

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6732/19
Applicant: RUSSELL MARTIN KROG
Respondent: McCULLOCH BULK HAULAGE PTY LTD
Date of Determination: 27 MARCH 2020
Citation: [2020] NSWCC 95

The Commission determines:

1. Award for the respondent in respect of the applicant's allegations of cervical spine injury and/or consequential cervical spine condition.
2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) orthopaedic surgeon and an AMS specialist cardiologist to determine the extent of the applicant's whole person impairment, if any, which results from injury to the applicant's lumbar spine and consequential cardiac condition deemed to have occurred on 13 May 2019 being the date of the applicant's claim in accordance with section 16 of the Workers Compensation Act 1987, as amended (1987 Act).
3. The Registrar is requested to place before the AMS(s) a copy of the Application to Resolve a Dispute registered 20 December 2019 and attachments (Application), a copy of the Reply registered 28 January 2020 and attachments (Reply), a copy of the Application to Admit Late Documents filed 31 January 2020 and attachments (AALD), a copy of the applicant's second Statement dated 10 March 2020 (the subject of the next Direction) (second statement) and a copy of these Reasons for Decision.
4. The applicant's solicitor is directed to file within 14 days an Application to Admit Late Documents attaching the second statement.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Russell Martin Krog (the applicant) was employed by McCulloch Bulk Haulage Pty limited (the respondent) as a truck driver. He suffered an injury to his lumbar spine in the course of his employment for which he ultimately underwent L4/5 surgery.
2. The applicant as a consequence of his back injury suffered a consequential cardiac condition. Neither the cardiac condition nor the lumbar spine injury are in issue.
3. Relying upon an opinion of Dr A G Hopcroft, the applicant claims that he has also suffered an aggravation, acceleration, exacerbation or deterioration (aggravation) of underlying degenerative changes in his cervical spine. That opinion suggests that each of the following three matters have equally contributed to cause this aggravation: -
 - (a) during the lumbar spine surgery, the applicant being moved from a supine position then into a prone position;
 - (b) the "nature and conditions" of the applicant's work as a truckdriver up until 24 August 2015 (when the applicant last worked), and
 - (c) the applicant's post lumbar spine surgery treatment program.
4. The applicant seeks compensation only pursuant to section 66 of the *Workers Compensation Act 1987* (1987 Act) as amended. He seeks a referral to an Approved Medical Specialist (AMS) for determination of the applicant's whole person impairment in respect of injury to the applicant' lumbar spine and cervical spine as well as consequential condition in the nature of cardiac condition with deemed date of injury 13 May 2019 (date of claim) or alternatively 24 August 2015 (last day worked).

ISSUES FOR DETERMINATION

5. The parties agree that the applicant's section 66 entitlement should be assessed by an AMS. What is not agreed is the terms of the referral and whether there was any injury and/or consequential condition in respect of the applicant's cervical spine.

PROCEDURE BEFORE THE COMMISSION

6. The matter came for conciliation and arbitration hearing in Tamworth on 12 March 2020. Mr S Hickey of Counsel instructed by Ms E Campbell Solicitor appeared for and with the applicant. Mr P Barnes of Counsel appeared for the respondent.
7. I am satisfied that the parties to the dispute had ample opportunity to resolve their differences but were unable to achieve settlement. I have used my best endeavours to encourage resolution, however, resolution was not possible and the matter therefore proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application;
 - (b) Reply,

- (c) AALD, and
- (d) the second statement.

Oral evidence

- 9. No oral evidence was given.

SUBMISSIONS

- 10. It is unnecessary to summarise in detail the oral submissions provided in this matter as a sound recording is available.

FINDINGS AND REASONS

- 11. The applicant relies upon an MRI scan of 21 December 2017 (MRI scan) and two reports of Dr AG Hopcroft in support of his claim of injury to the cervical spine. Dr Hopcroft in his report of 5 December 2018 makes reference to the fact that the MRI was to the applicant's entire spine (that is to say, including the cervical spine) and revealed extensive degenerative changes of the cervical spine together with multi-level foraminal narrowing, particularly at C3/4.
- 12. The MRI scan does not concentrate solely upon C3/4 but it also deals with foraminal narrowing at other cervical levels.
- 13. The foundation for Dr Hopcroft's opinion is his report well after surgery on 11 December 2019. That report dealt with significant pathology at L4/5 but also expressed the view that the applicant's cervical pathology had been accelerated by driving trucks and was also aggravated during the surgery to his back (requiring him to be moved from a supine to a prone position during surgery). Dr Hopcroft also added in as causative factors the nature and conditions of the applicant's employment and his post-surgery treatment program. I take it to mean that Dr Hopcroft was of the opinion that active physical interventions (moving the applicant during surgery and active rehabilitation after surgery) were causative factors in terms of the applicant's cervical spine condition.
- 14. One difficulty with Dr Hopcroft's approach is that he does not offer any opinion as to the length of time the L4/5 surgery would have taken. There is no evidence of the precise movements during lumbar spine surgery or rehabilitation treatment to which the applicant was exposed. Dr Hopcroft may well have knowledge of stresses and strains associated with both treatments, but there is no specific explanatory evidence offered to explain his conclusions. It is, accordingly, not permissible for this Commission to take judicial notice of these facts, in the absence of evidence to support the foundation for accepted facts.
- 15. To that extent, Dr Hopcroft's theory concerning injury to the neck during back surgery is highly speculative. There is no contemporaneous complaint in the immediate post-surgery period of any cervical spine symptoms. Although the applicant claims¹ that since 2011 he experienced pain and symptoms in his neck, there is no complaint at all to his general practitioner, nor to any of the specialists whom he saw regarding his back. Additionally, the claim form lodged by the applicant refers to only lower back pain and leg pain. When seen by Dr Diebold² the applicant could not relate his neck pain to any particular activity.

