WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5421/19**
Applicant: **Diane June Johnson**
Respondent: **Woy Woy Hotel**
Date of Determination: **6 April 2020**
Citation: **[2020] NSWWCC 107**

The Commission determines:

1. The cause of the injury was the aggravation of the degenerative changes in the cervical and lumbar areas of the applicant's spine.

2. Employment was the main contributing factor.

3. Accordingly, the respondent will pay to Mrs Johnson the following weekly amounts:

    (a) $279.40 from 10 May 2016 to 8 August 2016 pursuant to s 36 of the *Workers Compensation Act* 1987;
    (b) $235.28 from 9 August 2016 to 5 February 2019 pursuant to s 37 of the *Workers Compensation Act* 1987; and
    (c) $235.28 from 6 February 2019 to 4 February 2020 pursuant to s 38 of the *Workers Compensation Act* 1987.

4. The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and Medicare documentation.

5. I remit this matter to the Registrar for placement in the medical assessment pending list. It is to be referred when appropriate to an Approved Medical Specialist for a whole person impairment assessment on the following bases:

    (a) Date of injury: 10 May 2016 (deemed)

    (b) Matters for assessment: Cervical and lumbar areas of the spine
    Scarring (TEMSKI)

    (c) Evidence: ARD & attached documents
    Reply and attached documents dated 30 December 2019
    Application to Admit Late Documents (ALD) dated 27 November 2019.

6. I grant liberty to the parties to apply on telephone notice to each other.

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Diane June Johnson, the applicant, brings an action for compensation against Nevitoro Investments Pty Ltd, the respondent. Mrs Johnson alleged that on 10 May 2016, she injured her neck, left arm and back. She seeks payments of weekly compensation, s 60 expenses and lump sum compensation in respect of the cervical spine, lumbar spine, left upper extremity and scarring.

2. The employer issued two s 74 notices dated 22 August 2016 and 3 April 2017 respectively, and a s 78 Notice on 11 September 2019.

3. An Application to Resolve a Dispute (ARD) and Reply were duly lodged.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:

    (a) Was the injury suffered by Mrs Johnson the aggravation of a disease process, a personal injury, or both?

    (b) If it was the aggravation of a disease process, was employment the main contributing factor?

PROCEDURE BEFORE THE COMMISSION

5. This matter was heard at Wyong on 22 January 2020. Mr Allen Parker of counsel appeared for the applicant and Mr Howard Halligan of counsel appeared for the respondent. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;
    (b) Reply Admit Late Documents (ALD) and attached documents dated 30 December 2019, and
    (c) ALD dated 27 November 2019.

Oral evidence

7. No application was made with regard to oral evidence.

FINDINGS AND REASONS

8. This matter was discussed in some detail during conciliation and at the commencement of the hearing Mr Parker sought to amend the claim for injury by adding “in the alternative a disease injury which occurred on 10 May 2016 (deemed)”.

9. This amendment was opposed by Mr Halligan but after giving reasons which will appear on the transcript, I allowed the amendment.

10. As will be seen, I also issued a direction on 29 January 2020 seeking, inter alia, confirmation as to the name of the respondent. Mr Halligan advised that the respondent's proper description is Nevitoro Investments Pty Ltd, and I amend the name of the respondent accordingly wherever it appears.

11. Mrs Johnson made a statement dated 3 October 2019. She described the workplace duties she was doing on the date of her injury, 10 May 2016[1]:

> "7. In terms of the injury itself, I confirm that on the day of my injury I began my shift at approximately 8.30 a.m.
>
> 8. On beginning my shift, I was required to effectively set up the bar area for the day. This involved turning on all TV units as well as all keynoting tab machines and preparing the tab area by printing all of the necessary form guides to be attached to the walls in the tab area.
>
> 9. In addition to this, I was required to set up kegs in the bar. This involved lifting the kegs and putting them into place, rolling them and pushing them into line also had to connect the kegs to the taps and to the gas.
>
> 10. Following this I was required to fill the ice boxes behind the bar. These required obtaining ice from the ice machine in large buckets and taking these into the bar areas to be placed in the ice boxes for use in drinks and for keeping other drinks.
>
> 11. Once this was done, I was required to restock fridges from the night before which included carrying cartons of drinks from the back storage area to the front of the bar to restock the fridges.
>
> 12. The other task that I was required to do was to clean out the fridges where the glasses were kept. All glasses were kept in large metal trays inside the refrigerator. To clean the fridge, I would have to pull each glass tray out, take it to the cool room to keep the glasses cold, then clean the fridge and then return to the cool room to collect the glass tray and then take it back to the fridge and replace it in the fridge.
>
> 13. The reason that I was required to do so was that happy hour in the bar started at 10.00 a.m. and as such, we were always required to have a large number of glasses cold in the fridge to accommodate the increased turnover during that time."

12. Mrs Johnson stated:

> "In fact, on the day in question at approximately 2.30 p.m. whilst undertaking these duties, I noticed a sudden onset of severe back pain.
>
> 19. Given that my shift was shortly to finish, I simply continued with my duties until the completion of my shift at approximately 3.00 p.m."

