# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

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| **Matter Number:** | **2778/20** |
| **Applicant:** | **Panagiottis Dalecos** |
| **Respondent:** | **Hansimikali Investments Pty Ltd t/as Budget Petrol** |
| **Date of Determination:** | **8 September 2020** |
| **Citation:** | **[2020] NSWWCC 307** |

The Commission determines:

1. Award for the respondent in respect of the applicant's claim for condition in the left wrist consequent upon injury to the left index finger on 24 January 2014.

2. Pursuant to s 66(1) of the *Workers Compensation Act 1987* the applicant is not entitled to have his permanent impairment claim in relation to the left upper extremity referred to an Approved Medical Specialist for assessment.

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

Brett Batchelor
**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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
**As delegate of the Registrar**

# STATEMENT OF REASONS

## BACKGROUND

1. Panagiottis Dalecos (the applicant/Mr Dalecos) claims lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) as a result on injury on 24 January 2014 arising out of or in the course of his employment as a motor mechanic with Hansimikali Investments Pty Ltd t/as Budget Petrol (the respondent).

2. On 24 January 2014 Mr Dalecos was cutting an exhaust on a motor vehicle with a pneumatic cutter when the disc fell apart, cut through his face mask and lacerated his left index finger. The applicant reported the injury to his supervisor, Mr Hansimikali, on the day of injury.

3. Mr Dalecos attended on his general practitioner, Dr Peter Vo, on the day of injury[1]. Dr Vo recorded that the applicant was using a pneumatic tool attached to a disc cutter which shattered and that pieces penetrated over the left index finger causing a laceration. The "Initial Symptoms" were recorded as "L index finger laceration."

4. Later in the clinical note recorded by Dr Vo, the following appears:

> "Oblique laceration ovver the extesnor aspect of the L infex finger
> No bony tenderness, tendons - intact, cap refill-N, No neurosensory deficits" [sic]

   Following the injury on 24 January 2014 Mr Dalecos returned to work for the respondent, carrying out his regular duties and worked with a metal frame on his left index finger.

5. The applicant came under the care of another general practitioner, Dr Dennis Koutis, in September 2015[2] following heart surgery. On 24 December 2015 Mr Dalecos consulted Dr Koutis in respect of his left index finger injury[3].

6. On 17 March 2016, the respondent's then insurer, CGU Workers Compensation (NSW) Limited (CGU), prepared a "**File Note Report**" in respect of Mr Dalecos' left finger injury[4].

7. On 23 April 2018, the applicant attended an independent medical examination with Dr J Brian Stephenson, orthopaedic surgeon, arranged by his solicitor. Dr Stephenson reported on 14 May 2020[5] when he recorded an assessment of permanent impairment of the left wrist and left index finger, finding 9% upper extremity impairment in respect of the left wrist and 12% upper extremity impairment in respect of the left index finger. The total combined upper extremity impairment was therefore 20% which is equivalent to 12% whole person impairment (WPI).

8. On 5 July 2018, the applicant's solicitors made a claim on the respondent for lump sum compensation in the sum of $17,050 for 12% WPI as a result of "Industrial Accident: 15 January and From 14 August 2015 to 18 August 2018"[6].

9. On 26 September 2018, AAI Limited trading as GIO (GIO), the then insurer of the respondent, issued to the applicant a declinature of liability letter in which, inter alia, liability was declined for the claim in respect of injury to the left index finger and the claim for compensation for 12% WPI as a result of injury to that finger[7].

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[1] Application to Resolve a Dispute (the Application) p 47.
[2] Application p 53.
[3] Application p 51.
[4] Application p 11.
[5] Application pp 25 and 39.
[6] Application p 15.
[7] Application p 19.

10. The applicant commenced proceedings in the Commission on 20 May 2020 by way of the Application in which he claimed compensation for permanent impairment as a result of injury the to the left upper extremity on 15 January 2020 which resulted in 12% WPI. At the arbitration hearing referred to hereunder this date was noted to be an error and the date of injury in the Application was, by consent, amended to 24 January 2014.

