

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 6239/19  
**Applicant:** AISL Pty Ltd trading as Rosehill College  
**Respondent:** iCare (as agent the for the Workers Compensation Nominal Insurer)  
**Date of Determination:** 24 June 2020  
**Citation:** [2020] NSWCC 209

The Commission determines:

1. The deemed date of the worker's injury the subject of the claim at issue is 29 July 2019.
2. At the deemed date of injury, the applicant was relevantly insured.
3. Award for the applicant on the claim against the respondent.
4. The applicant is not required to reimburse the respondent for benefits paid to the injured worker.

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

Cameron Burge  
**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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Ms Vanessa Munoz (the worker) was employed by AISL Pty Ltd trading as Rosehill College (the applicant) as at 11 July 2019.
2. On that day, a contentious meeting between members of the executive of the applicant and the worker took place at the applicant's premises and in the course of the worker's employment. The precise events which took place at that meeting are contentious, however, there is no issue the worker left the applicant's premises. It is also common ground that after leaving the applicant's premises, the worker suffered a fall which necessitated a visit to her general practitioner on that day, followed by a radiological investigation of her left knee.
3. A non-WorkCover certificate was issued by another general practitioner, Dr Vo on 12 July 2019 indicating the worker was unable to return to work from 12 July 2019 to 16 July 2019 inclusive "due to a medical condition."
4. There is no doubt that on 11 July 2019, the applicant was not insured. It secured workers compensation insurance on and from 16 July 2019.
5. The worker made a claim for workers compensation and was paid benefits. iCare, as agent of the workers compensation nominal insurer (the respondent) paid weekly benefits to the worker for incapacity from 29 July 2019 and issued a notice pursuant to section 145 of the *Workers Compensation Act 1987* (the 1987 Act) seeking reimbursement of monies paid to the worker.

### ISSUES FOR DETERMINATION

6. The parties agree that the only issue for determination is whether the applicant is required to repay the monies paid by the respondent to the worker pursuant to her workers compensation claim.

### PROCEDURE BEFORE THE COMMISSION

7. The parties were unable to resolve their differences, and the matter proceeded to an arbitration hearing before me on 26 May 2020. On that occasion, Mr P Macken, solicitor, appeared for the applicant, and Mr F Doak of counsel appeared for the respondent.

### EVIDENCE

#### Documentary evidence

8. The documents in evidence before the Commission consisted of the following:
  - (a) Miscellaneous Application (the Application) and attached documents;
  - (b) Reply and attached documents;
  - (c) Applicant's Application to Admit Late Documents (AALD), dated 25 May 2020 and attached documents, and
  - (d) Respondent's AALD dated 12 March 2020 and attached documents.

## Oral evidence

9. There was no oral evidence called at the hearing.

## FINDINGS AND REASONS

### Is the applicant required to repay the respondent?

10. In my view, the applicant is not required to repay the respondent.
11. The respondent seeks to rely on a date of injury of 11 July 2019, however, the applicant submits the date of injury is in fact later and falls within the period when it was insured.
12. In support of that submission, Mr Macken took the Commission to the clinical records of the applicant's general practitioner, who saw the worker on 11 July 2019. On that date, the entry recorded by the doctor relates to a knee injury suffered by the worker after she had left the applicant's employment.
13. There is no issue the worker's psychological injury is in the nature of a disease process which has a deemed date of injury. Consistent with authorities such as *GIO Workers Compensation (NSW) Ltd v GIO General Ltd* (1995) 12 NSW CCR 187 and *Inghams Enterprises Pty Ltd v Thoroughgood* [2013] NSWCCPD 29 (*Thoroughgood*) the relevant date of injury in such a case is that on which the injured worker suffers an incapacity of the nature claimed in the relevant proceedings. In this instance, that means the date of incapacity for employment.
14. The worker's injury was categorised as a disease of gradual process to which section 16 of the *Workers Compensation Act 1987* (the 1987 Act) applies by both parties to this hearing, and that is consistent with the findings of the medical practitioners who have provided reports in the matter.
15. Mr Macken conceded there was certainly an incident at the applicant's premises on 11 July 2019, however, he submitted the first period of incapacity attributable to a psychological injury was that set out in the medical certificate of Dr Gobran at page 62 of the Reply. That certificate is dated 31 July 2019 and although referring to a stated date of injury of 11 July 2019 and the injured worker having consulted the practice on 15 July 2019, sets out a claim for incapacity from 1 August 2019 to 31 August 2019.
16. The documents attached to the Application at page 107 confirm the applicant was insured from 16 July 2019. Mr Macken submitted, and I accept, that if the deemed date of injury was to fall on any day after 16 July 2019, then the applicant would relevantly be insured and would therefore not have to repay to the respondent amounts by way of benefits paid to the worker.
17. The list of payments found at page 148 of the Application reveal that the first date on which the applicant was paid weekly benefits for incapacity was 29 July 2019.
18. Notwithstanding the respondent's submissions to the contrary, in my view the case law in relation to these matters is clear. In a claim for weekly benefits, the deemed date for an injury which is a disease process is the date of incapacity of the type claimed. In this instance, that means incapacity for employment attributable to a psychological or psychiatric condition.
19. I have no difficulty in accepting the respondent's submission that the worker left work in a distressed and upset state on 11 July 2019. That does not, however, mean she suffered from a psychological injury on that date. Distress and upset is not of itself enough to constitute a psychological injury. As both parties accepted, the question is a factual exercise in establishing when the worker first suffered incapacity as a result of the psychological or psychiatric disorder.

