

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 645/18  
**Applicant:** Brian Woodhead  
**Respondent:** Coles Supermarkets (Australia) Pty Ltd  
**Date of Determination:** 14 May 2018  
**Citation:** [2018] NSWCC 130

The Commission determines:

1. The relevant date of injury for the lump sum claim is 5 October 2017 (deemed).
2. The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment in respect to the left and right upper extremities (shoulders) and scarring from the deemed date of injury 5 October 2017.
3. The documents to be referred to the Approved Medical Specialist are those attached to the Application to Resolve a Dispute and the Reply.

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

Josephine Bamber  
**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 JOSEPHINE BAMBER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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

## STATEMENT OF REASONS

### BACKGROUND

1. Brian Woodhead commenced work with the respondent, Coles Supermarkets (Australia) Pty Ltd, in about 1990 as a butcher. It is agreed that he has sustained injury to both shoulders in the course of his employment with the respondent. He underwent left shoulder replacement surgery in January 2016 and right shoulder replacement in December 2016.
2. Mr Woodhead is now seeking lump sum compensation for permanent impairment in relation to the injuries to his left and right upper extremities. He relies upon an assessment from Dr Bodel dated 21 September 2017, which also includes an assessment of the impairment from the surgical scarring. In Part 5.6 of his Application to Resolve a Dispute (ARD) he has only sought assessment of “both upper extremities (shoulders)”, but this requires amendment to include “scarring”.
3. In Part 5.6 and Part 4 of his ARD Mr Woodhead pleads the date of injury as “5 October 2017 (deemed)”. His description of injury in Part 4 states:

“The Applicant engaged in heavy and repeated work as a butcher between 2004 until 2014, the nature and conditions of which placed stress and strain upon both shoulders, in particular the requirement to repeatedly dismantle carcasses of beef and lamb together with the associated lifting and manoeuvring of meat and the heavy manipulation and tearing of meat and parts of carcasses together with the lifting and manoeuvring of heavy boxes onto and off trolleys.”
4. The parties are in agreement that the claim for lump sum compensation can be referred by the Registrar of the Commission to an Approved Medical Specialist (AMS) for assessment, however they disagree as to the date of injury.
5. Mr Woodhead asserts the correct date of injury is as he has pleaded 5 October 2017 (deemed), being the date of his lump sum claim.
6. The respondent asserts that the correct date of injury is 18 July 2014, being the last date of employment<sup>1</sup>.

### PROCEDURE BEFORE THE COMMISSION

7. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
8. The parties attended telephone conferences on 26 March 2018 and 24 April 2018. The second telephone conference was held to enable the parties to make oral submissions. Mr Leonart, solicitor, made submissions on behalf of Mr Woodhead and Mr Dolan, solicitor, made submissions for the respondent, instructed by Ms Renee Roumanos from Wesfarmers.

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<sup>1</sup> T3.03

## EVIDENCE

### Documentary evidence

9. 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 filed by the respondent dated 16 April 2018, being a list of payments.

### Oral evidence

10. There was no oral evidence. The parties' submissions were sound recorded, a copy of which is available to the parties together with the written transcript.

## FINDINGS AND REASONS

11. Section 354(6) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) provides:

“If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing.”

12. Having regard to the documents that are now before me, I am satisfied that I have sufficient information to proceed ‘on the papers’ without holding any conference or formal hearing

### Prior proceedings

13. Mr Woodhead had filed proceedings in the Commission, matter 2887 of 2015, which were resolved by agreement between the parties on 1 December 2015. The details of the agreement were set out in a Certificate of Determination - Consent Orders, as below:

#### “Consent Orders

1. The respondent will pay the applicant \$1,484.38 per week from 19 July 2014 to 17 October 2014 pursuant to section 38 of the Worker's Compensation Act 1987.
2. The respondent will pay the applicant \$1,000.00 per week from 18 October 2014 and continuing pursuant to section 37 of the Worker's Compensation Act 1987. (Credit to respondent for payments made during the period).
3. The respondent will re-credit long service leave and annual leave taken during the period.
14. The respondent agrees to pay reasonable section 60 expenses relative to the surgery proposed by Dr Cass<sup>2</sup>.”
15. As these prior proceedings resolved by consent orders, there appears to have been no determination made by the Commission as to the “date of injury”. The consent orders do not refer to an agreement about a date of injury.

