

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1084/20
Applicant: Chantel Fenech
Respondent: New South Wales Trustee and Guardian
Date of Determination: 26 May 2020
Citation: [2020] NSWCC 171

The Commission determines:

1. The applicant suffered injury in the course of her employment with the respondent to her cervical spine, lumbar spine, right upper extremity (shoulder) and left upper extremity (shoulder and arm) on 19 February 2013.
2. The matter is remitted to the Registrar for placement into the pending list for referral to an Approved Medical Specialist (AMS) to determine the level of permanent impairment arising from the following:

Date of injury: 19 February 2013
Body systems referred: Cervical spine, lumbar spine, right upper extremity (shoulder) and left upper extremity (shoulder and arm)
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) the Application to Resolve a Dispute and attached documents;
 - (c) Reply and attached documents, and
 - (d) Report of Associate Professor Cyril Wong dated 17 March 2016 and marked Exhibit A.

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. On 19 February 2013, Chantel Fenech (the applicant) was travelling to a meeting in the course of her employment with the New South Wales Trustee and Guardian (the respondent) when she was assaulted by a fellow train passenger.
2. As a result, she suffered accepted injuries to the cervical spine and both upper extremities, for which she claims permanent impairment compensation. The applicant also claims to have suffered an injury or consequential condition to her lumbar spine, which the respondent disputed by way of a section 78 notice dated 4 October 2019

ISSUES FOR DETERMINATION

3. The parties agreed the following issues remain in dispute:
 - (a) whether the applicant suffered a lumbar spine injury in the assault on 19 February 2013, and
 - (b) if the answer to (a) is in the negative, whether the applicant suffered a consequential condition to her lumbar spine as a result of weight gain caused by the accepted injuries suffered in the assault.
4. There is no issue the injuries to the cervical spine, left upper extremity and right upper extremity will be remitted to the Registrar to be placed into the pending list for assessment by an Approved Medical Specialist (AMS) to determine the degree of whole person impairment arising from them.
5. The injury to the left lower extremity pleaded in the Application to Resolve a Dispute (the Application) is not pressed, as it does not give rise to any alleged permanent impairment.

PROCEDURE BEFORE THE COMMISSION

6. I am satisfied the parties to the dispute are aware of the implications of the assertions made in the pleadings and in the evidence. I have used my best endeavours to bring about a resolution between the parties, however, I have been unable to do so. Accordingly, the matter proceeded to an arbitration hearing before me on 29 April 2020.
7. On that occasion, Mr R Stanton of counsel appeared for the applicant instructed by Ms S Khodr and Mr A Parker of counsel appeared for the respondent instructed by Mr G White.

EVIDENCE

Documentary evidence

8. The following documentation was before the commission and taken into consideration in making this determination:
 - (a) the Application and attachments;
 - (b) required attachments, and
 - (c) Report of Associate Professor Cyril Wong dated 17 March 2016, admitted by the applicant without objection and marked Exhibit A.

Oral evidence

9. There was no oral evidence called the hearing.

FINDINGS AND REASONS

Whether the applicant suffered an injury to her lumbar spine in the assault

10. Injury is defined in section 4 of the *Workers Compensation Act 1987* (the 1987 Act) as follows:

"In this act: Injury means:

- (a) 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...."

11. There is a long line of authority concerning the question of what constitutes an injury, including the decision in *Castro v State Transit Authority (NSW)* [2000] NSWCC 12 (*Castro*). That case makes clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro*, a temporary physiological change in the body's functioning (atrial fibrillation) without pathological change, did not constitute injury.

12. The applicant bears the honours of proving that her lumbar spine condition/injury is work-related. In determining the cause of an injury, the Commission must apply a common-sense test of causation. In the workers compensation context the appropriate test of causation was set out by Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*) where His Honour said:

"Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate caused by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed the worker to subsequent death or injury will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common-sense evaluation of the causal chain."

13. In this matter, having regard to the medical and lay evidence relied upon by the parties, I am satisfied for the following reasons that the applicant's lumbar spine injury was suffered in the course of her employment in the assault which took place on 19 February 2013.

14. In so finding, I have had regard to the medical evidence relied upon by the parties, in particular the contemporaneous evidence which, in my view, demonstrates the applicant making complaints to her treating doctors very shortly after the assault at issue. Those complaints include a history taken by Dr Rozario, treating rheumatologist who provided a report on 15 May 2013 in which she stated:

"She has discomfort on movements of the cervical and lumbar spine. She has reasonable movements of all joints although associated with discomfort. There was no Synovitis. There were no bruises to note clinically. I note a rash suggestive of psoriasis on her occipital. Otherwise, her examination was essentially unremarkable.

