

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1880/19
Applicant: Mark Annabel
Respondent: Oracle Corporation (Australia) Pty Ltd
Date of Determination: 5 July 2019
Citation: [2019] NSWCC 234

The Commission determines:

1. I find that Mr Annabel has failed to establish on the balance of probabilities that the DVT he sustained in May 2017 was caused by his employment.
2. There will accordingly be an award in favour of the respondent.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Mark Annabel, the applicant, brings an action for weekly payments of compensation and s 60 expenses between 10 May 2017 and 5 April 2018. Mr Annabel claims that in a period following notice of redundancy, he suffered pulmonary emboli as a result of a deep vein thrombosis (DVT) which had occurred by virtue of the seating posture he had adopted during the period he was on "gardening leave".
2. Oracle Corporation (Australia) Pty Ltd (the respondent) issued s 74 notices dated 23 November 2017, 27 November 2017 and 28 May 2018, denying liability.
3. The **Application to Resolve a Dispute** (ARD) was lodged around 12 April 2019, and the Reply was lodged on or about 24 August 2018.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) Did the DVT result from an injury arising out of or in the course of Mr Annabel's employment;
 - (b) If so, does Mr Annabel have any current work capacity, and
 - (c) If so, the amount Mr Annabel is able to earn in suitable employment.

PROCEDURE BEFORE THE COMMISSION

5. The matter was heard at Wyong on 11 June 2019. Mr Andrew Davis of counsel appeared for the applicant and Ms Lyn Goodman of counsel for the respondent. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

6. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) **ARD** and attached documents;
 - (b) Reply and attached documents, and
 - (c) Application to Admit Late Documents containing the supplementary report of A/Prof Myers.

Oral evidence

7. No application was made with regard to oral evidence.

FINDINGS AND REASONS

8. Mr Annabel along with a number of other fellow workers was advised that his position was made redundant on 21 April 2017.
9. The procedure adopted by the respondent when making people redundant was described by Ms Anne McCudden, the HR manager, in her statement of 20 October 2017.
10. Ms McCudden explained that a person made redundant was given an option of either taking paid leave in lieu, or of accepting what was described as “gardening leave” to enable the person to apply for other jobs with the respondent. Ms McCudden noted that Mr Annabel was “shocked and disgusted” to hear that he was being made redundant.¹
11. Mr Annabel had been employed by the respondent for some 30 years and over the last 10 or so years had been working from home.
12. He described his duties in his supplementary statement dated 14 November 2018.²

“8. Prior to the development of DVT following my redundancy, my normal work practice and routine for the ten-year period when I was working from home would be as follows:

- I. Following my wife leaving for work at 7:45 am I would start work at my computer.
- II. I would read emails and respond to emails.
- III. I would analyse logs for the cases that I was working on, write reports and send them out. Typically, at 9:30 am, I would make myself a cup of tea. I would then go back, after a break of 15 minutes, and have a regular team meeting or conference call. Typically, in the course of this meeting I would have my mobile phone in my hand and earphones plugged in and would walk around listening to and discussing various topics. These meetings would take about an hour on average, sometimes an hour and a half.
- IV. Then I would take a lunchbreak. Typically, this is when I did my treadmill exercise. I did have my mobile phone on me always and there were times when there was an urgent support call where I would cease the treadmill activity and return to deal with that particular issue. My lunchbreak usually was about an hour and a half by the time I completed my treadmill exercise, showered and had something to eat. In summer I would also, after working out on the treadmill, swim laps in our pool. When I did not do my usual treadmill or pool workout I would do other household chores such as mow the lawns, do the edges or general home maintenance and improvement work.
- V. Then at 1:30 pm I would return to my computer and review and respond to any emails.