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<sup>2</sup> ARD p42

## Relevant legislative provisions

16. Section 16 of the *Workers Compensation Act 1987* relevantly provides:

- “(1) If an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease:
- (a) the injury shall, for the purposes of this Act, be deemed to have happened:
    - (i) at the time of the worker’s death or incapacity, or
    - (ii) if death or incapacity has not resulted from the injury-at the time the worker makes a claim for compensation with respect to the injury, and
  - (b) compensation is payable by the employer who last employed the worker in employment that was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration.
- ...
- (3) In this section, a reference to an injury includes a reference to a permanent impairment for which compensation is payable under Division 4 of Part 3.”

## Discussion

17. The respondent submitted that “liability is accepted for the claim” and Mr Woodhead “continues to receive weekly payments of compensation and medically-related expenses as a result of a deemed date of injury which was 18 July 2014, the last date of employment.”
18. The respondent stated that the claim does invoke the disease principles and the situation in Mr Woodhead’s claim is very similar to the decision of an Arbitrator of the Commission in the matter of *Best v Leighton Contractors Pty Ltd*<sup>3</sup> (*Best*). The respondent submitted that a decision I had made in *Dunn v Roads and Maritime Services*<sup>4</sup> (*Dunn*) could be distinguished on the basis that the facts differed to those arising in Mr Woodhead’s case, because Mr Woodhead, unlike Mr Dunn, was continuing to receive weekly compensation.
19. Mr Woodhead’s solicitor submitted that the decision in *Best* should not be followed in light of the Court of Appeal’s decision in *SAS Trustee Corporation v O’Keefe*<sup>5</sup> (*O’Keefe*), a decision of a superior court. He also submitted that the decision of the Commission in *Collingridge v IAMA Agribusiness Pty Ltd*<sup>6</sup> (*Collingridge*) was distinguishable because in that case the applicant was making a claim for further impairment compensation on a background of an earlier claim in which there was concurrently a claim for weekly payments and permanent impairment compensation.
20. In *Dunn*, I considered the various authorities such as *Stone v Stannard Brothers Launch Services Pty Ltd*<sup>7</sup> (*Stone*), *GIO Workers Compensation (NSW) Ltd v GIO General Ltd*<sup>8</sup> (*GIO*), *White v Sylvania Lighting Australasia Pty Ltd*<sup>9</sup> (*White*), *Alto Ford Pty Ltd v Antaw* (*Antaw*)<sup>10</sup>. I concluded, as a result of applying *White*, *Stone* and *Antaw*, the correct deemed date of injury for Mr Dunn’s “impairment injury” was the date of the lump sum claim. I stated at [105] and [106] the following:

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<sup>3</sup> [2016] NSWCC 259

<sup>4</sup> [2017] NSWCC 36

<sup>5</sup> [2011] NSWCA 326

<sup>6</sup> [2011] NSWCCPD 31

<sup>7</sup> [2004] NSWCA 277; 1 DDCR 701

<sup>8</sup> (1995) 12 NSWCCR 187

<sup>9</sup> [2011] NSWCCPD 7

<sup>10</sup> [1999] NSWCA 234; 18 NSWCCR 246

"I am fortified in coming to this conclusion because the Court of Appeal again considered section 16 of the 1987 Act in *SAS Trustee Corporation v O'Keefe* [2011] NSWCA 326 (O'Keefe). Handley JA (with McColl JA agreeing) succinctly summarised the relevant cases from [95] to [100] and found:

'[101] The cases establish that if the claim is for lump sum compensation any earlier claim for weekly compensation is irrelevant. Any injury by permanent impairment (s16(3)), is deemed to have happened when the lump sum claim is made.'

Also, more recently in *Saad Bros Motor Pty Ltd v Simon* [2014] NSWWCPCD 22 (*Simon*) Roche DP followed *O'Keefe* and *Stone*. He stated at [76] that the Commission's decision in *Collingridge v IAMA Agribusiness Pty Ltd* [2011] NSWWCPCD 31 (*Collingridge*) was:

'determined on its own facts. Those facts were that there had been a previous judicial determination (made before 1 January 2002) of the date of injury for a claim for lump sum and weekly compensation. Because his condition deteriorated, Mr Collingridge subsequently made a claim, after 1 January 2002, for additional lump sum compensation. It was held (at [83]) that once the disease provisions had been applied to determine the deemed date of injury for a claim for lump sum compensation, as they had been in the previous judicial determination, there was no scope to apply them again to produce a different date of injury with respect to the later claim for additional lump sum compensation.'

