WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2567/20**
Applicant: **Mark Arnold Gorrell**
Respondent: **Secretary, Department of Transport**
Date of Determination: **8 July 2020**
Citation: **[2020] NSWWCC 226**

The Commission determines:

1. The respondent is to pay the applicant weekly compensation:

    (a) from 10 July 2019 to 8 October 2019 at the rate of $1,399.30, and
    (b) from 9 October 2019 to date and continuing at the rate of $1,178.35.

2. The respondent is to pay the applicant's s 60 expenses.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mark Gorrell was employed by the Secretary, Department of Transport to work for the State Transit Authority (STA) as a bus driver from its Brookvale depot. On 28 June 2018 at about 6.40 pm, he was driving a bus along Military Rd, Cremorne when a pedestrian ran into the path of his bus. He braked suddenly and felt a pop in his spine.

2. Mr Gorrell was referred for psychological counselling and ultimately returned to work on 10 August 2018. He said that he began to suffer pins and needles in his arms on his return to work. In January 2019 he suffered pins and needles over his body while standing in the surf. He went to Northern Beaches Hospital and subsequently underwent a series of investigations. On 5 April 2019 he underwent urgent surgery to his cervical spine being a C3 to C6 decompression and lateral mass fusion.

3. The parties agree that the only issue in dispute is whether Mr Gorrell suffered an injury to his neck on 28 June 2018.

PROCEDURE BEFORE THE COMMISSION

4. The matter was listed for conciliation conference and arbitration hearing by telephone on 1 July 2020. Mr Trainor of counsel appeared for Mr Gorrell and Mr Hanrahan of counsel appeared for STA.

5. 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 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.

6. Mr Trainor amended the Application to Resolve a Dispute (ARD) to claim weekly compensation from 10 July 2019 and to claim a general order for s 60 expenses. The reason for the latter amendment is to permit the parties to consider the application of s 60(2A)(a) of the Workers Compensation Act 1987 (the 1987 Act) with respect to the need for prior approval of treatment expenses.

7. The parties agree that Mr Gorrell's pre-injury average weekly earnings were $1,472.94.

EVIDENCE

Documentary evidence

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

    (a) ARD and supporting documents;

    (b) Reply;

    (c) Mr Gorrell's Applications to Admit Late Documents dated 2 June 2020 and 24 June 2020, and

    (d) STA's Application to Admit Late Documents dated 25 June 2020.

9. There was no oral evidence.

10. Mr Gorrell signed a statement on 7 November 2019. He said that before the injury he often worked a split shift and used to exercise between shifts, taking long walks and using the gym.

11. Mr Gorrell described the incident in his statement. He referred to the date of injury as 28 June 2018. It is clear from other material that the date was 26 June 2018. Mr Gorrell said:

> "I was driving a route E69 Bus along Military Road going north. It was peak hour and I had a full load of passengers. It was dark outside and because it was peak hour traffic I was driving fairly slowly. I heard a huge bang and a man hit the windscreen and bounced onto the footpath. He came from the median strip and hit the windscreen to the left of the centre. The first time I saw him was when his face appeared on the windscreen. I braked as soon as I heard the bang. I hit the brakes really hard and had no time to brace myself.
>
> The way bus brakes work is that if you hit the brake hard the bus stops immediately. They are air brakes not discs so they lock up. I remember feeling a pop in my neck at the time but I don't have any recollection of telling anybody about that at the time. I didn't think it was relevant and I was really feeling quite numb."

12. On the day following the incident, Mr Gorrell received a telephone call from Ryan Pickett [sic]. He went to work and saw a psychologist at the depot. In the following week he saw a different psychologist. He then saw a doctor at Botany for counselling and attended daily for 10 days. At about the time he completed that treatment, the police told him that the pedestrian admitted he had run in front of the bus and that the passengers agreed. A staged return to work was proposed.

13. Mr Gorrell went on a prearranged cruise holiday for two weeks on 18 July and went back to work on 10 August. From the first day he began to experience pins and needles in his neck which progressed down his shoulders when he drove. The pins and needles were worse in his left arm. It became more intense closer to Christmas and he stopped walking to work when a staff car park opened in September. He said that he told Liz Hawkins, the Depot Inspector, that he was unable to do overtime because of the pins and needles. He did not return to the gym.

14. Mr Gorrell commenced five weeks holidays on 24 December. He noticed that his neck and shoulders were sore and his fitness was decreasing. He said:

> "On the 20th January 2019, I went to the beach with my daughter Kiana. I was standing in the water and I felt like I'd been bitten by something in the ocean because I had pins and needles all over my body and up and down my back. The only place they weren't was on my stomach- I felt as if I had died of energy. I got out of the sea and I went to the lifesavers. I said 'I think I've been bitten by something.' They examined me and were unable to identify anything. They recommended that I go to the hospital.
>
> I went to Northern Beaches Hospital about noon that day, the 20th January and I was there until 2am. They took x-rays, did blood tests and I also had a brain scan and an ECG. All the test results came back negative. At 2am I was discharged and I was told 'I can't see anything wrong with you'. The pins and needles continued during this time while I was in the hospital but it had settled a little bit. From the day I went to NBH until I went back to work on 27th the pins & needles got worse."

