WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number:	**6800/19**
Applicant:	**John Gaydon**
First Respondent:	**The Castlereagh Hotel Dubbo**
Second Respondent:	**Tara Mooney**
Third Respondent:	**David Mooney**
Fourth Respondent:	**Lorraine Joyce Bailey**
Fifth Respondent:	**Nathan Mooney**
Date of Determination:	**6 May 2020**
Date Amended:	**11 May 2020**
Citation:	**[2020] NSWWCC 146**

The Commission determines:

1. Deanna Mooney (the deceased) died on 7 November 2012 as a result of injury arising out of and in the course of her employment with the first respondent.

2. At the date of the deceased's death, the applicant was her de facto husband as that term is used in s 4(1)(c) of the *Workplace Injury Management and Workers Compensation Act 1998.*

3. At the date of the deceased's death, the applicant was dependent for support upon her.

4. The second respondent is an adult child of the deceased, and at the date of the deceased's death was dependent for support upon her.

5. The third respondent is an adult child of the deceased, and at the date of the deceased's death was dependent for support upon her.

6. The fourth respondent was the mother of the deceased, and since the date of the deceased's death has died and accordingly is not entitled to any benefit.

7. The fifth respondent is an adult child of the deceased, and at the date of the deceased's death was not dependent upon her for support.

8. There was no other person dependent upon the deceased for support at the date of her death.

9. The sum payable in respect of the death of a worker as at 7 November 2012 pursuant to s 25 of the *Workers Compensation Act 1987* was $489,750.

10. Order that the first respondent employer pay one third of the sum referred to in 9 above, being $163,250 to the applicant's solicitors Messrs LHD Lawyers upon trust, to be distributed in accordance with his instructions.

11. Order that the first respondent employer pay one third of the sum referred to in 9 above, being $163,250 to the second respondent's solicitors Messrs Law Partners upon trust, to be distributed in accordance with her instructions.

12. Order that the first respondent employer pay one third of the sum referred to in 9 above, being $163,250 to the third respondent's solicitors Messrs Carroll & O'Dea Lawyers upon trust, to be distributed in accordance with his instructions.

13. The first respondent is to pay the deceased's funeral expenses as claimed in the sum of $8,834.45 upon production of accounts and receipts.

14. The parties have liberty to make written submissions on the claim for weekly compensation within 14 days of the date of this decision, failing which there will be an award for the respondent on the claim for weekly compensation.

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.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 5 March 2012, Ms Deanna Mooney (the deceased) was working as a casual cook at The Castlereagh Hotel, Dubbo (the first respondent) and suffered an injury to her lumbar spine while lifting heavy drums of cooking oil.

2. The first respondent disputed the deceased's claim and the matter proceeded to hearing at Sydney before Arbitrator Wynyard on 7 November 2012. At the hearing, the deceased was subjected to cross-examination, details of which will be discussed further in these Reasons. She then caught a flight back to Dubbo. Whilst on the plane, the deceased suffered a fatal heart attack.

3. The applicant was, at the date of the deceased's death, her de facto partner. The second and third respondents are the deceased's adult daughter and son respectively. The fourth respondent was the deceased's mother. She has died since the applicant made this claim. The fifth respondent is also an adult son of the deceased.

4. The applicant made a claim in respect of the death of the deceased, alleging it was brought about as a result of her work place injury. In response to the applicant's claim, the respondent issued a s 78 notice on 14 November 2019 declining liability on the basis the deceased's death did not result from her injury suffered on 5 March 2012.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:

    (a) did the deceased's death result from the injury suffered on 5 March 2012;

    (b) in the event the deceased's death was as a result of the events surrounding her attendance at the hearing of her claim on 7 November 2012, can her death be said to arise as a result of her compensable injury, and

    (c) if the applicant succeeds on liability, what should be the apportionment of the benefit between him and the second and third respondents?

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a hearing by way of telephone hook-up on 7 April 2020. 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 am also 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.