20. As Mr Doak submitted, the exercise is not wholly dependent on medical evidence, however, it is also not dependent purely on the lay evidence of the worker. There must be an examination of the totality of the evidence and a finding made in light of it.
21. The contemporaneous evidence establishes, in my view, that the worker left the premises of the applicant in an upset and distressed state on 11 July 2019. She then suffered a fall and injured her knee. When she visited the doctor on that date, no complaint is recorded concerning anything other than her injured knee. Notwithstanding the contents of the lay evidence, a precondition to a finding of psychological injury is a diagnosis of a psychological or psychiatric disorder. In my view, the evidence does not establish the presence of such a disorder on 11 July 2019.
22. The earliest entry concerning a psychological injury is Dr Gobran's consultation on 15 July 2019. On that same date, Dr Gobran completed a WorkCover NSW Medical Certificate certifying the worker as unfit for work as a result of a psychological injury (p 179 of the respondent's AALD dated 12 March 2020). However, no claim was made for incapacity in reliance on that Certificate.
23. The question of incapacity in this context was dealt with by the Court of Appeal in *GIO Workers Compensation (NSW) Ltd v GIO General Ltd* (1995) 12 NSWCCR 187 (*GIO*). Sheller JA said at 196B:
- “In the case of the worker's claim, the injury, being a disease of such a nature as to be contracted by a gradual process, is deemed to have happened at the time of incapacity. **I have no doubt that is a reference to the incapacity for which compensation is claimed.**” (my emphasis)
24. It is apparent from his Honour's statement that an element of a finding of incapacity in a case such as this is compensation having been claimed in respect of that incapacity, and that the deemed date of injury relies on the compensation having been claimed. Similarly, in *Stone v Stannard Brothers Launch Services Pty Ltd* [2004] NSWCA 277 (*Stone*), a worker made a claim for permanent impairment in 2001. The trial judge held that treatment for the condition would have given rise to an incapacity for work before 1987 and held the deemed date was before 30 June 1987.
25. The Court of Appeal held that as there was no claim or entitlement to claim weekly compensation, section 16 did not fix a date on which the impairment injury occurred. The deemed date of injury was instead held to be the date on which the worker made the claim for the relevant compensation. Handley JA noted section 16 may fix different dates for incapacity and impairment injuries. At [5], his Honour said “Incapacity referred to in s 16(1)(a) does not mean physical incapacity for work in the sense explained in *Arnotts Snack Products Pty Ltd v Yacob* [1985] HCA 2; (1985) 155 CLR 171 **but means the incapacity for which weekly compensation is claimed.**” (my emphasis)
26. The decision in *Stone* was followed by Deputy President Roche in *Thoroughgood*. In my view, these authorities make it clear that the deemed date of injury in a case of an injury in the nature of a disease of gradual process is the relevant incapacity for which weekly compensation was claimed.
27. In this matter, the evidence discloses the worker claimed and was paid weekly benefits for the period commencing 29 July 2019. In light of the authorities referred to above, the appropriate deemed date of injury in my view is the date of the incapacity for which weekly compensation has been claimed, namely 29 July 2019.

28. It is common ground that as from 16 July 2019 the applicant was relevantly insured. This being so, in my view, the notice forwarded by the respondent to the applicant is invalid, and accordingly there will be an award for the applicant on this application.
29. The issue of the quantum of benefits paid to the worker was raised by the applicant. In light of my findings on the question of insurance, it is unnecessary to make findings in relation to that issue.
30. Similarly, Mr Macken submitted at the hearing that there was no evidence of a claim having been made in respect of which the respondent sought reimbursement, and accordingly the notice pursuant to section 145 is invalid. Mr Doak noted that submission was first raised at the hearing and had not been traversed in the Application or at the teleconference. In light of my findings on the question of insurance, it is also not necessary to make a finding on this issue.

## **SUMMARY**

31. For the reasons set out above, the Commission will make findings and orders as set out on p1 of the Certificate of Determination.