15. Mr Gorrell returned to work on 27 January 2019, with increasing pain and pins and needles in both arms and from the waist down. He saw his general practitioner, Dr Norrie in February 2019 who reassured him that "everything was normal for my age." He subsequently saw Dr Singh and Dr Wang. Dr Wang provided a referral for a neurosurgeon but Mr Gorrell was unable to obtain an appointment for six months. Dr Wang told him "if you still have pins and needles go to hospital."

16. On 31 March Mr Gorrell went to the Emergency Department at Royal North Shore Hospital (RNSH). He saw Dr Parratt and Dr Ball. Mr Gorrell said:

> "I remember Dr Ball saying 'we can't afford to let you leave; the situation is that even the smallest trip could damage you badly' .. He went on to say 'we can't do anything tonight or tomorrow because we are booked out but we want to put you on standby if someone pulls out.'
>
> I stayed in RNS Hospital and on 5th April 2019 Dr Ball operated on me. He told me he removed 4 vertebrae from my neck and inserted 2 titanium plates and 10 screws. To do so he had to cut some muscles in my neck."

17. Mr Gorrell explained the delay in making a claim for compensation in his statement. Because the STA does not rely on any defence with respect to the lateness of notice of injury or the claim, it is not necessary to summarise that evidence.

18. Mr Gorrell said that STA's insurer asked him to see Dr P Bentivoglio on 26 August 2019 and that he attended that appointment. A copy of the letter dated 19 July 2010 is attached to the Application to Admit Late Documents dated 24 June 2020. In a short statement dated 10 June 2020, Mr Gorrell confirmed that he attended the appointment and that he had not been provided with a copy of the report.

19. Mr Gorrell made a supplementary statement on 13 May 2020 which repeats much of the evidence in his original statement and described events after the surgery. He said that he last worked on 25 March 2019 and used his leave entitlements.

20. Mr Gorrell completed a claim form on 10 July 2019. He said:

> "A pedestrian jumped in front of bus, which I hit him causing me to jump on the brakes heavily which gave me whiplash. I heard a pop in my neck. 4 passenger were thrown to the front of the bus.
>
> At the time I had a sore neck. After that my neck slowly got worse, then pins and needles in arms, hands, legs and feet. At the time of the accident I was not in a good way."

21. Brian Wright, another driver at the Brookvale Depot, provided a statement dated 7 November 2019 in which he said that he had exercised with Mr Gorrell before the incident. After the incident he observed that Mr Gorrell had lost drive and enthusiasm and that he was limping.

STA's evidence

22. STA provided copies of three excerpts of CCTV film of the incident – one showing the view of the road from the front of the bus, one showing the view inside the bus including Mr Gorrell and a training video prepared from the former.

23. Ryan Piggott is the Acting Depot Director at the Brookvale depot. His usual role is Senior Depot Supervisor. He provided a statement dated 18 June 2020 and recalled that Mr Gorrell was shaken and that he had a period off work with the return to work plan indicating that the injury was psychological. Mr Piggott was asked to provide comments about Mr Gorrell's presentation between 26 June 2018 and 1 April 2019. Mr Piggott said that he did not recall Mr Gorrell mentioning any issues and had no reason to believe he was not fit to operate a bus. He did not recall Mr Gorrell mentioning that he was suffering pins and needles and did not observe him limping.

24. Elizabeth Hawkins is the Duty Officer at the Brookvale depot. She recalled that Mr Gorrell underwent counselling following the incident. Not long before he underwent surgery, Mr Gorrell told her that he trod on a stonefish at Freshwater Beach and suffered pins and needles. Ms Hawkins did not recall Mr Gorrell suffering any physical issues and she said that he did not mention that he suffered any physical symptoms as a result of the incident on 26 June 2018 [sic] or any other work related incident. Specifically, she did not recall Mr Gorrell telling her that he suffered pins and needles in his shoulder in October 2018.

25. STA issued a notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* on 19 July 2019. It said that Mr Gorrell has failed to establish that he had suffered an injury and that there was no contemporaneous evidence of neck or other physical symptoms. STA said that Dr Parratt's conclusion was that Mr Gorrell had suffered a whiplash injury which was not consistent with CCTV footage which "does not indicate movement sufficient to cause a whiplash injury." STA said that there was no medical evidence establishing that employment was the main contributing factor to disc disease or aggravation of disc disease.

