WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3443/19
Applicant: Bernard Goonan
Respondent: State of New South Wales
Date of Determination: 21 October 2019
Citation: [2019] NSWWCC 340

The Commission determines:

1. The respondent is to pay the applicant the sum of $1770 per week from 7 February 2019 to 30 April 2019 pursuant to section 36 of the *Workers Compensation Act 1987* (the 1987 Act) as preserved by clauses 25 and 26 of Part 19H of Schedule 6 to the 1987 Act.

2. The respondent is to pay the reasonably necessary treatment expenses resulting from the subject injury pursuant to section 60 of the 1987 Act including the expenses set out in the Schedule appearing at pages 196 and 197 of the documents attached to the Application to Resolve a Dispute.

3. The respondent is to pay the costs of the applicant as agreed or assessed.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Bernard Goonan (Mr Goonan/the applicant) suffered an injury to his back in the course of his employment as a police officer. The injury was deemed to have occurred on 17 August 2015 (the subject injury) and was due to employment tasks. Liability was accepted by the workers compensation insurer.

2. Mr Goonan continued his employment with the New South Wales Police Force within the Prosecutions Division. In January 2019 Mr Goonan suffered an increase in low back symptoms while lifting a tyre at home. On 6 February 2019 Mr Goonan experienced a severe increase in the level of symptoms when lifting a heavy box in activity unrelated to employment ("the later incident").

3. Mr Goonan attended the Emergency Department of Canberra Hospital and an MRI scan was performed. He was referred to a neurosurgeon, Dr Pik, who performed an L4/5 laminectomy, microdiscectomy and rhizolysis.

4. Mr Goonan had commenced annual leave on 4 February 2019. He did not return to work until 30 April 2019 when he was given light duties and, after two weeks, was able to return to full duties.

5. A claim for workers compensation based on recurrence of the accepted injury on 17 August 2015 was declined by the insurer. The insurer disputed that Mr Goonan had suffered an injury on 6 February 2019 arising out of employment or that employment was a substantial contributing factor to any injury sustained on 6 February 2019. The insurer further disputed that the requirement for medical treatment and the incapacity for work resulted from injury deemed have occurred on 17 August 2015. The incident on 6 February 2019 was an intervening incident which had caused worsening of the symptoms and led to the need for surgery.

6. Mr Goonan's solicitors filed an Application to Resolve a Dispute against the State of New South Wales (the respondent) claiming weekly payments from 7 February 2019 to 30 April 2019 and reimbursement of the treatment costs. The respondent maintained denial of liability on the ground set out above.

ISSUES FOR DETERMINATION

7. The parties agree that the only issue in dispute is whether incapacity for work and the requirement for treatment resulted from the subject injury.

PROCEDURE BEFORE THE COMMISSION

8. 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

9. 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, and

    (c) Documents attached to Application to Admit Late Documents by the applicant dated 13 September 2019

Oral evidence

10. No application was made to adduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

11. Counsel for the applicant submitted that Mr Goonan had suffered continuing symptoms since the subject injury. The effects of the subject injury were disclosed by the radiological investigations and the nature of the pathology was such as to establish the basis upon which the Independent Medical Expert, Dr Bodel, had reached a conclusion that incapacity and the requirement for surgery resulted from the subject injury.

12. Counsel for the respondent submitted that the incident of the lifting of the box which was unrelated to employment constituted a *novus actus interveniens*, that is an intervening incident, which broke the chain of causation.

13. Counsel for respondent submitted that the subject injury accepted by the insurer was no more than a complaint of low back pain and Dr Bodel was incorrect to conclude that incapacity and the need for treatment resulted from the subject injury. The subject injury had not involved any complaint of right leg pain which was a feature of the symptoms following the later incident.

14. Counsel for respondent submitted that Dr Bodel had not taken into account the earlier incident in January 2019 when Mr Goonan had noticed increase in symptoms in an incident unrelated to employment. The onset of radiculopathy followed the later incident and the disc rupture had not been caused by employment. Dr He, the treating general practitioner, was incorrect in describing a disc prolapse evidenced on MRI.

15. In his statement dated 25 June 2019 Mr Goonan said that from about 2000 until 11 February 2015 he had been a member of the Tactical Operations Unit. In February 2015 he was transferred to the Police Prosecutors Division performing courtroom duties and office duties. He said that he started to experience back pain on performing the latter role and had submitted an injury notification form in August 2015.