## ISSUES FOR DETERMINATION

11. The parties agree that the only issue remaining in dispute is whether the applicant suffered a condition in his left wrist consequent upon the undisputed injury to the left index finger on 24 January 2014.

## PROCEDURE BEFORE THE COMMISSION

12. 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.

13. The parties attended an arbitration hearing on 24 August 2020 conducted via telephone conference. Mr W Carney of counsel appeared for the applicant instructed by Mr D Eggins. The applicant attended on a separate line. Mr M Nesbeth of counsel appeared for the respondent instructed by Mr N Bennett of the GIO.

## EVIDENCE

### Documentary evidence

14. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) the Application and attached documents, and
    (b) Reply and attached documents.

### Oral evidence

15. There was no application to adduce oral evidence or to cross-examine the applicant.

## SUBMISSIONS

16. The submissions of the parties are recorded in the transcript of 24 August 2020 (T), a copy of which can be obtained on request. I will not repeat them in full. In summary they are as follows.

### Applicant

17. The applicant refers to the entry in the treating doctor's clinical note of 24 January 2014 (referred to above at [3] and [4]). The next important piece of history according to the applicant is a WorkCover certificate of capacity dated 24 December 2015[8] in which the medical certificate contains a description of a laceration of the left index finger and left little finger "…with ongoing symptoms of pain, stiffness and lumps". According to the applicant, this is consistent with the clinical note of Dr Dennis Koutis of that day[9], which records in addition, limitation of movement and the need for referral for an ultrasound. However it does not appear that such referral took place.

[8] Application p 43.
[9] Application p 51.

18. The applicant then refers to the CGU File Note Report dated 17 March 2016 (noted above at [6]) and the detailed description of the injury which occurred in January 2014 recorded therein. The applicant submits that this entry in the CGU records makes reference to the applicant seeing his general practitioner "a couple of months ago", which is a reference to the attendance on Dr Koutis on 24 December 2015.

19. The applicant submits that the picture that emerges from these records is that, by this time there was a problem with the finger and its mobility, one that had not gone away. There was a problem with the knuckle where the cut took place, or close to it, and where it had actually moved. This is commented upon by the independent medical examiner (IME), Dr Stephenson, in his report.

20. The applicant draws attention to the consistent history of injury as related to Dr Stephenson and recorded in his report, and in particular what Dr Stephenson concluded as to what had happened to the left index finger in the absence of x-rays or x-ray reports. The full diagnosis was not just a simple laceration, but a compound displaced lateral condyle fracture of the head of the middle phalanx of the left index finger. The lack of treatment material is commented upon by Dr Stephenson.

21. The applicant submits the little finger of the left hand was involved in the incident of 24 January 2014, which is mentioned in the report of the treating doctor in December 2015, and that these injuries have given rise to the disability in the left wrist; that is, the disability of two fingers leads to involvement of the left wrist.

22. The applicant then addresses the evidence of Dr Stephen Rimmer, the IME to whom the applicant was referred by the respondent, and whose reports dated 11 and 19 September 2018 are attached to the Reply[10]. In respect of Dr Rimmer's comments on the left hand, the applicant notes the loss of function, specifically loss of range of motion in the left little and ring fingers. Notwithstanding the doctor's comment that when the applicant was viewed informally during the consultation all digits moved freely, the applicant submits that it is more than the left index finger involved in the applicant's current disability with his left hand.

23. The applicant makes submissions on the basis of the laceration of the left index finger and the fact that at some time later there seems to have been some sort of separation at the left index finger, which he calls the knuckle, properly described by Dr Stephenson. There is also the problems with the left littler finger described by his treating general practitioner in December 2015 which would also lead to the wrist being assessed. For assessment of the wrist, one would need the involvement of more than one finger, that is, two fingers, with separation of the joint of the (index) finger[11].

