

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3744/19
Applicant: Terrance Charles Smith
Respondent: Blacktown City Council
Date of Determination: 15 October 2019
Citation: [2019] NSWCC 335

The Commission determines:

1. The applicant sustained an injury to his cervical spine in the course of his employment with the respondent by way of a disease injury as provided by section 4 (b)(ii) of the *Workers Compensation Act 1987*, with a deemed date of injury of 11 January 2018.
2. A three-level fusion as proposed by Dr Singh is reasonably necessary as a result of the disease injury sustained by the applicant.
3. The need for the proposed surgery does not result from the injury sustained by the applicant in the course of his employment with the respondent on 15 January 2003.

The Commission orders that:

1. Pursuant to section 60 (5) and section 61 (4A) of the *Workers Compensation Act 1987*, the respondent is to pay the costs of the three-level fusion surgery proposed by Dr Singh.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Terrance Charles Smith, seeks an order pursuant to section 60 (5) of the *Workers Compensation Act 1987* (the 1987 Act) that the respondent, Blacktown City Council, is to pay for a three-level decompression and fusion from C3 to C6 of his cervical spine that has been recommended by his treating specialist, Dr Singh.
2. The applicant claims that the need for the surgery is as a result of an injury that he sustained to his neck on 15 January 2003, when he was suddenly jolted in the backhoe that he was operating and struck his head forcibly on the ceiling of the cabin that he was in, or that the work that he has been doing as a backhoe operator has been the main contributing factor to the aggravation of a disease to his cervical spine.
3. The respondent concedes that the applicant did sustain an injury to his neck on 15 January 2003, but that injury does not result in the need for the proposed surgery. The respondent denies the applicant's employment has been the main contributing factor to the aggravation of a disease to his cervical spine or that the effect of the applicant's work upon the condition of his cervical spine materially contributes to the need for surgery.
4. The respondent does, however, concede that the surgery proposed by Dr Singh is appropriate for the condition that the applicant is suffering from.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant's need for surgery to the cervical spine is as a result of the injury he sustained to his neck on 15 January 2003;
 - (b) Whether the applicant has sustained an injury to his cervical spine as a result of a disease injury pursuant to section 4 (b)(ii) of the 1987 Act;
 - (c) Whether the applicant's need for surgery to the cervical spine is as a result of a disease injury sustained in the course of his employment with the respondent.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conference and hearing at Penrith on 4 October 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.
7. Mr Tanner appeared for the applicant. Mr Dodd appeared for the respondent, instructed by Mr David Cooper.

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 and attached documents;
 - (b) Reply and attached documents.

Oral Evidence

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

FINDINGS AND REASONS

The applicant's case

10. The applicant has provided two statements, dated 22 January 2018 and 18 July 2019. Neither statement provides evidence from the applicant of the details of the injury he sustained to his neck on 15 January 2003.
11. In his statement dated 22 January 2018, the applicant states that he commenced his employment with the respondent in December 2002 and from the commencement of his employment 95% of his work has been as a backhoe operator. He states that he operated an older style backhoe until 2005, when he then commenced to operate a backhoe with a float suspension. He states that from 2017 he has operated a new machine which also has a float suspension.
12. The applicant states that the float suspension assists when driving over uneven ground but that even with float suspension he is always being heavily jolted and jarred by way of backward, forward and sideways movements. He also states that a great deal of a working day is spent operating an arm of the machine to break up material and when this occurs the machine vibrates heavily.
13. A description of the injury on 15 January 2003 is contained in the reports of Dr Oates dated 28 November 2017 and Dr Carney dated 4 July 2019. It is recorded that the applicant drove a backhoe over a speed hump at some speed and struck his head on the ceiling of the cabin that he was in. He felt immediate pain in his neck and tingling in both hands and arms.
14. There are reports from Dr Singh, orthopaedic and spine surgeon, who has proposed a three-level decompression and fusion from C3 to C6.
15. In his first report dated 16 May 2017, Dr Singh takes a history of the applicant sustaining an injury to his neck "a few years ago", being when his head struck the ceiling of the cabin that he was in when driving over a speed hump. He writes that this probably led to his myelomalacia and compression at the C3/4 level with an osteodiscal bar. He also diagnoses cervical spondylosis with foraminal stenosis at C3/4, C5/6, and C6/7.
16. Dr Singh refers to seeing a copy "of the accident notification report at the time" of the injury and opines that the mechanics of the injury "corresponds to his current findings."

