numbness, pins and needles and constant pain and swelling.
12. In May 2020 the applicant moved to a new work role with the respondent. This role involved significant workload as it required more computer work. The applicant went to see Dr B Schick and had some time off work and a reduction in her working hours. She was experiencing frequent pins and needles and pain, however, in July 2020 her workload decreased and by September 2020 the applicant was working at about 80 percent of her pre-injury capacity.
13. The applicant's treating doctor is Dr N Brittain and he had referred the applicant to Dr Schick before 20 February 2020.¹ Dr Schick noted² a history of the applicant's symptoms getting worse when she was typing and best when on holidays. He noted an ergonomics assessment had been undertaken and he thought there was ulnar nerve compression of the applicant's wrist.
14. The applicant was sent to physiotherapy by which time (5 March 2020) the applicant was complaining of bilateral elbow, as well as wrist, pain.³ By 20 February 2020 Dr Schick had diagnosed bilateral carpal tunnel syndrome and the general practitioner was describing the condition as "progressive since March 2019".⁴
15. The applicant was also referred to a hand therapist, Ms S Marwedel and the general practitioner was generally certifying the applicant capable of 4 to 7 hours per day for 5 days per week.⁵
16. Medical certificates in that vein continued generally throughout 2020.
17. Ms C Jaconelli is a Health Safety and Environment Coordinator for the respondent. On 20 January 2020 she conducted a workplace assessment and recommended a trial of an ambidextrous mouse as well as rest and stretch breaks for the applicant, half hourly. A further referral to an outside supplier⁶ was prepared on 3 March 2020.⁷ That organisation noted that the applicant's work tasks included "constant typing" and "constant mouse work" and recommendations were made, including task rotation, the use of breaks, stretches and exercises and correct workstation setup. An adjustable keyboard was recommended.

¹ Application page 7.

² Ibid.

³ Ibid at page 9.

⁴ Ibid at page 13.

⁵ Ibid at page 14.

⁶ See report of Recovre.

⁷ Application page 37.

18. The applicant was examined by Dr L Reiter on behalf of the respondent on 12 March 2020. Dr Reiter is a consultant rheumatologist and her report is dated 15 March 2020.
19. The applicant gave Dr Reiter a history that “whenever she was at work, keying she would notice pain on the volar aspect of her right wrists, which commenced on 1 March 2019”.⁸
20. By the time of Dr Reiter’s consultation the applicant had reduced her working hours from 7 hours per day to 5-6 hours per day with a break every 30 minutes.⁹
21. Dr Reiter agreed with Dr Schick that the applicant had clinical evidence of bilateral elbow medial epicondylitis and bilateral ulnar impingement at the elbow on both sides as well as right carpal tunnel syndrome. Dr Reiter considered a number of studies and concluded that the applicant’s keyboard work as not associated with any increased risk of these conditions. At page 6 of her report¹⁰ she concludes:

“therefore, none of the studies looked at the incidences occurrence or possible causation of lateral and medial epicondylitis with keying and mouse work”.
22. Dr Reiter’s opinion concerning the “studies” is clearly based upon existing scientific research studies. It is in my view an incorrect approach for two important reasons. First, civil cases in many jurisdictions have highlighted that scientific standards of proof require more than the civil standard¹¹. Dr Reiter’s opinion has a scientific approach to it and does not properly take account of the very contemporaneous evidence of the applicant that she was suffering pain whilst keying. Second, the studies did not consider whether the types of duties performed by this applicant aggravated (etc) any underlying disease which this applicant had developed.
23. Dr J Bodel in his report of 11 May 2020 supports the connection between the applicant’s condition and her work. He concludes that the applicant has carpal tunnel syndrome and probable ulnar neuritis. He opines that the applicant suffered an underlying constitutional condition which was aggravated, accelerated, exacerbated and deteriorated by her work. Dr Bodel was also satisfied that the applicant’s keyboard and mouse work was the main contributing factor to that aggravation (etc).