24. The applicant submits that Dr Rimmer's recording of the applicant's complaint of a loss of range of motion in the left little and ring fingers is "curious", in view of the fact that the major problem was with the left index finger which was lacerated. Dr Rimmer's observations of the applicant when observed informally are again noted and contrasted with the significant problems recorded throughout the histories given to doctors of the real problem with the left index finger[12].

25. In conclusion the applicant submits that the significant problem with the left index finger, coupled with the involvement of two fingers, would involve the wrist in that there would be an inability to grip or use the left hand. This would give rise to a rateable loss of function of, or disability in, the left wrist[13].

[10] Reply pp 7 and 9.
[11] T p 12.25-13.05.
[12] T p 15.20-.30.
[13] T 16.25.

**Respondent**

26. The respondent refers to the description of the incident by the applicant in both of his statements in evidence, noting that both were given by the applicant a number of years after the injury. In particular the respondent notes the applicant's evidence of the use of a metal frame over his left finger involving difficulty with grabbing things, and therefore the necessity to use the right hand.

27. The respondent emphasises the time that has passed since the injury, and that the applicant seems to be suggesting that over the years the left hand has been used in such a way as to give rise to injury in the left wrist. However the fact that the applicant himself has not said this or alluded to this is significant. The respondent then refers to the documents more contemporaneous to the accident.

28. In the "Workers Compensation First Attendance Form" dated 24 January 2014[14] the type of injury is noted as "left finger sliced with…" (indecipherable but could be "a tool"). The WorkCover certificate of capacity dated 24 January 2014[15] (the date of accident) contains a diagnosis of "Penetration injury with L index laceration", and the explanation as to how the injury is relayed to work given as a result of using a pneumatic tool and the penetration of shattered pieces of a disc cutter over the left index finger causing a laceration. This entry is consistent with the clinical note entry of the general practitioner on the day of injury.

29. The respondent also notes the reliance on a clinical note in which reference is made to the need for an ultrasound. Nothing turns on this, according to the respondent, as the ultrasound was not actually performed.

30. In respect of Dr Stephenson the respondent notes that the history of injury recorded by the doctor in the principal report dated 14 May 2018 contains a description of the injury consistent with all other contemporaneous documents, but then proceeds to a further description on the fourth page of the report[16] to a diagnosis of a compound displaced fracture rather than a laceration, while conceding that there were no x-rays or medical report to confirm this[17]. The respondent submits that, in the absence of the diagnosis of a compound displaced fracture being confirmed anywhere else in the clinical records, that diagnosis should be rejected. Alternatively, the diagnosis of a fracture of the head of the middle phalanx is accepted, it is still in the middle of the finger. It does not extend as far as the knuckle which would be involved to make a fist. The respondent submits that there is no evidence to support injury to or a condition in the wrist as a result of the injury to the left index finger.

31. The respondent also submits that when Dr Stephenson records examination of the left wrist, there is no explanation from him as to why he includes the left wrist in such examination, or in his assessment.

32. The respondent submits that when Dr Stephenson is asked to identify how he reached his diagnosis[18], there is nothing there or elsewhere in the report with respect to the left wrist. Further there is nothing in the applicant's statement in respect of the left wrist, and the respondent submits that Dr Stephenson's report reflects what the applicant related to him, that is, the applicant did not say anything about the left wrist. In this circumstance, the respondent questions why the left wrist should have been assessed at all. Further, on the same page of the report when Dr Stephenson is questioned about the applicant's capacity for employment, he refers only to loss of capacity for full manual dexterity due to the left index finger restriction in motion. The doctor is talking about nothing more than the left index finger.

[14] Application p 8.
[15] Application p 40; Reply p 36.
[16] Application p 28.
[17] T p 21.10-.15.
[18] Application p 32.

33. In conclusion with reference to Dr Stephenson's report, the respondent submits that the only evidence that could possibly support a consequential injury to the left wrist is found in that doctor's report, but the report simply cannot be accepted.