26. STA issued a review notice dated 25 March 2020 in which it confirmed its decision. In brief summary, the notice said that there was no evidence of a contemporaneous report of symptoms and that Dr Stening's report was based on Mr Gorrell's reported history of the onset of symptoms. It stated that it had sought a report from Dr Ball on receipt of which it would review its position.

27. Mr Gorrell prepared a statement in response to those of Mr Piggott and Ms Hawkins. He said that he rarely saw Mr Piggott outside the office so that it was possible Mr Piggott had not observed him limping.

Medical evidence

28. The Discharge Summary from Northern Beaches Hospital dated 2 February 2019 records;

> "56M presented with bilateral tingling in his arms.
> Onset at the beach while in the ocean, not really exerting himself.
> Bilateral tingling from shoulders to hands, hands felt weak bilaterally.
> No chest pain/palpitations/SOB
> Felt unsteady walking, legs also felt weak
>
> Daughter did not notice abnormal gait
> Nil history of chronic neck issues
>
> Has returned to bus driving after a 5 week holiday and arms were sore/achey yesterday evening·
> Symptoms resolved after an hour but still feel a little tingly in his hands if he coughs
> Has a slightly stiff/ achey neck today and trapezius- attributes to sleeping."

29. Mr Gorrell was asked to follow up with his general practitioner.

30. On 4 February 2019, Mr Gorrell underwent CT scans of his cervical and lumbar spines at the request of Dr Norrie and the report notes a clinical history of “bilateral weak arms.”

31. On 5 March 2019, Mr Gorrell saw Dr Singh at Medclinic Family Practice Warringah. The history recorded was:

> “on 28th Jan had a bite in the ocean - on right foot big toe
> ?stonefish
> since then pins and needles whole body - namely the arms and legs
> went to hospital that day - did ecgs, xrays etc - all negative
> saw own GP 2 wks ago
> reports decreased strength in arms and legs
> left hip painful since lst wk and saw physio
> cannot jog, strength decreasing
> 1 month ago had a sore neck which has resolved
> no electric shock like pains
> states has had bloods done 1 month ago NAD
> biggest concern - lack of energy and weakness.”

32. Dr Singh ordered blood tests.

33. On 31 March 2019, Mr Gorrell saw Dr M Wang at the Vale Medical Deputising Service. Dr Wang recorded:

> “the pt was bitten on right toe by something in the ocean 2.5 months ago,
> he had pins and needles in arms and legs, body, he went to northern beaches hospital, he had blood and X-ray, no positive findings.
>
> today he has left hand numbness and weak for 2 weeks, pain on left hip
>
> PMH: no spinal problem before the bite.
>
> …
>
> neurological: mild weakness in left hand and leg,
> the sensation in both hands and legs are same, no changes
> plan: refer to a Neurologist for urgent review
> he is bus driver, advised not to drive if he has weakness in arms and legs
> off work for 3 days next week.”

34. Mr Gorrell went to the Emergency Department at RNSH on 1 April 2019. The notes read:

> “58year old male presents with ?worsening ?ongoing numbness and weakness in LEFT hand
> - ongoing discomfort for past 2-3 months
> - has been having difficulty holding a pen and is normally LHD for writing
> - has also noticed some difficulty in right hand ·
> - has dropped x2 glasses that he was holding in LEFT hand
> - also finding it difficult to grip the steering wheel of the bus with left hand
> - also has had difficulty walking
> - reports feeling unsteady on feet
> - feels as though he has difficulty with walking, feels as though he can't hold himself up properly in the ocean
> - feels as though he can't lift his legs up in the surf and walk out properly
> - denies chest pain, denies shortness of breath
> - denies abdominal pain
> - some constipation secondary to drinking 'manshake' every morning
> - no nausea/no vomiting

- states has been to NBH since the day he got bitten in ocean by a creature in Jan/Feb
- felt that his symptoms have begun since then ?related ·
- is supposed to see a neurologist, but not available for 2 months appointment
- felt LEFT hand and hip pain symptoms getting worse so presented today"

35. The reason for admission in the hospital records is:

> "Presented to ED with 6 week history of progressive shooting pains, unsteadiness, weakness and parasthesias in limbs L > R
> Pre-op examination showed power 4+/5 L UL and LL with positive Hoffman on L, no clonus, reflexes brisk both LL, tone slightly increased globally
> MRI spine showed C3/4 and C4/5 stenosis with cord signal change at those levels, worst at C5/6 where there is complete effacement of CSF spaces."

