

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3081/20
Applicant: Jayson Aaron Dunkley
Respondent: Sydney Hoist and Scaffolding Pty Ltd
Date of Determination: 28 August 2020
Citation: [2020] NSWCC 290

The Commission determines:

1. The applicant suffered an injury to his right lower extremity (ankle) and lumbar spine in the course of his employment with the respondent on 25 November 2016.
2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:

Date of injury:	25 November 2016.
Body systems referred:	Right lower extremity (ankle); lumbar spine.
Method of assessment:	Whole person impairment.

3. The documents to be referred to the AMS to assist with their determination are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) Application to Resolve a Dispute and attachments;
 - (c) Reply and attachments.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 25 November 2016, Jayson Dunkley (the applicant) had a significant fall from approximately two metres' height while working with Sydney Hoist and Scaffolding Pty Ltd (the respondent) on a building site. As a result of that fall, he suffered a serious right ankle injury, liability for which is accepted.
2. The applicant also alleges that he suffered an injury to his lumbar spine in the subject fall. Liability for that alleged injury was disputed on the basis the applicant's back injury did not arise out of his employment with the respondent, and his employment was not a substantial contributing factor to it.
3. The applicant brings proceedings seeking permanent impairment compensation in respect of both the right lower extremity and his lumbar spine. It is common ground that if there is an award for the respondent in relation to the lumbar spine claim, then the whole matter will fail, as on the applicant's own case his right lower extremity injury does not exceed the 10% whole person impairment threshold for permanent impairment compensation.

ISSUES FOR DETERMINATION

4. The parties agree that the only issue which remains in dispute is whether the applicant suffered a workplace injury to his lumbar spine.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a hearing on 5 August 2020. I am satisfied that the parties understand the nature of the Application and the legal implications of any assertion made in the information supplied. Notwithstanding the best endeavours of the parties and me to bring the dispute to an acceptable settlement, resolution was not possible and accordingly the matter proceeded to hearing before me on that date.
6. At the hearing, Mr A Parker of counsel instructed by Ms L Droubi appeared for the applicant and Mr L Morgan of counsel instructed by Mr Quillan appeared for the respondent.

EVIDENCE

Documentary evidence

7. 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 and attached documents.

Oral evidence

8. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Whether the applicant suffered a lumbar spine injury in the incident at issue

9. The applicant's case is pleaded as a frank injury. "Injury" is defined in s 4 of the *Workers Compensation Act 1987* (the 1987 Act) as a personal injury arising out of or in the course of employment.

10. There is a long line of authority to the effect that in order to s 4, an injured worker must demonstrate that they have suffered a sudden or identifiable pathological change in the claimed body part (see for example *Castro v State Transit Authority (NSW)* [2000] NSWCC 12). A temporary physiological change in the body's functioning without an underlying pathological change will not constitute an injury.
11. An employer is only liable to pay compensation in circumstances where employment is a substantial contributing factor to the injury suffered (s 9A of the 1987 Act). Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (*Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29] (*Dayton*)).
12. It is important to recognise that under s 9A the employment must be a substantial contributing factor to the *injury*, not to the incapacity, need for treatment or permanent impairment loss suffered. In *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC [48], Nielson CCJ (as he then was) stated "employment must be a substantial contributing factor to the event causing the injury; that is, to the receipt of the injury, rather than be a substantial contributing factor to the ongoing incapacity" (at [19]).
13. In this matter, the applicant stated he was very active before the incident at issue, training at the gym, running and playing football on a regular basis. He said that since the accident, he became far less active and had gained approximately 20 kg in weight. He denied ever having previous back pain, contrary to the dispute raised by the respondent. At [32] of his statement, the applicant said:

"On 24 January 2018, the CT scan taken by Dr Potgieter to my lower back demonstrated that L4/5 and L5 levels of arthropathy were present. The workers compensation insurer has provided that I was referred for a CT scan of the lumbar spine prior to the workplace injury. This is incorrect. I did not have a CT scan performed on 24 January 2016 but rather on 24 January 2018. I believe that the injury to my lower back was caused as a result of my accident on 25 January 2016. I do not ever recall having back pain prior to my accident on 25 November 2016. The pain in my lower back can be directly attributed to my accident. I had a sudden onset of back pain after the accident. The pain was not severe but enough to cause discomfort. The pain worsened and became more uncomfortable when I returned to work on light duties. The pain gradually became worse until it became severe. I was prescribed Panadeine Forte for my back pain."

14. The respondent in part based its denial of any back injury on an entry contained in the clinical notes of the applicant's general practitioner Dr Mohammed Islam on 9 October 2016, approximately six weeks before the injury at issue. That entry states:

"History:
Chronic lower back pain flare-up after heavy lifting

Examination:
L4/5 tenderness to spine
No paraspinal tenderness
RON not restricted
No neurological deficit..."

Dr Islam referred the applicant for a CT scan of his lumbar spine for the pain, and to exclude nerve pathology. It is common ground the applicant did not undertake that scan.

