WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2251/20**
Applicant: **Wayne Anthony Brown**
Respondent: **S & A Trailers Pty Ltd**
Date of Determination: **20 August 2020**
Citation: **[2020] NSWWCC 281**

The Commission determines:

1. The impairment to the right upper extremity, crystallised on the 23 October 2017, results from the injurious event on 5 April 2017.

2. The impairment that results from the events on 5 April 2017 and 23 October 2017 are to be aggregated.

3. The matter is remitted to the Registrar to be referred to an Approved Medical Specialist for whole person impairment assessment to both the left and right upper extremities.

4. The date of injury is 5 April 2017. The Application to Resolve a Dispute and Reply to Application to Resolve a Dispute are to be provided to the Approved Medical Specialist.

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

E BEILBY

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 E BEILBY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Wayne Brown (the applicant) commenced employment with S & A Trailers Pty Ltd (the respondent) in 2012 as a welder and a fabricator. He has prepared statement which provides a useful summary of the background to this dispute[1].

2. On 5 April 2017, the applicant sustained injuries to his left wrist and hand.

3. On that day the applicant was drilling holes for cages on the side of a trailer using a cordless drill. The drill bit became loose and he attempted to tighten up the drill bit and accidentally knocked the trigger. The drill abruptly began to spin and became caught in the applicant's left glove, twisting his left wrist and hand. The trigger was stuck down until the drill bit spun around and the trigger was released. The applicant's left thumb was suddenly bent backwards and he immediately felt pain shoot through his left thumb and left wrist.

4. The applicant sought treatment which included an MRI on 6 May 2017 which illustrated a complete rupture of the ligament of the left thumb. The applicant required surgery which was performed on 18 May 2017 by Dr Yee, hand surgeon. A k-wire was inserted in the surgery and after the surgery the applicant was required to wear a heavy plaster cast for a week. It was then placed in a plaster cast for six weeks.

5. Following the removal of the k-wire and the cast the applicant experienced ongoing symptomatology in his left wrist and left shoulder.

6. On or about 21 July 2017, the applicant returned to work on modified duties. The applicant explains in his statement[2] that owing to the nature of his employment his duties still involved constant use of the hands, lifting heavy items and manipulating tools.

7. The applicant explains in his statement that he was heavily reliant on his right hand as his left hand remained in a splint due to the unaddressed left wrist pain. The applicant explains that whilst his left wrist and hand were secured in a splint and a brace, his ability to move his left hand and fingers was significantly reduced. He had little grip strength in his left hand and felt constant pain and discomfort whenever he slightly moved his left wrist. The applicant therefore had particular difficulty lifting items that required two hands, such as big pieces of steel.

8. The applicant was required to still use cordless drills which he describes as powerful. He tried to avoid the drill due to his incapacitated left hand.

9. The applicant also used angle grinders and welders and says that if he refused to use these tools he would have been unable to perform any of his duties whatsoever. The applicant refrained from using his left hand to guide and support the tools and as a result he manoeuvred and controlled the tools exclusively with his right hand. The applicant describes this as being very difficult and he often felt as though he had less control over the tools whilst using only one hand.

10. The applicant was required to use an angle grinder which weighed approximately 2kg. When the tool switched on the applicant felt the centrifugal force in his right hand and wrist. When he turned the angle grinder on, the tool gave "a bit of a kick" which often caused a substantial jolt to the right hand when the grinder caught on to a piece of material.

[1] Page 1 of the Application
[2] Page 5 of the Application

11. When the applicant performed welding duties, he also had to carry the weight of a torch which was connected to a lead and weighed approximately 2-3kg. The applicant explains that the higher he held the torch, the heavier the weight of the lead as it lifted off the ground. When the applicant held the torch above his shoulder height for extended periods whilst his left wrist was incapacitated, he felt a growing ache and pain in his right shoulder.

12. On 23 October 2017, the applicant was using an angle grinder to clean a lid for a trailer in preparation for painting. He clearly explains in his statement that he operated the tool solely with his right hand and did not support the tool with his left due to "its incapacity". The disc of the grinder suddenly became caught on a piece of steel, ripping the grinder out of his right hand. The force twisted the right wrist around and bent his right thumb backwards. The applicant immediately felt excruciating pain shoot through his right thumb and wrist.

