WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1340/20**
Applicant: **IDA LEE**
Respondent: **UNIVERSITY OF NEW SOUTH WALES**
Date of Determination: **3 JUNE 2020**
Citation: **[2020] NSWWCC 184**

The Commission determines:

1. The respondent's application made in the submissions dated 22 April 2020 that I recuse myself is granted.

2. This matter is to be reallocated to another arbitrator for determination.

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

Carolyn Rimmer
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 CAROLYN RIMMER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Ida Lee (the applicant) was employed by the respondent, the University of New South Wales (UNSW), and sustained an alleged psychiatric injury in the course of her employment deemed to have occurred on 8 January 2020.

2. The applicant is claiming weekly benefits from 15 January 2020 to date and continuing.

3. In a letter dated 10 February 2020, UNSW notified the applicant that an independent medical examination (IME) had been arranged and she was to be examined by Dr Deepinder Miller, psychiatrist, on 18 March 2020.The reason provided by UNSW for the medical examination was that the clinical notes had been requested from the applicant's general practitioner, Dr John Cosgriff, but had not been received.

4. By email dated 10 February 2020, the applicant's solicitor, Mr Richard Brennan, objected to the examination by Dr Miller on the basis that Dr Cosgriff had only received the request the week before and had forwarded a tax invoice to the UNSW for payment for the provision of the notes. Mr Brennan referred to s 119 of the *Workplace Injury Management and Workers Compensation Act* 1998 (1998 Act), which required that any medical examination must be arranged in accordance with the *Workers Compensation Guidelines* (the Guidelines).

5. On 17 February 2020, UNSW replied to Mr Brennan, asserting that the examination was in accordance with the Guidelines, and advising that if the applicant did not attend, her payments would be suspended.

6. On 2 March 2020, Dr Cosgriff confirmed that the tax invoice he had sent for the provision of his notes remained unpaid.

7. On 10 March 2020, the applicant commenced proceedings in the Commission, namely, a Miscellaneous Application, seeking an order that the proposed IME with Dr Miller on 18 March 2020 did not comply with s 119 of the 1998 Act or the Guidelines and that pursuant to s 119(4) of the 1998 Act she was not required to attend the IME.

8. UNSW suspended the applicant's payments on 18 March 2020.

9. UNSW, in a letter dated 23 March 2020 suspended the worker's payments effective from 18 March 2020 on the basis of an alleged refusal to attend a work capacity assessment in accordance with s 119(3)(a) of the 1998 Act and s 44A(6) of the *Workers Compensation Act 1987* (the 1987 Act) and a medical examination as requested as set out in s 119(3)(a) of the 1998 Act.

10. The parties were legally represented in the telephone conference on 7 April 2020. The applicant was represented by Mr Brennan of McNally Jones Staff. The respondent was represented by Mr Michael Taylor of Leigh Virtue & Associates.

11. Mr Brennan had filed an Application to Admit Late Documents (AADL) on 30 March 2020 and served a copy of the AADL on Mr Makin of Leigh Virtue & Associates. However, Mr Taylor said that he did not have access to those documents and stated that he would not be in a position to make submissions in the matter in the telephone conference on 7 April 2020. I decided to hear submissions from Mr Brennan in the telephone conference and directed Mr Taylor to file submissions by close of business on 9 April 2020. Mr Taylor did not object to this course.

12. Following the telephone conference on 7 April 2020, Mr Makin applied for a transcript of the telephone conference. He was advised that the telephone conference had not been recorded.

13. On 9 April 2020, UNSW lodged an Application - Appeal Against Decision of Arbitrator, which was rejected as it did not comply with the Commission's Practice Direction No 6 – 'Appeal Against a Decision of an Arbitrator'.