16. The injury notification form in evidence records gradual onset of pain performing his role in the Prosecutors Division. The Incident Report recorded:

> "The pain had periodically gone away but not for more than a day or two. The pain and immobility is getting worse and not responding to stretching and exercise. This injury has gradually gotten worse and worse to the point where I am concerned that it is not transient and may be a symptom of a significant injury."

17. Mr Goonan noted that this injury had been accepted by the workers compensation insurer. He continued to experience back pain. On 16 January 2019 he had been lifting a tyre at home when he suffered pain in the right side of his lower back. He saw his general practitioner, Dr He, the following day and was prescribed painkillers. He said that within two weeks the pain subsided and he had not otherwise required medical treatment in respect of his low back at that time.

18. Mr Goonan said that following the later incident on 6 February 2019 he experienced severe right-sided sciatic pain with numbness and tingling in the right leg. The following day he went to Canberra Hospital Emergency Department as the pain had not subsided. He underwent an MRI scan and on seeing his general practitioner he was referred to Dr Pik who had recommended decompressive surgery.

19. Dr Pik had performed surgery on 28 February 2019 and Mr Goonan had remained off work until 30 April 2019 at which point he was able to return to work, initially on light duties.

20. The report of an MRI scan performed on 17 August 2015 recorded a clinical history "? Disc herniation". The report notes correlation with earlier MRI scan from 8 April 2015. The report records:

> "There is overall normal alignment of the lumbar spine. Vertebral body heights are preserved.
>
> At L5/S1 there is minor broad-based disc bulge. No significant central narrowing. There is mild foraminal narrowing which is unchanged since the previous study but no definite neural compression.
>
> At L/5 there is a mild broad-based disc bulge. There is no significant central foraminal narrowing. Mild degenerative change in the facet joints again noted.
>
> At L3/4 there is a mild broad-based disc bulge, worse on the right. No significant central or foraminal narrowing. Note is made of Schmorl's nodes. This is unchanged since the previous study."

21. Minor disc bulges are noted at the higher levels of the lumbar spine. The report concludes:

> "There is spondylitic change in the lumbar spine as described characterised predominantly by a mild broad-based disc bulges. There is mild foraminal narrowing at L5/S1 bilaterally, however there is no definite neural compression at any level. The appearances are stable since the previous study."

22. A referral letter dated 18 August 2015 to Dr Michelle Atkinson, orthopaedic surgeon, for "review of lower back pain" notes that Mr Goonan had been attending an exercise physiologist on a few occasions and attending to core strengthening. The referral letter notes that a worker's compensation claim has been made and accepted.

23. A report from Dr Atkinson, orthopaedic surgeon, to the then treating general practitioner, Dr Reid, noted Mr Goonan's earlier posting in the SWAT team, which included the wearing of body armour and belt weighing about 35 kg. Dr Atkinson noted that Mr Goonan had complained of backache after several hours wearing this equipment. She recorded the increasing back pain that followed posting to the prosecution area. She recorded:

> "The most marked pain occurs when he stands up from a seated position and finds himself hunched over and a locked up sensation in the lower back. He often finds he has a list to the side.
>
> When travelling to work by bus he finds that both legs give way as he stands up after being seated for 15 minutes which he describes as though something has touched his spinal cord.
>
> He is unable to participate in dead lifting and punching/boxing exercises in the gym as when he twists his spine he has low lumbar pain and locking.
>
> When lying in bed if he coughs he describes severe pain."

24. Dr Atkinson noted the results of the two MRI scans and a CT scan of the lumbar spine which she said "demonstrates mild disc degeneration with bulging at the two caudal levels. There is also mild facet arthropathy with narrowing of the foramina at L5/S1."

25. Dr Atkinson commented that Mr Goonan's pain was not neuropathic and was consistent with the two-level disc degeneration present on MRI which she said was "consistent with the required fitness training and occupation wearing 35 kg of body armour." She did not recommend surgery.

26. Dr Atkinson's letter to Dr Reid contains a recommendation for referral for "assessment of his movement and activities with a view to altering activities which may be exacerbating his pain." The evidence includes a "Musculoskeletal Referral" by Dr Atkinson to Damien Benson at Spectrum Healthcare.

