

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 803/20
Applicant: ANISON YABOUALY
Respondent: W W WEDDERBURN PTY LIMITED
Date of Determination: 1 April 2020
Citation: [2020] NSWCC 103

1. The Commission determines
 - (a) Award in favour of the applicant in respect of weekly payments of compensation pursuant to section 37 of the *Workers Compensation Act 1987*, as amended (1987 Act) in the sum of \$920.00 per week from 11 July 2019 to date and continuing.
 - (b) General order in favour of the applicant in respect of medical, hospital and related expenses pursuant to section 60 of the 1987 Act.
 - (c) The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) (psychiatrist) to determine the extent of the applicant's whole person impairment, if any, which results from psychological injury deemed to have occurred on 13 February 2019.
 - (d) The Registrar is requested to place before the AMS a copy of the Application to Resolve a Dispute dated 14 February 2020 and attachments, a copy of the Reply registered 6 March 2020 and attachments 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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Anison Yaboualy (the applicant) was employed by W W Wedderburn Pty Limited (the respondent) in the printing industry as a prepress coordinator/graphic designer. The applicant brings proceedings pursuant to the 1987 Act for weekly payments of compensation, medical and associated expenses and a lump sum for whole person impairment. The applicant alleges psychological injury pursuant to section 4 (b) (i) of the *Workers Compensation Act 1987* (the 1987 Act).
2. Relying on the medical opinion of Dr B Teoh, psychiatrist, the respondent submits that the applicant did not suffer any diagnosable psychological condition. Rather, the applicant's reaction was simply a normal emotional reaction to the circumstances the applicant faced. Further, Dr Teoh's evidence should be preferred rather than the evidence of Dr Rastogi because the applicant gave an exaggerated history to Dr Rastogi which underlies Dr Rastogi's opinion.

ISSUES FOR DETERMINATION

3. The central issue for determination is whether the applicant suffered a diagnosable psychological injury, namely whether the applicant's evidence should be preferred over the medical opinion of Dr Teoh.

PROCEDURE BEFORE THE COMMISSION

4. The matter came for conciliation and arbitration hearing via telephone on 23 March 2020. Mr L Morgan of Counsel instructed by Ms W El Masri, Solicitor, appeared for and with the applicant. Mr G Barter 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 to Resolve a Dispute (the Application), and
 - (b) Reply.

Oral evidence

7. No oral evidence was given.

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's statement¹ makes it clear that there were tensions and difficulties experienced by her in the workplace. This position is echoed by a number of comments by lay witnesses² and the tensions between the applicant and Ms Flower appear to have escalated to the point that by 13 February 2019 the applicant made a complaint.
10. There had earlier in January 2019 been a complaint by the applicant concerning Ms Flower's swearing. Mr Jones' comments that the severity of the problem came as something as a surprise to him, however, that needs to be considered in the context of Mr Jones only having started work for the respondent in December 2018.
11. Dr B Teoh, consultant psychiatrist, saw the applicant on 2 May 2019. He was of the view that the applicant's condition did not fit the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSMV) criteria. The doctor thought that the problems were interpersonal and not related to work, that the applicant exhibited only mild symptoms of emotional distress and was exaggerating the severity of her condition.
12. The applicant gave to Dr Teoh a consistent history regarding her complaints about Ms Flower. Dr Teoh expressed the view that the applicant had not sustained an injury as required by section 11A(3) of the 1987 Act. Dr Teoh appears to have not understood that section 11A does not need to be satisfied by the applicant. Rather, the onus is on the respondent to prove its section 11A defence.
13. For that reason, I discount Dr Teoh's expression of opinion. His opinion proceeds on the incorrect footing that the applicant must satisfy section 11A. There are additional reasons to discount Dr Teoh's opinion. Dr Teoh somewhat inconsistently notes that the applicant presents with symptoms of anxiety, but then expresses a view that her symptoms do not fit within DSMV. There is in my view an inconsistency in that approach. Finally, as pointed out by Deputy President Roche in *Wicks*³ "...the (DSMIV) is only a guide that is subject to clinical judgment, and ... adherence to the diagnostic criteria is not mandatory but advisory..." The focus on DSMV compliance to support a clinical diagnosis of psychological injury is, on this view, not mandatory. In other words, even if Dr Teoh was correct about the non-compliance with DSMV, I do not accept that the applicant is automatically disentitled.
14. I would add that I do not accept the submission that the history given to Dr Rastogi was so exaggerated as to affect the Doctor's opinion. There is ample evidence of very bad behaviour on the part of Ms Flower levelled at the applicant, even to the point that Ms Flower prepared an apology. There are emotional expressions used by the applicant, as Mr Barter submits. But these types of response in human experience tend to be emotional and the correct approach must be to examine what was said, by whom, when and in what context and then consider whether these real events as determined affected the applicant. Then, whether the result is a psychological condition.
15. The applicant made an early presentation to general practitioner, Dr Abraham. Her condition was such that Dr Abraham on 18 February 2019 referred the applicant to psychological counselling. The applicant gave a history of several months of bullying and the doctor had no hesitation in coming to a diagnosis of major depression with panic attacks and depressed mood.