¹ Reply 26

² ARD 221

- VI. I would then prepare for the typical 2 o'clock meeting which was another hour to an hour and a half normally in length; again, I would often take this call on my mobile with my earphones in walking around.
 - VII. Following this meeting I would then attend to ancillary matters and review and respond to further emails before completing my working day at about 4:30 pm.”
13. Mr Annabel is a person who maintains his fitness by, amongst other things, playing squash once a week. He noticed around the second week of May 2017 that he was becoming short of breath, and the same symptoms occurred at a squash match on 18 May 2017.
 14. He attended his general practitioner, Dr Rajan, and a test revealed that Mr Annabel was suffering pulmonary emboli in both lungs.
 15. It was discovered that the emboli were secondary and that he had in fact suffered a DVT in his left leg. This was treated at Gosford Hospital and by 5 April 2018, he was certified fit to return to eight hours duties, five days per week.
 16. It is for the period between 10 May 2017 and 5 April 2018 that the claim for compensation has been brought.
 17. In his first statement Mr Annabel described his daily routine after 20 April 2017 when he was on “gardening leave” :³
 - “19. The second method was called Garden Leave in which I would remain an employee for a further 4 weeks and I would be eligible to apply [for] internal positions. Under the Garden Leave scheme my termination date was 25 May 2017. For the period 20 April 2017 to 25 May 2017 I would not be required to attend work.
 - 20. I elected to use the second method known as Garden Leave.
 - 21. During the period, I was not set any work duties specific to my previous job. I did not complete any work for Oracle Australia.
 - 22. During the period 20 April 2017 to 25 May 2017, I applied for the position of NSW Field Manager with Oracle Australia. This involved preparing a CV. When it was completed it was 5 pages in length. This CV took about 2 or 3 days to complete as it needed drafting and redrafting to meet the job requirements as stipulated in the job specification. I submitted the CV but was not interviewed for the position until 23 May 2017 and received a letter stating I was unsuccessful on 25 May 2017.
 - 23. Also during this time, I attended about 5 workshops about redeployment. At these workshops, I was instructed on job obtainment processes such as being registered on LinkedIn etc. I would then come home and implement these instructions. This would take about 3 hours each time.
 - 24. Each day I would access the Seek Employment database and review new jobs. I would then adjust my resume to reflect each position. I estimate that I applied for about 50 jobs.

³ ARD 201

25. As I had working relationships with many people in the Asia Pacific region I received many emails from colleagues that had heard about the redundancy. I had previously sent an email to all contacts in a list I maintained for work colleagues.
 26. In the first few days, I would receive between 20 and 30 emails a day which I would respond to. After about 2 weeks, I was receiving about 6 emails a day and after 4 weeks 1 or 2 emails. This would require sitting at the computer for extended times.
 27. I also received about 25 telephone calls in this period. I would often take these calls while sitting at the computer.
 28. To complete all these activities, I believe I would spend on average eleven hours a day on my computer.”
18. Dr Mark Burns, Occupational Physician, was retained as the applicant’s medico-legal referee. On 5 April 2018, Dr Burns took the following history:⁴

“It appears that whilst he had been told that he was on gardening leave, the people who normally reported to him had not been given this information. He continued to field not only telephone calls but also emails from other people within the corporation. He had to tell each of these people that he was being made redundant. As well as fielding phone calls, he commenced looking for jobs which were available within the corporation. He found one such job and over a period up until 3 May 2017, put together a covering letter as well as his resume.

He reported that he spent a large amount of this time in a seated position at home and calling other members within the company in order to find out what sort of things he should be putting in the resume. During this period, he cut back on his physical activity and was not doing his normal physical training. He did though continue to play competition squash one night a week. When questioned about his set up at home, he reported that he tended to sit with his left leg folded up under him.”

19. Dr Burns’ opinion was that the DVT had been caused by Mr Annabel’s employment. He said:⁵

“Mr Annabel developed a deep venous thrombosis in the left leg followed by multiple pulmonary emboli. He reported today that for a period of approximately two weeks he had stopped doing physical training at home and was doing only sedentary activities with his left leg folded underneath him. He believes strongly that it was this decrease in physical activity which predisposed him to his deep venous thrombosis and pulmonary emboli.

I note that long periods of sitting, especially if there is a degree of compression under the thigh over the hamstring region, can increase the likelihood of deep venous thrombosis. This has been well documented with people who sit for prolonged periods of time on long haul airline flights. Taking into account, I believe that his prolonged sitting, especially with the left leg folded up

⁴ ARD 10

⁵ ARD 13

underneath him, would have caused the possibility of pressure over the back of his left thigh in the hamstring region. This could have materially increased his risk of developing deep venous thrombosis in that leg. It would though be difficult to try and quantify the increase in risk. I note though that investigations of all other causes of deep venous thrombosis have not shown any positive results.”