15. Mr Parker submitted the use of the word “chronic” by Dr Islam and adopted by the respondent’s Independent Medical Examiner (IME) Dr Machart is inaccurate and not supported by any evidence. He noted the GP clinical records in evidence traced back to 2010 and made no mention of any back pain, and that while the applicant was referred for a back CT scan in October 2016, he did not attend to it. Mr Parker submitted that one entry regarding an episode of back pain is insufficient to satisfy the Commission on the balance of probabilities that there was a pre-existing problem with the applicant’s back which was meaningfully troubling him before the incident at issue.
16. The applicant’s fall took place on 25 November 2016. He described the incident in his statement as follows:
 - “23. On 25 November 2016, I was working as a basic rigger with my colleague, Eric whose role was an advanced rigger. We were working together to strip down a machine as the contract at the Wollli Creek job site was complete. We had a crane ready to lift the panel off the machine. As the machine is getting lifted, it became stuck on a bolt. I proceeded to the machine by using a rigger’s platform in an attempt to undo the bolt. The rigger’s platform collapsed. I fell from the rigger’s platform approximately two metres down. I became trapped between the machine and the panel. Eric instructed the crane driver to lift the panel up so that I could be freed...”
 24. Following the accident, I was off work for approximately one month.
 25. When I returned to work, I was on light duties which included forklift and steel man work. I was on light duties for approximately four weeks. I was not allowed on site and was not allowed any lifting.
 26. I had on-going pain in my back and right ankle. As a result, I was off work for a further four weeks. When I returned to work, I could not handle the pain and could not do even the lighter duties.”
17. On balance, I accept Mr Parker’s submission that the applicant did not suffer from chronic back problems before the incident at issue. There was little doubt that he was engaged in physical work and had been for some time. If the applicant was indeed suffering from chronic back problems over the course of many years sufficient to warrant a referral for a CT scan, I find it difficult to believe he would be able to carry on duties in the nature of his occupation as a rigger. I also note there is no evidence in six years’ worth of clinical records of any other complaint regarding back pain aside from one visit to a general practitioner in October 2016. There was no attack on the applicant’s credit in this matter, and whilst I do not criticise Dr Machart for relying on the history in the clinical note from that date, the balance of the evidence in my opinion does not sustain a finding of pre-existing chronic lower back pain.
18. That view is further supported by the absence of any clinical notes relating to pre-existing back injury and also by reference to the GP referral for physiotherapy post-accident where he included a history of depression in 2010 but made no mention of any back problems.
19. Mr Parker submitted the applicant’s pre-occupation post-fall was on his right ankle rather than his back. He noted the applicant’s statement that his post-accident back pain was initially not severe but caused discomfort which worsened over time. There is no question the applicant’s right ankle injury was his primary complaint in the immediate aftermath of the fall. That much is clear from contemporaneous medical records.

20. In support of the claim of back injury, Mr Parker took the Commission to the description of the fall contained in various documents placed into evidence. I do not propose to recount those histories verbatim, as there is no doubt the applicant fell suddenly from a substantial height of approximately two metres landing on his right ankle which was wedged between two pieces of machinery. I also note it took some time to release him from his landing place.
21. Following the accident, it is apparent the applicant's focus was on his ankle. He was placed in a CAM boot and on large doses of painkillers. Mr Parker submitted this explained the absence of complaint to his general practitioner regarding his back in the immediate aftermath of the fall. Moreover, the applicant's statement notes at paragraph 26 he had on-going pain in his right ankle and back after the injury at issue. I reiterate there is no challenge to the applicant's credibility in this matter.
22. In the medical certificate of Dr Wu from July 2019 [Application page 203], a notation is made that the applicant had been suffering back pain for "more than a year, and worsening over the past 6/12, shooting down to a leg." Notwithstanding this was the first mention in a medical certificate of back pain, the clinical records reveal the applicant complained to his GP of back pain on 22 January 2018, which at that time he said he had been suffering for "four-five months."
23. That timeframe places the lower back complaints of pain to approximately mid-2017. In my view, that timeframe is consistent with Mr Parker's submission the applicant's primary focus and that of his treaters was the right ankle in the immediate aftermath of the fall. That emphasis does not preclude the applicant from having suffered a lower back injury in the fall at issue. Likewise, the absence of referral in the clinical notes to a back injury before January 2018 does not mean the applicant was without some measure of pain post-accident.
24. Mr Parker noted Dr Machart rejected the applicant's lower back symptoms as relating to the fall at issue in part in reliance on the GP entry in October 2016 of "chronic" back pain. He submitted that if the Commission accepts that description as inaccurate, then Dr Machart's opinion would not be preferred, relying as it did at least in part on that entry. In his report dated 31 October 2019 at page 235 of the Application, Dr Machart noted the following history:

