WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1821/20**
Applicant:	**JADE LIONS**
Respondents:	**PRYSMIAN AUSTRALIA PTY LIMITED (First) AND WORKFORCE ROAD SERVICES PTY LIMITED (Second).**
Date of Determination:	**2 JULY 2020**
Citation:	**[2020] NSWWCC 218**

The Commission determines:

1. Award in favour of the applicant against the first respondent in respect of section 60 expenses incurred as and from 18 June 2019.

2. Otherwise, award in favour of the first respondent.

3. Award in favour of the second respondent.

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.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Jade Lions (the applicant) is a 38 year old man who worked for Prysmian Australia Pty Limited (first respondent) and then for Workforce Road Services Pty Limited (second respondent). The applicant brings proceedings pursuant to the *Workers Compensation Act 1987* (the 1987 Act) as amended for weekly payments and medical expenses as a consequence of aggravation, acceleration, exacerbation or deterioration (aggravation etc) of underlying plantar fasciitis and lower back conditions.

2. The applicant had proceeded against the first respondent (only) in 2019 and a decision was issued by Arbitrator Sweeney on 17 June 2019. The conditions just mentioned were not, however, pleaded and the second respondent was not a party.

ISSUES FOR DETERMINATION

3. The issues are:

    (a) Did the applicant report his injury and make a claim for compensation in time?

    (b) If so, did the applicant's employment with either or both respondents amount to an aggravation etc of his underlying plantar fasciitis within the meaning of section 4(b)(ii) of the 1987 Act?

    (c) If so, are either or both respondents liable to pay the applicant weekly payments and/or section 60 expenses?

    (d) Did the applicant's employment with either or both respondents amount to an aggravation etc of the applicant's lumbar spine?

    (e) If so, are either or both respondents liable to pay the applicant weekly payments and/or section 60 expenses?

    (f) If so, what is the extent of the applicant's capacity to perform work from 18 June 2019 to date?

PROCEDURE BEFORE THE COMMISSION

4. This matter came for conciliation and arbitration hearing via telephone conference on 24 June 2020. Mr L Morgan of Counsel instructed by Mr A Tohme, Solicitor, appeared for and with the applicant. Mr P Perry of Counsel instructed by Ms O Raiman, Solicitor appeared for the first respondent. Mr F Doak of Counsel instructed by Ms M McDonald, Solicitor, appeared for the second respondent. Mr G Zarambolous attended from Icare.

5. The matter proceeded to conciliation in which the three Counsel, in particular, actively participated and both the worker and the insurers were involved. Documents the subject of the Applications to Admit Late Documents were admitted into evidence without objection. The impact of Arbitrator Sweeney's decision was discussed and the issues for determination were narrowed.

6. 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

7. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute (Application) registered 1 April 2020 and attachments;

    (b) first respondent's Reply registered 21 April 2020 and attachments;

    (c) second respondent's Reply (also) registered 21 April 2020 and attachments;

    (d) applicant's Application to Admit Late Documents dated 13 May 2020 and attachments, and

    (e) second respondent's Application to Admit Late Documents registered 10 June 2020 and attachments.

Oral evidence

8. No oral evidence was given.

SUBMISSIONS

9. It is unnecessary to summarise in detail the oral submissions provided in this matter as a sound recording is available.

DISCUSSION, FINDINGS AND REASONS

General matters

10. Arbitrator Sweeney in matter number 823/19 decided an action by the applicant against the first respondent. He concluded that the applicant suffered a lower back (lumbar spine) injury in the course of his employment with the first respondent on 2 February 2016. That finding and certain other findings by Arbitrator Sweeney are binding on the applicant and the first respondent in this matter.

11. The applicant in 823/19 did not proceed against the second respondent.

12. After a period of light duties after 2 February 2016 (the history suggests two weeks), the applicant returned to pre-injury duties with the first respondent. The applicant was made redundant in September 2016. He obtained work with the second respondent in November 2016 and worked there until about 6 April 2017.

13. In early 2017 the applicant's work as a traffic controller with the second respondent was (apparently) between 18 and 30 hours per week. This is not entirely clear because another statement of the applicant of the same date[1] references twelve (12) hours per week. In early 2017 the applicant saw Dr Shamon who treated his heel symptoms with cortisone injections. The applicant had to stop work with the second respondent, he says, because of his heel pain.

[1] 5 February 2019.