20. The respondent qualified A/Prof Paul Myers, Vascular Surgeon, as its medico-legal referee. The history taken by A/Prof Myers on 20 November 2017 was:⁶

“He said he had worked at Oracle Engineering, which is mainly a computer software company, mostly working from home but also travelling interstate, and overseas at times, for 30 years as what Mr Annabel termed a ‘support engineer’.

He was made redundant without much warning, he felt, in April 2017.

His last work day was 25/05, but in the intervening period he had been on what was called ‘gardening leave’ for five weeks.

He did have the opportunity of applying for a further internal position that was available at the company, which he did but he was not successful in gaining that position.

He was also preparing to apply for a further position at a company called ‘Sageco’.

He was domiciled at Woy Woy and most of the available jobs required people to be in North Sydney, North Ryde or in the central business district of Sydney - he felt he really did not wish to commute if he could avoid that.

Mr. Annabel said that he spent long periods during this gardening leave at his desk.

He said he was replying to copious emails and phone calls from the company colleagues during that time.

He said that he had significant amounts of work to do in applying for other positions.

In April 2017, he made one trip with members of the family, including himself driving, to the Gold Coast and return.

Mr. Annabel said he normally was very fit and that up until about this time he had been playing squash twice weekly and kite surfing.

He said, however, that he began to get significantly short of breath, particularly when playing squash, and was unable to run.

He went to see his general practitioner, which visits ultimately led to investigations that showed that he had had bilateral multiple pulmonary emboli.

A source for the embolus thrombus was sought and he was found to have a DVT of the left leg.”

⁶ Reply 6

21. A/Prof Myers was of the opinion that there was no work-related factor that was contributing to the thrombosis, and that work was certainly not the main contributing factor. He said, in answer to the following question:⁷

“(a) Is there any causal nexus between 'multiple extensive pulmonary emboli in both lungs and a DVT in the left leg' and his employment as a computer engineer with Oracle?”

I do not think there is.

Emboli that pass to the lung obviously originate elsewhere. The commonest site is from deep venous thrombosis (DVT) in the deep veins of the legs.

This appears to have been the case in Mr. Annabel.

Whilst there are often DVT's precipitated by injury or illness, or with underlying blood dyscrasia, there is no evidence of those causes in Mr. Annabel.

I accept that he worked long hours at the computer. However, during this one moves around, gets up, walks around, goes to have refreshments, toilet breaks and such like.

Whilst he may have been doing this for long hours, it is essentially no different to the work that he had been doing for many years.

Whilst there has been no other apparent specific precipitating factor, the most likely cause for this in a gentleman of Mr. Annabel's age is associated with either the car trip to the Gold Coast and return, or is idiopathic i.e. with no cause known.

(b) Bearing in mind that the worker presented with disabling symptoms to Gosford Hospital on 13/06/2017, what was the worker doing in terms of working at home on gardening leave in the period of time leading up to that presentation at hospital, together with your opinion as to whether there were extended periods of time sitting at his desk doing duties for the employment with such inactivity or idleness being causally relevant to the development of the embolism?

As noted above, he told me that he was spending long hours at the computer, up to 11 o'clock at night. This also included answering emails and many calls from colleagues.

However, this does not, in itself, lead to such '*inactivity or idleness*' that would be likely to cause a deep venous thrombosis and subsequent pulmonary embolus.

(c) To the extent that you believe the embolism was an internal injury, was the worker's employment a substantial contributing factor to the development of the embolism?

The embolism was a secondary event to the DVT.
For the reasons I have given above, I do not believe that Mr. Annabel's thinks deep venous thrombosis was due to his employment or that employment was a substantial contributing factor to its development.”

⁷ Reply 10

Contemporaneous evidence

22. The clinical notes of Mr Annabel's general practitioner, Dr Rajan at Reliance Medical Centre, were lodged. They showed the following entry on 27 May 2017:⁸

"He felt heart racing and SOB while playing squash and treadmill exercise he used to play squash for years but never had this problem before no cough/flu symptoms recently no resting SOB states that the HR goes up to 160/min in few minutes of exercise"

23. When Mr Annabel was admitted to hospital the history noted in the hospital records on 14 June 2017 was:⁹

"1-week history of exertional SOB
Relatively quick onset - SOB during squash game.
Then worsening SOB on following games
No associated chest pain
No infectious contacts
Drive to QLD in April - 2 trips in 1 week
Sits at desk for work
Active 5x/week, no SOB or chest pain with exercise
No weight loss
FOBT testing clear, no colonoscopies, no bleeding from bowel
CTPA in ED;
Multiple extensive pulmonary emboli involving the main and multiple segmental pulmonary arteries, both right and left side involving all lobes of R lungs."