36. On 20 May 2019, Dr A Pahwa, wrote to Dr Norrie and summarised Mr Gorrell's presentation at RNSH:

> "I had the pleasure of reviewing Mark Gorrell in the Neurosurgery Outpatient Clinic today for Dr Jonathan Ball. As you are aware he is a 58-year-old gentleman who was admitted under my care back in April 2019 with a progressive likely cervical myelopathy. He initially came in under the Neurology Team under Dr Parratt and one of the concerns at this presentation was whether he could have transverse myelitis but an MRI scan was highly suggestive of cord compression and as such we looked after him from there . He had a cervical laminectomy and posterior fusion from C3 to C6 and follows us up today for a clinical review and also with some x-rays. Prior to his operation he had progressive spastic quadriparesis with mainly sensory symptoms."

37. The Discharge Referral from RNSH said that Mr Gorrell's diagnosis was "cervical decompression + lateral mass fusion for cervical canal stenosis." The presenting complaint was:

> "In January was swimming and either stubbed right foot/?was bitten .Got out of the water and describes having pi ns an d need les all over and felt generally weak. Persistent generalised paraesthesia since, predominantly in legs.
> 3 weeks ago developed weakness and reduced sensation In left hand and has noticed left grip strength progressively worse.
> Struggling to write, has dropped things on several occasions (left hand dominant).
> Working as bus driver, unable to grip wheel with left hand.
> 1.5 weeks ago noticed reduced sensation in right hand.
> Sensation not as reduced as left. Good motor function.
> …
> Reviewed by Neurology (Dr Parratt): Progressive spastic quadriparesis, L> R, predominant sensory symptoms and pain . Flushing sensations In legs consistent with spinal pathology. Pyramidal weakness, 4/4+ LUL, spastic lower limbs and LUL and hyper- reflexic throughout. Impaired temperature sensation left hand and left leg . Need to exclude surgical high cervical cord lesion but transverse myelitis is the other possibility."

38. Dr Parratt reviewed Mr Gorrell and reported to Dr Norrie on 9 July 2019. He said:

> "Mark suffered a major accident in June 2018. He had to stop the bus suddenly due to a pedestrian stepping out on to the road. He suffered a whiplash at the time and he recalls that there was a 'pop'. Since then he noted that there was pain in the neck and in the shoulders and this was exacerbated by looking in the mirrors and driving over bumps and so on.

> The first neurological symptoms developed in January, and were characterised by progressive sensory symptoms followed by a progressive spastic quadriparesis. When I first saw him at RNSH on the 1st April he was losing function of both the hands due to weakness and numbness and his walking distance had reduced drastically. He had clear signs of myelopathy and an urgent MRI C-Spine was arranged which showed that there was evidence of cervical cord compression from disc osteophyte complexes. He was operated upon under Jonathan.
> …
> It was a pleasure to see Mark and his wife. The last time I saw Mark he presented with a 4 month history of progressive sensory disturbance of all four limbs and spastic quadriparesis. He was shown to have cervical canal stenosis and cord compression. He has improved since the operation and continues to do so. I found that there was a significant reduction in spasticity of the lower limbs, improvement of power and improvement of sensation in the hands. There are still issues including a spastic , numb left upper limb but I am hopeful that he will realise further improvements over the next 6 months.
> …
> I have completed his workcover forms as it is a reasonable synopsis that the injury in July 2018 resulted in disc bulging/prolapse and the progressive symptoms."

39. On 20 April 2020, Dr Parratt reported to Mr Gorrell's solicitors. He said that Mr Gorrell presented with "severe spastic quadriparesis due to a herniated cervical disc. An emergency operation was required and he has improved subsequently with some lasting neurological deficits." Dr Parratt said:

> "Mark suffered a major accident' in June 2018. He had to step the bus that he was driving suddenly due to a pedestrian stepping out on to the road. He suffered a whiplash at the time and he recalls that there was a 'popping' noise in his neck. From that point he developed pain in his neck which radiated across the trapezius muscle and into the shoulders. The pain was exacerbated by turning the head such as when lacking in the wing-mirrors of the bus, or when driving over bumps in the road.
>
> The first neurological symptoms developed in early January 2020. He initially stubbed his toe whist at the beach and then found there were sensory symptoms in all four limbs. In retrospect the toe stubbing likely represented the first motor symptom of his spastic paraparesis, The sensory symptoms progressed over a period of 8 weeks with increasing pins and needles and hot burning sensations in the legs. By early March he was losing dexterity and strength in the left hand and by the time of assessment had dragging, spastic weakness of the legs and the right hand was becoming weak."

40. Dr Parratt said:

> "Mr. Gorrell suffered from a progressive myelopathy which resulted in spinal cord injury and the symptoms that he now suffers. This was secondary to a large central disc in the cervical spine and some underlying cervical degenerative disease. It is my view that the whiplash injury sustained in July 2018 was the precipitating factor to the disc herniation and there is clear evidence of symptoms related to disc herniation and cervical paraspinal muscle spasm, from that point. As such, I think that the neurological injury was related to the whiplash which was sustained during work."