13. By that stage the pain in her back was so serious that Mrs Johnson was unable to drive home but went to her sister's house nearby. Her daughter then came and drove her to the hospital. She was given painkillers and attended work on 11 May 2016, the following day,

[1] ARD page 13.

where she did her regular daily duties. At the end of the shift her condition deteriorated to the extent that she attended a local general practitioner at the Reliance Medical Practice complaining of back and neck pain. She was referred for x-rays of the cervical and lumbar areas of her spine. She was unable to attend work thereafter and has not resumed work since. She said that since that time “my condition has relentlessly deteriorated” .

14. She underwent physiotherapy, pain management and medication but on 15 May 2018 came to surgery with Dr Little where she underwent a postero-foraminotomy to C5/6 and C7. She said that she was disappointed with the outcome and has subsequently required physiotherapy and pain management for her condition. She continues to be reviewed by the Neurological Outpatients Department at Royal North Shore Hospital but is unable to afford continuing treatment such as physiotherapy.

15. She continues to attend pain and management treatment when she can afford it.

16. Mrs Johnson’s background is that she worked initially as a hairdresser and then took time off to have four children in the next five years before returning to permanent part time bar work at the Ambervale Tavern in Campbelltown. She remained there for seven years.

17. She then moved to the Central Coast where she stayed for five years and obtained permanent part time bar work for seven years. She ceased that employment to become a foster mother and remained a foster parent for approximately three years, providing intermittent foster care.

18. In 2010 the applicant obtained her position with the respondent working permanent part time in the bar.

19. Mrs Johnson said that prior to her injury she had not sustained any injury to her back or neck and had made no complaints to her doctor about those areas[2].

20. Clinical notes were produced by the Woy Woy General Practice, where Mrs Johnson was treated by her local medical officer, and I was referred to various entries and reports.[3]

21. On 12 September 2007, an entry was noted by Dr Marvin Drapeza that noted a complaint of "headache, tense neck muscles for about two years... Had eight year old daughter with Aspergers syndrome.... She has five children.” The diagnosis was "tension/cervicogenic/muscular headache."

22. Also within the notes was a report from Dr John Graham, Neurologist, dated 4 June 2009, who was then investigating a complaint of radicular upper arm symptoms. An MRI scan was taken of the brain and spinal cord, about which Dr Graham noted a disc protrusion at C5/6 but no significant nerve root compression or spinal cord implication. Dr Graham commented that the most likely cause of Mrs Johnson’s sensory symptoms was "degenerative disease at C5 to 6 with some irritation of the nerve roots from time to time."

23. On 16 June 2009, Dr Graham reported:

> "The MRI of her neck shows degenerative disease at C5/6 with some irritation of the nerve roots. Conservative treatment with isometric neck exercises and good posture would be the best way to go at this point in time."

24. Dr Graham commented that the most likely cause of Mrs Johnson’s sensory symptoms was "degenerative disease at C5 to 6 with some irritation of the nerve roots from time to time."

[2] ARD page 16 [29].
[3] ALD Insurer .

25. In the same report, Dr Graham commented on the results of the MRI scan of the brain and lumbar spine.

26. I was also referred to an entry of 10 February 2012 by Dr Peter Simpson which noted local tenderness over the left forehead and "some soreness of the left posterior neck."

27. On 30 July 2012, Dr Simpson noted a complaint of "pain in the back of the neck and headaches." As part of his note he said "known OA of the neck."

28. My attention was also drawn to an entry on 31 May 2013 also by Dr Simpson, who noted "Getting some pain in the lower thoracic back region each side.... Feels that [breasts] are [heavy] and I think this is a contributory factor to the low [thoracic pain]." (Spelling errors corrected).

29. Reference was also made to a report by Dr Bill Johnstone, Ear, Nose and Throat Surgeon dated 4 April 2014. Mrs Johnson was complaining of a quite severe jaw problem associated with a seven week period of severe left-sided ear involvement "associated with cervical spine neck tension and headache." Dr Johnstone noted a chronic history of temporomandibular joint problems, and that Mrs Johnson had been under a lot of stress.

30. Mrs Johnson was referred to Dr James Bodel for a medico-legal opinion.

31. On 29 August 2018, Dr Bodel took a consistent history of the onset of Mrs Johnson's condition. He noted that MRI scans dated 11 June 2016 showed very significant central and left sided disc prolapse at C5/6 and a central bulge at C6/7. He also noted the lumbosacral region dehydration at L3/4. He noted there also appeared to be some compression of the C6 nerve root on the left.[4]

32. He noted the opinion of Dr Nathan Hartin of 13 July 2016, that there had been some aggravation of degenerative change caused by the injury at work. Dr Bodel also noted a signed statement from Ms Johnson which confirmed that:[5]

> "The nature of her work was quite heavy and it was not just the one event that caused the problem, but that she developed her pain over time and association with work in general but specifically that episode late on 10 May 2016…. "

33. In response to specific questions Dr Bodel outlined the history saying:[6]

> "This lady suffered an injury to her neck with left arm brachialgia and also a lower back injury as a result of an injury at work on 10 May 2016. There is some degenerative change in the neck and in part the injury may be an aggravation, acceleration, exacerbation and deterioration of a disease process."

34. Dr Bodel said:

> "I am satisfied that there was a significant injury to the neck and referred pain into the left arm as a result of the injury at work on 10 May 2016 and there was also a soft tissue injury to the lower part of the back with no sciatic radiation of the pain."

