

RECENT DECISIONS

Clinical records destroy claim for primary psychological injury

Qannadian v Bartter Enterprises Pty Limited [2016] NSWCCPD 50 (18 October 2016)

[Link to decision](#)

Summary

The decision in *Qannadian* demonstrates the importance and the use of clinical records in the fact finding process.

The acceptance and use of the clinical records was assisted by the fact that the clinical records were extensive and comprehensive while the Arbitrator exercised caution in the application of the records to his decision. Additionally, specific reasons were provided for the Arbitrator's decision and reliance upon the records.

An Arbitrator may form a view about the credit of a witness, as long as the parties have been provided a reasonable opportunity to make submissions on the issue, without the need of oral evidence or cross examination.

DP Snell agreed with DP Roche in *Romanous Constructions Pty Ltd v Arsenovic* [2009] NSWCCPD 82 that '[w]hether a worker has sustained a primary psychological injury depends on an assessment of all the evidence, lay and expert, in the particular case.' DP Snell accepted the respondent's submission that '[t]he Arbitrator explained his reasoning process, gave all material facts appropriate weight, and constructed inferences based on legitimate evidence and reasoning.'

Background

Mr Qannadian (the appellant) was employed by the insured as a forklift driver, picker and packer. On 8 November 2011, his left foot and ankle were crushed between two forklifts. He subsequently underwent two separate foot fusions.

On 24 February 2016, the appellant filed an Application to Resolve a Dispute (ARD), in which he claimed lump sum compensation for 17% whole person impairment in respect of an alleged primary psychological injury. The appellant relied upon the report of Dr Robertson, psychiatrist, in which he diagnosed Post-Traumatic Stress Disorder (PTSD), as a result of the forklift accident on 8 November 2011. The appellant also provided a statement in which he stated that he became depressed and experienced nightmares and flashbacks immediately following the accident.

The respondent filed a reply to the ARD, disputing liability for the primary psychological injury, and lump sum compensation. It relied on the report of Dr Vickery, psychiatrist, who formed the opinion that the appellant did not sustain a primary or secondary psychological injury as a result of the incident on 8 November 2011.

Arbitrator's Decision

The Certificate of Determination dated 26 May 2016 provided an award for the respondent in respect of the claim of primary psychological injury.

The Arbitrator stated that the extensive clinical notes made no reference to the appellant experiencing

nightmares, flashbacks, startle response or hypervigilance (symptoms of PTSD). He stated that 'a more likely explanation for those doctors not recording those references is because the applicant did not mention such matters to them', and that 'the most likely explanation for the applicant not raising such factors was not because he wasn't asked, but because he was not experiencing such symptoms or concerns when seen by his treating practitioners.'

The Arbitrator stated that the treating practitioners appeared to have related the appellant's psychological symptoms to consequential or secondary effects of the physical injury.

As a result, the Arbitrator rejected the appellant's evidence that he suffered symptoms of PTSD immediately following the accident.

The Arbitrator further noted that Dr Robertson was not provided copies of the extensive clinical record, and that the history Dr Robertson relied upon was 'substantially incorrect and incomplete'. The Arbitrator rejected the appellant's claim of a primary psychological injury, to the extent the opinion of Dr Robertson was relied upon in making the argument.

The appellant appealed the Arbitrator's decision.

Appeal Decision

DP Snell provided a decision on the papers and addressed the three grounds of appeal raised by the appellant. He found that the Arbitrator had followed all the correct tests in coming to the conclusion that the appellant did not sustain a primary psychological injury.

Implications

- Medical reports must be carefully reviewed to ascertain whether the conclusion reached was based on the correct history. Should it be found that the report was based on an incorrect history, an Arbitrator may reject the findings of the report. It follows that if there is evidence to suggest that a report was based on an incorrect history, it can be argued that the medical

report should be rejected. In order to argue the same, one must have evidence to prove that the history is incorrect.

- Extensive and detailed clinical records may be used to argue existence/non-existence of certain symptoms, in circumstances where there is a discrepancy between what was recorded in the clinical records and what is being alleged by the worker.
- During proceedings in the Commission, one is not precluded from relying upon clinical records in the absence of evidence from the author of the clinical notes. However, clinical records must be used with caution, including having regard to the circumstances in which the notes were made.
- An Arbitrator is able to form a view about the credit of a witness, even if that witness has not given oral evidence or been cross-examined.
- The issue of diagnosis cannot be the subject of 'determination' by an AMS.

For more information, please contact:



Mary Karekos

Partner

T: 02 8257 5731

M: 0419 281 720

mary.karekos@turkslegal.com.au



Irene Youn

Lawyer