14. In terms of the hours worked by the applicant with the second respondent (Workforce), there must be some serious issue about the extent of his work-related disability. Arbitrator Sweeney noted, and I agree with, the proposition that there is inconsistency in the applicant's evidence in that regard concerning the amount of hours that he worked.

15. At this point, I adopt and incorporate into these Reasons paragraphs 16 to 42 of the Reasons for Decision of Arbitrator Sweeney of 17 June 2019. I do so not for reasons relating to stare decisis nor issue estoppel, but simply by way of explanatory factual history with which, having reviewed the material, I agree.

The applicant's case

16. The applicant's case in this present matter relies upon the following:

    (a) allegedly unchallenged evidence from the applicant concerning the nature of the work he performed;

    (b) Doctor Bodel's opinion concerning aggravated[2] plantar fasciitis and lower back injury suffered in employment with the first respondent and aggravated
    by employment with the second respondent, coupled with

    (c) Doctor Bentivoglio's lack of reference to the question of aggravation in terms of section 4(b)(ii) of the 1987 Act;

    (d) the opinion of Doctor Soo of 6 May 2020 concerning the applicant being required to be on his feet which exacerbated his foot pathology, consistent with Doctor Bodel's opinion, and

    (e) both respondents aggravated the applicant's plantar fasciitis condition.

17. Mr Morgan's submission was that since the time of Arbitrator Sweeney's decision the applicant has only been fit to perform sedentary work on a part time basis at $20 per hour for 20 hours per week. Further, that this calculation should be assessed with reference to his pre-injury average weekly earnings in the employ of the first respondent ($1,246.78 per week).

18. In terms of pre-injury average weekly earnings it is noted that so far as the second respondent is concerned the figure is claimed by the second respondent to be $687.51 per week.

19. Although injury to the applicant's cervical spine is pleaded in the Application, this injury/pathology was not pressed in submissions.

Employment periods

20. The relevant periods of employment are as follows. The applicant worked for the first respondent for seven months between 2 February 2016 and 2 September 2016. The applicant worked for the second respondent for about five months between 7 November 2016 and 6 April 2017. The applicant was self-employed between March 2017 and June 2017 in a retail store. The applicant worked for TNT between 28 August 2017 and 30 October 2017 as a handyman. There is no other relevant employment.

[2] "aggravated" and "aggravation" (etc) and similar expressions in these Reasons includes reference to aggravation, acceleration, exacerbation or deterioration within the meaning of section 4 (b) (ii) of the 1987 Act.

Notice of Injury and claim for compensation

21. Mr Perry for the first respondent took issue with the applicant's failure to comply with sections 254 and 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). In terms of the plantar fasciitis injury, there was no notice at all.

22. This Commission has held[3] that "injury" in section 254 means the incident of injury, not the pathology. In this context, Mr Perry's argument applies also to the lower back injury to the extent that the applicant now says that his lower back was aggravated within the meaning of section 4(b)(ii) of the 1987 Act because of the general nature and conditions (for want of a better expression) of the applicant's work. In Mr Perry's submission, there is no evidence given by the applicant concerning why he failed to give notice of that aggravation (etc), nor for that matter any evidence concerning why his claim for compensation was not made in respect of that injurious event.

23. Section 261 is similar to section 254 in providing exceptions where there is a failure to make a claim for compensation in that the recovery is not barred where the failure "was occasioned by ignorance, mistake, absence from the state or other reasonable cause" and is made within three years after the injury occurred (for our purposes).

24. The applicant was aware of his plantar fasciitis because in the proceedings before Arbitrator Sweeney the claim that he made in that regard (acknowledged by GIO by email of 28 January 2019) was abandoned. The applicant had opportunity to press the plantar fasciitis claim against the first respondent in the proceedings before Arbitrator Sweeney. Doubtless this claim was not pressed because there was insufficient medical evidence to support it at that time. The supporting evidence arrives with the report of Doctor Bodel of 28 August 2019. This observation is not critically made, because the applicant was entitled to proceed in that fashion.

25. I cannot, however, accept Mr Perry's submissions on notice of injury and claim for compensation, principally because of his client insurer's section 74 "Further Notice" dated 24 October 2018. That Notice discusses a medical certificate of Dr S Calvache-Rubio dated 12 July 2018. It is acknowledged by the insurer that the claim was "Back/left heel injury due to pulling cables at workplace *and prolong [sic] standing at workplace*" (emphasis added). The use of the conjunctive "and" suggests that the "standing" was in addition to the pulling of the cables. The insurer was clearly aware of the "injurious event" namely the standing over time but did not cavil with any tardiness in the timing of the complaint. "Prolong [sic-prolonged] standing" does not in my view relate to the specific incident of 2 February 2016. Rather, it must be a reference to a gradual exposure through standing, over (a) prolonged time(s).