17. In a report to the applicant's solicitors dated 3 October 2017, Dr Singh reiterates that the mechanics of the injury of 15 January 2003 "correspond to the current findings on his scans and his clinical examination." He also writes that: "Repetitive backhoe driving duties in a jolting vehicle as described by him are likely to have been a significant contributing factor in aggravating this problem."
18. That opinion is repeated in a further report from Dr Singh dated 17 October 2017. Dr Singh adds that the applicant should have the proposed surgery sooner rather than later "as there is the potential for significant and catastrophic neurological worsening."
19. The applicant attended Dr Oates, consultant occupational physician, at the request of his solicitors and has provided a report dated 28 November 2017.
20. Dr Oates records that following the incident on 15 January 2003 the applicant experienced a worsening of neck and arm pain and numbness and tingling over the years. He records that over the years the applicant was exposed to whole body vibration up and down his spine when operating a backhoe.
21. Dr Oates diagnoses the applicant as having aggravation of multilevel cervical spine degenerative disease with a serious finding of spinal cord myelomalacia at the C3/4 level secondary to prolonged pressure from a C3/4 discovertebral bar.
22. Dr Oates opines that the incident on 15 January 2003 represents a substantial contributing factor to the cervical spine condition, as a blow to the top of the head could cause a cervical disc to blow out and set in train post-traumatic degenerative disease, as manifested by the C3/4 discovertebral bar and myelomalacia.
23. Dr Oates also opines that:

"I believe that the nature and conditions of employment as a backhoe driver, as he described it to me, subjects his spine to regular daily whole-body vibration and jolting, which would no doubt contribute to aggravation, exacerbation and acceleration of the development of the cervical post-traumatic degenerative condition."
24. In regard to the proposed surgery, Dr Oates opines:

"The surgery proposed to stabilise and decompress the affected segments of the cervical spine is reasonably necessary and results as a consequence of the original injury which initiated the process in 2003 and ongoing nature and conditions of employment which have served to perpetuate aggravation of the cervical post-traumatic degenerative condition."
25. The applicant also attended Dr Carney, neurosurgeon, at the request of his solicitors, and has provided a report dated 4 July 2019.
26. Dr Carney records that the applicant continued to have a sore neck after the incident on 15 January 2003 but that it fluctuated in intensity. He records that since 2013 or 2014 the applicant has noted an increase of pain and stiffness in his neck.
27. Dr Carney opines that it is likely that the applicant suffered a partial spinal cord injury or at least a cord concussion in the incident on 15 January 2003. He opines that this incident has been a substantial contributing factor to his condition.

28. Dr Carney also opines that:

“...the conditions of his employment particularly repetitive back hoe driving and related duties have aggravated this condition, and presents the main contributing factor to the aggravation.”

29. Dr Carney opines that the proposed surgery is reasonably necessary and a consequence of the original injury in 2003 and the nature and conditions of the applicant's employment.
30. Mr Tanner for the applicant submits that the respondent has provided no evidence to dispute the applicant's evidence that driving a backhoe is the only work that the applicant does for the respondent and that has involved a daily assault upon his neck for many years.
31. Mr Tanner submits that for the applicant to prove that he has sustained a disease injury, he need only establish that the work undertaken by the applicant is the main contributing factor to the aggravation of the disease, not the main contributing factor to the disease as a whole. He submits that there is no other source or cause of the aggravation of the disease in the applicant's cervical spine that is material and that ousts the effect that the applicant's work has had upon the deterioration of his neck.

