

## RECENT DECISIONS

# No Evidence of Injury – No Problem

*Palise v Australian and New Zealand Banking Group Limited* [2018] NSWCCPD 13

[Link to decision](#)

### Summary

The worker challenged an Arbitrator's factual finding that she did not sustain a neck injury. The determination of the appeal focussed upon whether the Arbitrator had failed to properly consider the worker's own evidence and contemporaneous medical evidence in respect of her neck complaints.

### Background

The worker was employed by the Bank as a part-time personal banker. On 10 June 2014, the worker slipped at work and fell over landing heavily on her left side. She claimed to have suffered injuries to her left hand, left shoulder, knee, hip and neck and was certified unfit for three days before returning to restricted duties.

The insurer accepted liability for weekly payments and medical expenses in respect of soft tissue injury to the left knee and lower back, aggravation of the left shoulder, acromioclavicular joint arthritis, left middle/index finger and left ulnar nerve neuritis at the elbow.

The worker underwent a left carpal tunnel release in March 2015 (liability declined) followed by surgery in August 2015 for left arthroscopic decompression, rotator cuff repair, bicep procedure and excision of the AC joint (liability for which was accepted by the insurer).

In December 2016, the worker made a claim for lump sum compensation under section 66 in respect of the injury on 10 June 2014 that was declined by the insurer. However, the insurer accepted that she had a 5% WPI in respect of the left upper extremity.

The worker then filed an Application to Resolve a Dispute (ARD) in the Workers Compensation Commission claiming lump sum compensation in respect of the injury to her neck, left shoulder and left wrist.

### At first instance

The matter proceeded to a conciliation/arbitration hearing before an Arbitrator who found in favour of the respondent in respect of the neck injury. He held that the worker had failed to discharge the onus of proving that she had injured her neck. As the combined impairment for the left shoulder and wrist did not meet the section 66 threshold of greater than 10% WPI, the Arbitrator declined to refer the matter to an AMS for assessment.

### On appeal

The worker appealed from the Arbitrator's decision and the matter was determined by President Judge Keating 'on the papers'. He upheld the appeal, finding that the worker had injured her neck and remitted the matter to an AMS to determine the degree of impairment for the left shoulder, left wrist and cervical spine.

In coming to his decision, President Keating closely examined all of the evidence. He noted that the Arbitrator had highlighted the absence of any contemporaneous report of a neck injury in the medical certificates issued from November 2014 to April 2015, the GP's clinical notes or in the medical histories obtained by medical specialists who had examined the worker.

The Arbitrator had also observed that the fact that the worker was referred for imaging of her cervical spine in July 2014 and May 2016 did not necessarily confirm (or even infer) an injury but was to exclude the possibility of nerve root impingement.

President Keating, however, accepted the worker's submissions that the arbitrator had failed to provide sufficient reasons for rejecting (or impliedly rejecting) her evidentiary statement and had failed to accept the medical evidence in support of her neck injury.

President Keating determined that the worker's evidence was 'crucial' to the issue as to whether she had suffered an injury to the neck and '...the arbitrator's failure to deal with the worker's evidence in any satisfactory way was an error in the fact-finding process'. In this regard, he referred to the High Court decision in *Waterways Authority v Fitzgibbon* [2005] HCA 57 as to the importance of the sufficiency of reasons given by a primary judge.

The worker submitted that the Arbitrator had failed to grapple with the brevity of the clinical notes of the treating GP and that an inference drawn that a record of increasing neck pain recorded on 31 July 2014 was not indicative of previous complaints of neck pain, was not available on the evidence.

President Keating noted that the worker had given sworn evidence of an injury to her neck on 10 June 2014 and persisting stiffness associated with some dizziness and headaches. He found that her evidence was consistent with the evidence as a whole and there was no persuasive evidence to the contrary. 'She appeared to be a stoic individual returning to work within a short period of time after the injury, notwithstanding the serious nature of her injuries. I accept her evidence'.

President Keating stressed that care should be exercised when relying upon clinical note extracts and referred to the Court of Appeal decision in *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 which cautioned that apparent inconsistencies in such evidence should be carefully considered by having regard to the following:

- (a) The health professional who took the history had not been cross-examined about:
  - (i) the circumstance of the consultation,
  - (ii) the manner in which the history was obtained,
  - (iii) the period of time devoted to that exercise,
  - (iv) the accuracy of the recording,
- (b) The fact that the history was probably taken in furtherance of a purpose which differed from the 'forensic exercise'...
- (c) The record did not identify any question which may have elucidated replies,
- (d) The record is likely a summary rather than a verbatim recording,
- (e) A range of factors may have influenced the record, e.g. fluency of English, the doctor's knowledge of the background circumstances, the patient's understanding of the purpose of the questioning, etc.

President Keating proceeded to find in favour of the worker. He said that while the absence of any contemporaneous clinical records of a neck injury during the initial GP visits was a '...relevant and important matter, as the appellant submits, it was not determinative'. He found that the evidence as a whole overwhelmingly supported a conclusion of a neck injury and went '...well beyond conflicting inference of equal degrees of probability'.

### Implications

This decision highlights that '...the lack of a contemporaneous record of neck injury is not determinative' and the evidence must be evaluated in its entirety.

The decision also provides a caution against insurers and claims managers relying upon extracts of clinical notes in isolation.

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