35. Prognosis was uncertain, and Dr Bodel found that Mrs Johnson had no current fitness for her pre-injury work. He thought she might be able to contemplate a graded reintroduction to work within the following months. He said that alternate work was a prospect but she would need

[4] ARD page 125.
[5] ARD page 123.
[6] ARD page 124.

to be retrained. He said that she would not be able to do the heavy work she was doing in her pre-injury work.

36. Dr Bodel noted under “past medical history”:[7]

> "This lady is otherwise quite well and not being treated for any other illnesses. She has never previously had any problems with the neck or left arm or the back or legs."

37. On 2 July 2019, Dr Bodel wrote a further report[8]. In the past medical history Dr Bodel noted that there had been a previous fracture of the right foot but that she was otherwise quite well and has not been treated for any other illness[9]. He said:

> “This lady has suffered an injury to her neck with left upper arm brachialgia and injury to her back with right leg pain as a result of the incident that occurred at work on 10 May 2016.”

38. He said there was a direct causal link between the injury and her ongoing complaints. He said that Mrs Johnson’s residual symptoms and signs of pathology and injury would make it impossible for her to return to the sort of work she was doing prior to her injury. He said that her capacity to return to work in general was severely compromised by the residual effects of the injury. He said he thought her ability to find work on the open labour market had been compromised and she could only contemplate part time light duty work at waist level only for 20-25 hours.

39. Mrs Johnson was seen by Dr Anil Nair on two occasions. Dr Nair’s first report was dated 11 August 2016.[10] Dr Nair took a short history of the injury, noting that Mrs Johnson’s symptoms occurred on 10 May 2016, where she spent her day awkwardly cleaning bar fridges. He noted that she denied any history of lower back pain or neck pain prior to the subject injury.

40. Dr Nair noted the imaging by MRI scan of the cervical and lumbar areas of the spine of 11 June 2016. He thought degenerative changes were shown, particularly at C5/6 and C6/7, with moderate left foraminal stenosis. He noted the presence of multilevel degenerative changes in the lumbar spine particularly at L4/5 and L5/S1.

41. Dr Nair diagnosed cervical and lumbar spondylosis, which he said was not related to the events of 10 May 2016. In answer to a somewhat convoluted question from the insurer, Dr Nair said that he did not believe that Mrs Johnson’s condition was due to a "simple frank injury." He thought that the condition was a degenerative condition, and not an acute injury.

42. He was also asked the following question:[11]

> “If you believe the condition to be disease related; do you believe work is the main contributing factor to the aggravation, exacerbation, acceleration or degeneration of the disease? If so, please detail how the employer is deemed to be the main contributing factor over the normal degenerative process of the disease, especially considering the minimal hours worked and the history of absenteeism.”

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[7] ARD page 121.
[8] ARD page 127.
[9] ARD page 128.
[10] Reply page 1.
[11] Reply page 5.

43. Dr Nair replied:

> "I believe the condition to be a degenerative condition, and it is my opinion that work is not the main contributing factor."

44. In his second report of 28 August 2019, Dr Nair added to his original history that Mrs Johnson's injury was caused by cleaning bar fridges, as well as cleaning up the cellar. Dr Nair saw additional MRI scans dated 11 May 2018, which confirmed the presence of degenerative changes in all levels of the spine. He noted that Mrs Johnson had undergone a cervical foraminotomy since he last saw her in 2016, and that she continued to have significant pain.

45. Dr Nair's diagnosis remained of degenerative change. He said:[12]

> "There is no evidence of an acute injury in the medical imaging that was presented to me."

46. Dr Nair said he was "struggling" to indicate a capacity for Mrs Johnson to perform work due to the fact that her subjective factors were "discordant" with the findings and medical imaging. He found her unfit for her pre-injury duties, and unfit for light duties until she had consultation with an occupational physician.

47. In a supplementary report of the same date Dr Nair said:[13]

> "It is my view that the current symptoms of disability are due to degenerative conditions. I would like to reinforce my opinion that I am unable to explain Mrs Johnson's current symptoms to anatomical lesions due to the fact that her complaints are generalised and not related to a particular dermatomal or myotomal pattern."

48. The respondent issued three notices denying liability. The first was dated 22 August 2016.[14] Whilst the authors acknowledged that Mrs Johnson had "significant" pathology requiring treatment, liability was denied on the basis that her employment was not the main contributing factor to the aggravation, acceleration, exacerbation or deteriorating of either her cervical spondylosis or lumbar spondylosis. The authors referred to an opinion from Dr Hartin, who also diagnosed a degenerative condition in the cervical and lumbar areas of Mrs Johnson's spine.

49. The decision was based on Dr Nair's opinion of 11 August 2016. The notice said:

> "….. Allianz does not dispute that you have significant pathology that requires treatment, Allianz does dispute that your employment at Nevitoro Investments Pty Ltd is the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of your cervical spondylosis and lumbar spondylosis condition."

50. In its next notice dated 3 April 2017[15], the same basis was given for denial.

51. The latest notice of 11 September 2019 confirmed the reasons for denial in the previous two notices. On this occasion the report of Dr Bodel had been served, and a re-examination with Dr Nair had occurred. The notice confirmed the denial of liability regarding the cervical and

[12] Reply page 9.
[13] Reply page 13.
[14] ARD page 26.
[15] ARD page 32.

lumbar areas of the spine, and also denied liability for the injury to the left upper extremity. The notice said:[16]

> "…Dr Nair maintained his opinion that the radiological findings are degenerative in aetiology with no evidence of an acute injury on 10 May 2016. This is consistent with the radiological evidence available including the x-ray of your lumbar spine dated 11 May 2016, the MRI of your cervical and lumbar spine dated 14 June 2016."

