

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 561/20  
**Applicant:** Zhen Wang  
**Respondent:** Wiretainers Pty Ltd  
**Date of Determination:** 28 May 2020  
**Citation:** [2020] NSWCC 180

The Commission determines:

1. The nature and conditions of employment with the respondent was the main contributing factor to the aggravation of a condition or an underlying disease in the applicant's lumbar spine pursuant to s 4 of the *Workers Compensation Act 1987*.
2. The claim in respect of the lumbar spine is remitted to the Registrar to be referred to an Approved Medical Specialist (AMS) for assessment. The date of injury is 27 November 2014. The Application, Reply and late documents are to be provided to the AMS.
3. Award for the respondent in respect of the claim of injury to the thoracic spine.

By Consent

- (a) The claim in respect of injury to the cervical spine, cervical spine myelopathy and associated neurological disturbance is to be referred to the Registrar to be remitted to an AMS for whole person impairment assessment. The date of injury is 27 November 2014. The Application, Reply and late documents are to be provided to the AMS.

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.

*A Reynolds*

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. In 1992, Mr Wang (the applicant) commenced working for Dynamic Wire Pty Ltd, which later merged and became Wiretainers Pty Ltd (the named respondent). The applicant had no difficulties or physical limitations when he commenced employment, save for a previous injury to his index finger on his right hand.
2. The applicant says that his work duties with the respondent were physically demanding and included repetitive lifting, spot welding and picking products off the ground and packaging them into containers and pallets. He also frequently used machinery such as trimming machines.
3. The applicant explains in his statement<sup>1</sup> that in executing his duties he was required to work in bent and awkward positions for long periods of time. This meant that he acquired a stooped posture with a bent neck to operate machines and he would often be in this position for hours and even days at a time.
4. The respondent has not put the applicant's duties, or his description of them, in issue.
5. Over time the applicant started to experience pain and stiffness in his neck and back. He first noticed back pain around 11 May 2007 and says that he told his production manager that his fingers felt numb and both hands and legs felt weak. The applicant saw his general practitioner who then referred him to physiotherapy.
6. The applicant continued to work with the same heavy nature of duties and his pain progressively worsened over the years.
7. In November and December 2014 the applicant explained that there was a considerable busy period which required an increase in spot welding and trimming jobs. The applicant in performing these duties was required to bend considerably due to the low placement of the machines and materials. He felt an increase of pain in the neck, shoulders, back, arms and legs and also experienced a sense of "clumsiness" whilst walking.
8. The applicant says that in late November 2014 the pain was then becoming unbearable and he then took his first leave from work due to pain on or about 17 November 2014.
9. The applicant's general practitioner, Dr Anish Ahmed certified the applicant as fit to work four hours per day five days per week.
10. The applicant then consulted with Dr Ming Lau, (GP) and underwent medical imaging on 4 December 2014.
11. Dr Ali (GP) referred the applicant to see neurologist Dr William Huynh who diagnosed the applicant as having carpal tunnel syndrome. After further consultation with other specialists including Dr Kohan and Dr Pope, there was a new agreed diagnosis that the hand symptomatology was caused by a cervical spine injury. The respondent has accepted the cervical spine injury in this case, it is not in dispute.
12. The applicant completed a WorkCover claim form on 23 January 2015. In respect of the claim of injury sustained, the applicant says that his cervical vertebrae and lumbar vertebrae had been affected by working in the factory.

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<sup>1</sup> Annexed to the Application at page 6 dated 3 September 2018.

13. The applicant continued to work however due to constant flare-ups of pain he ceased work in April 2015. Since that time the applicant has seen many specialists including Dr Ali Ghahreman and Dr Kohan. Dr Kohan recommended cervical surgery.
14. In 2015, the applicant then changed general practitioners as Dr Ahmed was no longer working at the same practice and began to consult with Dr Eric Lim and Dr Kwan Soon. Dr Lim referred the applicant to see Dr Hartin, orthopaedic surgeon. The applicant first consulted Dr Hartin on 22 February 2016<sup>2</sup> after being referred to him in respect of his neck injury.
15. On 4 November 2015, the applicant was involved in a motor vehicle accident. The applicant says that this was a minor incident and he felt some exacerbation of his neck pain.
16. Dr Lau also referred the applicant to see Dr Pope, neurosurgeon, whom the applicant consulted with on two occasions. Dr Pope recommended surgery however the applicant has elected not to pursue that path.
17. The applicant says in his statement that he continues to have symptomatology which includes pain in his upper, middle and lower back.
18. There is no dispute that the applicant has sustained a significant cervical injury with associated difficulties. The parties agree that there should be a referral to an Approved Medical Specialist (AMS) in respect of those injuries. The respondent disputes an injury to the lumbar and thoracic spines.