27. Mr Benson reported to Dr Atkinson (and to the insurer) noting the earlier history of employment with the TRG as well as the current requirements of Mr Goonan's courtroom duties. Mr Benson noted: "MRI imaging shows minor degenerative changes and foraminal narrowing at L5 bilaterally. There is no signs of neural compression. There was a remarkable degree of weakness in the multifidi group especially in the L4/L5 region." Mr Benson noted that he had commenced dry needling and trunk stabilisation exercises.

28. A report from a radiologist, Dr Jenny Bramley, dated 19 May 2016 records administration of a CT guided facet joint injection. The report notes referral on the basis of "back pain, facet joint arthritis" although the bone scan "did not demonstrate any active facet joints."

29. The report of an MRI scan carried out on 7 February 2019 was in evidence. The parties agreed that the document at page 1 of the Reply was in fact a legible copy of the illegible document at page 36 of the Application to Resolve a Dispute. The document records "background SI degeneration, acute pain yesterday with manual lifting at right L5/S1 with radiation to RLE num (sic ? numb) across L5/S1 medial foot great toe, urinary retention.? disc bulge with significant nerve root compression requiring operative intervention?"

30. Findings are recorded:

> "Multilevel lumbar broad-based disc bulges are evident causing bilateral neural foraminal stenosis and spinal canal stenosis with indentation of the anterior thecal sac. This is most marked at the L4-L5 vertebral level which is complicated by right central/paracentral disc extrusion causing high-grade spinal canal stenosis and thecal sac deformity. There is significant compression of the exiting right L5 nerve root. There is no abnormal bone marrow signal. Schmorl's nodes are evident at the L2/L3 and L3/L4 vertebral levels."

31. The report concludes: “L4/L5 broad-based disc bulge with right paracentral/central extrusion extending inferiorly causing compression of the cauda equina and right L5 nerve root origin proximal to its foraminal exit.”

32. Handwritten answers to a Recurrence Questionnaire sent to the then treating general practitioner, Dr He, were in evidence. Dr He detailed the “original injury and diagnosis: “Lumbar disc prolapse in 2015 due to work-related injury. Details not available to me.” Dr He noted that Mr Goonan had initially consulted her on 17 January 2019 and that she was not aware of symptoms prior to that date.

33. Dr He was asked to select the cause of the current onset of symptoms choosing between “a new incident, event or factor”, “aggravation due to the nature and conditions of current employment”, “spontaneous recurrence” or “other”. Dr He selected “a new incident, event or factor”.

34. Dr He reported: “developed back pain when moving a tyre on 16/1/2019. Acute pain on 6/2/2019 again when lifting heavy box. Admitted to hospital due to severe pain (with) neurological symptoms of lower limbs – diagnosis of cauda equina” Dr He recorded the date of recurrence: “Recurrence of back pain on 16/1/2019 after moving a tyre. Exacerbation of back pain again on 6/2/2019 after lifting heavy box.” She noted current employment “Employed in AFP [sic] as prosecutor. See above for triggering factor for current symptoms.”

35. Dr He was asked to give her opinion as to how the recurrence of symptoms was related to the original injury of L4/5 disc prolapse, “given that original injury resolved” and Mr Goonan had resumed work with the police on 13 March 2018. Dr He replied; “Exacerbation of previous injury sustained at work by heavy lifting.” She noted “Bernard has a pre-existing injury sustained at work which predisposed him to further injuries.” Dr He noted the diagnosis of cauda equina syndrome secondary to L4/L5 broad-based disc prolapse and the requirement for surgery.

36. The clinical notes of consultations with Dr He commence with a consultation on 17 January 2019. Dr He has recorded the reason for visit as “back pain”. She recorded:

> “History: L5/S1 disc prolapse three years ago and facet joint arthritis – work-related injury – had injection and physio – given Endone and Mobic in the past – no surgery – was moving a tyre yesterday at home – developed right-sided back pain 10 minutes later – radiating down to right buttock and right scrotum – sharp shooting pain and dull ache, 8/10 – no pin/needles/numbness/weakness in leg no loss of bowel/bladder control.”

Dr He recommended regular Panadol and Mobic with Endone as needed. There is then no further record of consultation until 12 February 2019 following the later incident.

37. At consultation on 4 March 2019 Dr He recorded “insurance company declined Bernie’s claim – rang Jon while Bernie in room – clarified that in my opinion this is exacerbation of old injury at work – Jon happy with phone discussion – no further paperwork from me is required at this stage.” (The Notice under Section 78 of the *Workplace injury Management and Workers Compensation Act 1998* dated 5 March 2019 identifies that the decision to refuse liability was made by ‘Jon C’ and I accept that this was the person referred to by Dr He.)