14. On 14 April 2020, I issued a further direction in the following terms:

> "In the telephone conference on 7 April 2020 I directed the respondent is to lodge and serve written submissions by 9 April 2020. I note that the respondent was represented by Mr Michael Taylor from Leigh Virtue & Associates in the telephone conference. Following the telephone conference Mr Makin of Leigh Virtue & Associates requested a transcript of the telephone conference proceedings. It appeared that Mr Makin, rather than Mr Taylor, was now to make submissions on behalf of the respondent. The telephone conference was not recorded and a transcript is not available. Mr Makin advised the Registry that the lack of a transcript made it "essentially impossible to comply with the order" made on 7 April 2020. Mr Makin then lodged an Application - Appeal against decision of Arbitrator on 9 April 2020, which was rejected by the Registrar on 9 April 2020. To enable this matter to be determined in a timely manner, I will determine this matter on the papers and make the following directions.
>
> 1. Applicant to file and serve written submissions by 17 April 2020.
> 2. Respondent to file submissions in reply by 22 April 2020.
> 3. The matter will then be determined on the papers."

15. The applicant filed submissions on 15 April 2020 and the UNSW filed submissions on 22 April 2020.

16. UNSW lodged a fresh Application – Appeal Against Decision of an Arbitrator dated 8 April 2020. This appeal was expedited and Ms Lee filed a Notice of Opposition to Appeal Against Decision of Arbitrator on 18 May 2020.

17. On 28 May 2020, Woods DP determined the appeal "on the papers" refusing leave to appeal the Arbitrator's interlocutory decision to proceed to arbitration.

18. In the submissions dated 22 April 2020 the respondent sought that I recuse myself from the further hearing of this matter.

19. The respondent argued that having regard to the circumstances of the matter, it was appropriate for me to disqualify myself from consideration of this Application. The respondent noted that this was a matter more properly dealt with by way of formal arbitration, the opportunity for which has not yet been afforded to the respondent in the matter.

20. The respondent wrote:

> "In summary (without conceding this to be the most appropriate way to deal with the Application), the Application is based on an apprehended bias for the following reasons:-
>
> (a) The Arbitrator has not conducted a proper arbitration and has dealt with the matter in a matter specifically inconsistent with what was indicated in the notification sent by the Commission dated 11 March 2020.
>
> (b) At the Teleconference Conference on 7 April 2020 (however this is described), the Arbitrator indicated that the Arbitrator had already determined these issues in a manner adverse to the respondent in a decision she had recently given in a matter

of ‘Taylor’ (matter number 1353/20). The Arbitrator went on to indicate words to the effect that insurers should not flagrantly ignore the requirements of the Guidelines and that under the circumstances this might require a referral of the respondent (the inference being a referral to the regulator).

(c) The Arbitrator was made aware of the fact of an application for appeal against a decision having been filed on 9 April 2020 and of the apparent rejection of that appeal by the Registrar. Having been appraised of those matters, the arbitrator then proceeded to make a further direction dated 14 April 2020 requiring the exchange of written submissions (but not addressing the question of any evidence), and indicating that the matter would then be determined on the papers (this despite the Arbitrator having already dealt with the matter on 7 April 2020).”

21. The respondent submitted that having regard to the matters set out above a reasonable bystander would form the view that the matter may not be fairly and reasonably dealt with so far as the respondent’s position was concerned and, in these circumstances, recusal was appropriate. The respondent relied on the decision of the High Court in *British American Tobacco Australia Services Ltd v Laurie* (2011) HCA 2.

22. The basis of the application is the respondent’s perception of my conduct in the telephone conference on 7 April 2020. The respondent submitted that I had already determined issues in a manner adverse to the respondent in a matter of *Taylor* (Matter No 1353/20) and indicated words to the effect that insurers should not flagrantly ignore the requirements of the Guidelines. The respondent submitted that I had dealt with the matter on 7 April 2020 and then proceeded to issue a further direction dated 14 April 2020 requiring the exchange of written submissions and indicating that the matter would then be determined on the papers.

