

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2375/19
Applicant: Utpala Dhungel
Respondent: Jewel of India Admin Pty Ltd
Date of Determination: 19 August 2019
Citation: [2019] NSWCC 277

The Commission determines:

1. The applicant suffered injuries to her cervical spine and lumbar spine as a result of the nature and conditions of her employment from January 2012 until May 2015, with a deemed date of injury of 22 May 2015.
2. The injuries referred to in (1) above are to be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:

Date of injury:	22 May 2015 (deemed);
Body systems referred:	Cervical spine; Lumbar spine;
Method of assessment:	Whole person impairment.
3. The documents to be referred to the AMS to assist with their determination are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) The Application to Resolve a Dispute and attached documents;
 - (c) The Reply and attached documents.

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

Cameron Burge
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Utpala Dhungel (the applicant) is a 48-year-old woman who was born in Nepal and immigrated to Australia in September 2009. She began working for Jewel of India Admin Pty Ltd (the respondent) on or about 16 January 2012 on a full-time basis. Her role with the respondent involved packing cooked frozen food. In her statement, she describes her duties as taking the cooked food from large containers and placing it into smaller containers ready for sale. She said she works on a food production line on which she packs containers for sale.
2. The applicant states her usual hours were from 6.30 am to 2.30 pm, however, there are no fixed hours and she usually worked eight hours per day or longer. She said that since she suffered the alleged injuries, she has not been doing any overtime, and alleges she has suffered injuries to her right upper extremity (shoulder), cervical spine and lumbar spine as a result of the nature and conditions of her employment with the respondent. In these proceedings, the injury to the right shoulder is admitted, however, liability for the alleged injuries to the cervical and lumbar spines is disputed.
3. It is alleged that the injuries in issue were caused by the nature and conditions of the applicant's employment. She states her injuries were caused by doing "the same repetitive work over and over monotonously" and that her daily primary task was to stand at a table, which was too high for her. While standing at the table, the applicant had a trolley next to her with the food in it. She manually removed scoops of food with a ladle and placed it into smaller containers for sale. The applicant says the food is partially frozen and sometimes can be hard to scoop out. Once the food was scooped out and placed into a container, the applicant stated:

"I have to reach all the way over the table, directly in front of me, to put the container onto the conveyor belt. The table is around half a metre in width, so I have to lean that far to put the container on the conveyor belt."
4. The applicant states that the containers usually weigh approximately 350 g, however, they vary and can be up to 1 kg in weight. She says she finishes approximately five containers per minute, which means she has to reach over to the conveyor belt around five times every 60 seconds. At paragraph 49 of her statement, the applicant said "It is the action of reaching over the table continuously, to put containers on the conveyor belt, that I believe has caused my back and shoulder injuries." The applicant also recounted that her duties required repetitive lifting and carrying at shoulder height or above, and also lifting of trays whilst bending down to retrieve them from racks.
5. The area in which the applicant worked is cold, with a temperature of no more than eight or nine degrees. She said she had complained to the respondent about the height of the table, which makes the process of packing and moving on the food uncomfortable to perform, however, no changes have been made to the process.
6. According to the applicant, her pain and symptomology commenced in or about October 2014. She said the first pain which she felt was in her back, however, she continued to work. The applicant said she first saw her general practitioner, Dr Gabriel Atef about the pain in her back in approximately October or November 2014. After a day or two away from work, the applicant continued with her normal duties until approximately March 2015, when she was sent for an ultrasound which she says disclosed a tear in her right shoulder and a "problem with my back."