24. On 7 April 2018, Mr Annabel made a further statement in which he explained that the trip to Queensland occurred when he and his family drove to the Gold Coast on 1 April 2017 and returned on 7 April 2017. He said that the driving duties were shared, there were regular stops and he and his family stopped overnight on the way home at Port Macquarie.
25. In a further supplementary statement dated 14 November 2018 Mr Annabel expanded on the history he originally gave. He said that after the trip to Queensland he continued to play high level squash and carry out his normal physical regime until he was made redundant on 20 April 2017. He repeated that he did not experience his symptoms until the second week of May 2017. He then sought to contrast his activities whilst working at home before and after he received his notice of redundancy. I have already set out his description of his typical day prior to the redundancy above. After his redundancy, however, he asserted that his routine changed. He said:¹⁰

"9. Contrastingly, following being made redundant on the 20th of April 2017, I would perform the activities referred to in paragraphs 21 to 28 of my statement dated 25 October 2017. I got up at 7:30 am and had breakfast before sitting down at my computer at my home office. I did not leave my desk until typically 7:00 pm except for going to the toilet or having a short break to have lunch or a snack which I typically made and then ate back at my desk. There were also occasions after dinner where I would return to sitting at my computer at my office until 9:00, 10:00 or even 11:00 o'clock at night to do these activities before my wife would urge me to go to bed.

⁸ ARD 30

⁹ ARD 161

¹⁰ ARD 220

10. The prolonged sitting that I engaged in following my redundancy carrying out the activities referred to in paragraphs 21 to 28 of my statement dated 25 October 2017 associated with my employment gave me symptoms of restlessness in my legs. As a result of this I developed a habit of sitting on my calves, alternating between legs from time to time. This was to relieve tension I was experiencing in my legs that occurred as I was not doing my normal exercise regime.....”

26. The original statement had been taken by an insurance investigator.

Submissions

27. Ms Goodman submitted that I would accept the opinion of A/Prof Myers. She emphasised that the work being done by Mr Annabel whilst he was on his “gardening leave” did not appear to be appreciably different to that which he was doing before his redundancy.
28. Ms Goodman submitted that, it was highly unlikely that Mr Annabel’s account of the manner in which he was working could be accepted. She submitted that A/Prof Myers’ assumption that Mr Annabel would have been getting up and down during the day for meal breaks and toileting and other reasons meant that he would not have been sitting on his calves for the 12-hour period without a break. That was the gravamen of Dr Burns’ opinion.
29. Moreover, Ms Goodman submitted that the detail about Mr Annabel having to sit on his calves was not added until it was given to Dr Burns. There was no mention of that posture in the contemporaneous evidence and it was not until after the consultation with Dr Burns that Mr Annabel later put on a more detailed statement, containing those assertions.
30. Ms Goodman also emphasised the different nature of the qualifications held by the two specialists. She said I would be assisted by the opinion of a vascular surgeon with an expert in behaviour and causes of DVT rather than that of an occupational physician whose expertise was of a somewhat more general nature.
31. Mr Davis made all the submissions that could reasonably be advanced for Mr Annabel. Mr Davis submitted that it was unremarkable that a further statement containing further details or further particulars would be made, as the original statement had been taken by the investigator who could not be expected to pay attention to the relevant medical details. He submitted that I would accept Mr Annabel’s explanation for the onset of his “restless legs.”
32. Mr Davis submitted that I would not accept A/Prof Myers’s opinion, as he had not read Mr Annabel’s statement - a proposition I note that is hardly surprising, bearing in mind that the relevant assertions were not made until 5 April 2018 whilst A/ Professor Myers’ opinion was dated 20 November 2017. It is perhaps more relevant that Mr Annabel failed to give that later history to A/Prof Myers at that earlier time.
33. Mr Davis submitted that the general practitioner’s opinion was consistent with that of Dr Burns. I assume he was referring to a handwritten, unsigned document in which the author suggested that sitting for long hours in front of the computer had to be the cause of Mr Annabel’s DVT, as he could not think of any other reason.¹¹ I do not place any weight on that document. Assuming that Dr Rajan was the author, this is a case in which the expertise of the medical opinion is significant, and the opinion of a general practitioner is of marginal weight.
34. Mr Davis further submitted that I would discount the drive to Queensland and back as being causative for the reasons advanced by Mr Annabel in his statements of 5 July 2018 and 14 November 2018. I understood Mr Davis to submit that because the trip was broken up by different drivers that it was not possible for the DVT to have formed during that period.

