

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4823/19  
**Applicant:** Van Kim Huynh  
**Respondent:** Australian Reinforcing Company (ARC) – St Marys  
**Date of Determination:** 12 December 2019  
**Citation:** [2019] NSWCC 401

The Commission determines:

1. Award for the respondent on the claim for injury or consequential condition to the cervical spine.
2. The balance of the matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:
  - Date of injury: On or about 18 May 2016 or 20 May 2016
  - Body systems referred: Right upper extremity (elbow and shoulder), Scarring – TEMSKI
  - Method of assessment: Whole person impairment.
3. The documents to be referred to the AMS to assist with their determination are to include the following:
  - (a) this Certificate of Determination and Statement of Reasons;
  - (b) Application to Resolve a Dispute and attachments;
  - (c) Reply and attachments, and
  - (d) applicant's Application to Admit Late Documents dated 25 November 2019 and attachments.

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

Cameron Burge  
**Arbitrator**

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

*A Reynolds*

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## **STATEMENT OF REASONS**

### **BACKGROUND**

1. Van Kim Huynh (the applicant) suffered an accepted injury to his right upper extremity in a frank incident which took place in the course of his employment with ARC – St Marys (the respondent) on or around either 18 May 2016 or 20 May 2016. There is no issue that injury, which was suffered to his elbow and shoulder, is to be referred to an Approved Medical Specialist (AMS) for assessment of permanent impairment. There is also a claim for consequential post-surgical scarring which will be referred for assessment.
2. The matter which remains in issue is whether there was either an injury or a consequential condition to the cervical spine arising from the same incident which caused the right arm injury.

### **ISSUES FOR DETERMINATION**

3. The parties agree that the following issue remains in dispute:
  - (a) Whether the applicant suffered either frank injury to his cervical spine on either 18 May 2016 or 20 May 2016, or a consequential condition to his cervical spine as a result of the accepted right upper extremity injury suffered on that date.
4. Although the matter is pleaded in the alternative as a frank injury, nature and conditions injury and consequential condition, the applicant quite appropriately abandoned any suggestion there was any cervical spine injury brought about by the nature and conditions of his employment.
5. It was agreed between the parties that, regardless of the outcome of the dispute surrounding the cervical spine, the injury to the right upper extremity would be remitted to the Registrar for referral to an AMS.

### **PROCEDURE BEFORE THE COMMISSION**

6. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
7. The parties attended a hearing on 9 December 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
8. At the hearing, Mr B Carney of counsel appeared for the applicant and Mr J Beran of counsel 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;
  - (c) Applicant's Application to Admit Late Documents (AALD) dated 25 November 2019 and attached documents; and
  - (d) Workers Injury Claim Form date stamped 28 December 2016, admitted by the respondent without objection and marked Exhibit 1.

### Oral evidence

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

## FINDINGS AND REASONS

### Cervical spine injury

11. The claim for frank injury to the cervical spine is not made out. The applicant bears the onus of proof in relation to the existence of an injury and must also satisfy the requirements of section 4 of the *Workers Compensation Act 1987* (the 1987 Act).
12. There is a well established line of authority which necessitates an applicant demonstrating a "sudden or identifiable pathological change" to a body part in order to satisfy the definition of injury in section 4 (see, for example *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 and *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWCCPD 47).
13. In this matter, there is no evidence at all which establishes the agreed frank incident on either 18 May 2016 or 20 May 2016 caused an injury to the applicant's cervical spine. There is no radiological evidence to establish a pathological change, nor is there any medical opinion, treating or otherwise, which establishes it. Rather, the applicant's Independent Medical Examiner (IME) Dr Sun states the alleged cervical spine injury was brought about by the nature and conditions of the applicant's employment.
14. As the parties each noted, if the applicant suffered a cervical spine injury owing to the nature and conditions of his employment, any impairment arising from that injury could not be added to that suffered to the right upper extremity in the admitted frank incident. Moreover, Dr Sun assessed the applicant as suffering from 8% whole person impairment (WPI) to his cervical spine, a figure which does not satisfy the threshold for making a claim under section 66 of the 1987 Act.
15. Mr Carney submitted that the applicant's general practitioners were concerned with the severe injury to the right elbow and shoulder, and therefore understandably failed to take note of the cervical spine symptoms. That may or may not be the case, however, the onus is on the applicant to prove on balance that a frank injury was suffered. In my view, there is simply no evidence to support that claim.

16. As Mr Beran noted, the opinion of Dr Sun is of no benefit to the applicant regarding injury to the cervical spine, as he categorises that alleged injury as one caused by the nature and conditions of employment, which is not the claimed mechanism of injury.
17. Absent any evidence from either a treating doctor, a radiological investigation or contemporaneous document recording a complaint of neck problems in or about May 2016, I am not satisfied on the balance of probabilities that the applicant suffered a frank injury to his cervical spine on the claimed date. Put simply, there is no stated opinion from any practitioner which links the neck claim to the frank incident at issue, nor is there contemporaneous evidence to enable me to draw an inference that such an injury was suffered.

### **Consequential condition to the cervical spine**

18. Unlike the claim for frank injury, the applicant does not need to show sudden and identifiable pathological change in order to succeed on the claim for consequential condition. Rather, all that is needed is for him to demonstrate the symptoms and restrictions in his neck “resulted from” the accepted injury to the right upper extremity (see for example *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWCCPD 8; *Moon v Conmah Pty Ltd* [2009] NSWCCPD 134 and *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWCCPD 23).
19. Mr Carney submitted that, adopting the common-sense approach to causation as set out in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*), I would accept the neck condition was brought about by the original elbow injury, in the same way that injury caused the accepted right shoulder injury through involvement of the bicep tendon. He submitted the ruptured tendon which required surgical repair, and which involved the shoulder explained the lack of complaint to the treating doctors, who were more concerned with that pressing issue than the neck condition.
20. I do not accept that submission. There is no evidence of neck complaint to either the treating General Practitioner Dr Ng or to the surgeon Dr Lieu. Dr Sun, the applicant’s IME, does not indicate in any way that the applicant’s neck complaints relate to the accepted frank incident – if anything, Dr Sun attributes those complaints to the nature and conditions of employment, which are irrelevant to this claim.
21. Mr Carney conceded the applicant did not seek treatment for his cervical spine until much later, however, the difficulty in the applicant’s case is deeper than a mere lack of early reporting of symptoms. There is no evidence, whether by way of treating report, radiological examination or IME opinion which provides sufficient grounds for me to be satisfied on a common-sense basis that there is a causal connection between the accident at issue and the neck condition. Without such evidence, the applicant’s claim of consequential condition to the cervical spine must fail.

### **SUMMARY**

22. I therefore find the applicant has not satisfied the onus of proof in establishing either injury or consequential condition *Kooragang*, and accordingly there will be an award for the respondent in relation to the cervical spine claim. The balance of the matter will be remitted to the Registrar for referral to an AMS to determine the permanent impairment arising from the accepted right upper extremity injury.