41. Dr Parratt reviewed the CCTV footage and provided a report dated 24 June 2020. Although that is not clear from his report, Mr Hanrahan conceded that it had been provided to him. Dr Parratt said:

> "It would appear that there was a reasonably large force that occurred when the bus slowed suddenly, in that a number of people fell to the ground and Mr. Gorrell's head and thorax lurched forward and appeared to touch the steering wheel. Given that Mr. Gorrell heard a 'pop' at the time, and then developed pain in the neck, it seems likely that this event was the precipitant or at least a significant contributing factor to his subsequent spinal canal compromise and spinal cord compression.
>
> As mentioned above, although this could not be regarded as the sole factor in the development of his neurological condition, it seems on the balance of probabilities, that this movement resulted in changes in cervical discs over and above degenerative changes that were likely to be present beforehand, and led to progressive impingement of the spinal cord and the myelopathy that he developed later.
> …
> I agree that this does not appear to be a conventional whiplash injury. However, given that the symptoms developed from the point of the 'bus incident' and there was a strong degree of force being applied to the upper body of Mr. Gorrell at that time, my view is that this event likely destabilised an already diseased spine and this led to progressive cord compression, progressive deterioration in strength, and ongoing pain, numbness and impotence to this point.
>
> As mentioned above, I think that the subsequent spinal cord injury stems from underlying degenerative disease which is evident on the MRI scan but also a large disc protrusion which compresses the spinal cord. It seems likely that this disc protrusion occurred at the time of the accident given the immediate symptoms experienced by Mr. Gorrell or that at least, the disc protrusion was exacerbated at that time. It is reasonable to surmise that slowly progressive cord compression (from that point) led to initially sub-clinical dysfunction of the spinal cord axons and then ultimately clinical myelopathy. There is evidence of this with gliosis and swelling on the imaging taken at RNSH."

42. Dr Norrie, Mr Gorrell's general practitioner prepared a report dated 10 February 2020 in which he said that Mr Gorrell had no current work capacity and that STA would not permit him to drive. His work capacity was limited to desk based computer work in finance.

43. Mr Gorrell's lawyers qualified Dr W Stening, neurosurgeon, who prepared a report dated 7 November 2019. Dr Stening obtained a history of the incident, including that Mr Gorrell felt a pop in his neck, and that Mr Gorrell was "numb" for several weeks, concerned that he must have killed the pedestrian. He obtained a history that Mr Gorrell started to develop pins and needles in September 2018. When his symptoms deteriorated he thought he might have been bitten in the surf.

44. Dr Stening reviewed the radiology and other reports. He diagnosed pre-existing degenerative change, most marked between C3/4 and C6/7, with quite severe canal stenosis at C3/4 and C4/5. He said that there was progressive cervical myelopathy based on the history and on the MRI scan taken in April 2019. He said:

> "Therefore, on the balance of probabilities, when the bus came to a sudden stop and he felt the 'pop' in his neck, the hyperflexion component of that sudden deceleration caused the spinal cord to be contused against the disc/bar complexes, together with a transient instability at the C3/4 disc. As the spinal

canal was already severely compromised, there was ongoing continuing microtrauma to the spinal cord leading to the progressive development of increased symptoms, mainly in the form of sensory disturbance in the arms, but later, gait disturbances.

The improvement of the neurological signs and symptoms following the decompression supports this view."

45. Dr Stening provided a supplementary report dated 19 June 2020 after reviewing the CCTV film. He said:

> "Upon examining the footage covering Mr Gorrell, as the driver of the bus, it is clear that there was no flexion/extension component when the bus came to a sudden stop. The footage did show a number of passengers losing their footing and falling to the floor when the bus stopped, indicating that there was a sudden deceleration.
> …
> The CCTV footage indicates that there was no 'whiplash' component to the injury and clarifies the fact that the injury was a translational injury at C3/4, that is, that the body of C3 move forwards on the body of C4, due to the inertia cause when the weight of the head continue to move forward, when the remainder of the body stopped suddenly.
> Further evidence that this is the case was the increased signal in the C3/4 disc in the MRI scan of the cervical spine, performed on 2 April 2019.
>
> The claimant felt a 'pop' in his neck at the time of the injury.
> …
> It has been shown that the cervical canal was severely compromised prior to the bus incident by the degenerative changes in the cervical spine, most marked at C3/4. It therefore would take very little movement of C3 on C4 to cause trauma to the spinal cord, in this case quite mild, but, nonetheless, on the balance of probabilities, the first incident in a series of microtraumas which ultimately led to the development of the cervical myelopathy. The subsequent microtraumas have obviously been also been very mild, and almost certainly not noticed by the claimant.
>
> On the balance of probabilities, this first episode of microtrauma to the cervical spinal cord did not produce sufficient damage to the cord to produce noticeable neurological signs or symptoms.
>
> Repeated microtrauma in an already compromised cervical canal is a well-known cause of the onset of a cervical myelopathy."

