

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3209/19
Applicant: Alexandria Eves
Respondent: Mission Australia
Date of Determination: 28 October 2019
Citation: [2019] NSWCC 351

The Commission determines:

1. The factual report of Anne-Marie Factual Investigations dated 28 March 2016 and the report of Dr Robert Wotton dated 31 October 2016 are admitted into evidence.
2. The tender of the report of Dr Robert Wotton dated 9 October 2019 is rejected.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Alexandria Eves (the applicant/Ms Eves) claims compensation for weekly benefits from 10 February 2016 to date and continuing for incapacity as a result of two injuries referred to in the Application to Resolve a Dispute registered 28 June 2019 (the Application). The injuries listed in Part 4 of that document are:
 - (a) psychological injury with an adjustment disorder with depressed and anxious mood as a result of bullying and harassment in the course of her employment with Mission Australia (the Respondent). The (deemed) date of injury claimed is 10 February 2016, and
 - (b) significant injuries sustained in a motor vehicle accident which occurred when the applicant was driving from Bourke to Cobar on 19 February 2016. The accident occurred about 45 km from Cobar after Ms Eves left Bourke at around 6.30 pm – 6.45 pm on that day.
2. In a notice issued to the applicant on 6 April 2016 pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) by the respondent's then insurer QBE Workers Compensation (NSW) Ltd (QBE), the respondent denied liability for psychological injury suffered by the applicant, relying on ss 4, 9A and 11A of the *Workers Compensation Act 1987* (the 1987 Act). QBE also issued a further s 74 notice to the applicant on 17 June 2016 in respect of the motor vehicle accident on 19 February 2016 in which the respondent denied liability for injury sustained in the accident, relying, inter alia, on ss 4, 9A and 10(3A) of the 1987 Act
3. Two further s 74 notices were issue to the applicant:
 - (a) by QBE dated 30 December 2016 which referred to the two earlier s 74 notices and contained a denial of liability for psychological injury deemed to have occurred on 10 February 2016 and resulting from the motor vehicle accident on 19 February 2016, and
 - (b) by AAI Limited t/as GIO (GIO), (which replaced QBE as the insurer of the respondent) dated 1 March 2018, and which contained a denial of liability for both the psychological injury deemed to have occurred on 10 February 2016 and the motor vehicle accident on 19 February 2016.
4. QBE instructed Anne-Marie Paterson Investigations (AMPI) to prepare a factual report. Two reports from that firm were produced, dated 10 and 28 March 2016.
5. It is common ground that the second report dated 28 March 2016 was not attached to any of the s 74 notices. The first report dated 10 March 2016 was served with the s 74 notice dated 6 April 2016. The second report was, according to the applicant, posted to her in an envelope in January 2018 together with two documents referred to therein which were not referred to in the first report, namely:
 - (a) "Chronology of events provided by the Claimant", and
 - (b) "Signed statement of Lisa Nean".
6. The applicant was seen by an independent medical examiner (IME), Dr Robert Wotton, on 13 October 2016 at the request of QBE. Dr Wotton produced a report dated 31 October 2016 which is attached to both the Application and the Reply lodged in the proceedings. This report was served with the s 74 notice dated 30 December 2016.

7. A supplementary report of Dr Wotten dated 9 October 2019 was lodged at the Commission with an Application to Admit Late Documents dated 10 October 2019 (AALD 10 October 2019). It was served on the applicant via email at 4.30 pm on that day.
8. The proceedings were the subject of conciliation/arbitration in Dubbo on 16 October 2019. There was no resolution of the applicant's claim at conciliation, and the matter proceeded to arbitration.
9. The applicant objected the AMPI factual report dated 28 March 2016 and the two reports of Dr Wotton being admitted into evidence.
10. Submissions were received in respect of the admission of the evidence referred to in [9] above and the matter was stood over for further arbitration hearing to 10.00 am on 11 December 2019 in Sydney. The parties were advised that a written decision would be issued in respect of the applicant's objection to the evidence.

ISSUES FOR DETERMINATION

11. The parties agree that the following interlocutory issues need to be determined in anticipation of the further arbitration hearing on 11 December 2019:
 - (a) Having regard to s 73 of the 1998 Act and regulation 41 of the Workers Compensation Regulation 2016 (the Regulation), are the reports of Dr Robert Wotton dated 31 October 2016 and 9 October 2019, and the AMPI factual report dated 28 March 2019 admissible?
 - (b) Is there any discretion to admit into evidence the reports of Dr Robert Wotton dated 31 October 2016 and 9 October 2019, and the AMPI factual report dated 28 March 2016?