34. The respondent submits that although Dr Rimmer talks about a laceration to the left index finger and left little finger, it is not clear from where the involvement of the left little finger comes. There is no reference to this finger in the applicant's own account of injury or in the clinical records. There is also no record of any physiotherapy to the left hand, and that is because the applicant had no difficulties with his left hand, and there was no involvement of the left wrist.

35. The respondent notes the current symptoms recorded by Dr Rimmer in respect of the left hand, specifically loss of range of motion of the left middle fingers, and also the dramatic deterioration in the applicant's clinical appearance on commencement of formal examination. What Dr Rimmer is saying, according to the respondent, is that caution needs to be exercised when looking at the range of motion recorded by him on formal examination; the applicant was not trying his hardest when examined. Further, there is no record in Dr Rimmer's report of any left wrist problem, which correlates with the lack of any problem with the left wrist recorded by Dr Stephenson.

36. In short and in conclusion, the respondent submits that there is no explanation as to how the applicant suffered a condition in his left wrist consequent upon the injury to his left index finger.

**Applicant in response**

37. The applicant does note that, at [14] in his supplementary statement dated 11 May 2020 he refers to the need to keep his job and that he kept working with a metal frame on his finger. His ability to grab objects and hold on to tools tightly was greatly affected. The applicant notes that he is left handed and that he tried to learn how to use, and write with, his right hand.

**FINDINGS AND REASONS**

**Contemporaneous records**

38. Both the applicant and respondent in submissions dealt with the contemporaneous records in evidence in respect of the injury to the left index finger on 24 January 2014. In chronological order, they are as follows.

39. The applicant saw his general practitioner, Dr Peter Vo, on the day of the accident. Dr Vo's clinical notes of that day are referred to above at [3] and [4]; there is a further entry under "**Actions**" referring to "Immunisation" with the consent provided by the applicant and:

> "Wound cleaned, debris cleaned + removed, L.A 2% instilled, sutured 4x 3.0, dressed."

40. There is a WorkCover certificate of capacity dated 24 January 2014 issued by Dr Vo referred to by the respondent above at [28]. The entries in the Medical Certificate within that certificate of capacity in respect of diagnosis and how the injury was related to work are consistent with Dr Vo's clinical notes of the attendance of the applicant on him that day. The reference is only to a penetration injury over the left finger causing a laceration.

41. The next contemporaneous document is the Workers Compensation First Attendance Form, also referred to above at [28]. It is dated 24 January 2014 and signed by the applicant. It is apparent that this document came into existence when Mr Dalecos attended on Dr Vo on 24 January 2014. It refers to the left index finger being sliced, probably with a tool.

42. The next chronologically 'contemporaneous' record in evidence is the clinical note of 24 December 2015, referred to above at [17]. The entry is as follows:

> "Thursday December 24 2015 12:15:16
> Dr. Dennis Koutis
>
> Overview of work injuries as per the outline on certificate.
> Still problems from lacerations and also has some lumps on the finger and limitation of movement.
> Referral for US will be needed. Also has ongoing problems from right hamstring strain.
> Certificate and then review after US to hand."

43. The next document is another WorkCover certificate of capacity dated 24 December 2015 issued by Dr Dennis Koutis, also referred to above at [17]. The diagnosis in that certificate is recorded as follows:

> "laceration left index finger and left little finger with ongoing symptoms of pain, stiffness and lumps; persistent pulled hamstring right leg"

44. Dr Koutis records in his clinical note "Overview of work injuries as per the outline on certificate". He appears to be referring to the WorkCover Certificate of capacity he issued that day. There is no specific reference to the left little finger in the clinical note, although he does refer to "lacerations", (plural), and "some lumps on the finger" (singular). The WorkCover certificate of capacity contains the first specific reference to a laceration in the left little finger. Dr Koutis is in a different medical practice (Letitia Street Clinic) to that of Dr Vo (Maroubra Medical & Dental Clinic). Dr Koutis' certificate of capacity was issued almost two years after the date on which the applicant lacerated his left index finger on 24 January 2014. The doctor first saw the applicant for this injury on the date of the certificate[19]. The "Patient stated date of injury" in that certificate is "January 2014 & 9/7/15". The last mentioned date refers to another injury referred to by Mr Dalecos at [14] in his statement dated 21 May 2019, not relevant to his claim in the current proceedings.

