WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1117/20**
Applicant: **Kurt Fercher**
Respondent: **Tooheys Pty Ltd**
Date of Determination: **14 May 2020**
Citation: **[2020] NSWWCC 154**

The Commission determines:

1. The applicant sustained an injury, being a loss or further loss of hearing which is of such nature as to be caused by a gradual process.

2. The applicant gave notice of the injury referred to in para 1 above on 10 July 2019.

3. At the time the applicant gave the notice referred to in para 2 above, he was employed in an employment to the nature of which the injury was due.

4. The deemed date of the injury referred to in paras 1 - 3 above is 10 July 2019

5. Liberty to apply with respect to the above findings, including by way of organising a further telephone conference or lodging any agreement.

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

Michael Perry
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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Kurt Fercher (the applicant) was employed by Tooheys Pty Ltd (the respondent) firstly as a brewery technician between 28 February 1988 and 2012, then from 2012 as a procurement officer and inventory controller until he retired on 2 August 2019. All that employment was of such a nature as to cause him, by gradual process, an injury (in the nature of boilermakers deafness) as defined in s 17 of the *Workers Compensation Act 1987* (the 1987 Act).

2. On 13 January 2014, the applicant made a claim (the first claim) on the respondent for compensation under s 60 of the 1987 Act for the cost of hearing aids. The respondent's insurer, Allianz Australia, (the insurer) accepted such claim after organising an ear, nose and throat surgeon (ENT), Dr Kenneth Howison, to assess the applicant. He found the hearing aids claimed were reasonable and necessary. Although he also found a hearing impairment reflecting a 17 % whole person impairment (WPI) due to industrial deafness, there is no evidence of a claim made by the applicant for lump sum compensation at that time. The parties agreed the date of injury the date of injury for that claim was and is 13 January 2014.

3. By letter from his solicitor to the insurer on 10 July 2019, the applicant made a further claim for compensation on the basis of an injury in the nature of boilermaker's deafness. The letter claimed lump sum compensation under s 66 of the 1987 Act for $74,500 reflecting a 27% WPI. This claim was based on a report dated 24 June 2019 from Dr Paul Fagan, ENT. The letter asserts the "date of accident" as 13 January 2014.

4. After receipt of the 10 July 2019 letter and claim, the Insurer again referred the applicant to Dr Howison. He saw the applicant again and reported on 27 September 2019. Dr Howison accepted that even though the applicant was working in an office environment in the latter years of employment, he was still exposed to considerable noise, and had been aware of gradual deafness over several years. Dr Howison found a 25% WPI.

5. The insurer wrote to the applicant's solicitors on 14 October 2019 noting receipt of a "Permanent Impairment compensation claim" on 12 August 2019. That claim is not in evidence. However, the insurer made, in the 14 October 2019 letter, a "Permanent Impairment counter offer", noting that it had reviewed the claim and determined that the applicant had sustained, "…permanent impairment to your industrial deafness as a result of the injury on 13/01/2014 … based on … report of Dr … Howison … you have an entitlement to a lump sum … WPI … 25% … entitlement … $44,000".

6. The applicant has now lodged an Application to Resolve a Dispute (ARD) claiming $74,500 in respect of 27% WPI – noting the "Date of Injury" as 13 January 2014. But beside the heading "Injury description … cause of injury …", he asserted he "relies upon … *Penrith Rugby League Ltd v Van Poppel* [2018] NSWCCPD55 (*Van Poppel*) … maintain … date of injury is the date that the claim for s66 was made – i.e. 10 July 2019 …".

ISSUE FOR DETERMINATION

7. The only issue is the correct date of the injury in the nature of boilermaker's deafness for the purposes of the 10 July 2019 claim for lump sum compensation.

PROCEDURE BEFORE THE COMMISSION

8. At a telephone conference conducted on 27 March 2020, Mr Hopper, solicitor, appeared for the applicant and Mr Studdert, solicitor, appeared for the respondent. It was noted that the Reply replicated the material in the ARD. Mr Studdert said this was done as there were no areas of factual dispute - other than the correct date of injury

9. Mr Hopper confirmed this. The parties then agreed to the determination of the matter without holding a conciliation conference or arbitration hearing.

10. I am satisfied the parties understand the nature of the application and legal implications of any assertion made. I have used my best endeavours to bring them to a settlement acceptable to each of them. I am satisfied they have had sufficient opportunity to explore settlement and have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

11. The documents in evidence before the Commission and taken into account in making this determination are those contained in the ARD and the Reply. The matters set out as background in paragraphs 1- 5 above adequately summarise the relevant evidence.

Submissions for the Applicant

12. Mr Carney of counsel prepared written submissions as follows. Section 17(1)(a)(i) "clearly states that where the worker was in employment when the claim is made, then the date of injury is…'at the time that the notice was given'…" (Mr Carney's emphasis). Each claim for compensation is treated as a new injury or cause of action – noting *Prisk v Department of Ageing, Disability & Home Care (No 2)* [2009] NSWWCCPD13 (*Prisk*).