7. In or about March 2015, the applicant had some injections at the hands of Dr Al Khawaja, and around the same time she asked her supervisor to be provided with an easier set of duties. Her role was then changed to taking filled containers of rice and putting them on the conveyor, which took place at a lower table. As such, the applicant did not have to reach over as far anymore and could easily lift the food which had already been prepared on to the conveyor from trays.
8. Nevertheless, the applicant states her back injury did not get any better despite her continuing in her new duties until 25 May 2015, at which time she received a WorkCover certificate of incapacity.
9. The applicant had time away from work and consulted Dr Todd Gothelf whom she describes as a shoulder specialist. Dr Gothelf sent the applicant for an MRI on her right shoulder and gave her injections, however, she says those injections made her condition worse. Eventually, the applicant underwent a supraspinatus tendon repair by Dr Gothelf.
10. I note the applicant had brought prior proceedings numbered 3291/2017. Those proceedings related to a claim for the surgery which was eventually carried out by Dr Gothelf to the applicant's right shoulder. The consent award was to the effect that the proposed surgery by Dr Gothelf was reasonably necessary.
11. As the applicant had previously discontinued the claim for injuries to her cervical and lumbar spines, liability in relation to those injuries remains in dispute in these proceedings.

ISSUES FOR DETERMINATION

12. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant suffered a workplace injury to her cervical spine, and
 - (b) Whether the applicant suffered a workplace injury to her lumbar spine.

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a hearing on 10 July 2019. 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.
14. At the hearing of this matter, Mr S Grant of counsel appeared for the applicant and Mr P Stockley of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application); and
 - (b) Reply and attached documents.

Oral evidence

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

The applicant's evidence

17. The applicant stated that she was involved in repetitive, heavy work which she performed overhead during the course of her employment with the respondent, and which also involved repetitive bending. In her second statement dated 25 September 2015, the applicant said:

“My shoulder injury is a consequence of overhead lifting and scooping frozen rice and curries and my back injury is a consequence of repetitive bending towards the conveyor belt and bending movement whilst lifting trays from the lower end of the trolleys.”

18. The applicant set out in detail the nature and extent of her duties. She said the trays which she was responsible for unloading weigh between 5 to 7 kg, and the trolleys upon which they are placed are of different heights. The applicant said almost 30 to 40% of the trolleys are taller than her head height. She said loading and unloading the trolleys required frequent lifting at both low and overhead levels. At paragraph 2 of her second statement, the applicant said:

“The pressure is most on my arms and shoulders while performing this task and I had done this almost daily for three years.”

19. The applicant noted in her statement that she had a previous back injury with a former employer, for which she did not make a claim. She says her previous lower back injury had completely resolved before she commenced employment with the respondent.
20. In support of her claim, the applicant relied upon reports from her treating practitioner Dr Al Khawaja and also Dr Stephenson, independent medical examiner (IME). Dr Al Khawaja's report is a short document reporting to the applicant's general practitioner and noting the applicant gaining no relief from C6/7 bilateral facet blocks.
21. Dr Stephenson provided two reports, dated 15 October 2015 and 18 October 2018 respectively.
22. In his first report, Dr Stephenson was asked about the relationship between the conditions which he had found on examination and the injury sustained during the applicant's employment. Dr Stephenson replied as follows:

“The diagnosis is consistent with musculoligamentous strain, both right shoulder and lumbar spine, which were likely to have occurred as a result of her employment. There is a past history of lower back pain when employed as a chef at Curry Monitor.

There were no findings of any radiculopathy in the lower extremities related to the back and the radiology confirms the absence of significant lumbar disc pathology in that respect, that is, there is no lumbar disc protrusion causing nerve root compromise.”

23. Dr Stephenson diagnosed the applicant as suffering from a 6% whole person impairment (WPI) to her lumbar spine with a one-tenth deduction for a pre-existing condition, therefore rounding down to 5%. In relation to the right upper extremity (shoulder), Dr Stephenson assessed the applicant as suffering from a 7% WPI.
24. In his second report dated 18 October 2018, Dr Stephenson again assessed the applicant as suffering from 7% WPI with regards to her right upper extremity. He assessed the applicant as suffering from 7% WPI with respect to her cervical spine and confirmed the WPI of 5% with regards to the lumbar spine. In terms of causation, Dr Stephenson said:

“I have no history of injury obtained. There was repetitive packing work and overhead work with both upper extremities leading to rotator cuff injury to right shoulder with musculoligamentous cervical and lumbar strain conditions; each carries a Diagnosis Related Category II rating.”