45. The next document relied upon by the applicant in support of his claim is the CGU File Note Report referred to above at [18]. The "Early contact with Wkr" recorded next to the "Date Entered" at the commencement of that document records:

> "CGU claim relates to Wkr's left index finger which was lacerated at work early January 2014.
> Finger was sliced over knuckle and is now paralysed. Wkr is left handed & has now had to learn to write with his right hand Can't shift gears properly."

46. The following appears on the second page of the document:

> "Left index finger injury occurred early Jan 2014. Cutting exhaust using pneumatic cutter & disc shattered. Part of disc went through leather glove into left index finger, another part hit left little finger. Part of disc also went through protective goggles he was wearing & hit glasses underneath. Attended NTD as hand all bloodied & cleaned wound & bandaged. Pain killers provided. No imaging. Received PID's COC dated 24/1/14 & RTW. No lost time. Wkr reports over time the knuckle has moved inwards 1.5cm, finger ceased working & now paralysed. Didn't return to NTD as thought injury would get better. Now gets electric shock when tries to bend finger. Disc nearly cut finger off. Saw GP a couple of months ago & needs surgery. Little finger also has bone fragment. No referral to NTS as Wkr awaiting

[19] Application p 43.

> claim info from ER which they wouldn't provide until lawyers sent request for ER to provide insurer info. Wkr is left handed & has had to learn to write with right hand."

47. There are subsequent entries in that four page document referring to the inability of the applicant to work since termination on 14 August 2015, a heart attack and the need to have surgery, and that the heart condition took preference over the workers comp claim which was why "little has happened since." It is also recorded that the worker can do some things with the left (dominant) hand, can pick up a glass to drink, can't hold a knife and fork or do anything involving the left index finger. Finger pain is noted at 0/10 if not using it and 8/10 if trying to use finger. Among the matters required by CGU in the report are a "Possible IME" and "NTD clinical notes". The third last paragraph of the report is as follows:

> "ER stated they were aware of his left index finger injury as they took him to the NTD for review. Wkr simply had wound reviewed then RTW with no lost time or any other Tx. Wkr never mentioned the finger to them again."

It appears that this CGU File Note Report was prepared with information supplied by the applicant and his employer. It is not apparent who "ER" is, although it could be a reference to employer representative.

48. On 17 March 2016 CGU wrote to Dr Koutis forwarding a questionnaire for the doctor to answer. He did so on 20 March 2016[20]. In his handwritten replies, Dr Koutis refers to "laceration, left index finger (with ongoing pain, stiffness and lumps);", and also to a pulled hamstring in the right leg. The "Date of injuries" is given as "January 2014 and 9/7/15." There is no reference in that report to an injury to the left little finger.

49. In *Onassis and Calogeropoulos v Vergottis*[21], Lord Pearce said of documentary evidence:

> "It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."

50. The important contemporary documents in this case are:

    (a) the clinical note of Dr Vo dated 24 January 2014;
    (b) the WorkCover certificate of capacity issued by Dr Vo on 24 January 2104, and
    (c) the Workers Compensation First Attendance Form dated 24 January 2014.

There is no reference in any of these documents to a laceration of the left little finger. That does not appear in any record until the clinical note and WorkCover certificate of capacity of Dr Koutis dated 24 December 2015, almost two years after the accident. There is also no reference in Dr Vo's note to the disc nearly having cut the finger off, something that surely would have been recorded. Dr Vo records an oblique laceration over the extensor aspect of the left index finger, no bony tenderness, intact tendons and no neurosensory deficits.