13. It is the applicant's belief that had his left hand not been completely incapacitated, he would have been able to support the tool with his left hand and reduced the chance of injury. That is, if he had been supporting the tool with both hands, he would have been more likely to be able to withstand the force of the tool when it caught on the piece of steel. Further, the applicant says as he was unable to use his left hand, he positioned himself in different ways than he usually would have had he been uninjured. He was unable to steady himself and had been regularly adjusting his stance and the way he used his tools.

14. Following this incident the applicant sought treatment in respect of his right hand and wrist which included surgery by way of a right wrist tendon reconstruction by Dr Yee.

15. The applicant now complains of significant symptomatology in both his left and right upper extremities arising from these two separate incidents.

ISSUE FOR DETERMINATION

16. The parties agree that the following issue remains in dispute:

    (a) Whether the impairment that flows from events on 5 April 2017 and 23 October 2017 can be aggregated.

PROCEDURE BEFORE THE COMMISSION

17. The parties attended an Arbitration on 10 July 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 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

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

    (a) Application to Resolve a Dispute and attached documents;

    (b) Reply to Application to Resolve a Dispute.

Oral Evidence

19. There was no application to adduce oral evidence.

MEDICAL EVIDENCE

20. Dr Lai provides evidence in support of the applicant's causation argument in his reports.[3] Dr Lai takes a history of injury as follows:[4]

> "While recovering from his left thumb surgery Mr Brown noted his left wrist extensor tendon on the dorsal ulna side subluxing causing him significant pain. He could not cope with the light duties and he could only use his right hand to carry out tasks singularly."

21. Dr Lai then comments:

> "As a result of the awkwardness of using only his right hand Mr Brown was involved in another injury to his right wrist."

22. The applicant submits that Dr Lai draws a requisite relationship between the injury that was occasioned to the right upper extremity to the left upper extremity and it was submitted that in terms of that evidence a finding would automatically follow.

23. Dr Quain has also prepared reports in this matter. In his report dated 16 January 2020, Dr Quain expresses the view that there were two separate incidents as the applicant stated that he may have had a splint on the left wrist at the time of the second incident, but that using a light angle grinder one- handed was not an uncommon practice.

24. I observe that the history Dr Quain has in regard to using the angle grinder one- handed as a common practice does not accord with the evidence provided in the applicant's statement.

APPLICABLE LEGISLATION

25. Section 322 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) provides:

> "(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines(as in force at the time the assessment is made) issued for that purpose.
>
> (2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker."

[3] Page 41 of the Application
[4] Page 43 of the Application

26. Sections 322(2) and (3) were considered in the *Department of Juvenile Justice v Edmed*[5] by Deputy Roche (at 26-27):

> "26. This definition is unhelpful in determining the issue before me. In Lyons, Judge Neilson held that "injury" refers to "both the [injurious] event and the pathology arising from it". I accept that definition as being appropriate for many purposes under the 1987 Act and the 1998 Act. That the term "injury" can have two different meanings is acknowledged in section 322(3) of the 1998 Act where reference is made to "Impairments that result from more than one injury arising out of the same incident..." (emphasis added). This reference to "injury" can only mean the 'pathology' that has resulted from the relevant work "incident" or injurious event. For example, if a worker falls and suffers a broken leg and separate and distinct nerve damage in the arm, he or she has suffered more than one "injury" (an injured leg and an injured arm) within the terms of section 322(3) resulting from the one "incident". In other words, he or she has suffered more than one pathology ("injury") as a result of the one incident or injurious event. Those "injuries" are to be assessed together. This interpretation is consistent with section 65(2) of the 1987 Act and is uncontroversial.
>
> 27. The difficulty arises when a worker suffers one pathology ("injury") as a result of several independent "incidents" or injurious events. This situation is partly addressed in section 322(2), which provides that "Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker" (emphasis added). The reference to "the same injury" in section 322(2) cannot be a reference to "the same incident" because that situation is dealt with in section 322(3). The expression "the same injury" is not defined but it follows that if "injury" in section 322(3) means 'pathology' (as it must), then, for the section to be logically consistent, it must mean the same in section 322(2). If "injury" in section 322(2) means 'pathology' then, for section 322(2) to be consistent with section 322(3), impairments resulting from the "same injury" (the same pathology) are to be "assessed together" regardless of whether they arise from the same "incident" or separate incidents."