46. STA's Application to Admit Late Documents contains correspondence evidencing attempts to obtain a report from Dr Ball. It also attaches a file note of a conversation between a representative of STA's lawyers and Dr Ball's assistant. The file note reads:

> "He received our request through the hospital last Friday and doesn't feel he can help us.
>
> Dr Ball said that none of his notes relate to our request, and he is unable to answer our questions because they don't usually go into background information in a private consultation, and as the patient went through the public hospital over 12 months ago the patient would have just seen whoever was on call the day.
>
> He is also not comfortable reviewing the footage, and is generally not comfortable in assisting us with this matter."

SUBMISSIONS

47. Mr Trainor said that the evidence showed that there was an evolving medical condition after 26 June 2018. From January 2019, the evidence showed that medical practitioners were struggling to make a diagnosis. He said that it was necessary to pay close attention to what the doctors said.

48. Mr Trainor said that the CCTV footage was significant and that a review of it suggested that the bus was travelling more than 15 kph. The brakes with which the bus was fitted caused it to come to a sudden stop. The footage showed that there was a major change in momentum, consistent with the pop that Mr Gorrell has always said that he felt.

49. In the short term, Mr Gorrell "bashed on" until his condition deteriorated at the beach in late January 2019 leading to significant radiculopathy and ultimately myelopathy, with symptoms effecting Mr Gorrell's whole body.

50. Mr Trainor said that Dr Parratt and Dr Stening provided a similar analysis, though Dr Stening said that the injury was a translational injury rather than whiplash. The difference was not relevant because whiplash was not a precise term. It was clear that the speed of the bus was reduced to zero in an instant and that massive energy was applied to Mr Gorrell's neck. His evidence that he experienced a pop had not been contradicted.

51. Mr Trainor said that the injury was superimposed on degenerative changes, leading to a protrusion at C3/4 so that it was an injury within the meaning of s 4(a) of the 1987 Act. There is no countervailing medical opinion and Mr Trainor described a "yawning" *Jones v Dunkel* problem on the STA's medical case because it chose not to rely on the report of Dr Bentivoglio, submitting that I can draw the inference that it would not have assisted the STA's case.

52. Mr Trainor said that contrary to the issues raised in the s 78 notice, the injury was not a disease so that it was not necessary to prove that employment was the main contributing factor to the aggravation of a disease. There was ample evidence that Mr Gorrell's employment was a substantial contributing factor to the injury.

53. With respect to capacity for employment, Mr Trainor submitted that Mr Gorrell's work capacity was, at best, theoretical and his capacity to earn was de minimis.

54. Mr Hanrahan said that the absence of a report from Dr Bentivoglio was balanced by the lack of a report from Dr Ball.

55. Mr Hanrahan said that STA took issue with the submissions that the CCTV footage showed that the bus was travelling at 50 kph because the traffic was heavy. There was no apparent flexion/extension injury.

56. STA's case is that the injury is a disease and that, based on the medical evidence, the incident may have been a substantial contributing factor to the compromise of Mr Gorrell's spinal cord but was not the only factor. Degenerative changes were present. The only immediate symptom noted was a pop in Mr Gorrell's neck, of which he did not provide notification, perhaps because of shock.

57. Mr Hanrahan said it was not clear what precipitated the attendance at RNSH in April 2020 and that it could not be said with confidence that the incident in June 2018 was the main contributing factor to the onset or aggravation of the disease. Dr Parratt conceded in his report dated 24 June 2020 that other factors played a part.

58. Dr Stening did not agree that Mr Gorrell suffered a whiplash injury and said that the incident set the scene for aggravation by repeated mild injuries. Mr Hanrahan said that the need for surgery was not so proximate in time that I could be satisfied that the incident was the main contributing factor to the aggravation. It was a disease because that is who the condition was described by Mr Gorrell's treating doctors.

59. The clinical records show that Mr Gorrell suffered neurological symptoms after the incident at the beach and Mr Hanrahan said that jumping in the waves was just as likely if not more likely to cause the aggravation as sitting in the bus. The history provided at RNSH was that symptoms had been suffered during the last six weeks which was coincident with the event at the beach. Dr Stening's report supported the view that the incident was not productive of damage and that the need for surgery was caused by repeated microtraumata on a compromised spine. Mr Hanrahan said that the significant event in the causation of neurological symptoms was the event in early 2019.