The respondent's case

32. Dr Rowe, orthopaedic surgeon, has provided reports dated 17 August 2017, 26 February 2018, and 17 July 2019.
33. In his first report dated 17 August 2017, Dr Rowe records that the applicant felt discomfort in the neck and pins and needles down both arms following the incident on 15 January 2003, but that his symptoms settled rapidly. Dr Rowe records that it was not until early 2013 that the applicant developed discomfort in his neck and sought treatment.
34. Dr Rowe diagnoses marked widespread cervical spondylosis with foraminal and central stenosis including myelomalacia, which is maximum at the C3/4 level.
35. Dr Rowe accepts the applicant's pathology as genuine but is not caused or aggravated by the incident on 15 January 2003. He writes that the incident produced no more than temporary symptoms and it was not until 10 years later that the applicant's symptoms have begun to run on an episodic basis.
36. In a second report dated 17 August 2017, Dr Rowe is asked if any injury sustained by the applicant could be regarded as a disease of gradual onset either caused or aggravated by his employment and opines:
- “Cervical spondylosis is a disease of gradual onset which is related to age and constitutionally determined degeneration. There is no evidence that his pathology has been caused or aggravated by his employment.”
37. Dr Rowe examines the applicant again to provide a report dated 26 February 2018. Dr Rowe records that the applicant is still working as a backhoe driver for the respondent and that the applicant says he has “an easy job.”

38. Dr Rowe confirms the diagnosis and opinion he provided in his previous reports. He is asked if the injury could be regarded as a disease of gradual onset that is either caused or aggravated by the applicant's employment and opines:

"Degenerative change in the cervical spine may be regarded as a disease of gradual onset. This is produced by age and constitutionally determined degeneration. There is no evidence that it was either caused or aggravated by the general nature and conditions of his employment."

39. Dr Rowe's opinions remain unchanged in a final report dated 17 July 2019. He adds that the proposed surgery is required due to age and constitutionally determined degeneration and that there is no evidence available that the incident in January 2003 or the nature and conditions of employment contribute to the need for that surgery.
40. Reports have also been provided by Dr Cochrane, neurosurgeon, dated 7 March 2018 and 7 August 2019.
41. In his first report dated 7 March 2018, Dr Cochrane records that the applicant felt pain in his neck and recalls numbness and tingling down his arms following the incident on 15 January 2003. He records that the day after the incident the applicant had persisting neck soreness but his arms felt "okay" and he lost no time from work.
42. Dr Cochrane concedes that there may have been some mild cord injury and a degree of canal compromise at the time of the incident on 15 January 2003 but there is no direct link between that event and the emergence of symptoms 10 years later.
43. Dr Cochrane diagnoses myelomalacia due to C3/4-disc protrusion which occurs or worsens in 2013. He opines that this is a degenerative condition and refers to the American Medical Association's *"AMA Guides to the Evaluation of Disease and Injury Causation (2nd Edition) 2014"* to conclude that there is no reported, documented or observed link between workplace activities, including heavy physical work or prolonged vibration, and the development of cervical canal stenosis.
44. In answer to a question as to whether any injury could be regarded as a disease of gradual onset either caused or aggravated by the nature and conditions of employment, Dr Cochrane opines:

"No – this is not my opinion. It is my opinion that persons not infrequently can suffer injury at the workplace and in the absence of any significant injury, will typically heal and recover and it is unlikely that discrete injuries without clinical cause to a present condition, could be considered a contributing factor. By means of example, if someone slips and falls and suffers an abrasion to a limb, then the abrasion heals and they have no residual symptoms, I would not state that such an injury has caused an aggravation or acceleration of an underlying degenerative condition or disease process but rather a discrete minor injury that has healed and recovered. As such, I am not of the opinion that *"any injury could be regarded as a disease of gradual onset either caused or aggravated by the nature and conditions of employment"*. I am of the opinion that injury that significantly and perceptively worsens symptoms of underlying disease process or degenerative condition could be considered part of disease of gradual onset. This is not relevant for minor self-limiting conditions or injuries."

