

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4941/18  
**Applicant:** Min YU  
**Respondent:** Spotless Services Ltd  
**Date of Determination:** 30 November 2018  
**Citation:** [2018] NSWCC 299

The Commission determines:

1. There has been no refusal by the applicant to submit herself for examination by a “medical practitioner” pursuant to s 119(1) of the *Workplace Injury Management and Workers Compensation Act 1998*.
2. Any entitlement to recover compensation is not suspended pursuant to s 119(3) of *Workplace Injury Management and Workers Compensation Act 1998*.
3. The applicant is prevented by sub-rule 10.3 (2) of the Workers Compensation Commission Rules 2011 from relying on the reports of Ms Yee King, dated 1 May 2017 and 15 May 2018.

The Commission directs:

1. The matter is listed for further teleconference on Wednesday 5 December 2018 at 9am.

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

Rachel Homan  
**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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

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



## STATEMENT OF REASONS

### BACKGROUND

1. Ms Min Yu (the applicant), commenced employment as a catering assistant for Spotless Services Limited (the respondent), at St Catherine's Aged Care Services in Eastwood on 14 September 2014. The applicant claims that she sustained a psychological injury arising from bullying and harassment in the course of her employment with the respondent.
2. A threshold dispute has arisen in this case as to whether the applicant's right to recover compensation in respect of the claimed injury has been suspended pursuant to s 119(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) owing to a failure to submit herself for examination by a psychologist at the request of the respondent's insurer.
3. At a teleconference on 19 October 2018, the parties were directed to file written submissions on the issue and advised of my intention to determine the threshold dispute on the papers upon receipt of those submissions.

### EVIDENCE

#### Documentary evidence

4. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute (ARD) and attached documents;
  - (b) Reply and attached documents;
  - (c) Written submissions and annexures filed by the applicant on 2 November 2018, and
  - (d) Written submissions and annexures filed by the respondent on 2 November 2018.

#### Procedural history

5. On 12 March 2017, the applicant made a claim for workers compensation. Dispute notices pursuant to s 74 of the 1998 Act were issued on 12 April 2017 and 23 November 2017.
6. Proceedings were brought in the Commission in respect of the claimed injury on 1 December 2017 (6298/17). Those proceedings were discontinued at conciliation conference on 23 January 2018 by consent. The parties reached agreement that the respondent would make voluntary payments of weekly benefits for a fixed period until 29 November 2017 and pay the applicant's medical expenses on a "without admission of liability" basis.
7. On 14 June 2018, the applicant's solicitors forwarded a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The claim for lump sum compensation attached forensic reports of psychiatrist, Associate Professor Michael Robertson, dated 13 September 2017 and 22 May 2018, clinical records from Rowe St Medical Centre and various other materials. The clinical records referred to the applicant being treated by a psychologist. Associate Professor Robertson also referred to having reviewed reports by a psychologist, Ms Yee King, dated 1 May 2017 and 15 May 2018, in his second report.

8. On 28 June 2018, the respondent notified the applicant that it required further medical examination to properly respond to her claim. The respondent arranged for the applicant to be medically examined by Dr Paul Phillips, psychologist, on 24 August 2018 and Dr Ben Teoh, psychiatrist.
9. By email dated 28 June 2018, the applicant's solicitors requested an explanation as to why the respondent required both examinations. A reply was sent on 29 June 2018 and on the same date the applicant's solicitors notified the respondent that they would be advising their client not to attend examination with Dr Phillips.
10. On 5 July 2018, the respondent requested a copy of the letter of instruction to A/Prof Robertson, including copies of Ms King's reports dated 1 May 2017 and 15 May 2018. The respondent again requested the applicant attend examination with Dr Phillips as A/Prof Robertson had relied on the opinion of a psychologist in providing his report, which formed the basis of the applicant's claim.
11. By email dated 6 July 2018, the applicant provided the letter of instruction to A/Prof Robertson but not the reports of Ms King. The applicant attended an examination with Dr Teoh on 12 July 2018.
12. A further notice pursuant to s 74 of the 1998 Act was issued on 8 August 2018 disputing liability in reliance on ss 4, 9A, 11A(1), 11A(3) and 66 of the 1987 Act.
13. The current proceedings were commenced by ARD, filed on 21 September 2018, seeking ongoing weekly benefits from 30 November 2017, medical expenses and lump sum compensation.
14. In the respondent's Reply, filed on 15 October 2018, it was alleged that the applicant's entitlement to recover compensation was suspended pursuant to s 119(3) of the 1998 Act owing to her refusal to submit herself for assessment by a psychologist at the respondent's request on 28 June 2018.
15. The reports of Ms King were first served on the respondent with the ARD.