23. In *Livesey v New South Wales Bar Association* [1983] HCA 1; (1983) 151 CLR 288 (*Livesey*) the Court held:

> “a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he [or she] might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.” (at [7])

If there is no allegation of actual bias, the Court stated:

> “the question whether a judge who is confident of his [or her] own ability to determine the case before him [or her] fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he [or she] has expressed in his [or her] judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters ‘of degree and particular circumstances may strike different minds in different ways.” (at [8])

24. The principles concerning the question of apprehended bias from a decision of the Deputy President were discussed in *Inghams Enterprises Pty Ltd v Belokoski* (*Belokoski) [2017] NSWCA 313* where Basten JA stated:

> “15. There was no dispute as to the relevant legal test. As explained in *Johnson v Johnson*, the question is ‘whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.’ It was not submitted that a different test should apply to the Deputy President of the Commission, although it was accepted that the application of the test must have

regard to the statutory function of an arbitrator and the role played by a Deputy President on an appeal."

25. In *Gomez v Padding Products Pty Ltd* [2005] NSWWCCPD 128 (*Gomez*) Sheahan P said of the dual role of Arbitrators in relation to apprehended bias [at 26]:

> "Given the unique role of the Commission arbitrator, acting both as conciliator and then as arbitrator, it is crucial, in the interests of justice and public confidence, that the arbitrator act, and be seen to act, fairly, impartially, independently, and free from bias throughout the entire dispute process." (at [26])

Sheahan P said at [21]:

> "The decision of an adjudicator not to disqualify him/herself on grounds of bias, after an application by a party, is not a mere procedural decision of case management or pre-trial preparation, but it is a decision, albeit interlocutory, that goes to the heart of due process, making a fundamental impact on both the scope and the outcome of the proceedings."

26. The High Court in *Elmer v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (*Ebner)* identified two steps required to assess an apprehension of bias:

> "First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."

27. I accept that the test of bias is based on the reasonable person, that is, would a fair-minded person reasonably apprehend or suspect that a decision-maker might have prejudged a case.

28. The absence of a transcript of the telephone conference on 7 April 2020 creates a significant problem in this matter. It is not possible for any party to the proceedings to identify precisely what it is said that might lead me to decide the case other than on its legal and factual merits.

29. I noted that Mr Brennan filed an affidavit in the proceedings before Woods DP and in relation to a number of issues stated that he had no recollection of what had occurred in the telephone conference although he made assumptions based on what his response would have been to certain applications being made.

30. The matter had proceeded to arbitration in the telephone conference on 7 April 2020 once I requested Mr Brennan to make submissions on behalf of the applicant. The proceedings should have been recorded at that stage.

31. This results in me being in a position where in order to determine this application I would be forced to rely on any recollections that I have of what took place in the telephone conference on 7 April 2020. This is not satisfactory and it is not appropriate, in my view, for an arbitrator to become a witness in a matter. Further, if I proceed to determine the matter and the respondent appealed my decision, relying on grounds of appeal that included a refusal to recuse myself following this application, it would not only delay the final determination of this matter but also would leave the further resolution of all issues far more difficult than would be the case if a transcript recording had been ordered by me. Such a situation would create potential problems in the Presidential Division.

32. I note that in *Tran v Westpac Banking Corporation* [2018] NSWWCCPD 4, Snell DP concluded that he could not properly carry out the task of conducting an appeal in the absence of an appropriate transcript.

33. There have been a number of Presidential appeals where the fact that there is missing or inadequate transcript has been an issue resulting in matters being remitted for re-determination rather than being simply resolved at Presidential level (*Nepean Rubber Moulding Pty Ltd v Veljanoski* [2014] NSWWCCPD 3*; Greater Western Area Health Service v Johnson* [2010] NSWWCCPD 100*; McKay v Hyrock Pty Ltd* [2011 NSWWCCPD 26)*.*

34. I have formed the view that this is not a matter where a lack of transcript can be accommodated by evidence as to what was said in the telephone conference on 7 April 2020.

35. I have concluded that that lack of a transcript of the telephone conference on 7 April 2020 has resulted in an inability to decide whether a reasonable person might or might not reasonably apprehend or suspect that I had prejudged the case. It is essential that an arbitrator be seen to act fairly, impartially, independently, and free from bias throughout the entire dispute process.

36. In all the circumstance I consider it appropriate to recuse myself. The matter is to be reallocated to another arbitrator for determination.