[20] Reply p 34.
[21] [1968] 2 Lloyd's Rep 403 at 431.

51. In *Nominal Defendant v Clancy*[22] Santow JA observed at [54]-[55]:

> "While clinical notes, as McColl JA observes, may in common experience be the raw data on which diagnosis and opinions are based, it does not follow that they will be comprehensive … clinical notes are written in the course of a busy practice where the clinician is primarily there to observe and administer treatment. They should not be construed with the minute attention one might give a formal legal document. It is fair to say a report to another doctor [or a medico-legal report] is likely to have been written with more deliberate consideration than rough notes."

52. In *Davis v Council of the City of Wagga Wagga*[23] the Court of Appeal (Mason p, Beazley and Tobias JJA agreeing) said:

> "experience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury"

53. Notwithstanding the brevity of Dr Vo's clinical notes in respect of the attendance of the applicant on him on 24 January 2014, he clearly records the injury to the left index finger and his treatment thereof. The problem with the diagnosis of Dr Stephenson, referred to hereunder, is that it was made so long after the event and without the benefit of radiological investigations or other reports from treating practitioners. Indeed, such investigations may not have been made nor reports produced. This would be consistent with what the applicant says in his statement evidence that, following the injury, he returned to work with regular duties, which he appears to have continued carrying out until the date of his subsequent injury to his back while lifting a 50 kg brake drum on or about 9 July 2015. He was also involved in a motor vehicle accident on 27 July 2015, and when he returned to work with the respondent on 24 August 2015, he says that his employment was immediately terminated and he was asked to sign a letter of resignation[24]. In that letter the applicant refers to a recent diagnosis of some heart problems and says that it would be best for himself and for the business that he takes some time to focus on improving his health. It was for that reason that he submitted his resignation, due to health issues, effective 14 August 2015. Mr Dalecos underwent double bypass heart surgery on 30 August 2015.

54. In neither of his statements dated 21 May 2019 and 11 May 2020 does the applicant refer to an injury to the left little finger, nor does he refer to any problems with his left wrist. In his first statement Mr Dalecos says that he reported the injury on 24 January 2014 to his supervisor, Nick Hansimikali, on that day. He says that he provided a workers compensation claim form but did not bother with WorkCover medical certificates because he knew that he (presumably referring to Mr Hansimikali) did not put the claim through to the insurer as he (the applicant) was not yet on the books as an employee. In the second statement Mr Dalecos confirms that Dr Vo completed the Workers Compensation First Attendance Form, which I note is signed by the applicant when he accepts responsibility for settlement of the account if his claim is not accepted, and also completed a WorkCover certificate of capacity form to be handed to the employer. The applicant says that as he needed to keep his job he kept working with a metal frame on his left index finger. This evidence is consistent with the third last paragraph of the CGU File Note Report quoted at [47] above.

55. In my view the evidence is insufficient to find that the applicant injured his left little finger on 24 January 2014.

[22] [2007] NSWCA 349.
[23] [2004] NSWCA 34.
[24] See applicant's [18] further statement dated 11 May 2020 and Reply p 24.

56. Dr Stephenson records his assessment of the left wrist in his reports dated 14 May 2018 following his examination of Mr Dalecos on 23 April 2018. He records a history of injury of a laceration on the dorsum of the left index finger and found on examination a small transverse scar on the skin crease over the proximal interphalangeal joint, left index finger. Dr Stephenson said that the full diagnosis in respect of the left index finger was not simply a laceration, but rather a compound displaced lateral condyle fracture of the head of the middle phalanx. However he did not have any x-rays or medical reports to confirm that. He said that what was palpable was what appeared to be the lateral condyle head at the head of the middle phalanx, having displaced from the PIP joint (which I interpret to be the proximal interphalangeal joint), may have been pulled back by some tendon material. He then said in his principal report under "**EXAMINATION**":

> "On examination of the left index finger, upper extremity, I noted restriction in range of motion in the left wrist and also of the left index finger."

