

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 251/20
Applicant: Quoc (Ken) Hai Dang
Respondent: KD Dang Pty Ltd
Date of Determination: 16 April 2020
Citation: [2020] NSWCC 121

The Commission determines:

1. Award for the respondent.

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.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 14 June 2016, Ken Hai Dang (the applicant) loaded a heavy paper shredder onto the back of a utility and suffered injury to his lumbar spine. At the time, he was working for KD Dang Pty Ltd (the respondent) which was his own company that he had established in 2011.
2. The applicant worked as a truck driver and would often have to lift, carry and manoeuvre heavy items. He states he first developed neck pain in 2015 (before the incident at issue) and that on the date of injury he felt a twinge in his neck at the time he lifted the paper shredder.
3. The applicant developed severe lower back pain after the incident on 4 June 2016 and underwent an MRI which showed a lumbar disc bulge. He ceased employment and has not worked since. The applicant lodged a claim with regards to his lower back, which was accepted.
4. In or about September 2018, the applicant had an incident of severe pain in his neck. He underwent investigations which confirmed the presence of C4/C6 disc bulges. In February 2019, he submitted a claim in relation to his neck, which has been disputed. He seeks the cost of a cervical discectomy and fusion be borne by the respondent.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Is the proposed cervical discectomy and fusion a medical necessity?
 - (b) Did the applicant suffer an aggravation of an underlying condition to his cervical spine in the incident on 14 June 2016 which has given rise to the need for surgery?
 - (c) In the alternative, did the applicant suffer a consequential condition to his cervical spine as a result of his accepted lumbar spine injury?

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a hearing via telephone link on 25 March 2020. I have used by best endeavours to bring the parties to the dispute to a settlement acceptable to all of them but have been unable to do so. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreement.
7. At the hearing, Mr L Morgan of counsel appeared for the applicant and Mr T Baker of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents;

- (c) applicant's Application to Admit Late Documents (AALD) dated 19 February 2020, and
- (d) respondent's AALD dated 17 March 2020 and attached documents.

Oral evidence

- 9. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Is the proposed surgery a medical necessity?

- 10. I note the respondent relies on Dr Casikar and submits the proposed cervical fusion is not a medical necessity. I reject that submission and find the opinion as to the need for surgery as put forward by treating surgeon Dr Singh to be a compelling one. Although Dr Casikar did not find evidence of radiculopathy, the balance of the medical evidence from both treating and Independent Medical Examiner (IME) evidence suggests the presence of radiculopathy and accordingly the medical need for the surgery is established.

Did the applicant suffer aggravation to an underlying condition in his cervical spine in the incident on 14 June 2016?

- 11. The applicant bears the onus of demonstrating he suffered an aggravation to his cervical spine in the incident at issue. There is no question he suffered a serious injury to his lumbar spine. Mr Morgan's primary submission was the applicant's underlying degenerative condition, the existence of which is not in issue, was aggravated by the work place incident on 14 June 2016.
- 12. It is trite law to say that the underlying pathology in the applicant's cervical spine does not need to have been caused or contributed to by his employment. Rather, the question is whether the incident on 14 June 2016 caused an aggravation to that pathology. For the reasons which follow, I do not accept this to be the case.
- 13. The difficulty for the applicant in this matter is the absence of complaint concerning neck symptoms for some two years after the incident which gave rise to the accepted back injury.
- 14. In his statement, the applicant says he felt a twinge in his neck in the incident at issue, however, his lower spine was the dominant injury and the focus of his treatment until approximately 2018, some two years post-accident.
- 15. Similarly, Mr Morgan noted the applicant worked for himself operating a franchise for Winc Pty Ltd and therefore had a great deal of pressure to remain at work and not complain regarding his injuries.
- 16. Dr Gehr (IME for the applicant) noted the presence of neck pain before the incident at issue, something from which the applicant does not resile.
- 17. Dr Singh, the applicant's treating neurosurgeon who proposes to carry out the discectomy and fusion, took a history of the applicant lifting a large box weighing approximately 80 kg, which slipped and struck his neck and shoulder. In his report to the applicant's solicitors, Dr Singh specifically agreed the applicant's cervical spine symptoms were an aggravation caused as a result of the incident on 14 June 2016.
- 18. Dr Singh is the only practitioner who takes a history of the applicant having been struck in the neck and shoulder by the paper shredder on the date of injury. He took that history some 2.5 years after the incident at issue. There is no contemporaneous evidence of the applicant suffering neck symptoms or being struck in the neck and shoulder by the paper shredder in the accident at issue.