27. Deputy President Roche found that reference to an injury can only mean pathology that has resulted from the relevant work incident or injurious event. That is, if a worker has suffered more than one pathology injury as a result of an incident or injurious event, those injuries can be assessed together. The respondent says the difficulty arises when a worker suffers one pathology injury as a result of several independent incidents or injurious events.

28. The Deputy President said that the reference to "the same injury" in s 322(2) cannot be a reference to the same incident because that situation is dealt with in s 322(3). That is, the expression "the same injury" is not defined but it follows that if "injury" in s 322(3) means pathology then the section to be logically consistent must mean the same in s 322(2). If an injury in s 322(2) means pathology then for s 322(2) to be consistent with s 322(3), impairments resulting from the same injury, meaning the same pathology, are to be assessed together regardless of whether they arise from the same incident or separate incidents.

29. The respondent submitted that what this means and in order for there to be a combination of assessments of impairment, there must be, either one injury in a sense of injurious event or the same pathology.

[5] [2008] NSWWCCPD 6 (*Edmed*)

30. Acting Deputy President Parker SC considered the assessment of whole person impairment when two injuries were received approximately a year apart, in *Le Twins Pty Ltd v Luo*.[6] The factual matrix of that case is very similar to the present one in that the applicant claimed to have injured his left shoulder due to protecting his right shoulder.

31. Arbitrator Homan had commented at paragraph 80 in her decision:

> "I am comfortably satisfied on the applicant's evidence and the contemporaneous medical evidence that at the time of the incident on 19 August 2016 the applicant's right shoulder remained symptomatic. I accept that the applicant had been actively protecting his right shoulder at work in the weeks and months leading up to the incident on 19 August 2016. I accept that it was the applicant's recollection and belief at the time of the incident that the injurious lift had been performed using his left hand specifically because he was protecting his right shoulder. I accept that the applicant was originally right hand dominant and accept, as a matter of common sense, that the applicant would be more likely than not to have performed the lift with his dominant hand or at least with both hands, had the right shoulder not been injured."

32. Arbitrator Homan therefore, after consideration of the facts of the case, was satisfied that the injury to the applicant's right shoulder on 18 August 2015 materially contributed to the incident on 19 August 2016 and the pathology it has caused. She was therefore satisfied that it was an unbroken causal chain and that the pathology in the applicant's left shoulder "resulted from" the injury on 18 August 2015.

33. Acting Deputy President Parker found that the proven facts did not support the inferences drawn by the Arbitrator in her reasons. That is, there was no evidence that the respondent worker would have been using his right arm for the lift or the lift would have been performed with his left hand irrespective of the right hand injury. Simply put, there was no proper basis to determine that choosing to lift with the left arm was compelled by the pre-existing injury to the right arm. Acting Deputy President Parker referred to Dixon CJ in *Jones v Dunkel*[7] where it was said:

> "The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied."

34. Acting Deputy President Parker moved on to re-determine the appeal from Arbitrator Homan and referred to s 322(2) which requires impairments that result from the same injury to be assessed together. It does not authorise impairments from different injuries to be assessed together.

35. Acting Deputy President Parker clearly states that whilst s 322(3) permits impairments for more than one injury to be assessed together, this is only permitted where the injuries arise out of the same incident. In the case before the Deputy President, the two impairments resulted from two separate and different incidents. In order for s 322 to be engaged, the Deputy President clearly articulates that the impairments need to result from the same injury (s 322(2)) and also arise from the same incident (s 322(3)).

---

[6] [2019] NSWWCCPD 52 (*Le Twins*)
[7] [1959] HCA 8

36. The respondent submits that in this case, unfortunately for the applicant, there is quite clearly an incident in April 2017 which meets the definition of injury together with a second injury in October 2017 that also meets the definition of injury. That must lead to a conclusion that there are two separate injuries in the sense of the injurious events as Deputy President Roche addressed in *Edmed.* It is quite clear as they are dealing with both different upper extremities, that neither has the same pathology. The effect of s 322 of 1998 Act means that these two impairments cannot be aggregated.