Dr Stephenson said there was a direct relation between the conditions found on examination and the injuries sustained by the applicant in the course of her employment.

The respondent's evidence

25. The applicant relied upon a factual report dated 15 July 2015 and statements from the applicant's co-workers and supervisor. Additionally, the applicant relied upon the IME reports of Dr Wallace and Dr Breit.

26. In his report dated 23 July 2015, Dr Wallace referred to the alleged injuries to the cervical spine, right shoulder and lumbar spine and in relation to causation said the following:

“There is no objective medical evidence that Ms Dhungel suffered any work-related injury at her cervical spine, right shoulder or lumbar spine.

I note the detailed description of the nature and conditions of her employment as a factory process worker in the investigation report provided by Quantum Corp dated 15 July 2015.

The nature and conditions of her employment with Jewel of India are not consistent with being the cause of significant pathology at her cervical or lumbar spine.

Ms Dhungel's work duties involve packing frozen product at bench level.

She worked in the same job for a period of three years before noting the onset of symptoms at the end of 2014. She suffered no specific injury at her spine or right shoulder in the course of her duties at work.”

27. In his report dated 30 January 2019, Dr Breit noted the following complaints:

“There is pain in the right side of the neck extending into the right shoulder cowl and into the humerus. There is some mild left shoulder pain and she cannot do things overhead demonstrating 100 degrees elevation on the right. There is difficulty getting her hand behind the back and a complaint of generalised numbness in the right hand.

There is lower back but no leg pain and no radicular complaints. There are no sensory symptoms and she is able to walk for about 45 minutes. Sitting is restricted to a few minutes because of the neck pain.”

28. When asked to provide a diagnosis and whether the applicant's complaints are consistent with the alleged mechanism of injury, Dr Breit said at page 95 of the reply:

“Ms Dhungel has cervical and lumbar spondylosis as well as a chronic right rotator cuff tear. There is evidence of pre-existing lumbar disease as well as right shoulder pathology...

Please see the body of the report for the examination findings and Ms Dhungel's claims which are consistent, although the onset of neck and back complaints remains a little 'convenient'.”

29. In the body of his report, Dr Breit recorded the applicant's cervical movements being generally restricted by 25%, cervical extension increased when the applicant demonstrated lumbar extension. Dr Breit was then asked to provide an assessment of the applicant's permanent impairment and responded as follows:

“Cervical Spine

Ms Dhungel had no spasm, there was no tenderness but rather a sensation of benefit from palpation and her movements were symmetrical and, in fact, inconsistent so that she has to be assessed under DRE Category I which is associated with 0% WPI.

Lumbar Spine...

There is non-symmetrical loss of movement and I would therefore assess Ms Dhungel under DRE Category II associated with a baseline 5% WPI to which I would only add 1% for ADLs given the number of other areas and, in particular, the shoulder that restricts her ADLs. Her claim of restricted ADLs is also inconsistent with the pathology and physical findings. That totals 6% WPI.

There is a well-documented pre-existing condition that led to her changing jobs. This suggests significant pre-existing pathology. That she changed jobs as a result of her initial episode is enough in my opinion to confirm significant disease but only the one-tenth rule may apply leaving a 5% WPI.

Right Shoulder

The right shoulder is assessed according to the SIRA guides... on that basis there is said to be 14% upper extremity impairment which converts to 8% WPI.

The x-rays as attached show quite marked pre-existing disease with constitutionally based lateral downsloping of the acromion and structural impingement... This is a very long-term pre-existing condition but again in this situation only the one-tenth rule may apply leaving 7% WPI.

The total is 12% WPI.”

30. The respondent's factual report contained statements from the applicant's co-workers and supervisor as to the nature of her duties. I do not propose to repeat them in details here, as for the most part the evidence confirms the nature and conditions of the applicant's employment. The applicant's direct supervisor, Mr Singh confirmed the applicant was regarded as a good worker who had no disciplinary issues. The overall perception of the evidence arising from the statements attached to the factual report is that the applicant's description of her duties is largely consistent with that given by the respondent's other employees and her supervisor.

