WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number:	**3089/20**
Applicant:	**Christopher Craddock**
Respondent:	**G H Varley Pty Ltd**
Date of Determination:	**8 September 2020**
Date Amended:	**17 September 2020**
Citation:	**[2020] NSWWCC 328**

The Commission determines:

1. The applicant did not suffer injury arising out of or in the course of his employment with the respondent on 29 March 2017 within the meaning of sections 4 and 9A of the *Workers Compensation Act* 1987.

The Commission orders:

2. Award for the respondent in respect of the applicant's claim for injury on 29 March 2017.

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

Jill Toohey
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 JILL TOOHEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Christopher Craddock, was working for the respondent, G H Varley Pty Ltd, on 29 March 2017. He claims compensation for an abdominal injury when he was struck by an air hose while using an air rivet gun connected to compressed air.

2. Mr Craddock claims weekly payments for the periods 24 May 2017 to 22 October 2017, and from 19 August 2019 to date and continuing, and reasonably necessary medical expenses.

3. By a notice issued under s 78 of the *Workers Injury Management and Compensation Act 1998* on 19 March 2018, the respondent denied liability to compensate Mr Craddock. The respondent asserted that his alleged injury had resolved and he did not continue to suffer from any injury within the meaning of section 4 of the *Workers Compensation Act 1987* (the 1987 Act), that his current condition was no longer related to the alleged injury, that the alleged injury did not cause him any incapacity for work, and that medical treatment was not reasonably necessary in relation to the injury.

4. By a review notice issued on 31 July 2019, the respondent maintained that Mr Craddock's injury was not covered by s 4 of the 1987 Act, that the injury was not received in the course of his employment with the respondent, that his employment was not a substantial, or the main, contributing factor, that he had no total or partial incapacity as a result, and that he was not entitled to weekly payments or medical expenses.

ISSUES FOR DETERMINATION

5. There is no dispute that Mr Craddock was struck by an air hose on 29 March 2017 in the course of his employment with the respondent. The parties agree that the following issues remain in dispute:

    (a) whether Mr Craddock sustained an injury within the meaning of s 4 of the 1987 Act;

    (b) if so, whether the effects of the injury are continuing;

    (c) whether he suffered any incapacity as a result, and

    (d) whether he is entitled to reasonably necessary medical expenses.

6. Parties agree that, for the purposes of calculating any entitlement to weekly payments, Mr Craddock's pre-injury average weekly earnings (PIAWE) was $1,286.98.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation conference and hearing on 18 August 2020. Mr Ross Stanton of counsel appeared for Mr Craddock. Mr Tony Baker of counsel appeared for the respondent. 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

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

    (a) Application to Resolve a Dispute (ARD) and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents and attachments lodged by the respondent on 7 August 2020, and

    (d) Report of Dr John Garvey dated 10 August 2020 lodged by the respondent and admitted at the hearing without objection.

Oral evidence

9. Neither party sought leave to adduce oral evidence or to cross-examine any witness.

FINDINGS AND REASONS

Mr Craddock's evidence

10. Mr Craddock's evidence is set out in a statement dated 9 October 2019[1]. He states he was born in 1989 and sets out his employment history since 2007. He states he has suffered from anxiety and depression since school.

11. Mr Craddock states that he had not suffered any previous abdominal wall problems and had no history of hernias apart from occasional bouts of diarrhoea related to certain foods. He had not had any bowel problems prior to the injury.

12. Mr Craddock describes the incident on 29 March 2017 as follows:

> "On 29 March 2017, I was positioned awkwardly between two shelves and as I went to put in a rivet, an air hose blew off the machine and struck me over the left side of my abdomen. It tore through my clothes and hit my left anterior flank region but did not cause a laceration or penetrate the skin.
>
> I had immediate severe pain and vomited because of the pain and reported the incident to my supervisor.
>
> Initially, after the incident I had trouble standing up straight because of the severe pain I was experiencing and I had a bruise in the area. I was sent home and I went and saw my general practitioner.
>
> I reported my injury to my general practitioner Dr Chin of Nelson Bay Super Clinic. Dr Chin provided me with a Work Cover Medical Certificate stating that I was unfit for work.

[1] ARD 1-5

> The supervisor called me and suggested that I use my annual leave and sick leave for my time off instead of going through workers compensation. I didn't want to rock the boat so I used the leave I had to take time off.
>
> When I tried to go back to work the pain was too severe and I had further time off work."

13. Mr Craddock states his employment was terminated on 24 May 2017 because he had difficulty carrying out his work and he had frequent days off. He was on leave without pay for most of the time once his annual leave and sick leave ran out. He was unable to find any work until October 2017 when he was able to find a job to suit his capacity.

14. Between May 2017 and October 2017, Mr Craddock states, he saw his general practitioner on a regular basis but "[he] didn't receive WorkCover certificates." He was unable to work from 24 May 2017 until October 2017 when he was able to find a job "to suit my capacity".

15. Mr Craddock stated that, in October 2018[2], started working for PPK Mining which involved sedentary type duties. He states he was terminated "a few weeks ago as I wasn't able to go to work for 5 weeks straight due to my abdominal pain." (That is, early September 2019.)