PROCEDURE BEFORE THE COMMISSION

12. Mr B McManamey of counsel, briefed by Ms M Bollins appeared for the applicant at the conciliation/arbitration on 16 October 2019. The applicant was present with her mother as a support person. Ms L Goodman of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

13. The following documents were before the Commission in Dubbo on 16 October 2019:
 - (a) the Application and attached documents;
 - (b) Reply and attached documents, and
 - (c) AALD 10 October 2019 with the following attachments:
 - (i) various bank statements of the applicant (347 pages), and
 - (ii) the report of Dr Robert Wotton dated 9 October 2019.

14. The report of Dr Wotton dated 31 October 2016 is attached to both the Application¹ and the Reply² (noting that page references herein are to the electronic page numbers in the Commission's documents). The s 74 notices are attached to both the Application³ and the Reply⁴.
15. There is a transcript of proceedings in Dubbo on 16 October 2019 (T).

SUBMISSIONS

Applicant

16. The applicant objects to the admission of the report of Dr Wotton dated 9 October 2019 because:
 - (a) it was served very late, a matter of days before the date fixed for conciliation/arbitration;
 - (b) there was no indication given at the telephone conference held on 29 September 2019 that the respondent was in the process of obtaining further medical evidence, and more importantly,
 - (c) this further report changes the nature of the case that the applicant must meet.
17. The applicant submits that whereas Dr Wotton in his first report dated 31 October 2016 ultimately expressed an opinion that he could not diagnose if the applicant suffered from a psychiatric condition because of the "overlay"⁵ (a term used by counsel for the applicant and not the doctor) caused by the motor vehicle accident which occurred within hours of the applicant leaving work on 19 February 2016. Dr Wotton in that first report also expressed the belief that there had not been an aggravation of a pre-existing underlying psychological condition, noting that there was a significant past history of unstable mood disorder and to some extent, that was evident in some of the applicant's behaviour in the workplace setting.
18. The applicant submits that Dr Wotton expresses "a completely new theory"⁶ on the applicant's condition in his second report. This is that he considers that the applicant suffers from a personality disorder when he says at the end of p 4 of the report:

"I do not think that the workplace events were the predominant cause of MS Eves' reaction but rather her reaction was a manifestation of her long-standing psychological disorder."⁷
19. The applicant submits that rather than being an injury as such, Dr Wotton is saying that the applicant's condition is just a manifestation of the disorder and really gives no explanation as to why he changes his opinion. It is a new opinion that has not been suggested before and one that the applicant cannot meet. She is therefore prejudiced.

¹ Application P 86.

² Reply P 312.

³ Application pp 73, 79, 65 and 415.

⁴ Reply pp 6, 10, 17 and 23.

⁵ T 14.20.

⁶ T 16.20.

⁷ AALD 10.10.19 p 352.

20. The applicant also objects to admission of the second report because the opinion of Dr Wotton is based, in part at least, on the second AMPI factual report which was not served with any of the s 74 notices. This is clear, according to the applicant, when the doctor specifically refers to “a second factual investigations” [sic] to which he says that he “did not previously have access”⁸.
21. The applicant also objects the admission of Dr Wotton’s first report dated 31 October 2016 because it is apparent from an examination of the list of documents with which he was provided that the doctor did in fact have access to the second AMPI factual report when he prepared his report. He refers to a statement of Lisa Nean dated 24 March 2016 at [5] on p 2 of the report and to the second AMPI factual report itself at [6]⁹. Ms Nean’s statement was only attached to this second factual report, not the first such report dated 10 March 2016. The “Chronology of events provided by the Claimant” was also only attached to the second factual report and not the first (see [5] above).
22. The applicant’s submission that the second AMPI factual report should not be admitted into evidence is made notwithstanding the fact that the applicant relies on the statement of Lisa Nean and the Chronology of events provided by the claimant (which, according to the applicant’s counsel, appears to have been in fact prepared by the applicant’s mother) in support of her case. The applicant objects to that part of the report prepared by the investigator and not the documents attached to the report.
23. In conclusion, the applicant submits that s 73 of the 1998 Act is mandatory in its terms, and that if the insurer does not serve a report with a s 74 notice, or has not already supplied such report to a worker and advised in the subsequent s 74 notice that the report will be relied upon, the report cannot be used by an insurer to dispute liability to pay or continue to pay compensation and is not admissible in proceedings on such a dispute before the Commission. The second AMPI factual report clearly falls into this category of reports, as it was not served with the s 74 notice dated 17 June 2016. For the same reason, the second report of Dr Wotton is inadmissible as the doctor in that report relies of the factual report as a basis of his opinion.
24. The applicant notes that if the second report of Dr Wotton is not admitted and the first report is, the problem arises that the Commission then only has part of Dr Wotton’s opinion expressed in the first report. This is a further reason that admission of the first report is objected to, although it is accepted that as the rules of evidence do not apply to proceedings in the Commission, the first report could be admitted without the second.