7. At the hearing, leave was granted for the applicant to amend the injury description/cause of injury and death by deleting all words after "consequence of" and inserting instead "her claim for injury on 5 March 2012." The description of injury in the Application to Resolve a Dispute (the Application) therefore now reads:

    "The [deceased] died after she sustained a heart attack which arose as a consequence of her claim for injury on 5 March 2012."

8. I note that the fourth and fifth respondents were not represented at the hearing, nor have they filed any appearance. There is no issue the fourth respondent died before the hearing of this matter. That being so, I am satisfied s 29(7)(b) of the *Workers Compensation Act 1987* (the 1987 Act) applies, and the fourth respondent's estate has no entitlement to any apportionment in the event the applicant succeeds on the question of liability. If the applicant so succeeds, any benefit payable will be apportioned as though the fourth respondent had predeceased the deceased.

9. In relation to the fifth respondent, I note the applicant's solicitors have provided proof of service of all pleadings in the matter, together with evidence of the fifth respondent being advised not only of the existence of the claim but of the dates of both telephone conferences and the hearing. There was no appearance by or on behalf of the fifth respondent, and in the circumstances I am satisfied he is both aware of the proceedings and has chosen not to make a claim for dependency.

10. At the hearing, the parties were represented as follows:

applicant	–	Mr R Hanrahan of counsel;
first respondent	–	Mr G Barter of counsel;
second respondent	–	Mr G Young of counsel, and
third respondent	–	Mr A Parker of counsel.

EVIDENCE

Documentary evidence

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

    (a) Application and attached documents;

    (b) first respondent's Reply;

    (c) second respondent's Reply filed under cover of Application to Admit Late Documents (AALD) dated 30 January 2020;

    (d) third respondent's Reply filed under cover of an AALD 3 February 2020;

    (e) applicant's AALD dated 28 January 2020;

    (f) applicant's AALD dated 1 April 2020, and

    (g) second respondent's AALD dated 19 March 2020.

Oral evidence

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

FINDINGS AND REASONS

Did the deceased's death result from her injury on 5 March 2012?

13. Each of the applicant and second and third respondents submitted the deceased's death resulted from her injury.

14. Mr Hanrahan for the applicant submitted and it is trite law to say there can be multiple causative factors giving rise to an injury or death. I accept that submission. He noted the following stressors which the deceased faced on her date of death:

    (a) an allegation that she sustained injuries owing to abuse by the applicant;

    (b) being subjected to cross-examination including questions relating to the cause of her injury and relating to surveillance footage of her;

    (c) being present during evidence given by a co-worker who was seeking to invalidate her claim and dispute her evidence, and

    (d) the stress of a delayed flight from Sydney back to Dubbo.

15. Dr Herman, Cardiologist provided a report by way of file review dated 2 October 2018 in which he concluded:

> "There are several mechanisms by which emotional stress may trigger myocardial infarction including a rise of arterial pressure, vasoconstriction leading to plaque disruption, factors increasing coagulability and these factors predispose to plaque disruption with superimposed occlusive thrombus provoking myocardial infarction and sudden cardiac death.
>
> Emotional stress also enhances activation of the sympathetic nervous system activation which increases platelet aggregation and increases the susceptibility to serious ventricular arrhythmias (which almost certainly occurred in Deanna Mooney's sudden cardiac death).
>
> I am not an expert in psychological stress and anxiety but from the transcript of the Arbitration hearing, it seems probable that she had been under a significant amount of stress and the temporal (timing) relationship of her myocardial infarction to the events earlier in the day, suggest that anxiety had played a significant role in her myocardial infarction and subsequent sudden cardiac death…
>
> Whilst Ms Mooney had significant coronary artery disease (probably been present for several years if not decades prior to her death) and while she did have a number of cardiac risk factors which provoked underlying atherosclerosis (coronary artery disease), the plaque ***rupture*** in the right coronary artery which was complicated by an occlusive thrombus leading to her myocardial infarction (and arrhythmia which led to a sudden death), was probably provoked by the emotional stress that she had encountered earlier in the day…
>
> In my opinion, the nature of her employment (dispute hearing) did give rise to a significantly greater risk of the worker suffering the injury than had she not been employed (been exposed to the Hearing)." (original emphasis)