Submissions (oral)

52. Mr Halligan opposed the amendment that was proposed by Mr Parker at the outset of the hearing. The denial before that amendment was granted was based upon the pleadings as they originally stood - that Mrs Johnson had suffered an injury as defined in s 4 (a) of the *Workers Compensation Act 1987* (the 1987 Act). Mr Halligan submitted that the evidence demonstrated that the injury was clearly caused by a degenerative process. Mr Halligan submitted that this evidence supported the respondent's contention within the s 74 notices that Mrs Johnson had not suffered a "frank" injury. Those notices relied upon the evidence of Dr Nair that Mrs Johnson had suffered degenerative disease in the cervical and lumbar areas of her spine, and that employment was not the main contributing factor to her injuries.

53. Mr Halligan submitted that Mrs Johnson relied on the expert report of Dr Bodel, who took a history that Mrs Johnson had not previously experienced problems in either her neck or back, and who found that there was a significant injury to the neck and lower back at work on 10 May 2016.

54. Mr Halligan conceded that there clearly was an event on that date, which the respondent was unable to "shrink away from." However, Mr Halligan argued that the incident provided a reason for Mrs Johnson to take medical advice, and did no more than demonstrate a deep-seated pre-existing disease.

55. Mr Halligan argued that if I were to accept the event had aggravated Mrs Johnson's degenerative spinal disease then neither the reports of Dr Bodel nor Dr Hartin were ultimately of any assistance, as they did not consider whether the employment was the main contributing factor to the aggravation. Mr Halligan submitted that neither opinion was enunciated in a way that would enable me to draw the appropriate conclusion. This led to an exchange as to the requirement of expert evidence to determine the main contributing factor issue, which in turn led to the issue of my direction of 29 January 2020.

56. Mr Halligan submitted the preinjury average weekly earnings were said to be $874.40, and that I would find that Mrs Johnson was able to earn $420 per week.

57. Mr Parker described the defence as being "ridiculous" and that it was no defence. He said common-sense shows that Dr Nair's hypothesis is badly flawed as I would be required to find that the incident on 10 May 2016 at work occurred, but that it was simply a complete coincidence that Mrs Johnson's degenerative condition caused her back and neck to fail at the very same time she was doing this arduous work. I would have to find that the arduous work Mrs Johnson was doing at the time of the onset of her symptoms had no part to play in this allegedly coincidental collapse of her degenerative condition, according to the respondent.

58. Mr Parker conceded that the clinical notes showed that Mrs Johnson was previously complaining of tension in her neck, but submitted that, without more, such a complaint could not be equated with a neck injury in the light of Mrs Johnson's history of raising five children, and fostering another for many years. Mr Parker submitted that in any event the respondent was aware that there had been an injury on 10 May 2016, even though it allegedly was in the

[16] Reply page 530.

form of the aggravation, exacerbation, acceleration or deterioration of the spondylosis in the cervical and lumbar areas of the spine. The denial that employment had been the main contributing factor nonetheless carried with it an admission that employment had been a contributing factor. The question of whether employment was the main contributing factor was one for the Commission to decide on the whole of the evidence, as I understood Mr Parker to submit, although both he and Mr Halligan were unable to supply me with authority as to the requisite proof needed.

59. In any event, Mr Parker said, Dr Bodel gave support to Dr Nair's opinion when he said that the injury could be, in part, such an aggravation of Mrs Johnson's pre-existing condition.

60. Mr Parker submitted that Mr Halligan's submission that the event on 10 May 2016 could be seen as a revelation of the underlying disease rather than the genesis of Mrs Johnson's symptoms defied common sense. I was being asked to accept that it was a mere coincidence that Mrs Johnson's degenerative changes became aggravated at the same time as she was doing the arduous work she described.

61. Mr Halligan replied that the s 74 notices in effect conceded the presence of spinal pathology which required treatment. The issue therefore was whether the pathology was work related. He submitted that the inference Mr Parker sought to draw was not available.

Written submissions

62. As indicated, during submissions counsel were unable to cite any authority regarding the standard of proof regarding the requirement that a claimant establish that employment was the main contributing factor to the injury. I accordingly issued the following direction:

> "1. I direct the parties to lodge an agreed Wages Schedule within 14 days of the date of this Direction.
>
> 2. In default thereof I direct the parties to lodge written submissions as to their respective positions.
>
> 3. I would be grateful if the parties could refer me to relevant case law regarding:
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> (a) the current law on the application of ss 4A and 4B where a personal injury may also be described as a disease injury within the definition of s 4B of the 1987 Act;
>
> (b) any authority as to whether the main contributing factor pursuant to s 16 of the 1987 Act is a matter of fact for the determination of the Arbitrator, or whether such requires expert medical opinion.
>
> 4. I direct the respondent to confirm the name of the respondent company, noting that the s 74 notice dated 22 August 2016 identifies the employer as Nevitoro Investments Pty Ltd."

63. Submissions were duly lodged, together with an agreed wages schedule. I am grateful for the industry of the parties in reaching such agreement, and to counsel for their submissions.