The pleadings issue

24. During submissions Mr Macken identified that the applicant had pleaded only one date of injury, namely 10 January 2020. It was suggested by him that references to section 4(b) (namely disease or aggravation of disease) are irrelevant because the applicant did not tick the box in the Application to indicate that 10 January 2020 was a deemed date of injury. It followed in Mr Macken’s submission that:
 - (a) Dr Schick in his report refers to the onset of symptoms in December 2019, not on 10 January 2020;
 - (b) the applicant needs to prove that this one day of exposure on 10 January 2020 was a substantial contributing factor to the applicant’s condition (section 4 (a));
 - (c) nerve conduction studies were entirely normal, whereas Dr Bodel assumes that these studies found something of significance;
 - (d) the physiotherapy report¹² identified cubital tunnel syndrome as well as carpal tunnel syndrome. The former is not alleged;

⁸ Ibid at page 46.

⁹ Ibid at page 48.

¹⁰ Ibid at page 50.

¹¹ See, for example, the discussion many years ago by Eggleston J in “Probabilities and Proof” Melbourne University Law Review (1963).

¹² Ibid at page 8.

- (e) the doctors identified the initial onset of symptoms as March 2019, not 10 January 2020;
- (f) the MRI of the applicant's cervical spine pathology occurred before the date of the alleged injury (10 January 2020) and identified right cervical radiculopathy, and
- (g) Dr Bodel's opinion is highly predicated on allegations which are not alleged. He only examined the applicant through video conferences without the MRI report of the neck and without nerve conduction studies. Disease has not been alleged, therefore Dr Bodel's conclusion is of no assistance.

25. I do not accept Mr Macken's submissions concerning the pleadings for the following reasons. First, the Commission is not a court of strict pleading and the task of the Commission is to determine proceedings "with as little formality and technicality as the proper consideration of the matter permits".¹³ Second, the respondent has always been aware that the disease allegation was a real prospect. Dr Reiter was actually asked by the respondent about disease and aggravation (etc) of disease so the respondent can hardly suggest that it was caught by surprise when faced with the applicant's medical evidence. Third, there was absolutely no suggestion of any deficiency in the pleadings raised by the respondent at the teleconference on 20 October 2020. Four, as a matter of general principle the function of pleadings is to enable the parties to understand the nature of the allegations against them and I have little doubt that the respondent was fully aware of the potential breadth of the case pleaded by the applicant. Five, the respondent had ample opportunity to clarify the applicant's failure to tick a box in the Application by requesting particulars in circumstances where the supportive evidence raised the suggestion of a disease allegation.

Conclusion

26. I am comfortably satisfied on the balance of probabilities, having regard to the applicant's evidence and the medical opinion generally, that the applicant has suffered the condition identified by Dr Bodel, that her endeavours to return to work reflect correctly her capacity for work since 17 August 2020 and that she is entitled to an award for weekly payments as well as a general award with respect to section 60 expenses.
27. I have recorded the respondent's submission in relation to the opinion of Dr K Edwards¹⁴ as being that Dr Edwards did not have a history from the applicant consistent with what was alleged in the Application. Be that as it may, I have outlined in the prior section the matters which this Commission regards as important in terms of any focus on strict pleadings in this particular matter.

ORDERS AND AWARDS

28. Award in favour of the applicant pursuant to section 37 of the 1987 Act for weekly payments from 17 August 2020 to date and continuing (quantum to be agreed or determined).
29. Award in favour of the applicant being a general award with respect to section 60 expenses.
30. There having been no submissions on capacity and economic loss, nor the reasonable necessity of the proposed operative procedure, liberty is granted to the parties to apply in respect of these matters in the event that they cannot be resolved by the parties directly.

¹³ Section 354 Workplace Injury Management and Workers Compensation at 1998.

¹⁴ Report Dr K Edwards 18 November 2020 attached to AALD dated 9 December 2020.