"He reported no symptoms in the right ankle or lumbar spine prior to the injury. I pointed out to him documentation from his GP chronic low lumbar pain prior to the injury. He had recollection that he suffered pain for one day. He could not explain why the doctor wrote 'chronic'."
25. It is apparent Dr Machart placed a substantial degree of reliance on the GP clinical record when he commented on the medical evidence in the matter at page 237 of the Application as follows:

"There is divergence in assessment by Dr Conrad. The doctor may not have been aware of the GP documentation in assessing the lumbar spine, symptoms of chronic lower back pain and aggravation a month before the MVA, and the fact that there was no corroborated evidence of lumbar injury over several months following the incident. It is not clear whether the doctor had access to the GP assessments or what his comment on the assessments was."
26. Mr Parker submitted, and I accept that in the circumstances of this matter where there is no attack on the applicant's credibility, it is not necessary for there to be corroborative evidence in order for his claims of back pain to be accepted. Rather, the Commission needs to be satisfied on the balance of probabilities and adopting a common sense test of causation that the applicant in fact suffered a frank injury in the fall in issue. In this matter, that necessarily involves accepting the opinion of Dr Conrad and the history provided by the applicant in his statement.

27. I do not prefer Dr Machart's opinion regarding the aetiology of the applicant's back symptoms. Whilst Dr Machart has quite properly noted the pre-injury reference to back pain, a perusal of the entire GP record back to at least 2010 reveals no complaint of back pain aside from that one entry a month before the fall at issue. There is no attack on the applicant's credibility in this matter, and I accept his evidence as to the nature, timing and extent of his back symptomology.
28. As Mr Morgan noted, the applicant must prove on the balance of probabilities that he suffered a lower back injury. That is the case whether or not there is an attack on the applicant's credibility. Mr Morgan submitted the pre-accident GP note from October 2016 referring to "chronic" back pain is significant in that the pain was serious enough for a referral for a CT scan and because it was very shortly before the incident at issue.
29. Mr Morgan also noted the first entry on a worker's compensation certificate referring to lower back problems was in July 2019, and the GP's reason for that pain was likely overcompensation from the applicant's accepted right foot pain. Mr Morgan noted such a finding may well be supportive of the development of a consequential condition, however, as noted the applicant clearly brings his claim in relation to the back as a frank injury suffered in the fall at issue.
30. Mr Morgan further submitted the GP records reveal the onset of back pain many months after the date of injury. He queried why the notes would reflect that history if the applicant had in fact told the doctor he has suffered back pain since the time of the fall.
31. I note, however, the clear line of authority that medical histories, in particular those of treating doctors, are to be treated with caution. In this matter, the applicant's uncontested evidence, which I accept is that he had back pain since the date of injury, however, his treatment in the immediate aftermath of the fall centred on his more serious right ankle symptoms until such time as the back pain evolved to the point where it required medical attention.
32. I also note the lumbar CT taken 24 January 2018 shows L4/5 and L5/S1 arthropathy, and to that extent demonstrate disc pathology sufficient to satisfy the definition of injury in s 4 of the 1987 Act.
33. Mr Morgan submitted the only medical basis for the lower back being injured in the fall is the opinion of Dr Conrad. He said the applicant's statement that he had a sudden onset of back pain post-fall which worsened on return to work is not borne out by the general practitioner records or workers compensation medical certificates.
34. However, having accepted the applicant as a witness of truth, I find his explanation concerning his back complaints plausible. I also accept the mechanism of the sudden fall from a height of approximately two metres on to his feet, sufficient to cause severe traumatic injury to his right ankle is also consistent with a mechanism of injury sufficient to cause the pathology in the applicant's back as demonstrated in the CT scan of January 2018.
35. I also note the GP entry in October 2016 refers to an episode of L4/5 tenderness, whereas post-accident there is radiological support for L5/S1 involvement. I prefer Dr Conrad's view to that of Dr Machart, because the mechanism of injury is consistent with the claimed pathology. I reject the respondent's submission the applicant needs corroboration of his complaint or of Dr Conrad's opinion in order to succeed. As noted, there was no attack on the applicant's credit in this matter, and in my view Dr Conrad's report adequately explains on the balance of probabilities the cause of the applicant's lower back injury, namely a sudden fall from a significant height with a jarring landing on his feet, sufficient to cause severe damage to his right ankle and also cause the lumbar spine injury at issue.

36. In so finding, I accept the applicant's evidence he had no significant back issues pre-injury. Although there is a one-off entry regarding back pain in October 2016, there is nothing before that entry to demonstrate the applicant suffered on-going or "chronic" back issues. Nor is there anything to suggest he underwent the CT scan recommended at that time. Indeed, his evidence is he did not undergo that investigation.

SUMMARY

37. I therefore find the applicant did not suffer chronic back pain pre-injury. I find, for the above reasons that the applicant suffered a frank injury to his lumbar spine in the fall on 25 November 2016, and accordingly that injury together with the accepted right lower extremity (ankle) injury will be referred to an Approved Medical Specialist to determine the applicant's degree of whole person impairment.