19. Dr Singh opined the applicant requires a decompression and fusion at C4/C6. For the reasons set out above, I accept the medical necessity for that treatment and note that on the question of suitability of surgery, a treating doctor's opinion will ordinarily be given substantial weight in a dispute surrounding the efficacy or otherwise of that treatment.
20. Mr Baker submitted for the respondent that the absence of reporting in relation to the cervical spine symptoms after the June 2016 incident is not merely down to the lumbar spine injury dominating his concerns and treatment. He submitted the contemporaneous records specifically rule out any reported injury or symptoms other than to the low back. He noted that all of the applicant's physical therapist records, reports of injury and alternative therapy records relate exclusively to the lumbar spine, and there is no complaint of any cervical spine symptoms until approximately September 2018.
21. Mr Baker submitted that the applicant's former general practitioner, Dr Chesterfield-Evans saw him on no fewer than 43 occasions after the June 2016 injury, and no mention was made of the applicant's alleged neck injury at all. He said the applicant's statement that Dr Chesterfield-Evans refused to document his cervical symptoms because the insurer would decline his claim is not believable and should not be accepted. I agree with Mr Baker on this point. This is particularly the case given Dr Chesterfield-Evans is far from the only practitioner whom the applicant consulted in the two years after the injury at issue, and none of those practitioners record any problem with his neck.
22. Likewise, Mr Baker noted there was no mention of any pain in the applicant's cervical spine in his report of injury/claim form. The mechanism of injury also makes no mention of the applicant's neck and shoulder region being struck by the paper shredder.
23. The respondent submitted that it took over two years for a complaint of neck problems after the incident on 14 June 2016. Given the severity of the onset of those symptoms in 2018 and the delay between the accident and the neck problems, the respondent submitted that logically the applicant's neck problems could not be linked to the incident on 14 June 2016.
24. There is no dispute the applicant suffers from a degenerative condition in his cervical spine, however, the applicant bears the onus of proving any aggravation to that condition was caused by the incident at issue. On balance, I am not satisfied this is the case. Adopting a common sense approach to causation in this matter as required by the decision in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 (*Kooragang*), and taking into account the contemporaneous records of all treating practitioners, I am not satisfied the applicant has discharged his onus on the balance of probabilities that the aggravation to his cervical spine is linked to the incident at issue.
25. In so finding, I reject the opinion of Dr Gehr. I do so without criticism of the doctor, who explicitly based his opinion on the history provided to him. That history was the applicant never having neck problems prior to 14 June 2016. We know, on the applicant's own statement, that he in fact did. The history to Dr Gehr was the applicant's treatment post-accident focused on his lumbar spine over his cervical spine. However, in my view, the records go further than that.
26. It is noteworthy that as soon as the applicant complained of neck pain following what he describes as the significant flare up in or about September 2018, that complaint was immediately recorded by his general practitioner. Dr Gehr says in his report that absent any other explanation; the injury was suffered whilst working with the respondent. I reject that reasoning because the evidence clearly discloses the presence of long-standing degenerative changes. Those changes appear to have become symptomatic in 2018, some two years post-accident. Dr Gehr provides no reason as to why that might be the case, hamstrung as he is by what I find to be an inaccurate history of neck pain being present post injury, but consistently unreported by medical practitioners.

27. In my view, it is unlikely that a litany of general practitioners, specialists, physical therapists and alternative medicine practitioners would all fail to record any cervical spine symptoms between 2016 and 2018 if they had been present and complained of. Moreover, when the applicant attended upon his general practitioner after the episode of neck pain in approximately September 2018, that complaint was immediately recorded, albeit there is no record of the cervical spine symptoms at that time being attributed to the incident in June 2016 by either the applicant or the general practitioner.
28. I note the often-recited rule that care should be taken in relying too heavily upon histories taken by medical practitioners. I accept that is the case, however, in my view the absence of evidence in this matter from so many practitioners is compelling, combined as it is with lack of any record of cervical injury or symptomology in the report of injury/claim form.
29. For these reasons, the applicant has failed to satisfy the onus of proof in establishing he suffered an aggravation of his degenerative condition in the cervical spine as a result of the incident on 14 June 2016. I prefer the opinion of Dr Casikar, who, consistent in my view and the radiological evidence, found the applicant to be suffering long standing degenerative changes in his spine which became systematic some two years after the incident, for reasons unrelated to his employment with the respondent.

Did the applicant suffer a consequential condition to his cervical spine as a result of the accepted lumbar spine injury?

30. In my view, the applicant has not satisfied the onus of proof in establishing a consequential condition in his cervical spine. Although an injured worker does not need to satisfy the requirements for an injury as set out in section 4 of the *Workers Compensation Act 1987* in order to demonstrate a consequential condition, in my view there is insufficient evidence to establish even a causal connection between the increase in symptomology in the applicant's neck and the accepted work place injury to his cervical spine.
31. The only doctor who expresses the view for the presence of a consequential condition is the applicant's general practitioner, Dr Rubio. Each of the other practitioners find variously that the applicant either suffered an aggravation in the incident at issue or that there is a non-work related degenerative change which has become symptomatic for non-work related reasons.
32. Dr Rubio provides no basis for finding a consequential condition between the accepted lumbar spine injury and the cervical spine. He merely says it is present. This being so, I reject his view in relation to this question and am not satisfied of the presence of any consequential condition in the applicant's cervical spine.

SUMMARY

33. For the above reasons, there will be an award for the respondent.