## **ISSUES FOR DETERMINATION**

19. The parties agree that the following **issue remains** in dispute:
  - (a) Did the applicant suffer an injury to the thoracic spine and/or lumbar spine?

### **Issues not in dispute**

20. The parties were able to agree that the applicant suffered an injury to the cervical spine and cervical spine myelopathy and associated neurological disturbances and/or conditions. It was agreed that that injuries/injuries should go to an AMS for assessment.

## **PROCEDURE BEFORE THE COMMISSION**

21. The parties attended an Arbitration on 29 April 2020 by way of telephone conference. 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**

22. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute (the Application) and attached documents;
  - (b) Reply to the Application to Resolve a Dispute;
  - (c) Late documents filed by the applicant (clinical notes).

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<sup>2</sup> Page 342 of the Application.

## DISCUSSION

23. Section 4 of the Workers Compensation Act 1987 (the 1987 Act) provides the definition of injury as:

(a) means personal injury arising out of or in the course of employment,

(b) includes a

**"disease injury"**, which means-

(i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

(ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease

24. The claim made by the applicant in respect of lump sum compensation arises from an allegation of injury from the nature and conditions of the applicant's employment with the respondent from 1992 to 21 April 2015 (with a deemed date of 27 November 2014).

25. The claim made is that the nature and conditions of employment included highly repetitive duties working in awkward positions and postures for extended periods of time requiring the applicant to strain his neck and arms and back regularly whilst trimming, spot welding, folding mesh and packing products.<sup>3</sup>

## Medical evidence

### *Retained experts*

26. The applicant was examined by Dr Patrick at the request of his solicitors. Dr Patrick has prepared three reports dated 8 March 2018, 15 August 2018 and 25 November 2019.<sup>4</sup>

27. In his final report Dr Patrick has the benefit of having perused the clinical notes which had been provided to him (including the general practitioner's notes). Dr Patrick observes that in the clinical notes the first relevant entry regarding complaints in the lumbar spine was on 25 August 2007 when the applicant complained of "low back pain with no radiation". The next relevant entry being 2 March 2009 when the applicant was prescribed Voltaren medication. Then on 19 October 2010 the applicant was examined by a Registered Nurse who recommended interferential treatment to the lower back. Dr Patrick then helpfully lists all the entries in respect of pain which include significant complaints in respect of the lower back.

28. After perusing the medical evidence Dr Patrick stands by his previous opinion in respect of injury and says that the heavy work performed by the applicant which at times was repetitive has caused injuries to the thoracic and lumbar spinal regions to which he assessed both of having a 5% whole person impairment.

29. Dr Patrick was of the opinion that the applicant's employment over many years was the main contributing factor to the injuries. He regarded the condition to be characterised as a disease and had arisen significantly as a consequence of the particular nature and conditions of work over many years.

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<sup>3</sup> Letter of claim dated 2 December 2019, Application page 18.

<sup>4</sup> Page 56 of the Application.

30. The applicant was examined by Dr Stenning at the request of the respondent, who had produced reports dated 4 May 2018, 13 September 2019, 25 October 2019 and 28 January 2020. Dr Stenning did not consider that the applicant had suffered an injury to his thoracic or lumbar spine.
31. In his initial examination on 30 April 2018, Dr Stenning took a history of pain in the lower back and found lumbar movement restricted. No complaint is recorded in respect of the thoracic spine.
32. In his second examination in September 2019, Dr Stenning did not seem to turn his mind to a thoracic or lumbar injury, but rather focused on the applicant's cervical condition. This is the same for his third report dated 25 October 2019.
33. In his fourth report Dr Stenning once again does not consider that the applicant had suffered an injury to the thoracic or cervical spine. Dr Stenning does not appear to engage in any consideration as to the heavy and repetitive nature of the applicant's work causing an injury to the applicant. Dr Stenning simply says that he has no "history of specific injuries to either the thoracic or the lumbar spine during either of my interviews."<sup>5</sup>