13. The applicant "has only ever made one claim for s66 lump sum compensation … and due to … s17(1)(a)(i) the correct date of claim is 10 July 2019." All of the applicant's employment with the respondent "up to the time he ceased to work and not just up to 2012" was "causing his hearing loss".

14. It is significant that Dr Howison recorded a 17% hearing loss when the first claim was approved in 2012, and then a 25% WPI when the 10 July 2019 claim was made; similarly, the report from the audiologist, Ms Carmichael (9 March 2018), states that the hearing aids he then had (presumably prescribed in 2014) are no longer effective in countering his hearing loss and needed to be replaced. The date of injury should be 10 July 2019 and "the only way the date of 2014 could be accepted is if that was the last noisy employment the applicant was engaged in and on the evidence this is not the case".

Submissions for the Respondent

15. Mr Beran of counsel prepared written submissions which are summarised as follows. *Prisk* is of no relevance and should be distinguished on its facts. In that case there were previous hearing loss claims against multiple previous employers who were not the subject of those proceedings, and the claim for further hearing loss had an "accepted deemed date of injury that was different to the dates of previous loss of hearing injury sustained with … previous employers". It was held in *Prisk* that the worker was not estopped from pursuing the claim for *further* hearing loss sustained with the subsequent employer.

16. *Prisk "*did not assert that a previous claim for s60 expenses against the same employer for which lump sum compensation subsequently was made created a separate cause of action".

17. Diseases can have multiple dates of injury under s 15 and s 16 of the 1987 Act for the purposes of incapacity and impairment injuries (*Alto Ford Pty Ltd v Antaw* (1999) 18 NSWCCR246). But industrial deafness, even though it is a disease in nature, is specifically dealt with under the provisions of s 17 of the 1987 Act. That section should inform the present analysis - not s 15 and s 16. Section 17 deems the injury to have happened where the worker was, at the time when he or she gave "notice of the injury".

18. The applicant has claimed permanent impairment compensation for hearing loss where there was no previous claim for lump sum compensation, but there was a previous claim for medical expenses pursuant to s 60 of the 1987 Act. The date of injury was accepted for that claim pursuant to s 17(1)(a) as being 13 January 2014. The applicant remained employed by the respondent at the time the notice of the injury and claim for medical expenses was made.

19. The proposition from *Rico Pty Ltd v Road Traffic Authority* (1992) 28NSWLR679 at 689-690 (*Rico*) is that s 17 proceeds on a series of fictions or assumptions and is taken to have happened "…in one blow … if the worker was, at the time when he or she gave notice of the injury …in an employment to the nature of which the injury was due, the injury is deemed to have happened at the time when the notice of the injury was given".

20. The respondent accepts the applicant gave notice of the claim for lump sum compensation on 10 July 2019. He then remained in *employment to the nature of which the injury was due* (Mr Beran's emphasis) at the time of making this claim and retired on 2 August 2019. His claim was subject to s 17(1)(a), but was in respect of the same injury date - 13 January 2014.

21. Contrary to s 15 and s 16 of the 1987 Act – which use the words "makes a claim for compensation" – s 17 (1) rather uses the words "notice of the injury". The correct date of claim is not 10 July 2019. The correct "…reference point as per s17 … and … in *Rico* is when the applicant provided the … notice of the injury".

22. On the basis that the applicant remained in employment to the nature of which the injury was due, the date of the "notice of injury being the industrial hearing loss and not the claim for lump sum compensation, is clearly the deemed date of injury …". This is consistent with *Van Poppel*. That case must also be distinguished on his facts – the worker's first "notification of the injury" was the date that she made the claim for lump sum compensation.

Submissions for the applicant in reply

23. The respondent's submission that there can be only one date of injury is incorrect. After 13 January 2014, the applicant suffered further hearing loss and therefore has suffered further injury. That injury "…occurred on 10 July 2019, the last day the applicant worked…". Nothing in s 17 states there can be only one date of injury for the purposes of paying compensation under various heads of damage. Where "…there is no previous s 66 paid pursuant to a claim for hearing loss it is clear that the new claim for s 66 is a separate injury carrying the date of injury of 10 July 2019…".

FINDINGS AND REASONS

What is the correct date of injury for the s 66 claim for lump sum compensation?

24. Again, the respondent accepts that when the applicant gave notice of the claim for lump sum compensation on 10 July 2019, he remained in employment to the nature of which the injury was due. This is a proper and necessary acceptance given the evidence. The respondent submits that the claim was subject to s 17(1)(a), but in respect of the same injury date for the first claim – 13 January 2014. I do not agree with this submission, nor with the respondent's submissions otherwise in support of the proposition that 13 January 2014 is the correct date of injury for the purposes of the lump sum compensation claim on 10 July 2019.