21. In *Simon*, the facts were summarised by Roche DP as follows:

"[3] In the present appeal, the worker suffers from a disease that he contracted in the course of his employment with the appellant between 1973 and 1996, namely, non-Hodgkin's lymphoma, which caused an incapacity for work in 1997. He claimed and was paid weekly compensation from 1997 until he turned 66 in August 2009, but made no claim for lump sum compensation under s 66 until 30 September 2011.

[4] The issue on appeal is whether, in a claim for lump sum compensation arising out of a disease injury to which s 15 of the 1987 Act applies, the correct date of injury is the date of incapacity (14 July 1997), as the appellant contends, or the date on which the worker claimed lump sum compensation (30 September 2011), as the worker contends and the Arbitrator found."

22. In *Simon* Roche DP upheld the Arbitrator's decision that the date of injury for the permanent impairment claim was the date that claim was made. He found at [77]:

"As the Arbitrator noted, the incapacity in *Collingridge* was a result of the first permanent impairment, which occurred at or around the time of the first claim. As Mr Simon has not made a previous claim for permanent impairment, his previous incapacity is irrelevant (*Stone* at [36] and *O'Keefe* at [101]), and the injury is the permanent impairment for which compensation is payable under Div 4 of Pt 3 (s 15(4)). As incapacity did not result from that injury, the date of injury is the time Mr Simon made his claim for compensation with respect to the injury (s 15(1)(a)(ii))"

23. In *Best*, the Arbitrator stated at [29]:

"Some cases, or statements in cases, have suggested that the entitlement to weekly payments must be 'claimed' in order to give rise to a relevant 'incapacity' and it has

even been suggested that such claim must be made in proceedings before the former Compensation Court or the Commission. In my view, what is important is the 'entitlement' to weekly payments. There is no logical reason why a distinction should be drawn between an entitlement to weekly compensation for which an insurer accepts liability in response to a claim and a 'claim' which must be pursued in proceedings consequent upon an insurer declining liability to make such payments."

24. However, in *Best*, the Arbitrator apparently was not taken to *O'Keefe* and *Simon*. In *Best*, the Arbitrator found the facts he was dealing with were most analogous to that in *Collingridge*. However, in *Simon* Roche DP distinguished *Collingridge*, as noted above, because that decision was based upon the worker having a first permanent impairment which occurred around the time of the first claim, and so the later lump sum claim retained the first date of injury.
25. In Mr Woodhead's case, he has not claimed permanent impairment compensation previously. Also, there has been no prior determination of a date of injury. So, the facts are very different to that in *Collingridge*. I consider that the facts in Mr Woodhead's case are most analogous to those considered by Roche DP in *Simon*. In *Simon* the worker was voluntarily paid weekly compensation for many years (from 1997 to August 2009) and those payments only ceased by operation of the legislation, when he reached 66. In Mr Woodhead's case, he also has been paid weekly compensation since 2014, and I consider the fact that he is still receiving weekly payments does not alter the analogy.
26. In *Simon* Roche DP stated at [70] "Even though, like Mr Simon, Mr O'Keefe had had previous periods of incapacity, for which compensation had been claimed and paid, Handley AJA held (at [104]) that those periods of incapacity were irrelevant."
27. Every case is decided on its own facts. However, I consider I am bound by the determination of a Presidential member, as in *Simon*, and the Court of Appeal, in *O'Keefe*. Given *Best* did not deal with these decisions I find it would be erroneous for me to adopt the reasoning in that case. In *Simon* Roche DP stated at [79] "the Commission is (naturally) bound to apply *O'Keefe*".
28. Accordingly, I find that the relevant deemed date of injury is the date of the lump sum claim, 5 October 2017.
29. I remit the lump sum claim to the Registrar for referral to an AMS to assess permanent impairment in respect to the left and right upper extremities (shoulders) and scarring from the deemed date of injury 5 October 2017.