64. Mr Halligan recounted the history of the proceedings, and then referred to *Australian Conveyor Engineering Pty Limited v Mecha Engineering Pty Ltd and* Anor (1998) 45NSW LR 606) as authority for the proposition that a frank injury (by which I assume he was referring to an injury defined by s 4(a) of the 1987 Act) could also aggravate a disease injury.

65. Mr Halligan referred to the pleadings and observed that “no reliance” had been placed on a frank injury having aggravated a disease claim as defined in s 16 of the 1987 Act. He referred to the wording of the pleadings, which was expressed in terms of “nature and conditions.” There was no reliance on a frank incident, he submitted.

66. The term “nature and conditions” itself was meaningless, and had been held to be so in a number of cases Mr Halligan cited.[17] The pleadings were required to set out the cause of injury and the nature of the allegations supported by appropriate evidence, and *Toplis* was authority for the proposition that a claim must be rejected where the pleadings failed to do so, Mr Halligan said.

67. Mr Halligan then submitted that Mrs Johnson’s claim was estopped by virtue of an Anshun estoppel. I was referred to *Jillian Mary Farrell v Secretary, Department of Education*[18], a case decided at arbitral level. As the question of estoppel was not raised in any s 78 Notice, not foreshadowed at the hearing, and leave has not been given for the respondent to raise this issue, I put the argument to one side. I note in passing that DP Wood has recently given a decision that may in any event render *Farrell* incorrect.[19]

68. Mr Halligan submitted that the issue of main contributing factor was a question of fact to be determined by the arbitrator. He submitted that there was an absence of evidence of causation to identify the issue under s 4(a) or 4(b), and that, following *Farrell*, the claim must fail.

69. Mr Parker in his written submissions referred to *Gibson v Royal Life Saving Society of Australia*[20] as authority for the proposition that an injury that results in the aggravation of a disease is capable of sustaining a finding of "personal injury" within s 4(a) relying on Rail Services Australia v Demoski.[21]

70. I was also referred to *State Transit Authority of NSW v El-Achi*[22] regarding the standard of proof in establishing main contributing factor, which Mr Parker submitted, was a question of fact.

Discussion

71. The original denial to this action was that Mrs Johnson’s employment was not the main contributing factor to the acknowledged aggravation, exacerbation, acceleration or deterioration of degenerative disease in Mrs Johnson’s spine. Mr Halligan submitted firstly that the claim should have failed, as it was pleaded as a personal injury, although he admitted that the amendment I permitted at the outset of the case rendered that submission otiose.

72. Whilst that may be correct, the submission ought to be dealt with beyond what I said on the record at the time. Whilst the procedure before the Commission is designed to avoid technicalities and formality, the system of pleading is one which attracts some importance. It was discussed in the early iteration of the Commission when DP Gabriel Fleming considered the manner in which pleadings are defined. In *Far West Area Health Service v Colin Robert Radford* [23] DP Fleming said from [23]:

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[17] *Inghams Enterprises PL v Rachmaninoff* [2011] NSWWCCPD 35.
Mirkovic v Davids Holdings PL (1995) 11 NSWCCR 656, at 667.
Toplis v Coles Group Ltd t/as Coles Logistics (2009) NSWWCCPD *(Toplis)*
[18] [2015] NSWWCC 287 (*Farrell*)**.**
[19] *Israel v Catering Industries NSW Pty Ltd* [2017] NSWWCCPD 53.
[20] [2009] NSWWCCPD 13 at [67].
[21] [2004] NSWCA 267 (Demoski)
[22] [2015] NSWWCCPD 71 at.[107].
[23] [2003] NSWWCCPD 10.

"23. The system of pleadings common to adversarial proceedings in the courts does not have the same role in the Commission. It is trite but necessary to reiterate that the Commission is not a Court…..

24. In the informal, less technical environment of the Commission it is not necessary or desirable to rely upon strict pleadings to define the issues between the parties…....When the parties reach the Commission the issues that are in dispute between them should be clear. This is not to say that some issues will not assume greater significance than others in the proceedings, or that others may be resolved after the dispute is lodged in the Commission and before the Arbitrator must make a decision.

25. There are a number of ways in which the issues between the parties to a dispute lodged in the Commission are defined, without the need for formal pleadings…"

73. DP Fleming identified those ways as firstly, the ARD and Reply, secondly the teleconference, and thirdly the conciliation/arbitration hearing. Each stage gave an opportunity to identify and elucidate the issues to be determined. She said at [25]:

> "…… In many cases the issues will be narrowed, with some resolved by conciliation, so that the course of the proceedings is directed only to those issues *truly* remaining in dispute…. the parties have a further opportunity to identify and narrow the issues in the informal environment of the conciliation and arbitration hearing….. These processes essentially fulfill the same function as formal pleadings while at the same time being more accessible and not disadvantaging the self-represented person unable to prepare formal pleading documents."

74. Since the above dicta, it has become apparent that it is not only the self-represented claimants who have struggled with the identification of the precise issues.

75. It is a question of fact whether any amendment application at the conciliation/arbitration stage should be permitted. In some cases, such an amendment might create insuperable prejudice to the opposing party and the application will be rejected. Other applications, such as the one for which leave was granted at the opening of this case, create no such impediments.