Submissions

31. For the respondent, Mr Stockley submitted that the applicant has done no more than demonstrate there were some symptoms in her neck and lower back, and accordingly had not satisfied the onus of proof in relation to injuries to those body parts. He referred to the reports of Dr Stephenson and noted that he was asked to assume the presence of injury.

32. Mr Stockley indicated that when Dr Stephenson set out the nature and conditions of the applicant's work at page 81 of the Application, he was only commenting on the applicant's stated history and an assumption of injury was implied in it. Mr Stockley also referred to the report of Dr Al Khawaja dated 10 July 2015, which he noted does not support the opinion of Dr Stephenson and relates the applicant's lumbar and cervical spinal injuries to work. It should be noted, however, that Dr Al Khawaja's report is a short one which is addressed to the applicant's referring general practitioner rather than to her solicitors.
33. Mr Stockley impressed upon the Commission the opinion of Dr Wallace, who noted at page 17 of the reply that the applicant's injuries were not work-related and that the nature and conditions of her employment were not consistent with the injuries complained of. He also noted that the report of Dr Breit was one which was obtained in order to get an assessment of WPI, rather than any opinion as to the cause of the applicant's injuries to her neck and lumbar spine.
34. In summary, Mr Stockley submitted that Dr Stephenson's conclusions in relation to the applicant's back injury are not supported by her treating doctors, and that when one considers the medical and lay evidence, the applicant falls short of discharging the onus of proof in relation to the presence of the cervical and lumbar spine injuries.

The applicant's submissions

35. For the applicant, Mr Grant submitted that Dr Wallace had also indicated that the applicant's right shoulder injury was not related to work, and given the respondent had resiled from that position and conceded Dr Wallace's views were incorrect, the Commission would not find his views in relation to the injuries to the other body parts reliable.
36. In relation to the views of Dr Breit in his report dated 30 January 2019, Mr Grant noted the respondent's own IME had accepted the applicant may well have injured her cervical and lumbar spine at work. Mr Grant submitted that the lay and medical material in the matter, including but not limited to the witness statements and general practitioner's notes, were all consistent with an injury having been suffered to the lumbar and cervical spines by the nature and conditions of the applicant's employment.
37. Mr Grant said the Commission would take a common-sense approach to causation, and look at the nature of the applicant's alleged injuries, the contemporaneous material, her statement and the nature of her duties. He contrasted the two diagnoses which were before the Commission, namely musculoligamentous strain found by Dr Stephenson and spondylosis by Dr Breit. Mr Grant noted that the medical material supported a finding that the applicant was exhibiting clear symptoms before she first suffered an incapacity for work, including symptoms so serious that she was referred for an MRI in April 2015.
38. Mr Grant indicated the nature of the applicant's employment was consistent with the development of injuries to her lumbar and cervical spines, and the notion of her suffering from the effects of severe pre-existing conditions is not consistent with her working for a number of years in such heavy employment. Mr Grant emphasised that the applicant cannot know what her condition is, and she is only able to describe what she is feeling and what has happened as a result of those symptoms. He submitted there was a clear history of complaint in relation to lumbar spine injury in the contemporaneous material and noted the insurer had made an offer to the applicant with respect to injuries to her lumbar spine and right shoulder in March of 2019.
39. Mr Grant noted that Dr Breit's acceptance of the fact the applicant may have injured her neck and lower back is consistent with the contemporaneous material, which in turn supports a finding that the applicant's injuries to those body parts were due to the nature and conditions of her employment. He further submitted the applicant had satisfied the onus of proof in establishing the nature and conditions of her employment had caused injuries to those body parts.