16. Mr Craddock states he continues to have intermittent diarrhoea and constipation, and due to nausea he vomits two to three times a week. It does not improve even if he eats bland foods. He has had to cut back on everything he eats but the pain is still not improving

Employment forms

17. On 3 October 2017, Mr Craddock completed a Tradesman Candidate Form for Maxwell Recruitment.[3] In response to the question whether he had any "Abdominal pain, stomach ulcers or serious bowel problems" he answered No. As to whether he was "currently recovering from any work-related injury or illness" he answered No. As to whether there was "anything restricting [his] ability to perform duties at work, such as health-related issues, injuries or any workers compensation claim" he answered No.

Claim form

18. On 11 December 2017, Mr Craddock completed a Worker's Injury Claim form. He described his injury as "impact to abdomen" and "Working on assembly line using an air-riveter when the air hose and metal clamps blew of and hit my abdomen on the left side" [4].

Verifact report[5]

19. Verifact conducted an investigation into Mr Craddock's injury and took statements from Mr Craddock's supervisor and others.

20. There were no witnesses to the incident itself. Mr Craddock's supervisor, Brett English, says he recalls it being brought to his attention that day and having a brief discussion with Mr Craddock who left for the day.[6] Chad Page, the First Aid Officer, recalls seeing Mr Craddock holding his stomach on one side and making "wincing faces". Mr Craddock told him the air hose had hit him in the stomach. Mr Page recalled a faint mark on the side of his stomach.[7]

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[2] Given the dates for which incapacity is claimed, this appears to be a typographical error and should read 2017
[3] Application to Admit Late Documents 7 August 2020
[4] Reply 160
[5] Reply 10
[6] Reply 39
[7] Reply 49

21. Mr English states that Mr Craddock returned to work the following Monday and resumed full duties. He did not observe any sign that Mr Craddock was having difficulties with his duties as a result of his injury. He recalled that the injury was reported to him as a strike to the stomach. Mr English states that he notes the injury report states a red mark was observed by the First Aid Officer and he (Mr English) stated "bruising" on the section he completed on 3 April 2017, but he does not recall ever actually sighting the bruises. At no time was there any suggestion of anything more serious such as a hernia or rupture.

22. Mr English states that, from quite early in his employment, Mr Craddock had an unusually high amount of time off, sometimes for a single day, and there were times he left early due to alleged illness. Mr English met with Mr Craddock on 4 May 2017 with James McCulloch present. Mr Craddock said he thought his absences were due to stomach pains that may have been due to the incident on 29 March 2017. Mr English said the issues "were larger than simply a work absence issue. During the meeting, Mr Craddock said he felt light-headed and faint. He was directed not to continue work but to see his doctor to have the matter properly diagnosed and treated. Mr Craddock was also talking about a possible bacterial infection and "some kind of pre-existing stomach condition". It was all a bit confusing so he needed to see a doctor.

23. At a further meeting later that month, Mr Craddock said he could not continue to work. According to Mr English, it was not clearly identified as a workers compensation matter at that time and so Mr Craddock agreed his employment would be terminated and he would get himself better and they "would see from there".

24. James Alexander, Employment Support Manager, provided a statement.[8] His notes of a telephone discussion with Mr Craddock on 1 May 2017 showed that Mr Craddock said his stomach complaint was possibly related to the incident at work. He did not know the cause of his complaint but said he had been "back and forth" to hospital about it and they did not know what it was either.

25. Mr Alexander states that there was no discussion of a workers compensation claim at that time. In a further discussion on 5 May 2017, Mr Craddock said he had not pursued a compensation claim because he did not have the correct certificate from his doctor. He subsequently had time off to investigate the cause of his complaint with his doctor. When they spoke again on 10 May 2017, Mr Craddock said his doctors told him his spleen was slightly swollen which could be consistent with the air hose incident but it was not conclusive.

Dr Chin's records

26. Dr Chin's records commence on 10 November 2015 when they record, among others, that Mr Craddock had anxiety and had been seeing a psychologist "but not for a while"[9]. On 29 March 2017, Dr Chin recorded, relevantly:

> "hit on abdo by airhose this morning – at work
> initially painful but used ice which has helped a lot
> feels fine now
> told to get checked by employer
> has eaten since
> **Reason for visit:**
> Injury, soft tissue
> **Examination:**
> Abdo soft, nontender, visible mark from airhose above umbilicus
> **Actions:**
> Medical certificate given from 29/03/2017 until 30/03/2017"[10]

[8] Reply 59.
[9] Reply 136.
[10] Reply 142.