45. In answer to a question as to whether the need for surgery is a consequence of the nature and conditions of employment, Dr Cochrane opines:

“I fully concede that there may be some contribution to the nature and conditions of employment since the physical labour and vibration could reasonably accelerate degeneration, but I note that there is no evidence in the literature that this is in fact the case, in a sense that there had been no controlled trials to look at the effects of heavy manual labour or vibration machinery operation in the development of cervical spondylosis. Common sense would dictate there would at least be some contribution of the nature and conditions of employment over a 15-year period. However, the substantial contributing factor is, in my opinion, degenerative change in the spine irrespective of employment.”

46. In a further report dated 7 August 2019, Dr Cochrane is asked to confirm that the nature and conditions of employment are not the main contributing factor to the onset of any disease or any aggravation, acceleration, exacerbation or deterioration of the applicant’s disease condition and opines:

“...I was of the opinion there may have been some contribution due to the nature and activities of work as to the development of cervical spondylosis. As such employment is probably a contributing factor to the progression of multilevel cervical spondylosis.”

47. In that further report, Dr Cochrane is also asked if the proposed surgery is a consequence of the incident on 15 January 2015, the nature and conditions of employment or due to non-work-related factors, and opines:

“The nature and activities of the work are likely a contributing factor to the development of multilevel cervical spondylosis, but not the main or substantial contributing factor in my opinion. There appear to have been transient neurological symptoms occurring with the work-related injury of 15 January 2003 and this again may represent a temporary and seemingly relatively mild injury to the cervical spine (given that symptoms resolved completely), and thereafter an approximate ten-year interval before symptoms recurred.

It is my opinion that the recommended surgery is primarily treating non-work related factors, being multilevel cervical spine degeneration, and to a lesser degree treating the effects of the work-related injury (by means of a potential work-related cord injury or acceleration of cervical degeneration) and similarly to a lesser degree due to the nature and conditions of employment which may have aggravated or accelerated the degeneration to some degree.”

48. Mr Dodd for the respondent submits that the need for surgery is not due to any effect that the applicant’s work might have upon his neck but is due to multilevel degeneration that is due to his age and constitution. Mr Dodd submits that the final opinion of Dr Cochrane that is set out above properly delineates the situation, namely that the proposed surgery is required because of non-work-related factors.
49. Mr Dodd submits that none of the applicant’s expert reports properly address and explain how the symptoms in the applicant’s spine result in the need for surgery but instead are just assertions that the proposed surgery is a consequence of the nature and conditions of his employment.

50. Mr Dodd submits that those doctors relied upon by the applicant simply assert that the incident in January 2003 and the work that the applicant has undertaken thereafter are the main and substantial contributing factors to the injuries he has suffered and which now require surgery, without providing any proper connection or explanation for how these opinions are reached.

Determination

51. The applicant requires a three-level fusion of his cervical spine due to multilevel degeneration. The findings made by doctors who have treated and examined the applicant of myelomalacia, stenosis and an osteodiscal bar at the C3/4 level are indications of this degeneration.
52. The primary argument brought by the applicant is that his employment has been the main contributing factor to the aggravation of the disease process that has caused this extensive degeneration in his neck, which thereby satisfies section 4 (b)(ii) of the 1987 Act, and which in turn makes the respondent liable for the surgery recommended by Dr Singh.
53. Section 4 (b)(ii) of the 1987 Act provides as follows:
- “In this Act:
- Injury:
- (b) includes a disease injury, which means:
-
- (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.”
54. Windeyer J in *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 (*Semlitch*) (at [9]) held that an aggravation occurs when “the disease has been made worse in the sense of more grave, more serious, or more serious in its effects upon the patient.”
55. Deputy President Roche in *Kelly v Western Institute NSW TAFE Commission* [2010] NSWCCPD 71 citing *Semlitch* said at [66]: “an aggravation or exacerbation of a disease occurs where the experience of the disease by the applicant is increased or intensified by an increase or intensifying of symptoms.”
56. The approach of the Commission in a number of matters since the amendments made to section 4 (b)(ii) in 2012 is to undertake an examination of whether “the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease” and not to the overall pathology or the overall disease process – see *Mitic v Rail Corporation of NSW* (WCC8497/2013) (*Mitic*) (ex tempore decision); and followed in *Mylonas v The Star Pty Ltd* [2014] NSWCC 174 at [151]-[166] (*Mylonas*); *Egan v Woolworths Limited* [2014] NSWCC 281 at [60]-[82].