DISCUSSION

Injury and contributing factor

40. "Injury" is defined in s 4 of the 1987 Act as follows:

"In this Act: injury means

- (a) 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
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

41. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*). That case makes clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro* a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

42. A worker is able to rely on injury simpliciter despite the existence of a disease, as highlighted in *Zickar v MGH Plastic Industries Pty Ltd (Zickar)* [1996] HCA 31; 187 CLR 310. In that case, the worker suffered brain damage due to the rupture, at work, of a congenital aneurism. The congenital condition could be characterised as a disease, however that would not have satisfied the requirements of clause (b) of the definition in s 4 of the 1987 Act. The worker succeeded in the High Court on the basis that the rupture itself could be described as an injury simpliciter. The Court held that the presence of a disease did not preclude reliance upon that event as a personal injury. Toohey, McHugh & Gummow JJ agreed with a passage in *Accident Compensation Commission v McIntosh* [1991] 2 VR 253 that, "it is nonetheless a rupture – something quite distinct from the defect, disorder or morbid condition, which enables it to occur" (at [262]). The terms "personal injury" and "disease" are not mutually exclusive categories. 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.

43. Liability for an employer to pay compensation pursuant to s 9 of the 1987 Act is limited by the requirement under s 9A that employment is a substantial contributing factor to the injury. Section 9A was introduced shortly after the High Court's decision in *Zickar*, and relevantly provides:

“No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.

Note: In the case of a disease injury, the worker’s employment must be the main contributing factor. See section 4.”

44. Subsection (2) of s 9A provides examples of matters to be taken into account in determining whether employment was a substantial contributing factor. The list, which is not exhaustive, has six examples:
- (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.
45. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (*Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29] (*Dayton*); *McMahon v Lagana* [2004] NSWCA 164 (*McMahon*) at [32]) to be decided after a consideration of all the evidence. See also *Workcover Authority of NSW v Walsh* [2004] NSWCA 186.
46. It is important to recognise in s 9A that the employment must be a substantial contributing factor to the injury, not to the incapacity, need for treatment or loss. In *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC 48; (2002) 23 NSWCCR 725 Neilson CCJ stated “employment must be a substantial contributing factor to the event causing the injury; that is, to the receipt of the injury, rather than to be a substantial contributing factor to the ongoing incapacity” (at [19]).
47. It is also important to note that the employment must be “a” substantial contributing factor to the injury, not “the” substantial contributing factor. The Court held in *Mercer v ANZ Banking Corporation* [2000] NSWCA 138 that there may be more than one substantial contributing factor to a single injury, of which employment only need be one (at [16]). The Court also excluded the relevance of a predisposition or susceptibility to injury, Mason P saying:
- “Section 9A does not require that the employment must be ‘the’ substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a particular condition (cf *University of Tasmania v Cane* (1994) 4 Tas R 156).” (at [27])
48. The applicant bears the onus of proving that her cervical and lumbar spine injuries are work-related. In determining the cause of an injury, the Commission must apply a common-sense test of causation. In the workers compensation context, the appropriate test for causation was set out by Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 (*Kooragang*) where his Honour said:

“The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’, is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. *What is required is a common-sense evaluation of the causal chain.* As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.” (at 810; emphasis added)

49. The line of authority which commenced with the decision in *Kooragang* has been consistently followed by both judges of the Compensation Court and by Presidential Members of the Commission.