16. The medical evidence relied on by the applicant included a report by Cardiologist, Dr David Brender dated 2 November 2015. He noted the deceased's underlying vascular disease as the predisposing factor to her fatal heart attack. Having examined the relevant material, Dr Brender concluded:

> "Given the above situation, including the fairly, to my mind, adversarial nature of the arbitration, the length of time that she was in the witness box and the evidence of her work mate (I am assuming that she was in the room during Kerri-Anne Emery's evidence and therefore was privy to it) I would have thought that by the time she left the arbitration rooms and made her way to the airport she would have been extremely stressed and depressed regarding the days' events.

> Added to that, is the anxiety of the departure from the airport, boarding the flight and discovering that it would be delayed. This would certainly have increased her stress levels…
>
> From my assessment of the reports, especially the transcript of the arbitration hearing, I would have assessed that the deceased was under a tremendous amount of stress by the time she left the hearing and this certainly could have been a precipitating factor in her development of a myocardial infarction which proved fatal.
>
> I of course cannot prove, in this case, a direct causal relationship but the events of the day as outlined do give a very strong temporal relationship to the event and I believe it more than likely that it was the antecedent cause for her fatal infarct."

17. An applicant is able to rely on injury simpliciter despite the existence of a disease, as was highlighted by the High Court in *Zickar v MGH Plastic Industries Pty Limited* (1996) 187 CLR 310 (*Zickar*). In that case, the worker suffered brain damage due to the rupture, at work, of a congenital aneurism. The congenital condition could be categorised as a disease, however, the worker succeeded in the High Court on the basis that the rupture itself could be described as an injury. The Court held that the presence of a disease did not preclude reliance upon the event of the rupture as a personal injury. Toohey, McHugh and Gummow JJ agreed with a passage in *Accident Compensation Commission v McIntosh* [1991] 2 VR 253 that:

> "it is none the less a rupture – something quite distinct from the defect, disorder or morbid condition, which enables it to occur. The terms 'personal injury' and 'disease' are therefore not mutually exclusive categories. A sudden identifiable physiological (pathological) change to the body brought about by an external or internal event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury."

18. Mr Hanrahan submitted that adopting a common-sense approach consistent with the test for causation as set out in *Kooragang Cement Pty Limited v Bates* (1994) 10 NSWCCR 796 (*Kooragang*), the stress under which the deceased was placed at the hearing of her claim can be said to have caused her death.

19. Mr Young adopted the applicant's submissions and emphasised that the stress of the hearing process need not be the only factor which contributed to the deceased's death. He noted the autopsy report summary which referred to the deceased becoming anxious upon being seated on the aircraft to return to Dubbo, and submitted that was evidence of the deceased being under stress in the aftermath of the hearing and the immediate leadup to the heart attack which led to her death. This was, he submitted, particularly the case given the third respondent's uncontested evidence in her statement that the claim had caused the deceased a great deal of stress and that she hated flying (see third respondent's Reply at page 3).

20. Mr Young noted the deceased was present during a very stressful episode, had her credibility challenged and also had it suggested that her injuries were caused in a domestic violence incident. He noted there was no evidence to contradict the view of Dr G Smith, Psychiatrist Independent Medical Examiner (IME) whose report is found attached to the applicant's AALD dated 1 April 2020. Dr Smith said:

> "In my opinion, the Worker's Compensation Commission arbitration held on 8 November 2012, on the balance of probabilities, placed Ms Mooney under acute stress. It did place her at significantly greater risk of suffering chronic stress but tragically she did not experience chronic stress after the event as she passed away that evening after the arbitration hearing…

> In my opinion, the experience of cross-examination was highly likely to have been extremely stressful for Ms Mooney. It was noted that she had limited experience and understanding of the court process, and this likely increased the level of her distress in the context of cross-examination. Furthermore, the cross-examination raised issues of violent assault against her, which was likely significantly traumatising resulting in severe emotional distress. Therefore, in my opinion, the arbitration, in particular the cross-examination, more likely than not placed Ms Mooney under acute stress."