Respondent

25. The respondent submits that the applicant’s objection to the first report of Dr Wotton does not really go to the admission of the report, but more to the weight that should be given to the opinion of the doctor expressed in the report. The respondent acknowledges that the second AMPI factual report was not served with or properly referred to in the s 74 notice but says that although Dr Wotton saw the document when preparing his first report, nevertheless that report is admissible.
26. The respondent points to the fact that the applicant has been in possession of the second AMPI factual report since January 2018 and seeks to rely on two attachments thereto, the statement of Ms Nean and the chronology. In this circumstance, as I understand the respondent’s submission, it matters not that this factual report was not served in accordance with s 73 of the 1998 Act and regulation 41 of the Regulation.

⁸ AALD 10.10.19 p 352.

⁹ Reply p 343.

27. The respondent also noted in submissions that as the matter was going over to another date, further consideration could be given as to the need to press for introduction into evidence of the material.
28. The respondent notes that Dr Wotton, when preparing his second report, was provided with material attached to the Application which had not previously been served on the respondent, in particular Patient Health Summary from RaMS Health Burke [sic] dated 20 March 2015 to 7 September 2016, report of Adam Fitzpatrick, psychologist, dated 19 August 2016 and IME report of Dr Martin Allen dated 18 November 2017. The respondent also refers to the notes of Dubbo Base Hospital going back to 2006 and 2007.
29. The respondent notes that although Dr Wotton could not come to a diagnosis in his earlier report, he did identify personality problems which the applicant had. The respondent submits that Dr Wotton in his second report more clearly articulates the personality problem from which he says the applicant is suffering, which manifested itself in the workplace.
30. The respondent acknowledges that the second report of Dr Wotton was served on the applicant very late, but notes that the respondent's solicitor wrote to the doctor within two weeks of receiving the Application with the additional material attached to it, but unfortunately Dr Wotton did not forward his second report until very late and that it was served on the applicant on the day it was received.
31. Again, the respondent noted that as the matter was to be adjourned, the applicant would have an opportunity to obtain a further report.

FINDINGS AND REASONS

32. Section 73 of the 1998 Act and clause 41 of the Regulation (which replaced clause 46 and prior to that clause 37 of earlier regulations) are quite clear and unambiguous in their language. Subsection (1) of s 73 provides that the regulations may make provision for or with respect to requiring an insurer to provide a worker, a worker's legal representative or any other person with a copy of a specified report, or a report of a specified kind, obtained by the insurer in relation to a claim by the worker. Subsection (3) relevantly provides that if an insurer fails to provide a copy of a report as required by the regulations under that section:
 - “(a) the insurer cannot use the report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the report for any other purpose prescribed by the regulations for the purposes of this section, and
 - (b) the report is not admissible in proceedings on such dispute before the Commission,…”
33. Clause 41(1) of the Regulation sets out the types of reports that an employer or insurer has in the employer's or insurer's possession. The two reports of Dr Wotton and the two factual reports prepared by AMPI clearly fall within the types of reports described in the sub-regulation.
34. In *Chown v Tony Madden Refrigeration Transport Limited* [2005] NSW WCC PD 159 Deputy President Dr Fleming said at [17]:
 - “17. There is no doubt that a purposive approach to statutory interpretation is the correct way to consider the relevant provisions. However, in my view section 73 of the 1998 Act and clause 37 of the Regulation are unambiguous in their language and the serious consequence of non-compliance is exactly what those provisions intended. They have a broader, underlying purpose, not referred to by

the Arbitrator, but consistent with the objectives of the Workers Compensation Acts, namely to ensure a timely, effective and transparent determination of a worker's entitlement to compensation as a result of a work injury. Where a worker is not informed of the basis of a decision to deny compensation, the obvious questions of whether to accept or appeal that decision, and how and when to return to prior employment may remain unresolved. The consequence of non-compliance with section 73 and clause 37 is that the reports of Dr Van Der Rijt and Dr Mills are not admissible in the proceedings before the Arbitrator. The Arbitrator has no discretion to avoid the consequence of these provisions."