27. The next recorded visit to Dr Chin was on 23 August 2017 for an unrelated matter. On 8 December 2017, Dr Chin recorded, relevantly:

> "needs workcover certificate as job terminated due to abdo injury back in march was seen here on the day of injury when hit by·airhose but has since been seen by Dr Plummer who Is refusing to do his workcover certificate told he needs to see the Initial GP going through lawyers"[11]

28. Dr Chin's last record is dated 20 December 2017, when she recorded reason for visit as "Workers Compensation paperwork" and that she had completed a form from GIO. The form[12] shows she undertook a clinical examination; she described Mr Craddock's injury as "abdominal injury by airhose" and "patient stated he was hit on his tummy by airhose at work". She only saw Mr Craddock once in relation to the injury and she understood another GP had refused to do an initial certificate. She stated:

> "I stressed to Christopher that he was fit for preinjury duties when last saw him in March".[13]

Nelson Bay Medical Centre records

29. Clinical notes from Nelson Bay Medical Centre include records of various doctors from around 2002 including medical certificates for undisclosed matters, prescriptions, results of tests and so on. They refer to a history of anxiety and depression, and vomiting, abdominal pain and diarrhoea from as early as 2002 and more frequently from around 2009, for varying periods. For example, on 11 November 2009, they show "perisstnt [sic] vomiting occurs 2 times a week" and "diarrhoea for 1 month". On 20 February 2013, they show vomiting and diarrhoea for several days.[14]

30. The last recorded consultation before the workplace injury was on 6 August 2015. Then, on 4 May 2017, Dr Plummer recorded[15] the reason for visit as "diarrhoea". He noted, relevantly:

> "vomiting regularly for 4 weeks??
> diarrhoeas for 4 weeks now settling
> has had faeces sampling
> seen many Drs
> arrange investigations
> **Examination:**
> …
> No abdominal tenderness.
> No abdominal mass palpable.
> No guarding. No rigidity. No rebound. No distension."

31. Dr Plummer arranged for an ultrasound of Mr Craddock's upper and lower abdomen, noting "(chronic abdominal pain for 4 weeks)".

32. On 10 May 2017, Dr Plummer noted "abdominal discomfort settled" and he arranged further investigations. He certified Mr Craddock fit for his usual occupation from 15 May 2017.

[11] Reply 145.
[12] Reply 147.
[13] Reply 148.
[14] 20 February 2013.
[15] ARD114.

33. On 22 May 2017, Dr Plummer noted "recurrent abdominal pains"[16]. On 26 May 2017, he noted that the CT suggested constipation.[17] The next visit, on 3 July 2017, was for an unrelated matter.

34. The first reference in Dr Plummer's records to the workplace injury was on 20 October 2017. He recorded[18]:

> "discuss original injury to abdomen in march. a blunt injury report was noted at work - high pressure hose injury-» LS upper quadrant
> Pt alleges that work offered wca injury services -»therapy etc or personal leave
> Pt chose personal leave
> it is alleged that the abdominal trauma in march 29th -» ongoing abdominal complaints
> pt was terminated from employment on 29/5/2017
> Pt claiming his original blunt trauma injury-» abdominal injury-> and was in hindsight work related
> laywers (sic) requesting workcover certificate.
> Pt alleges that Dr Napthali has agreed the blunt abdominal trauma- -» abdominal symptoms
> refer -» original Dr who [saw] re blunt trauma
> **Reason for visit:**
> Abdominal pain"

35. There was a consultation with a different doctor on 15 November 2017. On 15 January 2018, Dr Clark noted "really constipated again"[19]. On 24 January 2018, Dr Ortega noted that Mr Craddock had vomiting and nausea for the past week. She noted:

> "Intermittent abdo pain since lst year: upper abdo pain, crampy and RUQ stabbing
> No GIH, unwanted weight loss
> Has endoscopy and colonoscopy last -year nad --after work incident
> States since then bowel change a lot"[20]

36. Mr Craddock saw Dr Plummer again on 21 February 2018 for insomnia. He saw him next on 30 July 2018, complaining of abdominal pain. The records end with a consultation with another doctor on 12 September 2018 for gastroenteritis.

37. In a letter dated 30 July 2018 addressed "To whom it may concern", Dr Plummer wrote:

> "This letter Is to certify that the above mentioned had a prolonged bout of abdominal symptoms In 2017 from ~ 29/3/2017 to ~ 20/10/2017, this involved care locally, multiple investigations and also specialists."[21]

Calvary Mater hospital

38. Hospital records[22] show that Mr Craddock attended on 18 May 2017 with gradual onset of lower abdominal pain. A history of chronic diarrhoea was noted. He was awaiting further investigation. He was discharged the same day.

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[16] ARD 115.
[17] A CT scan requested by Dr Plummer on 23 May 2017 showed a large amount of faeces in the colon and no definite colon pathology. No other soft tissue pathology was demonstrated. (ARD 33)
[18] ARD117.
[19] ARD 117.
[20] ARD 118.
[21] ARD 34.
[22] ARD 30.

Dr Mendelsohn[23]

39. Dr Graeme Mendelsohn, general surgeon, saw Mr Craddock for assessment on 26 November 2018. He took a history that Mr Craddock had suffered from anxiety and depression since school. He denied any other particular health problems. He had not suffered any previous abdominal wall problems, he had no history of hernias and, apart from the occasional bouts of diarrhoea related to the intake of certain foods, he had not had any bowel problems prior to the injury.

40. Dr Mendelsohn recorded that the injury at work happened when an air hose blew off a machine and struck Mr Craddock over the left side of his abdomen. "It tore through his clothes and hit his left anterior flank region but did not cause a laceration or penetrate the skin." He had immediate severe pain and vomited. Initially he was having trouble standing up straight because of severe pain and had a bruise in the area. He was sent home and saw his doctor. His employer asked him to take leave rather than using workers compensation following the injury.