FINDINGS AND REASONS

Injury to cervical spine

50. I am satisfied on the balance of probabilities that the applicant suffered an injury to her cervical spine as a result of the nature and conditions of her employment with the respondent. In so finding, I have had regard to the applicant’s own evidence concerning the onset of her symptoms and her detailed account of her duties, which I accept involved prolonged and repetitive lifting, reaching and carrying at above shoulder and head height. I note, having regard to the lay evidence for the respondent, that there is little contest surrounding the repetitive nature of the physical duties carried out by the applicant, and the fact they at times involved reaching, lifting and carrying about shoulder height, and also bending and lifting.
51. Although the respondent’s lay witnesses indicate the bench at which the applicant worked was not overly high, Mr Singh did note that some of the benches in the factory were slightly higher than others, and the applicant had told him she cannot work at those higher benches. In my view, this is consistent with the applicant’s evidence that the benches she had to work at were often higher than standard, waist high benches. Moreover, as I have noted the evidence of the respondent’s witnesses is the applicant’s work was indeed repetitive and involved a lot of lifting and carrying, sometimes of heavy trays
52. There is a record of an MRI scan being carried out on the applicant’s spine on 25 April 2015 at Nepean Hospital, and the report of that scan noting “Clinical information: Neck pain, thoracic and lower back pain.” In my opinion, that note is consistent with the applicant’s evidence that she was experiencing symptoms in her cervical spine for some time before she first had time away from work, and that those symptoms were serious enough to warrant seeing her general practitioner and undergoing radiological investigation.
53. I have also had regard to the contemporaneous evidence provided by the clinical notes of the applicant’s general practitioner, whose note dated 3 June 2015 records the applicant requiring referral for the intra-facet joint C6/C7 block by Dr Al Khawaja, which was carried out on 4 June 2015. In his report to the general practitioner dated 10 July 2015, Dr Al Khawaja noted the applicant had undergone the facet joint blocks but they had provided her with no assistance.
54. In relation to the IME reports, I prefer the view of Dr Stephenson, which in my opinion is also supported by the respondent’s own IME, Dr Breit on the question of injury. I note Mr Stockley submitted that Dr Breit was asked to assess the applicant’s injuries to her cervical and lumbar spines rather than express an opinion on causation, however, the doctor made a deduction for non-work-related aspects of those injuries in providing his assessment.

55. It is apparent that in doing so, Dr Breit took into account all of the applicant's pathology in her cervical spine, whether related to the alleged workplace injury or not. It follows that, if Dr Breit considered the neck symptoms were not work-related, he would have made a deduction of 100% for a pre-existing condition, or alternatively commented that there was no injury for which the respondent is liable. Rather, it is apparent that in Dr Breit's view there is a work injury to the cervical spine, with a 10% deduction being appropriate for non-work-related, pre-existing factors.
56. That opinion in my view broadly supports Dr Stephenson, who also found a work-related injury to the cervical spine, albeit without applying any deduction for a pre-existing condition. Whilst Dr Wallace finds no causal link between the applicant's duties and the injuries in issue, in my view he does not provide sufficient reasons to support his views. Instead, Dr Wallace simply refers to the "detailed description of the nature and conditions of her employment" then draws the conclusion without explanation that "the nature and conditions of her employment with [the respondent] are not consistent with being the cause of significant pathology at her cervical or lumbar spine."
57. Mr Doak submitted that Dr Stephenson's opinion is of less value because he accepted at face value the applicant's history of her duties as contained in her statement. I respectfully disagree with that submission, as there is no evidence which contradicts the applicant's version of her duties, or that which she gives in relation to the onset of her complaints. I would add that it is perfectly appropriate, and extremely common for an IME who is charged with preparing a medical report to accept the history provided by the patient, unless there is material before them which would contradict that history. In my view, none of the treating medical evidence or lay evidence in this matter provides a basis for doubting the accuracy of the history provided to Dr Stephenson. Indeed, the history provided by the applicant to all of the medical experts is broadly consistent.
58. Taking into account all of the lay and medical evidence, the Commission will therefore make a finding that the applicant suffered an injury to her cervical spine as a result of the nature and conditions of her employment with the respondent owing to the nature and conditions of her employment from January 2012, with a deemed date of injury of 22 May 2015.

Injury to the lumbar spine

59. I am also satisfied on the balance of probabilities that the applicant suffered injury to her lumbar spine as a result of the nature and conditions of her employment. There is no issue the applicant had a pre-existing injury with a different employer, however, she stated that injury had resolved before she commenced employment with the respondent, and a claim was never made with respect to the previous injury.
60. I find the applicant's evidence that her lumbar spine was symptom-free before she commenced employment with the respondent to be consistent with the circumstances of the case and the objective facts. It seems to me that if the applicant's lower back was causing her difficulties, she would have been unable to carry out the repetitive and sometimes heavy duties with the respondent, which involved lifting, bending, carrying and reaching over the course of a normal work day.
61. I note the contemporaneous evidence establishes the applicant complaining of low back pain before her first period of incapacity. An entry from the general practitioner dated 14 March 2015 discloses a visit for low back pain, which led to the applicant having an x-ray on 19 March 2015. The findings of that report were:

"Significant narrowing of the L4/5 disc is present. This is much more severe than at any other lumbar levels. Whilst the end plates are well preserved, one at least wonders about the possibility of 6 discal inflammatory focus. It would be worth contemplating correlation with the patient's ESR and white count level."