38. A report from the treating neurosurgeon Dr Pik dated 25 February 2019 to Dr He noted a history of severe back pain with radiation down the right leg for the past three weeks. Dr Pik diagnosed significant right L5 radiculopathy with a partial foot drop due to a large L4/5-disc herniation. He recommended surgery. Dr Pik’s Operation Report recorded right L4/5 laminectomy, microdiscectomy and right L5 rhizolysis. At surgery Dr Pik noted “the right L5 nerve root was seen to be severely compressed by a large amount of sequestrated disc material from a right L4/5-disc protrusion.”

39. Dr Pik's report with respect to review of Mr Goonan on 16 April 2019 was in evidence but does not assist with the issue of causation.

40. Mr Goonan was examined by an orthopaedic surgeon, Dr Bodel at the request of Mr Goonan's solicitors on 12 April 2019. Dr Bodel's report of that date was in evidence. Dr Bodel noted Mr Goonan's employment with the Police Force including his training required to become a member of the Tactical Operations Unit. He noted that this required a very high level of fitness and the necessity to carry substantial weight of equipment.

41. Dr Bodel noted that Mr Goonan had reported intermittent low back pain over a number of years associated with the nature of his work. Dr Bodel reported "the pain was never serious and he was able to manage it with some intermittent massage and stretching and occasional non-prescription analgesic medication." He noted the significant flareup on 17 August 2015 which had occurred without accident or specific injury. He noted that Mr Goonan was working as a police prosecutor at the time.

42. Dr Bodel viewed the CT and MRI scans dated 8 April 2015 which he said "showed clear evidence of significant disc pathology at L3/4 and L4/5 and to a lesser extent at L5/S1. There is central bulging but no definite nerve root compression to any level."

43. Dr Bodel noted that Mr Goonan had received conservative treatment and had made steady progress. Dr Bodel noted that the pain began to deteriorate in early 2019 with further aggravation on 6 February 2019. This was accompanied by right-sided sciatic pain for the first time which extended down the right thigh to the foot. Further MRI scan had shown "a very large right-sided disc prolapse at the L5/S1 level which had not been present in any of the earlier films."

44. Dr Bodel noted the onset of cauda equina syndrome with right foot drop and the surgery performed by Dr Pik. The surgery had been effective in reducing the right leg pain.

45. Dr Bodel noted the report of the MRI scan carried out on 7 February 2019 which he said showed "broad-based bulging at the L/5 level with some right paracentral disc pathology. The report confirms acquired vertebral canal stenosis particularly at the L4/5 level which is the most significant abnormality with significant nerve root compromise of the right L5 nerve root." He noted that these findings were confirmed on operation by Dr Pik.

46. Dr Bodel discussed the history of injury:

> "Mr Goonan has had recurring episodes of back pain over a number of years since an incident that occurred at work on 17 August 2015. Initially his pain was intermittent and in the back and buttocks only. He continued to cope quite well until the pain worsened at that time after moving to the position of a police prosecutor. The prolonged sitting at a desk doing computer-based work aggravated the symptoms.
>
> He was still functioning reasonably well with ongoing mechanical backache and no significant sciatic radiation of the pain until 06 February 2019 when he picked up a box at home and had an immediate onset of severe right-sided sciatica with pain all the way to the foot associated with a foot drop and also urinary retention."

47. Dr Bodel was asked to provide his opinion as to whether the lower back condition and need for surgery were related to the original injury on 17 August 2015. Dr Bodel reported:

> "I do consider that this gentleman's need for surgery has arisen as a consequence of the initial accepted injury on 17 August 2015. That injury clearly showed evidence of disc pathology and that is evident in both a CT scan and an MRI scan done at the time. He developed the sciatic radiation of the pain when lifting the box at home. The event at home has caused an aggravation, acceleration, exacerbation and deterioration of that disease process being the lumbosacral disc pathology which was caused by work."

48. Dr Bodel added “the disease process is the disc pathology that is clearly evident at L3/4 and L4/5 in particular which occurred at work.” He was satisfied that there is “a direct causal link between the clinical findings here today in the accident as described”.

49. A series of WorkCover NSW certificates of capacity establish ongoing complaints of low back pain into September 2016 with a notation of physiotherapy assisting. Other certificates in December 2017 note “lower back injury; aggravation of pre-existing lower back” following “prolonged sitting” at work.