26. The insurer for the second respondent does not raise any time limit issues, quite properly so given its section 74 Notice of 26 July 2018 which does not mention the relevant sections.

27. In terms of section 261 of the 1998 Act, in the first respondent's Reply[4] there is reference by Doctor Holt to the applicant's identification of pain in his lower back, right buttock and right heel. The applicant references (in relation to "ignorance" in section 261) his lack of understanding of the workers compensation process. Specifically, I find that the applicant's action is not barred because of section 261 (4) and/or section 261 (5) of the 1998 Act. I therefore accept that the applicant gave notice of injury and made his claim within the parameters of the legislation.

[3] *Warwick Hobart v Pietrzak* [2006] NSW WCCPD 315.
[4] Reply first respondent page 12.

Aggravations and main contributing factor

28. During the period 29 March 2016 until July 2018 the applicant was consulting medical practitioners for various treatment. Notably, there is no complaint of any lower back problems. The applicant in his latest statement[5] confirms that he was able in a few months following February 2016 to resume his pre-injury duties. He adds that his lower back symptoms were improving but his heel problems were increasing. This, no doubt, explains why there was no complaint of lower back problems to the applicant's medical practitioners during that time.

29. I am mindful of the various authorities mentioned by Arbitrator Sweeney[6] concerning the need to consider medical practitioners' notes with caution. But in a matter such as the present one the absence of complaint concerning back injury *aggravation* (emphasis added) and the presence of direct statements by the applicant in the presence of his Solicitors concerning *improvement* (emphasis added) of his back condition are impossible to reconcile.

30. As earlier mentioned, the applicant commenced employment with the first respondent in 2016. There is an entry in the general practitioner's notes of 18 November 2015[7] where the applicant complained to the general practitioner about his heels and a diagnosis of plantar fasciitis was arrived at, attributable to the applicant's excess weight. This being the case, the only basis upon which the applicant can succeed against either respondent (for plantar fasciitis) is in respect of aggravation (etc) of plantar fasciitis in accordance with section 4(b)(ii). It follows that employment must be the main contributing factor to the aggravation of this disease.

31. I am mindful that it is unnecessary for the applicant to produce specific expert evidence addressing the "main contributing factor" issue[8]. I do, however, take the view that the intensity of the symptoms experienced by the applicant in connection with the work performed by the applicant must be *materially* increased[9]. In arriving at that conclusion I recognise that it is unnecessary for the applicant's work to be the main contributing factor to the conditions (plantar fasciitis and lumbar spine) themselves[10]. The work must be the main contributing factor to the aggravation (etc).

32. There is, in my view, insufficient evidence to conclude that the applicant's employment with either respondent was the main contributing factor to the aggravation (etc) of plantar fasciitis or lumbar spine for the following reasons:

    (a) plantar fasciitis was clearly a pre-existing condition. Additionally, the back injury had occurred (as found by Arbitrator Sweeney) on 2 February 2016. This is not enough to dispel the matter, but

    (b) if either condition was aggravated, employment has not been shown to be the main contributing factor to this aggravation. Factually, there is insufficient evidence concerning any material increase in prevailing symptoms either contemporaneous with or subsequent to the performance by the applicant of specific work tasks.

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[5] Application page 1 [12].
[6] Arbitrator Sweeney: *Jade Lions v Prysmian Australia Pty Limited* 823/19 17-06-2019 at [51].
[7] Application page 151.
[8] *State Transit Authority of NSW v El-Achi* [2015] NSWWCCPD 71.
[9] See the similar argument in *Rural Press Limited v Hancock* [2009] NSWWCCPD 160 at [67] as it relates to the concept of aggravation generally.
[10] *Murray v Shillingsworth* (2006) 68 NSWLR 451.

(c) Doctor Bodel's conclusions rely upon the history given. In terms of the back condition, the applicant's symptoms clearly abated on return to pre-injury duties with the first respondent. Doctor Bodel relies on a history of continuation of back symptoms throughout both employments. This history is inconsistent with the applicant's own statement and in my view Doctor Bodel's opinion is clearly infected by this incorrect history.