¹ Applicant's first statement 19 December 2019 at [24].

² Dr Diebold report 30 January 2019 .

16. When seen by Dr Hopcroft on 15 December 2016, it is clear that Dr Hopcroft only dealt with the applicant's lumbar spine. This is some 16 months after the applicant last worked for the respondent. It would seem from Dr Hopcroft's second report³ that there was a history of deep venous thrombosis in the applicant's right upper extremity after surgery. But on examination, there was no examination of the applicant's cervical spine.
17. The reports of Dr Siu, the applicant's treating specialist, span the period 20 June 2016 to 13 April 2018. The applicant had of course ceased work in August 2015 but through the period of Dr Siu's reports there is no reference in any report to the applicant making any complaint about his neck (cervical spine).
18. The applicant's second statement dated 10 March 2020 was admitted into evidence without objection. The applicant says:
 - “4. I reiterate I did have neck and back injuries prior to 2015. McCulloch's was well aware of my back injury. I would have substitute drivers for when my back was too painful to continue driving...”.
19. It is of some significance that the applicant states that “McCulloch's was well aware” of his back injury, yet does not assert any such employer awareness of his neck injury. In those circumstances, the inference must be drawn that the applicant did not tell his employer that he had any problem with his neck. The applicant could have, of course, requested production of his employment personnel file, medical certificates, sickness certificates and the like to attempt to discover at least some reference to neck pain in the course of his employment with the respondent before he ceased work. No such attempt appears to have been made.
20. Dr Hopcroft's reference to post-surgery rehabilitation playing a part in the applicant's neck condition is also speculative. There is no evidence about what that rehabilitation involved, how long it occurred for and how it could in any way have resulted in injury or consequential condition to the applicant's cervical spine. The statement of the involvement of rehabilitation and the statement concerning the contribution of the lumbar spine operation procedure are both, in my view, bare ipse dixit.
21. In terms of the clinical notes of the general practitioner, there would appear to be one entry concerning neck pain. This is an entry dated 18 February 2005, some months before the applicant commenced employment with the respondent. It assists neither party in any major sense, however, does record that the applicant at one time had neck pain. Nothing more can be inferred from that proposition, in my view.
22. In Dr Coroneos' report of 4 August 2016 Dr Coroneos notes the applicant's neck circumference but records “no neck pain”. Dr Diebold only examined the applicant's cervical spine in a cursory way and simply records in his report of 30 January 2019 that the MRI scan⁴ reported extensive degenerative changes in the cervical spine. In other words, there is no attempt to rely upon the specifics of the MRI report to support Dr Diebold's diagnosis of chronic pain secondary to diffuse degenerative changes.
23. I would finally add that although the applicant in his first statement claims that his physiotherapist⁵ worked on his neck pain also following his lumbar surgery of 27 April 2017, the actual notes of the physiotherapist, although very extensive, do not particularise that treatment nor record any complaint of neck pain⁶.

³ Dr Hopcroft report 5 December 2018.

⁴ MRI report 21 December 2017.

⁵ Applicant's first statement [33].

⁶ Clinical Notes Mr M Van der Graaf.

24. In the circumstances, I am not satisfied that there is sufficient evidence that the applicant suffered any injury to his neck nor any consequential condition to his neck in the matter as pleaded. There will accordingly be an award for the respondent in respect of the allegation of neck injury.
25. It is appropriate in my view that the deemed date of injury for the purposes of section 16 of the 1987 Act (for the compensable conditions) is 13 May 2019 and I note that the parties have not provided submissions to the contrary.

ORDERS

26. Award for the respondent in respect of the applicant's allegations of cervical spine injury and/or consequential cervical spine condition.
27. The matter is remitted to the Registrar for referral to an AMS orthopaedic surgeon and an AMS specialist cardiologist to determine the extent of the applicant's whole person impairment, if any, which results from injury to the applicant's lumbar spine and consequential cardiac condition respectively deemed to have occurred on 13 May 2019 being the date of the applicant's claim in accordance with section 16 of the 1987 Act.
28. The Registrar is requested to place before the AMS(s) a copy of the Application, a copy of the Reply, a copy of the AALD, a copy of the applicant's second Statement and a copy of these Reasons for Decision.
29. The applicant's solicitor is directed to file within 14 days an Application to Admit Late Documents attaching the second statement.