50. Certificates of capacity following the back surgery in February 2019 do not assist with causation except to the extent that Dr He provides a diagnosis of “L4/5 disc prolapse causing cauda equina syndrome” in respect of a “work-related injury/disease”.

Discussion:

51. Counsel for the respondent submitted that Dr Bodel had based his opinion upon an incorrect assessment of the extent to which pre-existing pathology was caused by the subject injury in August 2015 and that he had not considered the effect of the additional incident unrelated to work in January 2019. I do not accept those submissions. Dr Bodel had available to him the radiological investigations which followed upon the subject injury in August 2015. The state of the applicant’s lumbar spine at that time included the effects of the injury brought about by the requirements of employment both in the earlier active role and subsequently as a prosecutor.

52. The evidence of the certificates of capacity issued following the subject injury show that Mr Goonan was continuing to complain of symptoms in the low back for at least a year after the initial complaint to the doctor. Further complaints are recorded in December 2017 noted to have followed prolonged sitting in court.

53. Dr Bodel specifically noted “In early 2019 however his pain began to deteriorate. Unfortunately, on 6 February 2019 he was at home and he was ‘picking up a box’ when he further aggravated his back pain.” I infer that Dr Bodel was referring to both an event in “early 2019” which is presumably the incident involving the tyre and the later incident when Mr Goonan “further aggravated” his back pain.

54. Dr Bodel had available to him the original scans from the subject injury as well as the February 2017 MRI scan and the operation report. Dr Bodel concluded, and I accept, that there was a direct causal link between the admitted injury in August 2015 and the onset of additional symptoms when lifting the box in the later incident.

55. Counsel for the respondent pointed to the apparent discrepancy in Dr He’s replies to the questionnaire in which she appeared to state that the current diagnosis was due to a fresh event but then said that it was an aggravation of pre-existing condition. I do not accept that submission as Dr He has clearly clarified the position in her conversation with the case manager, Jon, on 4 March 2019.

56. The opinion of Dr Bodel and Dr He is uncontradicted by any medical evidence.

57. I accept that the onset of symptoms occurred when Mr Goonan lifted a heavy box in an action unrelated to employment but it is uncontroversial that there can be multiple causes of injury (*ACQ Pty Limited v Cook*; *Aircair Moree Pty Limited v Cook*[1]).

[1] [2009] HCA 28 at [27]

58. I accept Dr He's opinion that the subject injury rendered Mr Goonan more liable to further injury as subsequently occurred. Dr Bodel establishes that the position of the relevant disks following the subject injury played a significant role in the onset of the further pathology which occurred in the later incident in February 2019.

59. I am satisfied that Dr Bodel has provided a comprehensive explanation for the causal connection between the subject injury and the additional pathology to which the later incident gave rise. I am accordingly satisfied that the incapacity that flowed from the later incident and the requirement for treatment resulted from the subject injury on 17 August 2015.

60. The respondent did not dispute that Mr Goonan had no capacity for employment in the period claimed from 7 February 2019 to 30 April 2019 and Mr Goonan is entitled, as a police officer, to weekly payments as if the 2012 amendments had not been enacted[2].

61. Prior to the 2012 amending Act,[3] section 36 of the 1987 Act provided:

> "36 (1) The weekly payment of compensation to an injured worker in respect of any period of total incapacity for work during the first 26 weeks of incapacity shall be the amount of the worker's current weekly wage rate.
>
> (2) **current weekly wage rate**, in relation to a worker, means the worker's current weekly wage rate determined from time to time in accordance with section 42."

62. There is no dispute that Mr Goonan's current weekly wage rate is the sum of $1,770 per week. Mr Goonan is accordingly entitled to be paid the sum of $1,770 per week from 7 February 2019 to 30 April 2019.

63. No submissions were addressed to the claim for treatment expenses other than the issue of whether the requirement for treatment resulted from the subject injury. The applicant has established the necessary causal connection.

64. Accordingly, the respondent is to pay the reasonably necessary treatment expenses resulting from the subject injury pursuant to section 60 of the 1987 Act including the expenses set out in the Schedule appearing at pages 196 and 197 of the documents attached to the Application to Resolve a Dispute.

65. The respondent is to pay the costs of the applicant as agreed or assessed.

[2] see cl 25 and 26 of Pt 19H of Schedule 6 to the 1987 Act
[3] Workers Compensation Legislation Amendment Act 2012