### ***Clinical Medical Evidence - Discussed***

34. Significant submissions were made by Counsel in the Arbitration as to the significance of the treating clinical notes. Helpfully, I was taken through the notes and I agree that they are of some significance in respect of the onset and complaint of symptomatology. I will now outline the relevant entries in the notes from Australian Health Care (where the applicant sought treatment on a frequent basis from general practitioners and associated health care providers).
35. On 2 August 2010<sup>6</sup>, there is an entry in respect of back pain. No relationship was identified with work by the general practitioner at that point.
36. On 2 December 2011<sup>7</sup>, Dr Chow reports the applicant complaining of left sciatica on and off which had been constant for six months and the applicant had been "standing a lot at work". This appears to be the first reference where a general practitioner is linking the applicant's symptomatology to his work duties.
37. On 25 May 2012<sup>8</sup>, the applicant consulted Dr Peter Hill who records a complaint in respect of lower back pain which was "chronic".
38. On 28 May 2012<sup>9</sup>, the applicant consulted Dr Hill again after having inferential treatment to his lower back which the applicant found helpful.
39. On 1 August 2013<sup>10</sup>, the applicant complained of chronic back pain with a flare-up occurring in the last two days. The pain was now radiating to the right leg.
40. On 5 August 2013<sup>11</sup>, the applicant again consults in respect of lower back pain and further on 20 October 2014, 21 October 2014 and 22 October 2014.

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<sup>5</sup> Page 56 of the Reply.

<sup>6</sup> Page 239 of the Application.

<sup>7</sup> Page 238 of the Application.

<sup>8</sup> Page 472 of the Application.

<sup>9</sup> Page 472 of the Application.

<sup>10</sup> Page 475 of the Application.

<sup>11</sup> Page 475 of the Application.

41. On 18 December 2014, the applicant consulted with Dr Lau and at that point received a medical certificate and the doctor noted that the applicant should consider “part-time work due to his spinal problem”. The applicant returned to see Dr Lau on 7 January 2015 after having undergone the CT of the lumbar spine which showed mild degenerative change. It was suggested that the applicant should consult a neurologist.
42. On 5 January 2015<sup>12</sup>, the applicant had seen a neurosurgeon and it was suggested that the applicant be referred to a neurologist. Dr Lau at that point recommended a CT scan of the lumbosacral spine take place.
43. On 7 January 2015, the applicant saw Dr Lau<sup>13</sup>.
44. On 9 January 2015, the applicant once again saw Dr Lau. The applicant expressed an opinion that he thought his long working hours may be contributing to his spinal compression. Dr Lau referred the applicant to see Dr Clive Sun<sup>14</sup>.
45. What is really apparent from these entries is the symptoms are being reported more frequently to the doctors and the applicant is attending on the doctors and complaining about his lumbar pain on an ongoing basis particularly from late 2014.
46. It is also apparent that the pain appears to be focused on the lumbar spine as opposed to the thoracic spine.
47. The respondent submitted that in respect of the lumbar spine, the applicant has not complained to all the doctors he has seen with respect to symptomatology in the lumbar and thoracic spines
48. On 22 May 2015<sup>15</sup>, the applicant complained to Dr Lau about neck pain to the shoulder blade (L) and at that time had no spinal tenderness. The applicant also had no shoulder blade tenderness.
49. On 26 June 2015<sup>16</sup>, the applicant consulted with Dr Tony Ye and at that stage still experienced neck and back pain.
50. When the applicant consults Dr Kohan, neurosurgeon, on 8 September 2015, once again there was no complaint with respect to the lumbar spine though there was a complaint about the thoracic region of the back. The doctor does not deal with the complaint in respect of the thoracic region in any significant way.
51. Dr Ahmed in his role as a general practitioner, prepared a chronic disease management plan.<sup>17</sup> The management plan relevantly states that the applicant had presented with chronic lower back pain (lumbar spine scan shows disc bulges at L3/4 and L4/5 with degenerative changes). I observe that there was no complaint in respect of the thoracic spine in that document.
52. In respect of the thoracic spine, the applicant relies on complaint in the midline section of his back however on reading the treating notes there does not seem to be any significant complaint at all. Indeed, the first entry is on 7 March 2016.