41. Dr Mendelsohn recorded that Mr Craddock returned to work after about a week but had days off intermittently over the next month with pain in the area. He went back to see his usual doctor who "gave no new recommendations" and ordered an ultrasound. When he returned to work he suddenly dropped down with pain and attended at the accident and emergency department at the Mater Hospital. Blood tests were apparently normal and doctor recommended bedrest and ice. He tried to return to work but the pain was too severe and he was eventually dismissed. He subsequently found sedentary work but had time off intermittently with pain.

42. Dr Mendelsohn noted that Mr Craddock had intermittent diarrhoea and constipation and his doctor had suggested he might have irritable bowel syndrome. He did not suffer from constipation before the injury.

43. On examination, Dr Mendelsohn found "localised tenderness over the left side of the abdomen below the level of the umbilicus … in the left iliac fossa and there was an irregularity in the soft tissues at this point."[24] He concluded:

> "I believe that Mr Craddock is currently undiagnosed as to his exact problem. I feel it is likely that he may have an intra-muscular hernia (Richter's type) or neuroma of one of the superficial nerves damaged by the incident with the air hose. He also has problems with his bowel and vomiting and I suspect that he has a form of irritable colon syndrome. Investigations have not shown any other definite cause for the pain but irritable bowel syndrome is a diagnosis by exclusion of other causes. I think it is likely to be there and can certainly be related to stress. It is unlikely to be directly, however, as a result of the blow to his abdomen but could be a consequent injury because of the constant stress caused by pain and requiring time off work and restricted duties."

44. Dr Mendelsohn said the condition was consistent with the mechanism of injury Mr Craddock described.

45. In a further report dated 11 December 2019, Dr Mendelsohn said he agreed with Dr Draganic that Mr Craddock has chronic left iliac fossa pain which he thought was abdominal wall pain rather than reflecting an intra-abdominal condition such as diverticulitis or irritable bowel syndrome. He almost certainly had abdominal wall neuralgia as Dr Draganic suggested. Dr Mendelsohn said the only alternative was neuralgic pain as suggested by Dr Draganic

[23] ARD 36.
[24] ARD 39.

which would be due to the development of a neuroma, or chronic inflammation or damage to a superficial nerve as a result of the trauma. In either case, he said, it was almost certain that the injury was the cause of the ongoing problems. He confirmed his opinion that the chronic left iliac fossa pain was a direct result of the work incident.

46. Dr Mendelsohn noted that his previous report was incorrect in stating that Mr Craddock had no previous bowel problems. He had longstanding abdominal pain, vomiting and diarrhoea but they were irrelevant to his history of abdominal wall problems following the injury. Dr Mendelsohn said the report should have stated no previous abdominal wall problems.

Dr Draganic

47. On 8 May 2019, Mr Craddock saw Dr Brian Draganic, colorectal surgeon. Dr Draganic reported[25] to Dr Abbod at Nelson Plaza Clinic that Mr Craddock had chronic left iliac fossa pain. He had had it for about two years and "he feels that it coincides with an Injury he sustained where a hydraulic hose came loose and struck him in that area of the abdomen". Since then Dr Draganic said, he had very well-localised pain in that area. There were "no gastro-intestinal bowel habit, nausea, vomiting or systemic symptoms of weight loss or fever". The pain was constant, moderately severe and localised to a very small area of the left iliac fossa.

48. Dr Draganic thought Mr Craddock's symptoms "very suggestive of abdominal wall neuralgia" and recommended he see a chronic pain service.

Dr Garvey

49. Dr John Garvey, surgeon, saw Mr Craddock for assessment on 29 April 2020 at the request of the respondent. He had documents including Mr Craddock's statement of evidence, Dr Mendelsohn's reports, the general practitioners' records, reports of scans, and statements of Mr Craddock's co-worker from the Verifact report.

50. Dr Garvey found Mr Craddock had anterior cutaneous nerve entrapment syndrome.

51. With respect to Dr Mendelsohn, Dr Garvey noted the history he had taken. He agreed with Dr Mendelsohn's assessment that Mr Craddock almost certainly had abdominal wall neuralgia. He would not be suitable for his pre-injury capacity but would be suitable for part-time duties which did not involve bending, lifting or twisting. His ongoing incapacity was causally related to the incident on 29 March 2017.

52. Dr Garvey thought further investigation was required with abdominal wall MRI scan after which appropriate treatment could be offered. He expected the prognosis for the injury was good in the long-term and that Mr Craddock would get back to some form of gainful employment.

53. Mr Craddock had a further MRI on 12 June 2020. Dr Garvey was asked to comment on the results and whether he maintained his diagnosis of anterior cutaneous nerve entrapment syndrome. In a report dated 10 August 2020, he said he did; he said although the MRI had failed to confirm his provisional diagnosis, it relied mainly on clinical examination findings of hypersensitivity in the peripheral nerves T10, T11 and T12 on the left side. He then said:

> "Although the MRI scan has failed to detect any anterior cutaneous nerve entrapment or irritation, I note that no anterior abdominal wall cutaneous nerves have been identified at all. This makes me wonder whether the resolution of the scan technique was adequate for the purpose of diagnosing the cause of his peripheral neuralgia."

[25] ARD 35.