¹ Statement of applicant dated 10 May 2019.

² Mr K Flippence, Ms R Hook and Mr P Jones, for example.

³ *Transfield Services (Aust) Pty Limited v Wicks* [2001] NSWCCPD 63 at [108]-[109].

16. In March 2019, Dr Abraham recommended Zoloft and Diazepam and the applicant saw Ms R Genua for psychological counselling on 16 April 2019 and was referred to see Dr Phillips, psychiatrist on 27 June 2019⁴.
17. It would appear that despite the medication prescribed the applicant's condition worsened.
18. The applicant has the benefit of an opinion by Dr R Rastogi, psychiatrist. That Doctor supports the applicant's diagnosis of a DSMV condition, namely Major Depressive Disorder with Anxiety⁵.
19. Mr Barter for the respondent conceded that the applicant felt uncomfortable with Ms Flower's language, that the applicant felt uncomfortable with what she perceived as the respondent siding with Ms Flower and that the applicant was not happy at the work situation. He urged, however, that these are all common reactions and do not constitute a response that necessarily leads to a DSMV diagnosis.
20. This submission in my view overlooks the fact that the onus on the applicant to establish more than a mere emotional response is an onus uninvolvement with concepts of necessity. The onus is to establish the diagnosis on the balance of probabilities. Having discounted Dr Teoh's opinion for the reasons mentioned above, the Commission is left with the opinions of Drs Rastogi and Abraham and psychologist Ms Genua. Consistent with the decisions in *Chemler*⁶ and *K*⁷ there is ample evidence of tension in the workplace and a perception by the applicant of real events in the workplace to which she was exposed.
21. I would add that I accept Mr Barter's submission that the respondent did take steps to attempt to remedy the situation by counselling Ms Flower concerning her swearing behaviour. However, the fact remains that the behaviour continued and it was this behaviour which gave rise to what clearly was a disease condition in the applicant within the meaning of section 4(b)(i) of the 1987 Act. Although it was not the subject of any extensive submissions, I would add that there is insufficient evidence for the respondent to establish a section 11A defence because the applicant's condition was not wholly or predominately caused by reasonable action on the part of the respondent, but rather was caused by the behaviour of a fellow worker.
22. Finally, on the issue of capacity, again there were no competing submissions except to the extent that the respondent relied on Dr Teoh. There are numerous medical certificates of Dr B Abraham certifying the applicant as having no capacity for work. Having regard to all of the evidence I am satisfied that since 13 February 2019 the applicant has had no current work capacity within the meaning of section 32A of the 1987 Act.
23. The claim in this matter is for weekly compensation from 11 July 2019 to date and continuing pursuant to section 37 of the 1987 Act. The applicant's pre-injury average weekly earnings have been agreed at \$1,150 per week and 80% of that figure is the sum of \$920.00.
24. The applicant also seeks a general order in respect of section 60 expenses and a referral to an Approved Medical Specialist (AMS) for assessment of the degree of her whole person impairment. It is appropriate that orders and requests also be made in that regard.

⁴ Although it is suggested that this consultation did not proceed.

⁵ Report Dr R Rastogi at Application p 32.

⁶ *State Transit Authority (NSW) v Chemler* [2007] NSWCA 249.

⁷ *Attorney General's Department v K* [2010] NSWCCPD 76.

ORDERS

25. The Commission determines:

- (a) Award in favour of the applicant in respect of weekly payments of compensation pursuant to section 37 of the 1987 Act in the sum of \$920.00 per week from 11 July 2019 to date and continuing.
- (b) General order in favour of the applicant in respect of medical, hospital and related expenses pursuant to section 60 of the 1987 Act.
- (c) The matter is remitted to the Registrar for referral to an AMS (psychiatrist) to determine the extent of the applicant's whole person impairment, if any, which results from psychological injury deemed to have occurred on 13 February 2019.
- (d) The Registrar is requested to place before the AMS a copy of the Application, a copy of the Reply and a copy of these Reasons for Decision.