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<sup>12</sup> Page 235 of the Application.

<sup>13</sup> Page 235 of the Application.

<sup>14</sup> Page 233 of the Application.

<sup>15</sup> Page 231 of the Application.

<sup>16</sup> Page 230 of the Application.

<sup>17</sup> Page 393 of the Application.

53. Further, Dr Holly Mulvaney who the applicant consulted on 7 March 2016<sup>18</sup>, requested a CT scan of the thoracic spine. The applicant attempted to explain the absence of complaint in respect of the thoracic spine by submitting that the focus had been on the treatment for the neck and lumbar spine as opposed to the thoracic spine. The result of the x-ray was that no abnormality was detected.
54. I accept that an x-ray may not show the same detail as one would find in a CT scan or an MRI scan and I agree with the submission that because no abnormality was detected on x-ray you could not necessarily infer that there had not been some injury to the thoracic spine. Nevertheless the onus is on the applicant to identify an injury to the thoracic spine and at this stage there is no evidence to that effect.
55. Dr Pope, has prepared a report dated 21 December 2016, he being a treating neurosurgeon. Dr Pope takes a history that the applicant had progressive symptoms over time, stiffness in the neck, the cervicothoracic junction and going across into the shoulders and into the interscapular zone. Dr Pope does not identify any thoracic injury.
56. The respondent points out that Dr Lin (GP) has prepared a report,<sup>19</sup> which does not include any complaint in respect of the applicant's thoracic or lumbar spine. Whilst that might be so, it is quite clear from the treating notes that there is significant complaint in respect of the applicant's lumbar spine which appear to start in 2007, continue throughout 2010 and 2012 and into 2015.
57. The applicant has been referred to various neurologists. When the applicant saw Dr Ghahreman (neurosurgeon) who has produced a report dated 24 February 2015, the doctor does not address any complaint in respect of the lumbar spine.<sup>20</sup> In subsequent consultations with Dr Ghahreman, there is also no mention of the lumbar or thoracic spines.<sup>21</sup>
58. The applicant also sees Dr Huynh (neurologist), on 27 April 2015.<sup>22</sup> It is obvious from the report from the doctor that there is no complaint in respect of the applicant's lumbar or thoracic spines.
59. When the applicant consults Dr Kohan, neurosurgeon, on 8 September 2015<sup>23</sup>, once again there was no complaint with respect to the lumbar spine though there was a complaint about the thoracic region of the back. The doctor does not deal with the complaint in respect of the thoracic region in any significant way.
60. Dr Pope has prepared a report dated 21 December 2016<sup>24</sup>, he being a treating neurosurgeon. Dr Pope takes a history that the applicant had progressive symptoms over time, stiffness in the neck, the cervicothoracic junction and going across into the shoulders and into the interscapular zone. Dr Pope does not identify any thoracic injury.
61. The respondent submitted that the applicant failed to make any complaint to the various neurologists when consulting with them in respect of the thoracic or lumbar spines. In respect of the lack of complaint regarding the thoracic and lumbar spines to the various neurologists, Dr Huynh, Dr Kohan and Dr Ghahreman and Dr Pope, Ms Grotte submitted on behalf of the applicant that the focus by these doctors is on the neurological disturbances which the applicant is experiencing and they are attempting to assist the applicant in respect of that.

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<sup>18</sup> Page 497 of the Application.

<sup>19</sup> Page 11 of the Application.

<sup>20</sup> Page 122 of the Application.

<sup>21</sup> 30 July 2015, page 115 of the Application.

<sup>22</sup> Page 115 of the Application.

<sup>23</sup> Page 120 of the Application.

<sup>24</sup> Page 116 of the Application.

62. I agree that it is not surprising, or fatal to the applicant's case, that there is no focus on the thoracic spine and/or lumbar spine. The applicant was attending upon neurological experts in reference to his cervical condition and makes sense that this was given greater attention. I accept this as a reasonable explanation for the absence of complaint in the records.