54. Dr Garvey said if the respondent wished to take the matter further, he recommended a referral to a particular specialist in abdominal wall pathology for further imaging and testing to finalise the diagnosis. However, he said, he was confident with his clinical diagnosis.

The applicant's submissions

55. Mr Stanton submits that there is no dispute that Mr Craddock was struck by an air hose on 23 March 2017. The issue is what injury it actually produced, whether its effects continue, and its effects on Mr Craddock's entitlement to weekly benefits and medical expenses.

56. At first glance, Mr Stanton submits, the injury itself might not appear to have been a major trauma. However, Mr Craddock describes how the air hose tore through his clothes, indicating some force, he felt immediate pain and vomited, and he had trouble standing up. He was still in pain when he attended at Calvary Mater Hospital in May 2017.

57. Mr Stanton submits that Dr Mendelsohn had some difficulty with the diagnosis but was clear that Mr Craddock had suffered a frank injury and his condition was consistent with mechanism of injury he described. He did not consider Mr Craddock fit for pre-injury duties because of his pain, and he would be best to carry out sedentary work.

58. Dr Draganic found no evidence of a hernia or intra-abdominal mass. He diagnosed abdominal wall neuralgia. Dr Mendelsohn agreed with his diagnosis. He agreed that Mr Craddock has chronic iliac fossa pain as a result of the injury. He acknowledged prior abdominal problems but said they were unrelated to the injury.

59. Mr Stanton submits that Dr Garvey took a comprehensive history consistent with Mr Craddock's statement. He had Dr Mendelsohn's and Dr Draganic's reports. He found no inconsistency or exaggeration. He diagnosed anterior cutaneous nerve entrapment syndrome. He considered Mr Craddock fit for part-time suitable duties. After seeing the recent MRI, Dr Garvey maintained his diagnosis. Although the MRI had failed to confirm the provisional diagnosis, it rested mainly on his findings on clinical examination.

60. Mr Stanton submits that the doctors all came to the same conclusion, that as a result of the injury on 29 March 2017, Mr Craddock has anterior cutaneous nerve entrapment syndrome and continues to be unfit for pre-injury duties.

61. Mr Stanton submits that quantification of Mr Craddock's entitlement to weekly payments is more complicated, and there are no clear medical opinions directly on point. However, I would be satisfied that Mr Craddock probably had no current capacity during the initial period 24 May 2017 to 23 October 2017. The evidence is that he was terminated because he was having time off for treatment and various tests including a gastroscopy and endoscopy, and his symptoms were bad enough for him to go to hospital in May 2017.

62. Mr Stanton submits that I would be satisfied that, in the initial period, Mr Craddock is entitled to 95 per cent of the agreed PIAWE being $1,222.63 from 24 May 2017, and 80 per cent, being $1,029.58, from 22 August 2017 to. If Mr Craddock is found to have any capacity during the initial period, it would be very small and equivalent to no more than $200 per week given the time he had to take off and his impairment.

63. To his credit, Mr Stanton submits, Mr Craddock then found work. His responses on the Maxwell Recruitment forms should not count against him. It is understandable that someone trying to get back to work would give those responses. The mere fact that he indicated he had no prior problems is not evidence that the effects of his injury had ceased.

64. During the second period of incapacity, Mr Stanton submits, the best evidence is that Mr Craddock had some residual capacity. Dr Garvey thought he was only fit for part-time suitable duties. It is not clear what Garvey meant but it would be reasonable to infer capacity for approximately 20 hours per week at $20 per hour.

The respondent's submissions

65. Mr Baker submits that Dr Chin certified Mr Craddock fit to resume duties on the day after the incident. When he returned to work the following Monday, Mr English saw nothing to suggest serious injury. At the meeting on 4 May 2017, Mr Craddock identified possible causes for his stomach pain but not that his complaint was solely related to the incident. Despite claiming to be unfit from 24 May 2017 until 12 October 2017, Mr Craddock did not lodge a claim until 11 December 2017.

66. Dr Chin's notes on the day of the incident show that Mr Craddock had a "visible mark from air hose *above umbilicus*" (emphasis added). On the insurer's form in December 2017 she said Mr Craddock "stated that he was hit on the tummy"[26] by an air hose. Mr Barker submits this was precisely where Dr Chin saw the mark above his umbilicus, not on the left iliac fossa anterior flank as later recorded by Dr Mendelsohn and, subsequently, by Mr Craddock in his statement of evidence. Dr Chin noted the abdomen itself was "non-tender"; it was "initially painful" but "feels fine now". Mr Baker submits that Dr Chin's records are internally consistent and make clear that Mr Craddock was not struck on the iliac fossa region which a medical dictionary will show is below the umbilicus.

67. Mr Baker submits that, apart from 23 August 2017 when he saw Dr Chin for an unrelated matter, Mr Craddock did not see her again for nine months at which time she refused him a Workcover certificate and told him to see Dr Plummer. In the meantime, Dr Chin had certified him fit to resume duties. When he saw her again on 12 May 2018, he felt nauseous on eating but there was no complaint of stomach or left iliac fossa pain.