76. The issue for determination is whether Mrs Johnson suffered an injury on 10 May 2016. Whether it occurred as a frank injury, or as the aggravation, exacerbation, acceleration or deterioration of a disease is of secondary importance. I shall refer to the four descriptions of the disease process as "aggravation." If it proves to be a frank injury, then the applicant is required to show that employment was a substantial contributing factor. If it proves to be an aggravation injury, the applicant is required to show that employment was the main contributing factor.

77. Section 4 of the 1987 Act defines "injury" as follows:

> "(a) means personal injury arising out of or in the course of employment,
>
> (b) includes a
>
> **'disease injury'** , which means-
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

(ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease."

78. In common parlance, a frank injury refers to a s 4(a) injury, and a claim based on "nature and conditions" refers to a s 4(b) injury. Although Mr Halligan criticised the term "nature and conditions" in his written submissions, in fact that term was not used in the amendment I allowed, as was indicated at the outset of the reasons.

79. Whilst the ARD as lodged claimed that Mrs Johnson had suffered a frank injury, the denial Notices claimed that she had suffered an aggravation injury to which employment had not been the main contributing factor. Mr Halligan's objection to the amendment can thus be seen to be based on the common law adversarial system by which the formal pleadings defined the parameters by which the case was to be presented and defended.

80. In *Michelle Gai Weston t/as Northmead Beauty Therapy v Szenczy*[24] an arbitrator allowed an amendment during submissions where the respondent's defence was based on the premise that the wrong date had been identified in an otherwise admitted causal nexus between injury and employment. President Judge Phillips said at [175]:

> "There is no merit in the argument that the appellant [employer] was not afforded natural justice. Given that the Commission is not a tribunal of strict pleading and legal forms, I am satisfied that the appellant was acquainted with the case that it had to meet, including the facts. The fact that an amendment to the pleadings might take place during the hearing may in some circumstances give rise to unfairness to a party, but I am satisfied that such was not the case in this matter…"

81. I was similarly satisfied here. The respondent was acquainted with the case it had to meet – indeed it constructed its denial of liability on the conceded presence of pathology which demonstrated aggravation to degenerative change in the cervical and lumbar areas of Mrs Johnsons' spine. As indicated in the extract reproduced from 22 August 2016, the issue identified was that Mrs Johnson's employment had not been the main contributing factor to such aggravation. That was the issue that I permitted the amendment to the applicant's case to address.

82. Whilst it may be regrettable that Mrs Johnson's advisors did not make that application in the face of the unambiguous contents of the three denial Notices, it cannot be said that the respondent was taken by surprise, or suffered any prejudice. Section 354 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) provides relevantly:

> **"354 PROCEDURE BEFORE COMMISSION**
>
> (1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.
>
> (2) The Commission is not bound by the rules of evidence but may inform itself on any matter in such manner as the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.

[24] [2019] NSWWCCPD 38

(3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."

83. The proper consideration of the matter included the alternative claim as set out in the amendment. The facts in which the issues were raised are not in dispute, and the argument whether this is a frank injury case or a disease process aggravation case is in my view a technical one.

84. Mr Halligan's concession that he did not "shrink away from" the respondent's concession that there had been an event on 10 May 2016 was well made. The histories have all been consistent as to the occurrence of the injury itself. The description of the duties Mrs Johnson was engaged with during that day could well be described as "arduous." She was lifting and rolling kegs (presumably of beer), carrying large buckets of ice from the ice machine to the bar areas to place in ice boxes and she was carrying cartons of drinks from the back storage to the front of the bar to restock the fridges. On that day she was also pulling out large metal trays of glasses from the refrigerator, carrying them to the cool room, cleaning the fridge and collecting and restoring the glasses back in the fridge.

85. Similarly the histories taken by the medical practitioners are consistent as to Mrs Johnson's subsequent treatment which included physiotherapy, pain management, medication and on 15 May 2018, surgery to her cervical spine. There has been no challenge to Mrs Johnson's assertion that at the end of her shift her back was so painful that she was unable to drive home but that her daughter drove her from her sister's place to the hospital.

86. The respondent however submitted that Mrs Johnson has failed to satisfy her onus, as her medico-legal referee, Dr James Bodel, Orthopaedic Surgeon, relied in his report of 28 August 2018 upon a history given by Mrs Johnson that she had never previously had any problems. In his second report of 2 July 2019, Dr Bodel confirmed that history. This was hardly surprising, as Mrs Johnson confirmed in her statement of 3 October 2019 that she had never injured her back or neck, and had never complained to any medical practitioner in that regard. She also denied to Dr Nair that she had suffered any prior problems or treatment for her back or her neck.

87. However, as sometimes happens, the clinical notes produced by her medical clinic, Woy Woy General Practice demonstrated that Mrs Johnson had indeed sought medical attention regarding her neck. They showed in chronological order:

"
- Tense neck muscles 21 September 2007
- degenerative disease at C5 to 6 with some nerve irritation shown on MRI scan which also scanned the brain and the lumbar spine. 4 – 6 June 2009
- local tenderness left forehead and soreness left posterior neck 10 February 2012
- pain in back of the neck and headaches, OA neck known 13 July 2012
- pain in lower thoracic back region on each side: 31 May 2013
- cervical spine neck tension and headache, temporomandibular joint problems 4 April 2000".