60. Mr Hanrahan did not submit that Mr Gorrell was fit for employment.

61. In reply, Mr Trainor said that I could take notice that the bus was not travelling slowly at the time of the incident, noting that there was no traffic in the kerbside lane in front of the bus.

62. Mr Trainor said that I would be satisfied on the test in *March v Stramare (E & MH) Pty Ltd*[1] or even on the "but for" test of causation that the incident in June 2018 was the cause of the injury which led to the surgery.

63. Mr Trainor referred me to the notes from Northern Beaches Hospital to point out that Mr Gorrell said that he had suffered symptoms before the incident in the surf.

FINDINGS AND REASONS

64. I have reviewed the CCTV footage and my interpretation of it follows. The footage of the incident is taken from cameras inside and outside the bus. The footage outside the bus shows that the bus was travelling in the kerbside lane and that there was no other traffic in that lane. I am unable to draw any conclusion about the speed of the bus other than that it was moving smoothly, and passing apparently stationery traffic in the other lanes. After the bus stopped, the other traffic appeared to move slowly past, consistent with heavy peak hour traffic.

65. The footage shows that the bus stopped quickly after the pedestrian ran in front of it. The pedestrian can be seen to run between stationery cars in the next lane into the path of the bus from right to left. The bus stopped moving straight away and the pedestrian can be seen lying on the footpath and gutter. It is clear that the bus stopped suddenly.

66. The footage inside the bus shows Mr Gorrell standing on the brake. As he did so his upper body is thrown forward and back and I agree with Dr Parrett that his chest appeared to strike the steering wheel. The bus stopped suddenly and a number of standing passengers were thrown forward, falling to the floor of the bus. Mr Gorrell opened the doors and some passengers disembarked. Mr Gorrell made a telephone call.

67. Based on my review of the CCTV footage, I accept that Mr Gorrell's body was subjected to force when he stopped suddenly.

68. It is consistent with the nature of the incident that Mr Gorrell said he felt emotionally numb for a period afterwards. He thought he had killed the pedestrian until the police spoke to him about three weeks later. He underwent some counselling at the instigation of the STA and there is no evidence that he completed a claim form for workers compensation at that time. He was off work until a pre-arranged holiday and returned to driving in August 2018.

[1] [1991] HCA 12; (1991) 171 CLR 506.

69. I do not agree with Mr Hanrahan's submission that the absence of the report from Dr Bentivoglio is balanced by the absence of a report from Dr Ball. Dr Ball saw Mr Gorrell in the public hospital system as the file note in STA's Application to Admit Late Documents explains. In that situation, Dr Ball's concern was with treating Mr Gorrell's condition and not with its cause. On the other hand, Mr Gorrell was asked to see Dr Bentivoglio for the purpose of these proceedings and he attended the examination as long ago as 26 August 2019.

70. It would be expected that STA would rely on Dr Bentivoglio's report. I am satisfied that it is appropriate to draw an inference in accordance with *Jones v Dunkel*[2] that Dr Bentivoglio's report would not have helped STA's case.

71. There is no medical evidence from STA and its case is that I cannot be satisfied that the injury was the main contributing factor to the aggravation of a disease. That argument is based solely on the elapsed time after the injury, the lack of contemporaneous complaint of symptoms and the contention that Mr Gorrell began to notice neurological symptoms after the incident in the surf in January 2019. There is no expert evidence to support the conclusions it asks me to draw.

72. The radiological evidence makes clear that Mr Gorrell had significant degenerative changes in his neck and the medical evidence is that they would have pre-existed the injury on 26 June 2018.

73. Mr Gorrell said that he felt a pop in his neck at the time of the incident. Both Dr Stening and Dr Parratt consider that was significant. Each took a history from Mr Gorrell and prepared a report before viewing the CCTV footage. Each doctor accepted that the incident on 26 June 2018 caused an injury to his cervical spine, leading to progressive neurological symptoms culminating in cervical myelopathy and the need for urgent surgery in April 2019.

74. Dr Parratt said in his earlier reports that Mr Gorrell suffered a whiplash. Dr Stening said that he did not suffer a whiplash but did suffer a translational injury. The difference in nomenclature is not material.

75. The opinion of both doctors is that Mr Gorrell suffered pre-existing degenerative change in his cervical spine and that the incident was sufficient to compromise his spinal cord, leading to progressive deterioration. Both doctors obtained and considered the history that Mr Gorrell continued to work and of the onset of significant symptoms in the surf in January 2019.

76. Mr Gorrell said that he went to Northern Beaches Hospital on the day he felt pins and needles in the surf. The notes from Northern Beaches Hospital are dated 2 February 2019 and show that Mr Gorrell said that his arms were sore after returning to work and before the incident in the surf. That suggests that Mr Gorrell went to the hospital a couple of weeks after the incident and after he had returned to work in late January 2019.