¹¹ ARD 20

35. Mr Davis submitted that I would not find that the additional details about Mr Annabel's posture that were not given until 4 April 2018 to Dr Burns, and indeed not made the subject of any statement from Mr Annabel until 14 November 2018, were recent invention. The original statement of 18 October 2017 was taken by an insurance investigator and it could not therefore be expected that all the relevant details would have been evinced.
36. Mr Davis submitted further that I would not accept the opinion of A/Prof Myers, as he did not have the correct history, which was later given to Dr Burns. Mr Davis submitted that the assumption by A/Prof Myers that Mr Annabel would get up and move around whilst working at the computer was not established. This submission, with respect, overlooks both common sense and Mr Annabel's own evidence that he would have short breaks to get himself some food or for toileting purposes. A further difficulty with the submission regarding the correct history is a consideration as to why Mr Annabel did not give the correct history to A/Prof Myers. Whilst Mr Davis's comment regarding the insurance investigator's lack of expertise is one thing, the failure by Mr Annabel to give a more precise history to a vascular surgeon is another thing entirely.

Discussion

37. There are a number of problems with Dr Burns' opinion, not the least of which was that it required Mr Annabel to be seated without moving for long hours in order for the DVT to form. A/Prof Myers' assumption that Mr Annabel would have been moving around from time to time was supported by Mr Annabel himself in his statements.
38. There was some discussion during the case about the principle in *Browne v Dunn* as considered in the Presidential decision of *Bonica v Piacenti & Sons Pty Ltd*.¹² The issue of credit has been fully and fairly ventilated in the documentary evidence, and I have had the benefit of the submissions of counsel
39. I accept that Mr Annabel was attempting to assist the Commission honestly, but the detail of the circumstances surrounding the injury came out piecemeal, and there is a danger that a person trying to describe the events that happened some time ago would inadvertently reconstruct those events in light of subsequent developments. Mr Annabel's account of his posture of sitting on his calves whilst working at his computer was first given to Dr Burns on 5 April 2018. His first statement on 18 October 2017 regarding his post redundancy activities, whilst asserting that he spent long hours at the computer, also deposed to his going to workshops and receiving phone calls.
40. It was not until after Associate Professor Myers had given his opinion that Mr Annabel suggested that he had been sitting in the specific manner he described to Dr Burns. It is unlikely that A/Prof Myers would not have made specific enquiry as to any possible source of the DVT, and it is significant that Mr Annabel's later assertions were not made to A/Prof Myers. I also have some difficulty in accepting the concept of "restless legs" as a symptom or cause for Mr Annabel's need to sit on his calves.
41. Whilst there is a danger in relying on the content of clinical notes of medical providers both as to what is recorded and what indeed is not recorded, it is relevant to note that at a time when Mr Annabel was having his unusual condition diagnosed that he did not advise his treating practitioners of the peculiar way he had been sitting. It is a relevant matter that Mr Annabel did not mention the manner in which he was sitting to either his general practitioner or to the hospital. I note in that respect that all of the medical providers obtained the history of the car trip to Southport and back.

¹² [2019] NSW WCC PD 4

42. In the final analysis, I cannot be satisfied that Mr Annabel's employment was a main contributing factor or even a substantial contributing factor to the onset of the DVT. I accept the evidence of A/Prof Myers and indeed Dr Burns that the cause of deep vein thromboses can be multi factorial and idiopathic. Further, in considering such a specific injury as a DVT the qualifications and expertise of the medical-legal referees is a relevant factor regarding the weight that can be given to the expert opinion. A/Prof Myers is a Vascular Surgeon as well as a General Surgeon. Dr Burns, although pre-eminent in his field, is an Occupational Physician, and the field with which this case has been concerned is so specific that the opinion of the Vascular and General Surgeon is to be preferred over that of the Occupational Physician.

SUMMARY

43. Accordingly, I find that Mr Annabel has failed to establish on the balance of probabilities that the DVT he sustained in May 2017 was caused by his employment.

44. There will accordingly be an award in favour of the respondent.

