WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1597/20**
Applicant:	**Mohamad Dakkak**
Respondent:	**Gerard Lighting Pty Ltd**
Date of Determination:	**4 August 2020**
Citation:	**[2020] NSWWCC 263**

The Commission determines:

1. The applicant suffered an injury to his lumbar spine by way of a workplace aggravation to an underlying condition, with a deemed date of injury of 3 August 2018.

2. The applicant's employment with the respondent was the main contributing factor to the injury referred to in (1) above.

3. The surgery proposed by Dr Peter Khong is reasonably necessary as a result of the injury referred to in (1) above.

4. The respondent is to pay the costs of and incidental to the surgery proposed by Dr Khong.

5. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Between early 2004 and August 2018, Mohamad Dakkak (the applicant) worked with Gerard Lighting Pty Ltd (the respondent). The applicant was initially employed on a casual basis for 18 months before being made permanent. He worked as a paint line operator until approximately 2012 or 2013, when he became a supervisor.

2. The applicant alleges the nature and conditions of his employment over the years required him to manually handle heavy items. He says that on 3 August 2018, he noticed the onset of lumbar spine symptoms while in the course of his employment, which have developed to the point that he requires lumbar fusion surgery.

3. In August 2018, the applicant was already on light duties as a result of an accepted work-related injury to his right arm and a consequential condition to his left arm. The applicant worked until 6 August 2018, when he says he was told there were no suitable duties for him. He has not worked since and completed a claim form in relation to his alleged back injury on 21 February 2019.

4. On 21 August 2019, the respondent issued a section 78 notice denying the applicant suffered a workplace injury (section 4 of the *Workers Compensation Act 1987* (the 1987 Act)); that employment was not the main contributing factor to an alleged disease injury (section 4(b)(i) of the 1987 Act) or to any aggravation of that disease (section 4(b)(ii) of the 1987 Act).

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant suffered a workplace injury, be it either a frank injury or the aggravation of a disease process; and

    (b) Whether the proposed surgery is reasonably necessary as a result of any workplace injury (section 60 of the 1987 Act).

6. The question of whether the proposed surgery is a medical necessity is technically an issue, though the respondent offered no medical evidence to counter the suggestion that the applicant needs the proposed lumbar fusion surgery.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a hearing on 8 July 2020. 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. Notwithstanding my best endeavours to assist the parties to reach a negotiated resolution of their differences, they were unable to do so, and the matter therefore proceeded to hearing before me.

8. At the hearing, Mr C Tanner of counsel instructed by Mr M Dababneh appeared for the applicant and Mr J Gaitanis of counsel instructed by Mr G Walkom appeared for the respondent.

EVIDENCE

Documentary evidence

9. 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 attached documents;

    (b) Reply and attached documents; and

    (c) Applicant's Application to Admit Late Documents (AALD) and attached documents dated 26 June 2020.

Oral evidence

10. There was no evidence called at the hearing.

FINDINGS AND REASONS

Issue 1 - Whether the applicant suffered a work injury to his lumbar spine

11. The applicant brings his claim on the basis his injury satisfies the requirements of section 4(b) of the 1987 Act which relevantly provides:

> " "injury"…
>
> (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…"

12. There is a useful review of the authorities concerning the question of injury *Castro v State Transit Authority (NSW)* [2000] NSW CC 12, which makes it clear that what is required to constitute "injury" is a "sudden or identifiable pathological change."

13. The applicant submitted that the evidence established his injury satisfied the requirements of section 4(b)(ii). This being the case, it is necessary for the applicant to demonstrate that his employment was the main contributing factor, rather than a substantial contributing factor as is the case in frank injuries. In *Kelly v Western Institute NSW TAFE Commission* [2010] NSW WCC PD 71, Deputy President Roche said at [66]:

> "An aggravation or exacerbation of a disease occurs where the experience of the disease by the patient is increased or intensified by an increase of intensifying of symptoms (*Federal Broom Co Pty Ltd V Semlitch* (1964) 110 CLR 626)."

14. The question of “main contributing factor" in claims surrounding injuries involving a disease process was also considered by arbitrator Harris in *Ariton Mitic v Rail Corporation of NSW* (Matter number 8497 of 2013, 8 April 2014). In considering the terms of section 4 (b)(ii), the arbitrator 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 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 require 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…
>
> In my view, the amendment 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 [the body part at issue] 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."

15. Arbitrator Rimmer adopted this approach in *Mylonas v The Star Pty Ltd* [2014] NSW WCC 174 at [151]–[166], as did Arbitrator Edwards in *Egan v Woolworths Ltd* [2014] NSW WCC 281 at [60]–[82].

16. In *Semlitch*, Windeyer J said:

> "The question that each [aggravation, acceleration, exacerbation, deterioration] poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient" (at 639)

In relation to whether there is an aggravation, his Honour said "…the answer depends on whether for the sufferer the consequences of his affliction had become more serious" (at 637).