### **Findings and further discussion**

63. The respondent submitted that Dr Patrick's opinion should be given little or no weight on the basis that he failed to undertake an evaluative process of the various causes for the applicant's condition. The respondent has also criticised Dr Patrick on the basis that the doctor does not expressly state that the cause of the problems was the nature and conditions of employment. This however does not dispose of the claim as suggested by the respondent.

64. In *State Transport Authority of New South Wales v El-Achi* [2015] NSWCCPD 71 Deputy President Roche commented at [72]:

"That a doctor does not address the ultimate legal question to be decided is not fatal (*Guthrie v. Spence* [2009] NSWCA 369 at [194]-[199] and [203]).

In the common sense, an Arbitrator must determine, having regard to *the whole of the evidence*, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process."

65. Having considered the reports, it seems to me that Dr Patrick is quite clear in his process in forming his opinion. He understands the work that the applicant was doing meant that he maintained an awkward position and with repetitive motions and after applying his expertise and clinical skill and judgment comes to his conclusion. I am satisfied that he has indeed exposed the entirety of his reasoning and justified his position. It is clear when you read the whole of the report it was the doctor's opinion that employment was the main contributing factor to the applicant's injuries due to the heavy, awkward and repetitive nature of his employment.
66. Dr Stenning holds the opinion that there has been no injury to the lumbar spine and the thoracic spine as there was no relevant complaint of injury made to him at the time of his examination. This is despite there being an examination of the lumbar spine (but not thoracic) which disclosed a reduced range of movement. Dr Stenning does not make any comment on this examination in his later reports.
67. When comparing the two independent experts who have provided evidence in relation to the issues now in dispute (those being injury to the lumbar and thoracic spines), I prefer the opinion of Dr Patrick over Dr Stenning, as Dr Patrick, to my mind has examined the nature of the applicant's work which was heavy, repetitive and awkward. Dr Stenning does not appear to have taken this very important feature into account when arriving at his opinion.
68. The treating notes from the applicant's consultations with his general practitioners is to my mind very persuasive. They tell a history of a long period of complaint in respect of the lumbar spine. There is no doubt that the applicant has experienced significant symptomatology in his lumbar spine.
69. I observe that there is little complaint in respect of the lumbar spine to various treating neurologists. I accept that the focus was on treatment for the applicant's cervical complaints.
70. Having regard to the whole of the evidence, including the clinical notes, applicant's statement, expert evidence and consideration of the heavy and awkward nature of the applicant's employment, I find that the applicant's employment was the main contributing factor to the lumbar disease process.



71. In respect of the thoracic spine, the respondent submitted that it is necessary for the applicant to establish injury that there is evidence of pathological change.<sup>25</sup> Deputy President Roche in *Felstead* commented:

“It follows that the description of a personal injury as ‘a sudden identifiable pathological change’ is consistent with the authorities. It suggests no more than that, to qualify as a personal injury, there must be some sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state. Such a change or disturbance may be as simple as a bruise or a soft tissue strain.

If an event occurs such as the rupture of an artery, that will normally qualify as a personal injury even though it is the end result of a disease process. However, if the pathological change is not identifiable or ascertainable, it will obviously be difficult, if not impossible, to establish that the worker has received a personal injury. The reference to identifiable/ascertainable is merely a legal frame of reference to give contextual meaning and sense to ‘personal injury’”.

72. The applicant underwent an x-ray of his thoracic spine which did not show any pathology, this making the claim somewhat difficult for the applicant. I understand that an x-ray may not be as informative as other types of investigations, but the applicant bears the onus to prove his case. There is no persuasive evidence of a pathological change in this case.
73. Further, what is persuasive against a finding of injury to the thoracic spine is the lack of real complaint to any of the general practitioners he consulted. Whilst there is an entry on 7 March 2016 in the clinical notes which displays a complaint and a small comment from Dr Kohan in September 2015 and Dr Pope in December 2016, there is no consistent or ongoing complaint made. When this is paired with the X- Ray which disclosed no abnormality and the lack of any other evidence of injury (such as Ct Scan or MRI) the applicant has not discharged the burden of proof on the balance of probabilities.
74. Accordingly there is a finding in favour of the applicant in respect of the lumbar spine injury, and a finding in favour of the respondent in respect of the thoracic spine injury.



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<sup>25</sup> *North Coast Area Health Service v Felstead* [2011] NSWCCPD 51 (*Felstead*).