68. Mr Baker submits that, contrary to Mr Craddock's statement that he had no bowel problems before the workplace injury, records from Nelson Bay Medical Centre show a long history of abdominal pain, vomiting, nausea and gastrointestinal problems, apparently related to anxiety. On 4 May 2017, Dr Plummer noted that he had been vomiting regularly for four weeks and he had diarrhoea; he had no abdominal tenderness. On 10 May 2017, he noted "chronic anxiety" and "abdominal discomfort now settled" and certified him unfit for one day. On 22 May 2017, he recorded recurrent abdominal pain but examination was normal. A subsequent scan showed a large amount of faecal matter. By this time, Mr Craddock had seen Dr Plummer five times without mentioning the workplace injury.

69. Dr Plummer's first record of the air hose incident was on 20 October 2017, three days before Mr Craddock resumed full-time employment, and after he had seen lawyers. His notes show that Mr Craddock's lawyers were requesting a workers compensation certificate. Mr Baker submits he went to Dr Plummer on his lawyers' advice and subsequently provided the statement of evidence that does not reflect what actually occurred.

70. With respect to Mr Craddock's statement of evidence, Mr Baker submits that he uses the "extraordinary" expression that he was hit in his "left anterior flank region" [27]. Mr Baker submits those are not his words and come from Dr Mendelsohn's report. Further, Mr Craddock states[28] that Dr Chin gave him a Workcover Certificate but she did not. He states[29] he tried to go back to work but the pain was too severe but he does not say when, and the evidence shows that he resumed normal duties following the incident. He states[30] he was terminated because he had difficulty carrying out his work and had frequent days off but that

[26] ARD 23.
[27] at [19].
[28] at [22].
[29] at [24].
[30] at [25].

is not what Mr English and Mr Alexander say. He states[31] he was in and out of hospital four or five times between the injury and around June 2017 but the only evidence is that he went to the Mater Hospital once where he was seen and discharged.

71. Mr Craddock further states[32] that he saw his general practitioner regularly from May 2017 to October 2017 but did not receive Workcover certificates. Mr Baker submits he does not say why not. Dr Draganic thought he should be assessed by a pain specialist but there is no evidence he has done so.

72. Turning to the specialists' reports, Mr Baker submits that the history taken by Dr Draganic was manifestly incorrect. He said Mr Craddock had chronic left iliac fossa pain for about two years coinciding with being struck "in that area of the abdomen" but that is not where Dr Chin recorded the bruise on the day. He found tenderness in the left iliac fossa area but that is not where Mr Craddock was struck. He noted no previous gastro-intestinal symptoms such as nausea or vomiting, contrary to all the history.

73. Mr Baker submits that Dr Mendelsohn was not sure what the problem was and arrived at a diagnosis by exclusion. He thought Mr Craddock's condition unlikely to be related to the blow to the abdomen. He found localised pain on the left iliac fossa *below* the umbilicus, contrary to Dr Chin's record. He thought Mr Craddock was off work for about a week whereas he was certified fit to return the following day. Dr Mendelsohn recorded that, when he returned to work, he "apparently suddenly dropped down with pain", went home and went to the accident and emergency department at the Mater Hospital. In contrast, the hospital records show an insidious onset. In his second report, Dr Mendelsohn agreed with Dr Draganic but his opinion was based on an incorrect history that was not a fair climate for his opinion.

74. Mr Baker submits that all three doctors had the wrong history. There is no evidence to support their diagnoses.

75. Mr Baker submits there is no medical evidence to support the claim of incapacity in the first period, and the employment records show Mr Craddock had the ability to earn as much or more following the incident.

The applicant's submissions in reply

76. In reply, Mr Stanton submits that Dr Garvey had a full history including the employment records and the Verifact report and concludes that Mr Craddock continued to be affected by his injury and only has capacity for part-time work.

Consideration

77. Section 4 of the 1987 Act provides:

> "'**injury'** --
>
> (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, and"

[31] at [26].
[32] at [28].

78. By s 9 of the 1987 Act, a worker who has received an "injury" shall receive compensation from his or her employer in accordance with the Act.

79. Section 9A(1) provides that no compensation is payable under the Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury. Section 9A(2) provides:

> "The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination)--
>
> (a) the time and place of the injury,
> (b) the nature of the work performed and the particular tasks of that work,
> (c) the duration of the employment,
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
> (f) the worker's lifestyle and his or her activities outside the workplace."

80. Section 9A(3) provides that a worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following—

> (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
>
> (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

81. Subsection (3) makes clear that employment is not to be regarded as a substantial contributing factor merely because injury arose out of or in the course of employment, or because incapacity or the need for treatment resulted from the injury. The requirements of ss 4 and 9A must be independently satisfied: *Larson v Commissioner of Police*[33].

82. *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Aust. Pty Limited*[34] (2009) NSWCA 324 is considered the leading case on the application of s 9A of the 1987 Act. The headnote shows:

> "Per Allsop P, Beazley and McColl JJA (Handley AJA dissenting other than in relation to [1]-[79]):
>
> 1 The tests for an injury 'arising out of' employment under ss 4 and 9 and for employment being a "substantial contributing factor" under s 9A must be considered separately. It is not sufficient to find that injury arose out of employment and to therefore conclude that the employment concerned was a substantial contributing factor to the injury: [85], [91].

[33] *Larson v Commissioner of Police* [2004] NSWCA 126.
[34] *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Aust. Pty Limited* (2009) NSWCA 324.