17. The reasoning in *Semlitch* was followed by Burke CCJ in *Cant v Catholic Schools Office* [2000] NSW CC 37, where his Honour said at [17]:

> "… the thrust of these comments is that irrespective of whether the pathology has been accelerated there is a relevant aggravation or exacerbation of the disease if the symptoms and restrictions emanating from it have increased and become more serious to the injured worker."

18. In *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* (1998) 45 NSW LR 606 (*Mecha*) the Court of Appeal said the words “injury consists of the aggravation… of a disease" in section 16(1) of the 1987 Act should be construed as not referring to something which is an injury independent of its aggravating effects on a previously existing disease, but as being confined to what are entirely injuries by aggravation (per Sheller JA at 616).

19. It can therefore be said that the proper test is whether the *aggravation* impacted the individual concerned. It is not necessary for the particular disease to be made worse: *Cabramatta Motor Body Repairs (NSW) Pty Ltd v Raymond* [2006] NSW WCC PD 132. In *Raymond*, Roche ADP (as he then was) was satisfied that, on the whole of the evidence, it was open to the Arbitrator to conclude that the worker suffered an aggravation of his occupational asthma, in the sense that symptoms increased and became more serious while employed (at [45–47]).

20. The provisions in relation to section 4(b)(ii) are important in this matter given the fact that the applicant had previously suffered a serious lower back injury. In his initial statement, the applicant summarised that incident as follows:

> "17. Previously I also worked for a company called Cutting Edges Pty Ltd, Violet Street Revesby NSW as a storeman for approximately six years. I cannot recall the dates at all. Whilst I was working for Cutting Edges Pty Ltd, I hurt my lower back lifting items such as excavator points (metal tip of the excavator weighing approximately between 15–25 kg) from one box to another box.
>
> 18. There was a workers claim associated with this lower back injury and as a result, I was off work for approximately seven years. Again I do not remember the exact dates. I did not get back to work after that and I also received 'out-of-court' settlement. I do not want to comment on the out-of-court settlement. In total, I was on workers compensation for two and a half years, after the incident and prior to settlement
>
> 19. At the time, Dr Maniam, specialist was in Bankstown. I do not remember his details very well. I did not undergo any surgery on my lower back. I received hydrotherapy, physiotherapy and related exercises. My treating doctor at that time was Dr Kanawati or something like that. He was from a Medical Centre in Bankstown NSW. I cannot remember the doctor's name of any specific details.
>
> 20. Up to seven years I had no work and through an employment agency I joined Gerard Lighting Pty Ltd."

21. It is therefore apparent that the applicant had previously suffered a serious lower back injury, sufficient to keep him out of the workforce for approximately seven years.

22. The respondent challenges the applicant's credibility concerning the alleged injury and whether his back complaints are related to his employment with it. Mr Gaitanis noted the statements of numerous co-workers of the applicant who were working with him in August 2018. None of these witnesses recall the applicant complaining about his lower back before he left work for the last time. Moreover, the evidence establishes that on the day before the applicant alleged he was unable to continue working because of lumbar spine symptoms, he was disciplined as a result of an earlier altercation with a co-worker and demoted, including suffering a cut in pay.

23. Mr Gaitanis submitted the evidence does not establish on the balance of probabilities that the applicant's employment with the respondent was the main contributing factor to the aggravation of his pre-existing lumbar spine condition.

24. By contrast, the applicant submitted that the presence of an MRI scan taken in early 2019 established a pathological change sufficient to establish injury pursuant to section 4(b)(ii). Mr Tanner submitted that the lay evidence of the respondent's witnesses should not be preferred to that of the applicant, as it is apparent he was carrying out work which was heavier than the restrictions on which he was formally placed at the time of his leaving employment.

25. The applicant also submitted that a combination of the medical evidence, radiological investigations and the nature and the extent of his duties is sufficient to establish the presence of an injury pursuant to section 4(b)(ii).

26. As noted, the applicant's credit is in issue. The lay witnesses for the respondent, who are his former colleagues specifically state that the applicant did not complain to them of any lumbar spine difficulties in the lead up to his leaving work. Moreover, there is no contemporaneous complaint of lumbar spine pain before February 2019, approximately six months after the applicant left employment. Nevertheless, that evidence does, in my view, tend to disclose the applicant carrying out heavier work than the formal restrictions caused by his arm injury mandated. For example, the applicant's former colleagues state to varying degrees that from time to time he would engage in some work on the paint line to render assistance to them, as well as carrying out his supervisory role. The factual material put forward by the respondent reveals the duties on the paint line involved overhead work and lifting and carrying of items of varying weights on a repetitive and at times constant basis. I am satisfied the applicant carried out these duties from time to time even after he was on light duties, and certainly after he was promoted to supervisor. As already noted, before he was promoted to supervisor, the applicant carried out those duties on a full-time basis for many years.

27. Mr Tanner for the applicant submitted that there was no other reason for the development of the pathology in the applicant's lumbar spine other than his employment. With respect, it is not in my view sufficient for an injured worker to simply allege that the absence of evidence is sufficient to establish a causal chain. Nevertheless, in my view there is sufficient evidence to establish injury on the part of the applicant for the following reasons.