21. Mr Parker for the third respondent adopted the submissions of the applicant and the second respondent. Additionally, he noted the views of Associate Professor Haber, Cardiologist IME for the first respondent, who acknowledged the deceased had been subjected to "a very stressful cross-examination at the hearing of her compensation case." At page 10 of the first respondent's Reply, Associate Professor Haber said:

> "I understand that she was exposed to very stressful questioning by the barristers shortly before her death. If in fact she was under very heavy emotional stress, then it is more likely than not that the acute blockage of the right coronary artery by thrombus has caused her heart attack which was fatal. In such a case, it is considered that the plaque on the coronary artery has a tear with resultant leaking of the material from it with resultant thrombus/clot formation nearly blocking the coronary artery which already beforehand had a significant blockage/stenosis with resultant fatal heart attack."

22. For the first respondent, Mr Barter submitted there was insufficient evidence to enable the Commission to draw an inference the deceased had been subject to stress which was causative of her fatal heart attack. That being the case, he submitted the applicant must fail as he could not succeed without evidence the deceased became so distressed that the heart attack was brought upon her.

23. Mr Barter noted the conciliation/arbitration system within the Commission is structured to minimise distress suffered by injured parties. I accept this is so, however, as Mr Young noted, the fact proceedings are conducted in accordance with accepted guidelines does not mean they cease to be stressful for the participants.

24. Mr Barter submitted there was no evidence of stress being suffered by the deceased, however, when one examines the transcript of proceedings, in my view it is obvious the deceased was subjected to examination about sensitive personal matters including allegations of domestic violence and suggestions her injuries were not occasioned as she alleged, together with attacks on her credit.

25. In making these observations, I note that the cross-examination of the deceased was stringent, thorough and completely appropriate in the circumstances of the matter. Nevertheless, it is trite to say the experience of being cross-examined is a stressful one, particularly in circumstances where there are attacks on credit and matters of a personal nature are raised.

26. Mr Barter contended the medical evidence was predicated on the deceased being cross-examined for a lengthy period of time, when in fact that was not the case. In my view, however, the preponderance of the evidence establishes the doctors, including Associate Professor Haber for the first respondent, addressed the nature of the cross-examination and not just the length of it.

27. The first respondent submitted there was insufficient evidence upon which to draw an inference the deceased was under significant levels of stress at the time of her heart attack as a result of the hearing of her claim. On balance, having regard to the lay and medical evidence in this matter I reject that submission.

28. The evidence within the report to the Coroner indicates the deceased was anxious upon being seated on the aircraft, and there is no doubt she was subjected to a thorough, forensic and searching cross-examination at the arbitration. In my view, taking into consideration the lay and medical evidence, the deceased's death resulted from the stress of the arbitration hearing on 7 November 2012. The circumstances of this matter are analogous to those in *Zickar*. There is no question the deceased had a build-up of plaque in her coronary arteries, but each of the qualified doctors accept that stress can be a causative factor in myocardial infarction, and that the experience of the hearing would be regarded as a stressful one.

The relationship between the compensable injury and the hearing

29. In *Karathanos v Industrial Welding Co Limited* 47 WCR 79 (1973) (*Karathanos*) at page 80, McGrath J in the Workers Compensation Commission (as it then was) said:

> "It is my view that a reaction to the process of pursuing a claim under the Act, which aggravates the incapacity, is not a consequence of the employment injury which is compensable."

30. Authorities such as *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA 324 (8 October 2009) (*Badawi*) confirm the long-held position that the phrase "arising out of or in the course of employment" requires a causal element between the employment and injury.