37. *Le Twins* was considered by Deputy President Wood in *Ozcan v Macarthur Disability Services Ltd*[8]. In that case there was a referral to an Approved Medical Specialist (AMS) with three separate dates of injury. The AMS was asked to apportion the whole person impairment between each injurious event. In respect of spinal injuries, Dr Berry (AMS) indicated that there was a total 12% WPI of which 4% was attributable to each injury. Therefore, there was a finding of a 4% impairment of the thoracic and lumbar spines with a date of injury of 14 November 2011, a further 4% with a date of injury of 3 May 2012 and a final 4% in respect of an event on 26 September 2012.

38. Deputy President Wood referred to the principles set out in *State Government Insurance Commission v Oakley*[9] in her determination. In that decision Mason P, with whom Meagher JA and Barr J agreed, stated that:

> "1. Where the further injury results from a subsequent accident, which would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by that negligence;
>
> 2. Where the further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the defendant's negligence; and
>
> 3. Where the further injury results from a subsequent accident which would have occurred had the plaintiff been in normal health and the damage sustained no element of aggravation of the earlier injury, the subsequent accident and further injury should be regarded as causally independent of the first."

39. The Deputy President considered the effect of aggregation[10] and said consideration must be given to the common law principles in respect of causation, but such consideration cannot be given without regard to the statutory context which is in s 322 of the 1998 Act in the following context:

> "I can see no reasons why Sec. 322 of the 1998 Act, which by the text itself invites a consideration of causation of the permanent impairment, should operate without a consideration of that necessary element. That is, if the appellant can establish the fact that the first injury materially contributed to the total impairment, then the total impairment is attributable to the injury on 14 November 2011. It is quite clear from Johnson No. 2 that the common law principles of causation and tort are to be applied in determining the impairment that "results from" the injury."

[8] [2020] NSWWCCPD 21 (*Ozcan*)
[9] [1990] 10 MVR 570 (*Oakley*)
[10] Para 112

40. Deputy President Wood considered *Edmed* in light of s 322(3) and s 322(2) and said the following[11]:

> "Following *Edmed*, the result is that section 322(2) allowed aggregation of impairments from different injurious events where they involved the same pathology and section 322(3) allowed aggregation where there were injuries to different body parts in the same event. I do not see any conflict between the generally expressed common law principles discussed above and the application of section 322(2) of the 1998 Act in the manner expressed by Roche DP in *Edmed*. In fact, an application of the common law principles to *Edmed* would arrive at the same result as that determined by Roche DP.
>
> 118. The Arbitrator's reasons for determination preceded both the decisions in Luo and Johnson No. 2. Nonetheless, for the reasons given in both those authorities, it follows that the Arbitrator erred by considering that the principles were not relevant to the assessment of permanent impairment. The Arbitrator erred by failing to apply the common law principles in the context of section 322 of the 1998 Act, as set out in Oakley in determining whether the appellant's impairments could be aggregated."

41. In this case it is quite clear that there is a causal link between the first injurious event and the second injurious event and the applicant's statement is quite clear in establishing that link together with the medical evidence. In making this finding I accept the applicant's description of how and more particularly why he was holding the angle grinder the way he was. That is had his left hand not been completely incapacitated, he would have been able to support the tool with his left hand and reduce the chance of injury, he would have been more likely to be able to withstand the force of the tool when it caught on the piece of steel. I make a finding accordingly.

42. In making this finding I take in to account the different history taken by Dr Quain that it was common practice to use the grinder one handed. I prefer the evidence from the applicant as to what happened on that particular day. The applicant is in the best position to describe his work practice as it happened. The applicant's explanation is also supported by Dr Lai on a medical basis.

43. I find that the applicant suffered an injury to his right upper extremity a consequence of the injury to the left hand. I find as a matter of fact that the first injury materially contributed to the total impairment

44. In this case I find that the impairment to the right upper extremity "results from" (in the common law sense) the first injury. That is the injury sustained on 23 October 2017 would not have occurred but for the first event on 5 April 2017.

45. *Le Twins*, though instructive, can be distinguished from this factual matrix as in this case there is clear evidence from the applicant, supported by medical evidence as to the mechanism of injury on 23 October 2017.

Injury to the Shoulders

46. In respect of the injury to the shoulders only very short submissions were made by the respondent in respect of the injury to the shoulders as there appears to be differing mechanisms of injury provided in the medical evidence.

47. The respondent does not challenge injury to the shoulders and agreed that the matter is appropriate for determination and assessment by an AMS.

[11] Para 117 and 118