### **The respondent's submissions**

16. The respondent submitted the applicant had unreasonably refused to attend assessment in accordance with s 119 of the 1998 Act and sought an order that the applicant's right to recover compensation was suspended until she attended examination by a psychologist provided and paid for by the respondent. The respondent submitted that if that order was made, the present proceedings could not be maintained and were a nullity and should be struck out pursuant to Pt 1.6(4) of the Workers Compensation Commission Rules 2011.
17. In the alternative, the respondent sought an order that the reports of psychologist, Ms Yee King, attached to the ARD, were not admitted into the proceedings and that the applicant was prevented from relying on them.
18. The respondent submitted that it had complied with the relevant Guidelines, including the *WorkCover Guidelines on Independent Medical Examinations and Reports* in requesting the examination with Dr Phillips insofar as:
  - (a) Dr Phillips was an independent assessor and a specialist medical practitioner with qualifications relevant to the treatment of the injured worker's injury, which was psychological in nature;

- (b) Dr Phillips was appropriately qualified as a psychologist registered with the Australian Health Professionals Registration Agency;
  - (c) Dr Phillips' opinion was to be obtained for the purposes of providing information to assist with the applicant's workers compensation injury;
  - (d) The reports from the treating psychologist Ms King were not available at the time examination was arranged;
  - (e) The applicant was provided with adequate notice of the referral to a psychologist. The nature of the examination and reasons why the examination was required were provided to her on 29 June 2018, and
  - (f) The respondent took account of the applicant's objection to the examination and advised the applicant on 5 July 2018 of its decision following consideration of the objection.
19. The respondent referred to the authorities in *Kurnell Passenger & Transport Service Pty Limited v Randwick City Council*<sup>1</sup> and *Randwick City Council v Kurnell Passenger & Transport Service Pty Ltd*<sup>2</sup> with regard to the proper interpretation of s 119 of the 1998 Act.
  20. The respondent submitted that it was irrelevant that the respondent had previously declined liability for the applicant's claim or that the applicant was not in receipt of weekly compensation. The applicant's claim remained unresolved and therefore, the respondent submitted there was a valid entitlement to request that the applicant undergo psychological examination. The applicant had, in any event, advanced a new claim for lump sum compensation referring to treatment by a psychologist, the reports of which were not supplied despite request.
  21. The respondent submitted that "reasonableness" was not a qualifying requirement of s 119 but in any event disputed that its request was not reasonable. The respondent denied that the examination was invasive or intrusive in circumstances where the applicant was already consulting a psychologist, referring to *Kavanagh v Sutherland Shire Council & Another*<sup>3</sup>.
  22. The respondent submitted that the clinical records served in support of the present claim contained reference to Kessler Psychological Distress Scale (K-10) psychometric testing and Ms King's reports also made reference to the "clinical data collected". That data had not been served. The purpose of Dr Phillips' examination was to obtain data by examination and psychometric testing.
  23. The respondent submitted that Dr Phillips' speciality as a clinical psychologist was distinct from Dr Teoh's as a psychiatrist. The applicant had received treatment from medical practitioners of both specialties. In the circumstances, the respondent was entitled to rely on multiple forensic reports from doctors with those specialisations. The respondent submitted that Dr Phillips administered psychometric testing including but not limited to, the MMPI-2 and PAI, which are different methods of assessment and address different issues to the independent medical examination with Dr Teoh.
  24. The respondent submitted that the applicant had not provided any evidence that she was unable to attend examination or provided reasons to suggest her objection was a reasonable one.

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<sup>1</sup> [2009] NSWCA 59.