31. Whilst there is no doubt *Badawi* and the line of authorities in which it sits remains good law, the efficacy of the decision in *Karathanos* is open to question, particularly since the decision in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 (Kooragang), which established the common sense test of causation. Kirby P (as he then was) set out the test in the following terms:

> "Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. **What is required is a common-sense evaluation of the causal chain**. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation." (at 810; emphasis added)

32. In *Manpower Pty Limited v Harris* [2011] NSWWCCPD 10 (*Harris*), Roche DP said at [137] "In the light of *Kooragang Cement Pty Limited v Bates*, I doubt that *Karathanos* is good law." I respectfully agree with the Deputy President's view and accept the submission of Mr Young that there is no separate test set aside for the context of litigation. Rather, as the oft-cited decision in *Kooragang* notes, the exercise is to determine whether there is a common-sense causal link between the injury suffered by the deceased in March 2012 and the heart attack which caused her death in November 2012.

33. There is no question that had the deceased not been injured in the course of her employment, she would not have been subjected to the cross-examination and the stress of the hearing which took place in November 2012.

34. Although the comments of the Deputy President in *Harris* are obiter, the adoption of the common-sense test for causation in my view supersedes the judgement in *Karathanos.*

35. There is no issue that an injured worker who suffers further injury while, for example, attending a medical appointment connected with their initial injury is entitled to claim benefits arising from any further loss incurred as a result of the mishap associated with the appointment. To my way of thinking, the applicant's position in this matter is, subject of

course to appropriate findings of causation on a common-sense basis, no different. I do not accept the proposition that injury or death occasioned by the hearing of a claim is in a different category to an injury or death sustained in connection with attendance at, for example, a medical appointment associated with a claim.

36. Were it not for her original injury, the applicant would not have been at the hearing or been subject to cross-examination. Having found the deceased was placed under considerable stress at the hearing by virtue of the nature and extent of the cross-examination, the challenge to her credit and listening to a co-worker give evidence disputing the circumstances of her claim; and noting the medical evidence put forward by both parties, I am of the view the deceased suffered her fatal myocardial infarction as a result of the stress occasioned by the hearing. In my opinion, the applicant has established a causal link between the injury suffered by the deceased in March 2012 and her subsequent death through fatal heart attack after the hearing on 7 November 2012.

APPORTIONMENT

37. Having found in favour of the applicant on the issue of liability, the Commission must determine the appropriate apportionment between the applicant, and the second and third respondents.

38. For reasons which I have already set out, I am satisfied there is no entitlement to any benefit in the fourth and fifth respondents.

39. I note the applicant, second respondent and third respondent reached An in principle agreement at the hearing that in the event the applicant succeeded on the issue of liability, there would be an equal apportionment between them of one third of each of the benefit.

40. The Commission must be satisfied as to the dependency of each of the parties before it can award any benefit to them. The evidence of each of the applicant, the second respondent and the third respondent on these matters is uncontested. I accept each of these statements on the question of dependency. Having regard to their evidence and the circumstances to which they have deposed, I consider it appropriate to make an award apportioning the benefit between the applicant, the second respondent and the third respondent equally.

41. Accordingly, the Commission will order that the benefit sum of $489,750 be divided equally between the applicant, the second respondent and the third respondent.

Funeral expenses and weekly benefits

42. There is an account attached to the Application for the cost of the deceased's funeral. That invoice is not challenged and there were no submissions made in relation to the costs of the funeral service. In the circumstances, I find the cost of the deceased's funeral to be as claimed in the Application and given my findings on liability, will order the first respondent pay the deceased's funeral expenses in the sum of $8,834.45.

43. There is also a claim in the Application for weekly compensation in the sum of $315 per week from 5 March 2012 to 7 November 2012. No submissions in relation to that claim were made at the hearing. I note Arbitrator Wynyard made an order for payment of that weekly compensation in his decision in matter number 5077/12. It is unclear whether that compensation was paid to the deceased's estate. Absent evidence and submissions to the contrary, I do not propose to make an order for payment of compensation which has already been ordered to be paid. Should the parties wish to make submissions in relation to this aspect of the matter, they may do so within 14 days of the date of this decision. In the absence of submissions in relation to the weekly payments claim, there will be an award for the respondent on that aspect of the claim.