2 The meaning of an injury 'arising out of' employment for the purpose of ss 4 and 9 is settled. An injury arises out of employment if the fact that the claimant was employed in the particular job caused, or to some material extent contributed to the injury. The phrase involves a causative element and is to be inferred from the facts as a matter of common sense: [73] - [76].

3 The phrase 'substantial contributing factor' in s 9A also involves a causative element. It is a different or added requirement to the 'arising out of' employment limb of ss 4 and 9, however the causal connection required for s 9A is not less stringent than that found in s 9. *Mercer v ANZ Banking Group* [2000] NSWCA 138; 48 NSWLR 740 not followed: [80] - [85].

4 For employment to be a 'substantial contributing factor' to the injury for the purposes of s 9A the causal connection must be 'real and of substance'. The language of the section is not to be confused with interpretations such as 'large', 'weighty' or 'predominant': *Mercer v ANZ Banking Group* [2000] NSWCA 138; 48 NSWLR 740 not followed: [82] - [83], [107].

5 'Employment' for the purposes of s 9A is the same 'employment' that is under consideration in ss 4 and 9: [91]

6 In determining whether worker's employment was a substantial contributing factor, the matters specified in s 9A(2) must be taken into account to the extent that they are relevant: [89].

7 Section 9A(2)(b) directs attention to the nature of the work performed and the particular tasks of that work and not to what the employee was doing at the actual time of the injury. It is an incorrect approach to consider some other activity other than the employment that had preceded the injury and then seek a linkage with the employment from the standpoint of that preceding activity: [95] - [98], [105].'"

83. 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]; *McMahon v Lagana* [2004] NSWCA 164 at [32]) to be decided after a consideration of all the evidence. See also *Workcover Authority of NSW v Walsh* [2004] NSWCA 186.

84. Employment must be "a" substantial contributing factor to the injury, not "the" substantial contributing factor. There may be more than one substantial contributing factor to a single injury, of which employment only need be one: *Mercer v ANZ Banking Corporation* [2000] NSWCA 138.

85. Mr Craddock bears the onus of establishing his claim. The standard is on the balance of probabilities. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*,[35] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in Helton v Allen [1940] HCA 20; (1940) LR 691 at 712."

[35] *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [2008] NSWCA 246.

86. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[36]. That is not to say that "common sense" alone can determine the issues.

87. Turning to the evidence, there is no dispute that Mr Craddock was struck by an air hose on 29 March 2017. He claims he suffered a frank injury within the meaning of s 4(a). What actually occurred on that day and any consequences are at the heart of this dispute.

88. Mr Craddock attended on Dr Chin on the day of the incident. She noted a "visible mark from airhose *above umbilicus*" (emphasis added).

89. It is well-established that care should be taken not to place too much weight on the clinical notes of treating doctors who "sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable frank injury": *Davis v Council of the City of Wagga Wagga*[37] applied in *King v Collins*[38] and *Mastronardi v State of New South Wales*[39]*;* see also *Winter v NSW Police Force*[40]*.*

90. However, this is not a case of omitting what later might become significant information. Dr Chin's records record what she saw and her clinical examination. There is no reason to think that she did not record the site of the visible mark accurately. As a lay person, Mr Craddock could not be expected to describe the site of his injury to her in medical terms but she simply recorded the site of the visible mark or bruise. Mr Craddock has not suggested that her note was inaccurate, and no submission has been made to that effect.

91. Dr Chin's record is important because it is contemporaneous. The value of contemporaneous evidence has been repeatedly endorsed by the courts.[41] Moreover, Dr Chin's is the only contemporaneous record.

92. The next description of Mr Craddock's injury is around 18 months later, in November 2018, when he saw Dr Mendelsohn who recorded that the hose "tore through his clothes and hit his left *anterior flank* region" (emphasis added).

93. It is not clear why Dr Mendelsohn identified the site of Mr Craddock's pain as *below the level of the umbilicus* … in the left iliac fossa but it is reasonable to infer that Mr Craddock identified that as the site of his pain. On examination, Dr Mendelsohn found "localised tenderness over the left side of the abdomen *below the level of the umbilicus* … in the left iliac fossa and there was an irregularity in the soft tissues at this point" (emphasis added).

94. Dr Draganic also reported a history of nearly two years chronic left iliac fossa pain from where the air hose "struck him in that area". It does not appear from his report that he had Dr Mendelsohn's report so it seems probable that Mr Craddock identified that as the site he was struck. In any event, both doctors proceeded on the basis of a different site from the visible mark recorded by Dr Chin. It does not appear that either doctor had Dr Chin's records.

95. The site of where Mr Craddock was actually struck would have less significance if it were not for his long history of abdominal and gastrointestinal problems. Although he states that he had no bowel problems prior to the injury, the clinical records show a long history of abdominal pain, and diarrhoea for periods up to several weeks that cannot be described as "occasional bouts". It does not appear from the evidence that the cause of his long-standing problems was ever identified with any certainty.

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[36] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796.
[37] *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35].
[38] *King v Collins [2007] NSWCA 122.*
[39] *Mastronardi v State of New South Wales* [2009] NSWCA 270.
[40] *Winter v NSW Police Force* [2010] NSWCCPD 121.
[41] *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403.