88. I do not regard these entries as affecting either the credit of Mrs Johnson or the weight of the opinion expressed by Dr Bodel. It is clear that Mrs Johnson was consistent in her belief that she had not experienced any prior neck or back problems. She said so to Dr Nair in 2016, Dr Bodel in 2018 and 2019, and she repeated that assertion in her statement.

89. As can be seen from the chronology above, there was no consistency over the period of years in the complaints, nor were they of such regularity to imply that Mrs Johnson was suffering from a significant problem. She was described as having tense neck muscles, or neck tension, soreness and pain. These entries were years apart. It is more likely that she had simply forgotten her attendances, and her aches and pains which were of a temporary nature. The brain, cervical and lumbar spine MRI scan in June 2009 was clearly an investigative radiological enquiry, but its cause was unclear, and may have been to exclude pathology in the spinal cord, which it did. There is a danger in relying on the contents of clinical notes from medical practitioners to make definitive findings of fact.[25] The fragmented nature of the evidence as to past complaints is of little probative weight.

90. Nonetheless, the respondent did rely on it to demonstrate that degenerative changes had been detected on MRI in June 2009, which it used to bolster its argument that the probable cause of Mrs Johnson's injuries was the aggravation of degenerative changes. It was alleged that Dr Bodel had found a frank injury occurred on 10 May 2016 and his opinion should accordingly be rejected. An analysis of Dr Bodel's reports shows that he found that Mrs Johnson suffered a neck injury with left arm brachialgia and a lower back injury. That is undisputed in as far as her evidence is concerned. However, it is the nature of the injury that is disputed. Dr Bodel acknowledged that it was not just the one event that was causative, but that over time the heavy nature of the work caused the problem.

91. When Dr Bodel then opined that the injury "may be" an aggravation, exacerbation, acceleration or deterioration of a disease process, he accepted that the aggravation of degenerative disease was not excluded.

92. The diagnosis of the aggravation of a constitutional degenerative disease was given by Dr Nair also, and the respondent admitted in its s 74 Notices that Mrs Johnson had significant pathology requiring treatment, and that while she had aggravated, accelerated exacerbated or deteriorated her cervical and lumbar spondylitic condition, employment was not the main contributing factor.

93. The determining question in the light of that admission is as to whether Mrs Johnson's employment was the main contributing factor. Dr Nair mentioned on two occasions that the injury of 10 May 2016 was not "an acute injury", or "a simple frank injury." He was concerned, it would seem, to establish that the cause was the underlying degenerative state, and not a frank incident. Dr Nair's reports diagnosed Mrs Johnson's condition as having been caused by degenerative conditions. I accept that involved in the mechanism of injury was the aggravation of a disease process. I also find that the acute nature of the onset may well have involved a soft tissue injury as described generally by Dr Bodel.

94. However the immediate severity of Mrs Johnson's symptoms, and the fact that she has not worked since the following day, when attempted unsuccessfully to return, point to an injury of such severity that a simple diagnosis of soft tissue injury would not explain her symptoms I accept the applicant as a witness of truth. There is no evidence to suggest that her misinformation about her prior history was caused by an intent to mislead. That being so the only question regarding injury is whether employment was the main contributing factor.

95. I am grateful for counsel's submissions on this subject. There is a later authority, *AW v AW* that also bears on the issue. A detailed consideration of the authorities is not warranted in these circumstances, however.

[25] See *Mason v Demasi* [2009] NSW CA 227: *Qannadian v Bartter Enterprises Pty Limited* [2016] NSWWCCPD 50.

96. Mr Parker described the respondent's defence as defying common sense, amongst other things. I agree with that submission. The respondent's defence was articulated clearly and in detail, but its submissions could not overcome the fact that Mr Halligan quite properly conceded that he could not shrink away from the circumstances of the injury itself.

97. It follows that I do not accept Dr Nair's opinion that the sudden onset of severe back pain had no relationship to the arduous work Mrs Johnson had been doing that day. I do accept however that the cause of Mrs Johnson's present condition is the continuing aggravation of her degenerative spinal disease. I also accept that the arduous work was the main contributing factor to that aggravation. Although Dr Nair found to the contrary, his rationale for that opinion was difficult to discern. Dr Nair accepted the history he was given, but did not explain how the sudden and severe occurrence of the injury whilst Mrs Johnson was performing her heavy work nonetheless was not the main contributing factor. This event changed Mrs Johnson's life. She has not worked since.

98. I prefer Dr Bodel's opinion that she suffered injury to her back, her neck and left arm brachialgia. Whilst his description of the cause of those injuries was economical, he did not exclude the aggravation of degenerative change as being "in part" responsible. The respondent fairly conceded in its dispute notice that Mrs Johnson had significant pathology requiring treatment, and that she had aggravated the underlying cervical and lumbar spondylosis.

99. I find that the applicant suffered injury to her neck, back and left upper extremity. However I am satisfied that the symptoms in the left arm have their origin in the cervical injury. The first mention made by Mrs Johnson in her statement of symptoms in her left arm was in the context of her discussion of the report of Dr Bodel, at [37][26]. She did not describe how the left arm symptoms began, nor when they occurred. A perusal of the medical certificates lodged record during the first year following the injury diagnosis:[27]

> "disc protrusion with radiculopathy left C7, facet arthropathy L4/5 and L5/S1."