<sup>2</sup> [2008] NSWSC 296.

<sup>3</sup> (2000) 21 NSWCCR 1.

25. The respondent submitted generally that it faced significant prejudice by the manner in which the proceedings were brought. The respondent said it had been hampered from properly pleading its defence without the benefit of a report responding to Ms King's opinion or the testing she administered to the applicant during treatment. The respondent submitted that it would be contrary to objectives of the Commission to allow the applicant to:
- (a) Fail to provide copies of reports from the treating psychologist, which she had provided to her own IME psychiatrist for review;
  - (b) Refuse to attend an examination arranged by the respondent with a psychologist, arranged in response to the fact she had obtained psychological treatment, but
  - (c) To then allow her to rely on reports from the treating psychologist, despite her prior failure to provide copies when requested to do so.

### **The applicant's submissions**

26. The applicant submitted that the request for examination by both Dr Phillips and Dr Teoh was made on the 14<sup>th</sup> day following service of the claim. The respondent's response to the applicant's query regarding the basis for arranging two medical appointments relied on cl 44 of the Workers Compensation Regulation 2016. The applicant submitted that cl 44 related to the admissibility of evidence, not whether a worker may be required to submit to examination.
27. The applicant submitted that the compulsive power in s 119 was not unfettered and that s 119(4) required compliance with the Guidelines. Page 5 of the relevant Guidelines referred to an applicant being referred for an independent medical assessment (in the singular) if there was an assessment of permanent impairment equal to or greater than 10% whole person impairment. There was no reference in the Guidelines to arranging multiple assessments.
28. The applicant submitted that the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (4th edition)* were also relevant and provided that evaluation of psychiatric impairment was to be conducted by a psychiatrist who has undergone appropriate training. A qualified psychiatrist was permitted to draw upon a range of evidence to inform the diagnosis, including psychometric testing. The applicant submitted that this guideline did not mandate psychometric testing as a necessary prerequisite for giving a diagnosis.
29. The applicant submitted that Dr Teoh made an assessment in accordance with the Guidelines in the absence of testing. Dr Teoh did not consider that testing would help him diagnose the applicant.
30. The applicant submitted that she did not seek to rely on any psychometric testing or results.
31. The applicant submitted that she had satisfied s 119 by submitting to examination by Dr Teoh and should be permitted now to advance her case.
32. To the extent that I as arbitrator had any discretion in the matter, the applicant submitted that a balancing of the rights of the parties weighed in favour of the right of any injured worker to resist unnecessary and intrusive medical examination in circumstances that may aggravate or worsen her condition. The applicant referred in this regard to a decision of Arbitrator Harris in *De Vries v Bega Valley Shire Council* [2018] NSW WCCPD 22.

## FINDINGS AND REASONS

33. Section 119 of the 1998 Act provides as follows:

### **“119 Medical examination of workers at direction of employer**

- (1) A worker who has given notice of an injury must, if so required by the employer, submit himself or herself for examination by a medical practitioner, provided and paid by the employer.
- (2) A worker receiving weekly payments of compensation under this Act must, if so required by the employer, from time to time submit himself or herself for examination by a medical practitioner, provided and paid by the employer.
- (3) If a worker refuses to submit himself or herself for any examination under this section or in any way obstructs the examination:
  - (a) the worker's right to recover compensation under this Act with respect to the injury, or
  - (b) the worker's right to the weekly payments,is suspended until the examination has taken place.
- (4) A worker must not be required to submit himself or herself for examination by a medical practitioner under this section otherwise than in accordance with the Workers Compensation Guidelines or at more frequent intervals than may be prescribed by the Workers Compensation Guidelines.”

34. The obligation imposed upon a worker by s 119(1) of the 1998 Act is to submit herself for examination by a “medical practitioner”, provided and paid by the employer.

35. The term “medical practitioner” is not defined in the 1998 Act. It was previously defined in s 59 of the 1987 Act but that definition has been repealed.