96. The clinical records do not indicate any particular change in Mr Craddock's symptoms following the workplace injury. They show regular visits over the preceding years for abdominal pain, vomiting, nausea and diarrhoea. Mr Craddock saw Dr Plummer for abdominal pain, vomiting and diarrhoea on 4 May 2017, 10 May 2017, 22 May 2017 and 26 May 2017.

97. In that time, Mr Craddock underwent a CT scan to investigate the cause of his abdominal pain which Dr Plummer noted indicated constipation, and the pain was severe enough for him to go the hospital emergency department on 17 May 2017. Mr Craddock has not suggested that Dr Plummer omitted to record a complaint about his workplace injury. He has not explained why he did not tell Dr Plummer or the hospital about it. It is one thing to decide against making a claim for compensation for some time, but it is difficult to think of a reason why he would see a doctor several times over several months for abdominal pain, including having a CT scan, and attend at a hospital in severe pain, without once mentioning the injury at work, if it had the effects he claims. It is reasonable to infer it had no noticeable effect different from his previous abdominal symptoms.

98. Dr Chin certified Mr Craddock fit to return to work the following day and he resumed full duties the following Monday. The evidence strongly suggests any effects quickly resolved. I do not accept, as Mr Stanton submits, that he felt immediate pain and was still in pain in May 2017 when he went to the Mater Hospital. I accept he continued to suffer abdominal pain as he had for many years but not that anything of significance changed following the incident with the air hose.

99. It is not clear why Mr Craddock did not ask Dr Chin for a Workcover certificate, given that the incident at work that led him to see her had undoubtedly happened. In any event, his statement that she gave him a Workcover certificate is not correct. I agree with Mr Baker's submission that Mr Craddock's evidence contains other statements that are not correct including that he was in and out of hospital four or five times in the months following the incident at work.

100. Mr Baker submits that the visit to Dr Plummer on 20 October 2017, when he first mentioned the incident at work, was prompted by Mr Craddock's attendance on his lawyers. Dr Plummer's notes indicate that was so, although it does not follow necessarily that Mr Craddock did not sustain the injury he claims.

101. The respondent does not submit that Mr Craddock's evidence lacks credibility and I do not make that finding. I do not think his responses on the later employment questionnaires should be held against him. They were not all true with respect to his history but I accept they are not evidence that he did not suffer the injury he claims. Nevertheless, his evidence is unreliable in significant respects, in particular some of what he told the specialists of the incident itself and his medical history.

102. It is not clear whether Dr Draganic had Dr Mendelsohn's report but he proceeded on the same basis, that the site where the air hose struck was the left iliac fossa. Dr Garvey also apparently proceeded on the basis of Mr Craddock's written statement that he was struck in the left anterior flank region because he cited that statement in his report.

103. I agree with Mr Baker's submission that the three specialists reached their conclusions based on a description of the incident that did not accord with the contemporaneous record. They also did so against a background of long-standing complaints of abdominal pain, vomiting, nausea and diarrhoea. That background highlights the importance of a clear medical history and history of the incident itself in arriving at a diagnosis and attributing it to a particular incident.

104. Dr Draganic took a history that Mr Craddock had "no gastro-intestinal bowel habits, nausea, vomiting or systemic symptoms of weight loss or fever". As the clinical records show, that was not correct.

105. In his second report, Dr Mendelsohn corrected his earlier report and said Mr Craddock had longstanding abdominal pain, vomiting and diarrhoea. However, he said, they were irrelevant to his history of abdominal wall problems following the injury. It is not clear why he considered them irrelevant. Dr Mendelsohn agreed with Dr Draganic that Mr Craddock "almost certainly" had abdominal wall neuralgia as Dr Draganic suggested or, possibly, the development of a neuroma, or chronic inflammation or damage to a superficial nerve as a result of the trauma. In either case, he said, it was almost certain that the injury was the cause of the ongoing problems, and he confirmed his opinion that the chronic left iliac fossa pain was a direct result of the work incident. As already discussed, that finding proceeded on the basis of the history of the injury that he took from Mr Craddock.

106. It is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*[42], *Makita (Australia) Pty Ltd v Sprowles*[43], *Hevi Lift (PNG) Ltd v Etherington*[44], *South Western Sydney Area Health Service v Edmonds*[45] and *Hancock v East Coast Timbers Products Pty Ltd*[46] that there must be a "fair climate" upon which a doctor can base an opinion. I agree with Mr Baker's submissions that the specialists' reports are not given in such a fair climate.

107. Considering all of the evidence, I am not satisfied that Mr Craddock has discharged the onus of proof. I am not satisfied on the balance of probabilities that he suffered injury arising out of or in the course of his employment with the respondent on 29 March 2017 to which his employment was a substantial contributing factor. To the extent that he suffered any incapacity for work after 29 March 2017, I am not satisfied on the balance of probabilities that it was as a result of his employment with the respondent.

108. For these reasons, there will be an award for the respondent.

[42] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58.
[43] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705.
[44] *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; 2 DDCR 271.
[45] *South Western Sydney Area Health Service v Edmonds* [207] NSWCA 16; 4 DDCR 421.
[46] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11.