28. Although the applicant had been reprimanded and demoted shortly before ceasing work, the correlation of that reprimand and the alleged worsening of back symptoms does not itself mean there is causation between those events. The raising of a suspicion as to the applicant's timing of his complaints does not circumvent the fact the respondent has chosen not to put forward a medical opinion to counter that of treating surgeon Dr Khong and that of IME Dr Bodel.

29. At page 56 of the Application, Dr Khong who has seen the applicant on no fewer than four occasions indicated that "years of manual labour working at a paint line accelerated the degenerative changes in Mr Dakkak's lumbar spine – his incapacity appears to be a result of his work, and his employment has been a substantial contributing factor." Importantly, Dr Khong provides that opinion in the knowledge of the applicant's previous back injury and takes it into account in his report.

30. Mr Tanner submitted that although Dr Khong erroneously refers to the question of substantial contributing factor, the medical evidence would establish the applicant's employment being the main contributing factor to the aggravation of his pre-existing lumbar spine problems. Given the nature of the duties which are set out in both the factual report and the above lay evidence, in my view Dr Khong's findings are consistent with the factual background in this matter and establish on balance that the employment was the main contributing factor to the aggravation of lumbar symptoms.

31. Moreover, Dr Khong's findings are supported by Dr Bodel, IME for the applicant who also indicates that the nature and conditions of the applicant's employment were the main contributing factor to the aggravation at issue.

32. Mr Gaitanis for the respondent submitted that Dr Bodel's opinion could be discounted as he had not seen any radiology which went back as far as the applicant's previous lumbar spine injury. Whilst that may be the case, if the effect of the applicant's lumbar spine pathology had been the same since his previous injury, in my view it is most unlikely he would have been able to carry out the often heavy and repetitive work he undertook with the respondent over the course of many years.

33. Although the respondent submitted the applicant's own statement to the effect his lower back had been "injury free for 14 years" is completely at odds with a nature and conditions claim, in my view the medical evidence (both treating and IME) which the respondent has not countered with any expert opinion of its own, obviates that inconsistency.

34. Whilst I accept the respondent's submission that the applicant must establish with some certainty the mechanism of an injury, in my view in this case the applicant has established a causal connection between the nature and conditions of his employment and what he describes as the gradual onset of pain. Moreover, the opinion of Dr Khong is, in my view, persuasive as a treating surgeon who sets out his view of causation absent a retainer from either party to the proceedings and as the surgeon who is prepared to accept any potential liability arising from the major surgery which he proposes to undertake.

35. For these reasons, I accept the applicant suffered an injury in the course of his employment by way of an aggravation to pre-existing lumbar spine condition.

Issue 2 - Whether the proposed surgery is reasonably necessary as a result of the workplace injury

36. Both Dr Bodel, IME for the applicant and Dr Khong, treating surgeon, indicate that the proposed surgery is reasonably necessary. As the respondent submitted, even though it filed no evidence to contradict these claims, the Commission must still be satisfied on the balance of probabilities that this is the case.

37. I am so satisfied. The evidence of Dr Khong and Dr Bodel in this matter is unequivocal. They are each satisfied not only that the applicant requires lumbar fusion surgery, but that it is a medical necessity as a result of the workplace injury and owing to symptoms of radiculopathy. That evidence is the uncontradicted expert opinion in the case. This being so, I am comfortably satisfied on the balance of probabilities both that the proposed lumbar fusion surgery is a medical necessity and that it is reasonably necessary as a result of the applicant's workplace injury.

38. In reaching this finding, I have taking into account the factors as set out by Deputy President Roche in *Diab v NRMA Limited* [2014] NSWWCCPD 72 (*Diab*) and, in accordance with the decision of his Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233, in my view the proposed surgery is treatment of the nature of which the applicant should be granted rather than forborne.

39. No evidence has been put forward to counter the opinions of Dr Khong and Dr Bodel. There is no suggestion the surgery is unreasonably expensive. Moreover, fusion surgery is an accepted form of treatment for lumbar spine injury, and I note the applicant has previously had years of conservative treatment which Dr Khong describes as having failed. In my view, Dr Khong's reasoning behind the need for surgery is persuasive as to the reasonable necessity for the surgery. Having set out the causal link between employment and the injury, Dr Khong dealt with the need for surgery as follows:

> "10. I have recommended an L5/S1 anterior lumbar interbody fusion. I feel that a lot of his symptoms may be corning from this level, even though he has degenerative changes in the other disc spaces in his lumbar spine. Immobilising this motion segment, as well as indirectly decompressing the 51 nerve roots with a cage, may afford him relief from a good proportion of his back pain and right leg pain. He has failed all non-operative measures, and I believe surgical intervention is reasonably necessary. This treatment been recommended as a consequence of his work-related injury."

40. I accept that evidence from a treating surgeon, uncontradicted as it is by any opinion by an IME for the respondent and supported as it is by Dr Bodel. Accordingly, I find the surgery is reasonably necessary as a result of the workplace injury suffered by the applicant as a result of his employment with the respondent.

SUMMARY

41. For the above of reasons, the Commission will make the findings and orders are set out on page 1 of the Certificate of Determination.