77. The Northern Beaches Hospital records note that Mr Gorrell was not exerting himself when he noticed the onset of bilateral tingling in his arms.

78. Mr Gorrell assumed he had been bitten by something and that hypothesis was accepted by the medical practitioners who saw him in the period before his admission to RNSH.

79. Mr Gorrell continued to undergo investigations until he went to RNSH on 31 March 2019. By that time his condition was so serious that he remained in hospital until it was possible for him to undergo surgery. He said that he was told that he must stay because even a minor trip could cause damage.

[2] [1959] HCA 8; (1959) 1010CLR 298.

80. Mr Trainor argued that Mr Gorrell suffered a frank injury superimposed on a disease and I am satisfied that he did, consistent with the statements of the High Court in *Zickar v MGH Plastic Industries Pty Ltd*[3]*.* As Roche DP said in *North Coast Area Health Service v Felstead*[4] (*Felstead*):

> "A sudden identifiable physiological (pathological) change to the body brought about by an internal or external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury."

81. Roche DP said[5]:

> "In *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45; 200 CLR286 (*Petkoska*) Gleeson CJ and Kirby J observed (at [39]), after referring to *Zickar* and the need to consider the precise evidence in each case, that:
>
> > 'If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an 'injury' in the primary sense of that word.' (emphasis added)
>
> It follows that the description of a personal injury as **'**a sudden identifiable pathological change**'** is consistent with the authorities. It suggests no more than that, to qualify as a personal injury, there must be some sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state. Such a change or disturbance may be as simple as a bruise or a soft tissue strain. If the personal injury also aggravates a pre-existing disease, that does not mean it is no longer a personal injury."

82. Mr Hanrahan said that this was a disease case. I do not agree. Mr Gorrell suffered an injury which the doctors agree led to cervical myelopathy and the need for urgent surgery.

83. Roche DP explained the distinction in *Felstead*[6]:

> "While the majority in *Zickar* made it clear that the terms 'personal injury' and 'disease' are not mutually exclusive, Gleeson CJ and Kirby J observed (at [40]) in *Petkoska*:
>
> > 'The foregoing approach does not rob the disease provisions of the Act of utility. They would apply in cases of a disease in the nature of dermatitis, lead poisoning, brucellosis and many others of a progressive type. The disease provisions remain as alternative and additional heads of entitlement where a disease pathology exists with the appropriate employment connection, and does not manifest itself in the kind of sudden physiological change or disturbance of the normal physiological state that will constitute an 'injury' in the primary sense. There is no reason to read the word 'injury' down because of the alternative and additional definition of compensable disease conditions. On the contrary, considerations of the language and structure of the Act, of legislative history and of the proper approach to construing such legislation reinforce the conclusion to which the majority came in *Zickar*.'"

[3] [1996] HCA 31; 187 CLR 310.
[4] [2011] NSWWCCPD 51.
[5] At [80].
[6] At [83].

84. The thrust of STA's submissions is that if Mr Gorrell suffered the aggravation of a disease rather than an injury, any of a series of small traumas – such as the incident in the surf could have led to an aggravation. If that was so – and if the incident in the surf was a trauma – then employment would not be the main contributing factor to the aggravation.

85. The flaw in this argument is that there is no evidence that Mr Gorrell did suffer any trauma in the surf in late January 2019. He said he was standing in the surf and assumed he had been stung when he suffered the onset of pins and needles. The notes from Northern Beaches Hospital support his statement that he was merely standing in the water.

86. There is also no medical evidence to support the hypothesis that the event in the surf was a trauma.

87. Dr Stening said in his report dated 19 June 2020 that a series of mild microtraumas led to the development of cervical myelopathy. He said that the subsequent microtraumas had also been mild and not noticed by Mr Gorrell. This is consistent with Dr Ball's statement to Mr Gorrell that he was required to stay in hospital pending his surgery because even a minor trip could have serious consequences.

88. I am satisfied that Mr Gorrell suffered an injury on 26 June 2018. Because of the circumstances, it is clear that employment was a substantial contributing factor to the injury.

Award

89. STA did not argue that Mr Gorrell had any current work capacity so that it is appropriate that I make an award on the basis that he has no current work capacity.

90. Pre-injury average weekly earnings are agreed at $1,472.94. Ninety-five percent of that sum is $1,399.30 and eighty percent is $1,178.35. Mr Gorrell was not paid any weekly compensation. He used leave entitlements until 10 July 2019 and seeks that the award commence from that date.

91. I order STA to pay Mr Gorrell compensation:

    (a) from 10 July 2019 to 8 October 2019 at the rate of $1,399.30, and
    (b) from 9 October 2019 to date and continuing at the rate of $1,178.35.

92. I order STA to pay Mr Gorrell's s 60 expenses.