25. I also disagree with the submission that *Prisk* is of no relevance and must be distinguished on its facts. Very few cases have the same facts. As correctly submitted for the respondent, Mr *Prisk*, had made previous claims with respect to hearing loss against multiple previous employers who were not the subject of the ultimate proceedings against the ultimate employer – and there was an accepted deemed date of injury in relation to the claim against the ultimate employer which was different to "the dates of previous loss of hearing injuries … with the … previous employers" (para 2 respondent submissions).

26. It is also correct that *Prisk* was held to be not estopped from pursuing the claim for further hearing loss "…sustained with the subsequent employer … did not assert that a previous claim for s 60 expenses against the same employer for which lump sum compensation subsequently was made created a separate cause of action". Unlike *Prisk*, there is no estoppel issue in the present case. However, similarly to *Prisk*, this is a case that relevantly involves a previous claim with respect to hearing aids, and also involves a subsequent claim for a loss of hearing. Deputy President Bill Roche stated in *Prisk* (at [44]):

> "… the issue before Curtis CCJ was whether Mr Prisk was entitled to recover the cost of hearing aids under s60 … the injury relied on as the basis for that claim was the injury deemed to have occurred on 12 October 1995 … the issue in the present matter is quite different … it is Mr Prisk's entitlement to compensation in respect of a claim for further loss of hearing deemed to have occurred on 7 June 2006. That is a new cause of action seeking different relief and different considerations apply to each claim … in the first, Mr Prisk had to establish … his hearing aids were "reasonably necessary" medical or related treatment "as a result of an injury" with the named respondent … (49) … present claim concerns a separate cause of action, namely a claim for compensation in respect of further loss of hearing with a deemed date of injury of 7 June 2006. To succeed with this claim Mr Prisk had to establish that he was employed in employment to the nature of which the further loss was due at the time he gave notice of injury on 7 June 2006."

27. As in *Prisk*, the present claim, namely a claim for lump sum compensation in respect of loss of hearing, notified by the letter on 10 July 2019, concerns a separate cause of action to the first claim. I find that the deemed date of injury for the present claim to be 10 July 2019. For the purposes of s 17 (1) (a) (i) of the 1987 Act this is the date when the applicant gave notice of *that* injury. I find that at that time he was employed in employment to the nature of which the claimed loss was due. That the said letter referred to the "date of accident" as 13 January 2014 does not alter the correct date which is to be fixed by reference to s 17(1)(a)(i) of the 1987 Act.

28. That there can be different deemed dates of injury with respect to different causes of action was only partly dispositive in *Prisk.* But this matters not because there is no issue regarding estoppel in the present case. The question of whether the applicant is entitled to rely upon a second injury is inextricably bound up with the formulation of the only issue in the case.

29. The result in *Prisk* has not been controversial and is consistent (or at least not inconsistent) with other authorities (e.g. *Pickles v Staples Waste Removals Pty Ltd* [2000] NSWCC 56; (2000) 20 NSWCCR 729 at [70]; *Fairfield City Council v Deguara* [2019] NSWWCCPD1 at [182-202]).

30. I note the submission for the respondent in the present case that *Rico* is authority militating against the applicant's position here. I disagree and see nothing in *Prisk* that is inconsistent with *Rico*.

31. In *Prisk*, the relevant date of injury was deemed to be 7 June 2006, the date of the letter for Mr Prisk claiming compensation from the ultimate employer claiming in respect of 15% "further WPI" under s 66 and s 67 of the 1987 Act. Similarly in the present case, the applicant claimed compensation on 10 July 2019 being lump sum compensation under s 66 of the 1987 Act in respect of a 27% WPI. There is no issue that at this time the applicant was employed in employment to the nature of which the loss was due. Again, such concession was proper and necessary as it is in accordance with the preponderance of evidence, including in the applicant's statement and the opinions of Drs Fagan and Howison.

32. In one sense, the applicant's loss was a "further loss" in circumstances where Dr Howison had assessed him as carrying a 17% WPI in 2014 on 14 March 2014 – and then finding a 25% WPI on 27 September 2019. However, whether the relevant claim was in respect of a loss or a further loss of hearing does not matter. The applicant's case, for the reasons

appearing above, should succeed in either situation. Nevertheless, there was no earlier claim for lump sum compensation.

SUMMARY

33. For the reasons given above, I find that:

    (a) The applicant sustained an injury, being a loss or further loss of hearing, which is of such nature as to be caused by a gradual process.

    (b) The applicant gave notice of the injury referred to in (a) above on 10 July 2019.

    (c) At the time the applicant gave the notice referred to in (b) above, he was employed in an employment to the nature of which the injury was due.

    (d) The deemed date of injury for the purposes of s 17 (1) (a) (i) of the 1987 Act referred to in (a) – (c) above is 10 July 2019

34. This still leaves a situation where there is a two percentage point differential between the expert medical evidence lodged by each party. There have been no submissions, from either party, about the way to dispose of that matter. In those circumstances I will give liberty to apply.