57. Arbitrator Harris in *Mitic* said:

“The opening words of the amended s. 4(b)(ii) relate to the aggravation, acceleration, exacerbation or deterioration ‘in the course of employment of any disease’. In my view, those opening words therefore direct attention to the work related component of the ‘aggravation, acceleration, exacerbation or deterioration’. The following words of clause (ii) then state ‘but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease’. The concluding words of clause (ii) requires an examination of whether the employment was the main contributing factor ‘to the aggravation, acceleration, exacerbation or deterioration of that disease’ and not to the overall pathology or the overall disease process.

If one was looking at whether the employment had to be the main contributing factor to the overall pathology then the concluding words of s 4 (b)(ii) would be to the overall pathology or the disease and not to the aggravation, acceleration, exacerbation or deterioration of the disease.

In my view, the amendment to s 4(b)(ii) does not require the applicant to establish that the employment must be the main contributing factor to the overall disease process or pathology within his left knee but simply that the employment must be the main contributing factor to the injury, that is, the aggravation, acceleration, exacerbation or deterioration of such disease.”

58. The applicant has provided unchallenged evidence that 95% of his work since he commenced employment with the respondent in December 2002 has been as a backhoe operator and that in undertaking this work he has been jolted around in the cabin he works in on a regular and continual basis. I accept this unchallenged evidence of the applicant that he has had his neck jolted and jarred by way of backward, forward and sideways movements, as well as from heavy vibrations when operating the backhoe, on a regular basis for at least 15 years. I also accept that it is likely that this has caused repeated assaults upon the applicant’s neck.
59. I accept that the applicant’s employment must be the main contributing factor to the aggravation of the disease and not to the overall pathology or the overall disease process because of the significant impact to the applicant’s neck by continuous incidents of jarring and jolting while operating the backhoe and because there are no other causes or sources of such significant aggravation.
60. That is a finding is supported by Dr Singh, whose opinion I prefer, because of the position he holds as the applicant’s treating specialist and the primary role he has in determining the diagnosis of the applicant’s condition, the causes or causes of that condition, and the appropriate treatment that is required for that condition. Dr Singh writes that the applicant has described to him the repetitive backhoe driving duties undertaken by the applicant in a jolting vehicle and that these incidents “are likely to have been a significant contributing factor in aggravating this problem.” Although Dr Singh does not provide any more specific details of those repetitive backhoe driving duties, I find it reasonable to infer that those details would be consistent with the applicant’s own evidence. There is no evidence to otherwise contradict or qualify this.
61. Dr Singh opines that the repetitive backhoe driving duties have been a significant contributing factor to the aggravation of neck problems and not the main contributing factor to the aggravation of the disease, but I am mindful of what was said by DP Roche in *State Transit Authority v El-Achi* [2015] NSWCCPD 71 (*El-Achi*) at [72]:

“That a doctor does not address the ultimate legal question to be decided is not fatal. In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.”

62. Applying “an evaluative process” to this dispute, I am satisfied when the opinion of Dr Singh is considered together with the applicant’s evidence of many years of jolting and jarring to the neck, that the applicant’s employment is the main contributing factor to the aggravation of the disease that has resulted in degeneration of the applicant’s cervical spine.
63. I do not accept the opinions of Dr Cochrane because, as pointed out by Mr Tanner, Dr Cochrane applies the wrong test for the application of section 4 (b)(ii) when he opines that the “nature and activities of the work are likely a contributing factor to the development of multilevel cervical spondylosis, but not the main or substantial contributing factor in my opinion.” The test is whether the applicant’s employment is the main contributing factor to the aggravation of the disease not the overall disease pathology.
64. There is in any event a concession made by Dr Cochrane that the applicant’s employment is a contributing factor to the aggravation of the disease when he opines in his first report that the applicant’s employment “is probably a contributing factor to the progression of multilevel cervical spondylosis.” That is not far removed from the opinion of Dr Singh, which I accept, that the repetitive backhoe driving is a substantial contributing factor to the aggravation of the disease that is wearing away at his cervical spine.
65. I also agree with Mr Tanner that the opinions of Dr Rowe are of no assistance on the issue of whether the applicant has suffered an injury within the meaning of section 4 (b)(ii) because on the two occasions that he sees the applicant in August 2017 and February 2018 he does not record any details of the backhoe driving work that the applicant has undertaken on a continual basis for over 15 years. Dr Rowe does record in his report dated 26 February 2018 that the applicant has “an easy job” but that can have multiple explanations which were not investigated further by Dr Rowe.
66. I cannot accept the opinion of Dr Rowe that there is “no evidence” that the applicant’s work has caused or aggravated the condition of cervical spine when he has not recorded any details of what that work might be.
67. Mr Dodd submits that the need for surgery is not due to any effect that the applicant’s work might have upon his neck but is due to multilevel degeneration that is due to his age and constitution. DP Roche in *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 (*Murphy*) said at [57-58]:

“Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy’s claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary “as a result of” the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716).”

68. For reasons that I have already outlined, I have found that the many years of jolting and jarring to the applicant’s neck is the main contributing factor to the aggravation of the disease affecting the applicant’s cervical spine. I further consider that this injury materially contributes to the need for surgery because the applicant’s employment has hastened the degeneration in his neck and the associated symptoms that he has experienced. The applicant needs the three-level fusion due to multilevel degeneration in his neck and this has been brought about by the aggravation of disease by the work that he has been doing.
69. Neither counsel addressed on the deemed date of injury in the event that I found that the applicant did sustain a disease injury. The date of injury in the ARD is December 2017. I could not find anything in the material which supports that being the deemed date. The first dispute notice issued by the respondent in response to a claim that the nature and conditions of employment was a cause of the applicant’s injury is a section 74 notice dated 23 January 2018, which is an answer to a letter from Carroll & O’Dea dated 11 January 2018.
70. I therefore take the view that the claim for a disease injury was made on 11 January 2018 and, consistent with section 16 (1)(a)(ii) of the 1987 Act, that should be the deemed date of injury.
71. Although I have found that the applicant did sustain a disease injury as provided by section 4 (b)(ii) of the 1987 Act and that injury results in the need for surgery, I do not accept that the injury that the applicant sustained on or about 15 January 2003 materially contributes or results in the need for surgery.
72. The respondent concedes that the applicant did sustain an injury to his neck in the manner that has been described in various medical reports, but the expert opinions vary as to the diagnosis of that injury. This is not made any easier by there being no contemporaneous material provided in regard to the incident. There is no evidence provided of any doctors the applicant consulted following that incident or of any scans that he underwent.
73. Dr Singh and Dr Oates opine that the applicant sustained injury to the C3/4 disc in the incident on 15 January 2003. However, the proposed surgery is not limited to the C3/4 disc but is a three-level fusion, including the C3/4 disc, due to multilevel cervical spine degeneration which results from the applicant’s employment being the main contributing factor to the aggravation of a disease affecting his neck. If the proposed surgery were limited to the C3/4 level then further interrogation would be required as to whether such surgery results from the January 2003 injury, but that is not the case.
74. In contrast to the diagnoses made by Drs Singh and Oates in regard to the January 2003 incident, Dr Carney opines that this particular injury is likely to have caused a partial spinal cord injury or cord concussion, and Dr Cochrane opines that the applicant may have suffered a mild cord injury or a degree of canal compromise in that incident. However, neither doctor identifies the levels of the cervical spine where such an injury might have occurred, nor how such an injury now contributes to the need for the three-level fusion.
75. After the incident in January 2003, which may have caused some assault upon the

76. applicant's spinal cord, the applicant was subjected to another 15 years of constant stress and pressure being placed upon his neck in his work as a backhoe driver, and in my view, based upon the reasons I have already given, this is the cause for the increase in symptoms that this man has had and which now requires him to have the proposed surgery.
77. There will therefore be a finding that the need for the three-level fusion does not result from the injury sustained by the applicant in the course of his employment with the respondent on 15 January 2003.