62. As noted in the discussion surrounding the cervical spine, the applicant had a spinal MRI on 25 April 2015 for, among other things, complaints of lower back pain. Contrary to the comments of Dr Breit that the applicant's complaints of cervical and lumbar pain are "convenient", the clinical picture in my opinion demonstrates the applicant making spontaneous complaints to her treating doctors concerning both her lumbar and cervical spine before she was incapacitated for work.

63. The applicant attended her general practitioner again on 25 May 2015, at which time the doctor recorded the following entry in response to the MRI:

"partial fusion L4/L5 region also bursal effusion
pt wants to make under work cover
back pain throughout the spine mainly lower back
Worse on sitting, lying
can't move her R shoulder
Does heavy lifting at work
range of movements Ok
neurovascularly Ok
R shoulder limited ARC
limited abduction
Reason for contact:
WorkCover
Management:
light duties as on the forms
physio
review after few sessions"

64. On balance, and having regard to the contemporaneous material together with the opinions of the IMEs, I prefer the views of Dr Breit and Dr Stephenson to that of Dr Wallace regarding the lumbar spine. Each of the former accept an injury to that body system and provide reasons for doing so. As I have previously noted, Dr Wallace dismisses liability for the lumbar and cervical spines, but does not in my opinion provide any or adequate basis for doing so.

65. It is also worth noting that Dr Breit's report was commissioned by and is relied upon by the respondent. Dr Breit was specifically asked whether the applicant's complaints regarding her lumbar spine are consistent with the claimed injury, and concludes (consistent with Dr Stephenson) that they are. Dr Breit takes into account the presence of a pre-existing condition in the applicant's lumbar spine when making his assessment. Notwithstanding that condition, Dr Breit concludes:

"There is a well-documented pre-existing condition that led to her changing jobs. This suggests significant pre-existing pathology. That she changed jobs as a result of her initial episode is enough in my opinion to confirm significant disease but only the one-tenth rule may apply leaving 5% WPI."

With respect to the respondent, Dr Breit could not be clearer. He takes into account the previous condition and remains satisfied there is a workplace injury which gives rise to a WPI. The submission that Dr Breit's report was predicated on the basis of an injury being present and was only an assessment as to quantum does not, in my opinion, accord with the questions asked of him, which also went to issues of causation, consistency of presentation and to which body parts the respondent may be liable for.

66. Given the broad consistency between Dr Breit and Dr Stephenson, supported as they are by the contemporaneous complaints to treating doctors and the applicant's accepted evidence concerning the nature of her duties, I find she suffered an injury to her lumbar spine as a result of the nature and conditions of her employment from January 2012, with a deemed date of injury of 22 May 2015.

SUMMARY

67. The Commission will therefore make the following findings and orders:

- (a) The applicant suffered injuries to her cervical spine and lumbar spine as a result of the nature and conditions of her employment from January 2012 until May 2015, with a deemed date of injury of 22 May 2015.
- (b) The injuries referred to in (a) above are to be remitted to the Registrar for referral to an AMS for determination of the permanent impairment arising from the following:
 - Date of injury: 22 May 2015 (deemed);
 - Body systems referred: Cervical spine; Lumbar spine;
 - Method of assessment: Whole person impairment.
- (c) The documents to be referred to the AMS to assist with their determination are to include the following:
 - (i) This Certificate of Determination and Statement of Reasons;
 - (ii) The Application and attached documents;
 - (iii) The Reply and attached documents.