36. In *Godfrey v Wollongong Women's Information Service Inc*<sup>4</sup> (1999) 19 NSWCCR 74, the respondent arranged for the worker to be assessed by both a psychiatrist and a psychologist. The worker objected on the grounds that a psychologist was not a “medical practitioner”. The Court in that case drew a distinction between the regimes governing the medical examination of workers where a matter was before the Compensation Court and workers subject to s 119 of the 1998 Act. The Court noted that the former regime employed the term “medical expert”, which was found to be broader than the term “medical practitioner” and included other experts such as psychologists.<sup>5</sup> The Court found that the right the respondent had to require the worker in that case to be examined pursuant to s 119 did not include examination by a psychologist as she was not a “medical practitioner”.<sup>6</sup>

37. The legislation governing the registration of health practitioners in New South Wales is the *Health Practitioner Regulation National Law*. That statute draws a distinction between practitioners in the “medical” profession and other health professions including “psychology”.<sup>7</sup> The title “medical practitioner” is a protected title for use only by persons registered under that Law in the “medical profession”.<sup>8</sup>

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<sup>4</sup> (1999) 19 NSWCCR 74.

<sup>5</sup> At [18].

<sup>6</sup> At [19].

<sup>7</sup> Section 5 *Health Practitioner Regulation National Law*.

<sup>8</sup> Section 113 *Health Practitioner Regulation National Law*.

38. In my view, the term “medical practitioner” as it is used in s 119 (and elsewhere in the statutory regime including s 282 of the 1998 Act and cl 44 of the Workers Compensation Regulation 2016), should be interpreted consistently with the *Health Practitioner Regulation National Law* and does not include a “psychologist”, that is, a person registered in the “psychology profession”.
39. It follows, that s 119(1) could not be used by the respondent to compel the applicant to submit herself to examination by a psychologist. Accordingly, there is no failure by the applicant to submit herself for examination for the purposes of s 119(3) and no suspension of the applicant’s right to recover compensation. I decline to make the order sought by the respondent pursuant to s 119(3).
40. The respondent makes an alternative submission that the reports of psychologist, Ms Yee King, attached to the ARD, should not be admitted into the proceedings. I accept the respondent’s argument that the applicant has unfairly prejudiced the respondent by the withholding of those reports despite an explicit request for them on 5 July 2018. The reports were relevant to the consideration of the claim as they were from the applicant’s treating psychologist and were reviewed by the applicant’s independent medical expert and therefore could be considered to have formed part of the basis for his opinion.
41. Sub-rule 10.3 (2) of the Workers Compensation Commission Rules 2011 (the Rules) provides that a party may not introduce evidence that has not been provided to any party as required by the 1998 Act or and Regulation or Workers Compensation Guideline made under that Act. Amongst other things, s 282(1) of the 1998 Act requires a worker to give to the insurer full details of the injury received sufficient to enable the insurer to make a proper assessment of the worker’s entitlement. The insurer had in this case made it clear that it considered the two reports of Ms King to be relevant to its proper assessment of the claim. Those reports were within the applicant’s possession, having been provided to A/Prof Robertson.
42. In my view, the applicant was obliged to provide the respondent with the reports of Ms King. Her failure to do so, prevents her from now introducing that evidence in these proceedings in accordance with sub-rule 10.3(2). The failure also raises questions over the admissibility of the second report of A/Prof Robertson in which he relies on Ms King’s reports.
43. Sub-rule 10.3 (4) gives the Commission discretion to allow the introduction of evidence that the party would otherwise be prevented from introducing because of the operation of sub-rule 2, if it is satisfied that to do so would be in the interests of justice. In this case, the admission of the reports of Dr King would necessitate a delay in the proceedings to enable the respondent to deal with them by way of putting them to Dr Teoh for comment or otherwise. The exercise of this discretion is not, however, a matter on which the parties have had an opportunity to be heard. The matter will therefore be listed for further teleconference.

## SUMMARY

44. There has been no refusal by the applicant to submit herself for examination by a ‘medical practitioner’ pursuant to s 119(1) of the 1998 Act.
45. Any entitlement to recover compensation is not suspended pursuant to s 119(3) of the 1998 Act.
46. The applicant is prevented by sub-rule 10.3 (2) of the Workers Compensation Commission Rules 2011 from relying on the reports of Ms Yee King, dated 1 May 2017 and 15 May 2018.