100. Further, I note that Dr Bodel described Mrs Johnson's left arm pain as "brachialgia", which Mosby's Medical, Nursing and Allied Health Dictionary, fifth edition describes as "severe pain in the arm, often related to a disorder involving the brachial plexus."[28] The brachial plexus is described as:

> "A network of nerves in the neck, passing under the clavicle and into the axilla, originating in the fifth sixth, seventh and eighth cervical and the first two thoracic spinal nerves. It innervates the muscles and skin of the chest, shoulders, and arms."

101. Dr Bodel also described the symptoms in the left arm as "a significant injury to the neck and referred pain into the left arm", which is consistent with that definition. I am satisfied that the left arm symptoms have been caused as a result of the radiculopathy arising from the pathology in the cervical spine. Such injuries fall to be assessed as part of the impairment caused by the injury to the spine.

102. I am accordingly satisfied that on 10 May 2016 the applicant suffered injury to the cervical and lumbar areas of her spine, and that the cervical injury also caused the symptomatology about which she complains in her left arm.

103. I am satisfied that Mrs Johnson has no current work capacity. Section 32A of the 1987 Act provides relevantly:

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[26] ARD page 16.
[27] ARD pages 48, 51, 54, 57, 60 and 64.
[28] At page 218.

"'suitable employment' , in relation to a worker, means employment in work for which the worker is currently suited
-

(a) having regard to-

(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
(ii) the worker's age, education, skills and work experience, and
(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of-

(i) whether the work or the employment is available, and
(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
(iii) the nature of the worker's pre-injury employment, and
(iv) the worker's place of residence."

104. Dr Bodel on 21 July 2019 considered that Mrs Johnson had a residual earning capacity if she could find part time light duty work at waist level only for 20-25 hours per week. Dr Nair on 28 August 2019 thought Mrs Johnson unfit for either pre-injury duties or light duties until she had consulted an occupational physician.

105. In her statement of 3 October 2019, Mrs Johnson said:

"58**.** I confirm that the only work which I have ever undertaken is in hairdressing and bar work and that I hold no other relevant qualifications.

59. In these circumstances based on my age, education, training and experience together with my ongoing injuries and disabilities, I believe that I am currently totally incapacitated for all forms of employment."

106. Although the above three assessments were made within a period of four months between July and October 2019, the latter two accord with common sense, since Mrs Johnson has been out of the workforce now for almost four years. I prefer the opinion of Dr Nair, whose assessment that Mrs Johnson would need the assistance of an occupational physician before she was able to find any employment. I do not accept Dr Bodel's view that she could find the work described by him in her present state, particularly as he had a wrong history as to the number of hours and days Mrs Johnson had been working in her pre-injury employment. I also take into account Mrs Johnson's self- assessment, although the danger of self-interest makes it of less weight. It is however a strand in the evidentiary chain as to this subject.

107. The agreed wages schedule showed pre-injury average weekly earnings of $294.11. That amount, when looking at the payroll advice from the respondent[29] that Mrs Johnson was earning $21.86 per hour, would indicate that she was working 9-10 hours per week, and not the four to five shifts of eight hours duration per week reported by Dr Bodel. His assessment

[29] ARD page 411.

was made on an assumption that against a 32 to 40 hour pre-injury capacity, Mrs Johnson was only able to work light duties for 20-25 hours per week. I am satisfied that Mrs Johnson has no current work capacity.

108. Accordingly the respondent will pay from 10 May 2016 to 8 August 2016 pursuant to s 36, the sum of $279.40 per week. From 9 August 2016 to 5 February 2019 the weekly sum will be $235.28 pursuant to s 37. I note there has been agreement that weekly payment should proceed pursuant to s 38, although no proof of entitlement has been before me. Noting the parties' agreement I shall make orders for that period and grant leave to apply if I have mistaken the intention of the parties. The award for the s 38 period will be $235.28 per week from 6 February 2019 to 4 February 2020.

109. The claim for s 60 expenses sought the sum of $5,418.88, and enjoined me to "see addendum attached." I could not find such an addendum, and accordingly will simply make a general order.

110. The matter will be referred to an Approved Medical Specialist (AMS) for assessment of the cervical and lumbar areas of the spine, and for scarring pursuant to the TEMSKI scale. In accordance with the protocol introduced as a result of the pandemic emergency, the matter will be remitted to the Registrar for placement in the medical assessment pending list.

Summary

111. I find that the cause of the injury was the aggravation of the degenerative changes in the cervical and lumbar areas of the applicant's spine.

112. I find that employment was the main contributing factor.

113. Accordingly, the respondent will pay to Mrs Johnson the following weekly amounts:

    (a) $279.40 from 10 May 2016 to 8 August 2016 pursuant to s 36;
    (b) $235.28 from 9 August 2016 to 5 February 2019 pursuant to s 37,
    (c) $235.28 from 6 February 2019 to 4 February 2020 pursuant to s 38.

114. The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and Medicare documentation.

115. I remit this matter to the Registrar for placement in the medical assessment pending list. It is to be referred when appropriate to an AMS for a whole person impairment assessment on the following bases:

    (a) Date of injury: 10 May 2016 (deemed).

    (b) Matters for assessment: Cervical and lumbar areas of the spine, scarring (TEMSKI).

    (c) Evidence: ARD & attached documents, Reply and attached documents dated 30 December 2019 and Application to Admit Late Documents (ALD) dated 27 November 2019.

116. I grant liberty to the parties to apply on telephone notice to each other.