Dr Stephenson found:

> "…restriction in the left wrist compared to the opposite right wrist. There was a full range of motion in the left shoulder and elbow."

The details of his assessment of WPI are set out above at [7].

57. When Dr Rimmer saw the applicant on 5 September 2018 he recorded current symptoms in the left hand as loss of function, specifically loss of range of motion in the left little and ring fingers. On examination he found a well-healed scar over the dorsal aspect of the proximal interphalangeal joint of the left index finger. He noted that at the commencement of the formal examination Mr Dalecos' clinical appearance dramatically deteriorated, that is, when viewed informally during the consultation he moved all digits freely. He appeared to have a full pain free range of motion of the digits which was in marked comparison to the formal examination when he claims he could not move his left index finger. Dr Rimmer makes no comment about the left wrist. He also had no investigations to view. He said that these should have been brought for the purposes of an assessment.

58. Dr Rimmer's diagnosis is abnormal illness behaviour, resolved soft tissue injury to the left index finger and left little finger, and also resolved musculoskeletal strain, lumbar spine, which is not relevant.

59. At the outset of the arbitration hearing on 24 August 2014 the applicant articulated the issue for determination as noted in [11] above. The causation of the condition claimed in the left wrist must be determined on the basis of a commonsense evaluation of the evidence in the proceedings in accordance with what Kirby P said in *Kooragang Cement Pty Ltd v Bates*[25] (at 810)) namely:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. **What is required is a commonsense evaluation of the causal chain**. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation." (emphasis added)

[25] (1994) 35 NSWLR 452; 10 NSWCCR 796.

60. Dr Stephenson notes restriction in the range of motion in the applicant's left wrist, and also the left index finger. He does not make any diagnosis of what injury or condition the applicant has suffered in the left wrist. This is not necessary for there to be a finding in favour of the applicant. However, there are no investigations of the left wrist. There is no explanation by Dr Stephenson as to how the undisputed injury to the left index finger gave rise to an injury to, or condition in the left wrist. He simply makes an assessment of 9% upper extremity impairment as a result of the loss of range of motion in the left wrist, then combines this with the upper extremity impairment for the loss of range of motion of the left index finger of 12%, to give a 20% upper extremity impairment. This is equivalent to 12% WPI.

61. Dr Stephenson's diagnosis of the left index finger injury was not confirmed by any x-rays or medical reports. However, if it is accepted, it represents a significant injury to the finger. That still does not explain how the claimed condition in the left wrist arose. If Dr Rimmer's diagnosis of the left index finger injury is accepted, the injury is very much less serious. The fact that the applicant continued to work for the respondent until his subsequent back injury on 9 July 2015, albeit with a frame on the finger, is indicative that the injury may not have been as serious as is now sought to be made out.

62. I find that, after a commonsense appraisal of all of the evidence I have summarised above, the applicant has not on the balance of probabilities discharged the onus of proof on him to show that he suffered a condition in his left wrist consequent upon the injury to the left index finger on 24 January 2014. There will be an award for the respondent accordingly.

63. Dr Stephenson's assessment of upper extremity impairment in respect of injury to the left index finger is 12%. According to Table 16-3 on p 439 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 12% upper extremity impairment is equivalent to 7% WPI. This does not exceed the 10% threshold provided to in s 66(1) of the 1987 Act, and therefore the matter cannot be referred to an Approved Medical Specialist (AMS) for assessment.

**SUMMARY**

64. Award for the respondent in respect of the applicant's claim for condition in the left wrist consequent upon injury to the left index finger on 24 January 2014.

65. Pursuant to s 66(1) of the 1987 Act the applicant is not entitled to have his permanent impairment claim in relation to his left upper extremity referred to an AMS for assessment.