(d) In relation to the heels, it is in my view somewhat inconsistent that the applicant went on to work with the second respondent in an occupation as a traffic controller if in fact his heels were troubling him at that time. The same may be said concerning the applicant's work with TNT. Common sense would suggest that a worker with ongoing back or heel symptoms would simply not choose to be engaged in work of the nature which he chose. There is no ready explanation offered by the applicant as to why he would take such jobs, nor any suggestion that he did not know what tasks would be involved. The applicant's first statement of 5 February 2019 mentions financial difficulties in the context of working for the second respondent for 12 hours per week, however, no explanation is given concerning financial difficulty compelling the applicant to accept work for which he was physically unsuited.

(e) Dr Soo did not appear to have any history of prior heel/feet problems before the applicant's lower back injury on 2 February 2016. The applicant told Dr Soo that he had no symptoms before 2 February 2016.

(f) Doctor Bodel's opinion is also not supported by the evidence given by the applicant in his statements.[11] Doctor Bodel was given a history of injury to the right heel at the time of the back injury on 2 February 2016 but this onset of heel pain is inconsistent with the fact that the applicant had bilateral heel pain in 2015. The applicant told Doctor Bodel that his heel pain was much worse during his time working for the second respondent. This does not, however, appear to be the evidence of the applicant in his statement, notwithstanding that he provided three separate statements. There is no link drawn by the applicant between his heel condition and any aggravation in either employment in the applicant's first statement[12].

(g) In the applicant's second statement[13] he says that he would be at work and "towards the end of my shift I could no longer step on my heel"[14]. However, in the same statement[15] the applicant says that "Since my injury sustained on 2 February 2016 I have not sustained any further injuries". This second statement seems to have been prepared by his Solicitors, Turner Freeman, because the statement is on that Firm's letterhead. There is no explanation offered to the effect that the applicant was unaware of what he was saying to his Solicitors.

(h) Although Doctor Bodel arrives at a conclusion concerning lumbar spine injury, the applicant has not given any cogent evidence regarding aggravation of his lumbar spine.

[11] Reply first respondent page 70 and 73.
[12] First statement 5 February 2019.
[13] Second statement again dated 5 February 2019.
[14] Ibid at [14].
[15] Ibid at [26].

(i) There was in fact no complaint by the applicant of increasing pain in his heels during his employment with the second respondent.

(j) I am mindful of the various authorities mentioned by Arbitrator Sweeney[16] concerning the need to consider medical practitioner's notes with caution. But in a matter such as the present one the absence of complaint concerning back injury *aggravation* (emphasis added) for the stated duration and the presence of direct statements by the applicant in the presence of his Solicitors concerning *improvement* (emphasis added) of his back condition are impossible to reconcile.

33. In terms of the pleaded aggravations, for the reasons set out above, I am not satisfied on the balance of probabilities that the applicant suffered any aggravation to his lumbar spine nor to his plantar fasciitis in either of his employments with the first nor the second respondents. I would add that if I am incorrect with this conclusion, there is insufficient evidence that either employment was the main contributing factor to any such aggravation (etc) within the meaning of section 4(b)(ii) of the 1987 Act.

Capacity and economic loss

34. That then leaves outstanding (perhaps) only an issue as to whether the applicant has suffered any reduced capacity for work since Arbitrator Sweeney's decision on 17 June 2019 which results from injury to his lumbar spine on 2 February 2016. I am unconvinced that there has been any such reduction in the applicant's capacity and therefore I am not prepared to make any award for weekly payments of compensation from 17 June 2019. There is in my view insufficient evidence of deterioration in the applicant's condition concerning his lumbar spine.

The section 60 claim

35. There is a claim for section 60 expenses and I make a general award in favour of the applicant in that regard for expenses incurred on and after 18 June 2019. The liability for payment of section 60 expenses is a liability of the first respondent by reason of injury to the applicant's lumbar spine on 2 February 2016.

AWARDS

36. The awards are as follows:

(a) Award in favour of the applicant against the first respondent in respect of section 60 expenses incurred as and from 18 June 2019 resulting from injury on 2 February 2016.

(b) Otherwise, award in favour of the first respondent.

(c) Award in favour of the second respondent.

[16] Arbitrator Sweeney: *Jade Lions v Prysmian Australia Pty Limited* 823/19 17-06-2019 at [51].