35. This principle has been consistently affirmed in subsequent decisions of the Commission.
36. The second AMPI factual report dated 28 March 2016 was at no stage served on the applicant with a s 74 notice. This is acknowledged by the respondent. The s 74 notice dated 6 April 2016¹⁰ refers to a "Factual report" (singular) of "Annemarie Paterson Factual Investigator". In that notice, issued in respect of the psychological injury deemed to have been suffered on 10 February 2016, liability is denied on the basis that the information provided by treating doctors does not appear to provide a DSM diagnosis confirming a psychological condition. It is also noted that the "the factual investigation" has indicated non work-related issues.
37. The second s 74 notice dated 17 June 2016¹¹ issued in respect of the motor vehicle accident on 19 February 2016 does not contain any reference to a factual report. In denying liability for injury sustained in the accident, QBE relies on ss 4, 9A and 10(3A) of the 1987 Act.
38. The author of the third s 74 notice dated 30 December 2016¹² states that the notice is to be read together with the two notices dated 6 April 2016 and 17 July 2016. Reference is made to the examination of the applicant by Dr Robert Wotton on 13 October 2016 and his report dated 31 October 2016. It is listed in the notice as one of the reports and documents relied upon by QBE, as is the factual report of Annemarie Paterson, Investigator, dated 10 March 2016.
39. The fourth s 74 notice dated 1 March 2018 issued by GIO¹³ (described as a "Further Notice under Section 74" of the 1998 Act) was issued in response to an application for review submitted by the applicant's solicitors, received on 3 January 2018. It contains an extensive review of the evidence, including reference to Dr Wotton's examination of the applicant on 13 October 2016 and his report dated 31 October 2016. It also refers to at paragraphs v and xii on p 20 of the notice to the "factual report of Anne-Marie Paterson Investigations dated 28 March 2016,"¹⁴.
40. The applicant acknowledges receiving this report ("the second AMPI factual report" hereinbefore referred to) by post in January 2018. It appears that this report was served after receipt by the GIO of the request for review submitted by the applicant's solicitors Thereafter the s 74 notice dated 1 March 2018 issued.
41. The Application was registered on 28 June 2019. Included in the supporting documentation listed in Part 6 thereof are the four s 74 notices, although the notice of 1 March 2018 is listed as being authored by QBE rather than GIO.

¹⁰ Reply p 6.

¹¹ Reply p 10.

¹² Reply p 17.

¹³ Reply p 23.

¹⁴ Reply p 25.

42. Therefore, by the time that the applicant commenced proceedings on 28 June 2019 she had been served with four s 74 notices including that of 1 March 2018 which clearly identified the second AMPI factual report, dated 28 March 2016, as well as the report of Dr Wotton dated 31 October 2016.
43. In my view the respondent had, by the time that the applicant commenced proceedings, complied with s 73 of the 1998 Act and regulation 41 of the Regulation in respect of the disputed second AMPI factual report and the report of Dr Wotton dated 31 October 2016. Clause 38 of the Regulation sets out the information that must be contained in a s 78 notice (noting that this section now replaces s 74) in which an insurer disputes liability in respect of a claim. The information includes at (b) “a statement identifying all the reports of the type to which clause 41 applies that are relevant to the decision, whether or not the reports supports the reasons for the decision”.
44. For these reasons, the second AMPI factual report and the report of Dr Robert Wotton dated 31 October are admitted into evidence in the proceedings.

The report of Dr Wotton dated 9 October 2019.

45. That leaves the admissibility of this report to be determined. The applicant objects to its admission due to its very late service and that it changes the nature of the case that the applicant must meet in respect of the psychological injury deemed to have been suffered on 10 February 2019.
46. In my view, there is merit in this submission. In his report dated 31 October 2016 Dr Wotton was not able to make a diagnosis in respect of the psychological injury. In his later report, he says that he does not consider that the applicant suffered a work-related injury on 10 February 2016, but rather that her reaction to the workplace events was a manifestation of her long-standing psychological disorder. This is to be contrasted with his inability to make a diagnosis of psychological injury when he saw the applicant on 13 October 2016.
47. This does change the nature of the case that the applicant must meet in respect of injury, and she would therefore be prejudiced by admission of this report into evidence at this late stage of the proceedings.
48. In making this finding I do have regard to regulation 45(1) of the Regulation which provides for the admission of supplementary reports. It is in the following terms:

“(1) Despite clauses 44 and 46, a medical report other than the original report (**‘a supplementary report’**) may be admitted if:

- (a) it has the purpose of clarifying the original report, for example, where it can be shown that there has been some omission in relation to the material originally provided that could lead to an opinion in the original report being expressed on the basis of inaccurate or incomplete information and it does not go outside the parameters of the original report, but merely confirms, modifies or retracts an opinion expressed in the original report, or
- (b) it has the purpose of updating the original report by confirming, modifying or retracting an opinion expressed in the original report, or
- (c) it has the purpose of addressing issues omitted from the original report, or
- (d) it has the purpose of addressing an opinion in the other party's medical report.”

49. Whilst it may be said that Dr Wotton's report dated 9 October 2019 clarifies his original report, I think that it does more than simply confirming, modifying or retracting an opinion expressed in the original report. It offers a new opinion on the applicant's claim for psychological injury deemed to have occurred on 10 February 2016, and for this reason must be rejected.

SUMMARY

50. The AMPI factual report dated 28 March 2016 and the report of Dr Robert Wotton dated 31 October 2016 are admitted into evidence.
51. The tender of the report of Dr Robert Wotton dated 9 October 2019 is rejected.