The cause of her significant symptoms needs to be investigated further to explain the significant pain that she has been complaining of. I therefore recommended:

1. Whole-body bone scan;
2. An MRI of the cervical and lumbar spine and the left shoulder..."

15. Dr Teychanne provided a report dated 30 May 2013 found from page 145 of the Application. He took a detailed history which relevantly included the following:

"She stated the week after the assault she felt unbalanced and less coordinated in both legs and the week after the assault she noted pain over the lumbar spine extending up the left paralumbar region to the upper lumbar spine. She also noted pain into the left hip and stated over the past six weeks she had noted constant pain over the lumbar spine. At times the pain over the lumbar spine was intermittent arising from one hour to all day.

Over the past 20 years she had noted stiffness in the back. She stated this stiffness will flare up in cold weather lasting for three months through the winter months. She had noted pain over the lumbar spine associated with the stiffness in the lumbar spine since a motor vehicle accident some 20 years ago. She stated that subsequent to the assault she noted constant pain over the lumbar spine and more marked pain over the lumbar spine."

16. The complaints to treating doctors are broadly consistent with the version of the assault provided by the applicant, which Mr Stanton submitted was a prolonged and serious event involving repeated blows which the applicant was trying to fend off. Mr Stanton referred to the history provided to Dr Whittaker, respondent's rheumatologist Independent Medical Examiner (IME) recorded in his report found at page 38 of the Reply. He noted that whilst the applicant was initially seated when the assault began, she had stood up as the assault continued and was leaning backwards to try and avoid injury.
17. Mr Stanton submitted, and I accept, the applicant began to feel discomfort in her back a matter of a few short weeks after the assault.
18. The applicant's General Practitioner, Dr Seeto, provided a report dated 16 May 2018 in which she indicated the applicant was initially diagnosed with soft tissue injury to her neck, upper back, both wrists, elbows and feet. Although the respondent contended that report is suggestive of no injury being suffered to the lumbar spine, it is noteworthy that Dr Seeto records an MRI of the lumbar spine being carried out on 17 May 2013, albeit with no disc pathology being demonstrated. In my view, such an investigation being carried out is strongly suggestive of the applicant making complaints in relation to her lumbar spine in the aftermath of the assault. Absent such complaint, there is no reason why such an investigation would be undertaken. At page 40 of the Application, Dr Seeto said:

"With specific regards to the lumbar spine injury, it would be likely that, in the wrestling with the attacker on the train, she would sustain some strain to the lower back. This would be reasonably soft tissue injury in nature and with the MRI showing no disc pathology, expected to resolve over 6-12 weeks."

19. In other words, Dr Seeto is accepting of the fact that the applicant suffered a lumbar spine injury in the assault, however, that injury would have expected to resolve. It is apparent, however, from the applicant's complaints that the injury has persisted.
20. That finding is supported by Dr Teychanne's examination reported on 15 July 2013 in which he said:

"On examination she has mild pain over the lumbar spine on extension of the lumbar spine. She had normal movement of the lumbar spine. Straight leg raising was 70° on the right side inducing pain down the back of the right thigh on dorsiflexion of the right foot. Straight leg raising was 60° on the left side inducing pain over the lower lumbar spine into the left buttock and posterior left thigh. She had a decreased right knee jerk compared to a one plus left knee jerk. She had one plus ankle jerks. Both plantar responses were flexible.

EMG muscle sampling within the right peroneus longus muscle indicated a moderate decrease in recruitment pattern. She had a decrease in recruitment pattern within the left peroneus longus muscle. She had a very marked decrease in recruitment pattern within the left and right FHB muscle. The findings were consistent with a left L5/S1 and a right S1 radiculopathy."

21. Mr Stanton submitted the nature of the assault was consistent with a lower back injury, given the applicant twisting and moving in an attempt to ward off her attacker. He said it was understandable the applicant would be focused on the increased swelling in her neck and upper limbs, but that a focus on the lumbar spine came about a very short time (a matter of weeks) later and treatment was then sought.
22. I note there is a report from Dr Manohar, pain specialist, however, Mr Stanton submitted, and I accept that report does not really deal with the question of causation in relation to the applicant's symptoms.
23. Dr Whittaker, IME for the respondent noted in his report dated 22 October 2014 that the applicant's lumbar spine symptoms had worsened. As noted, that is consistent with the injury persisting rather than resolving as general practitioner Dr Seeto had thought it would.
24. Mr Parker submitted that there was a history of back pain experienced by the applicant for many years before the assault. He noted there were clinical entries in August 2009, December 2009, January 2010 and October 2010 together with a reference to the applicant having obtained a disability parking permit well before the alleged assault as a result of her lumbar spine problems. Mr Parker submitted the applicant was plainly suffering from a pre-existing lumbar spine condition which flared up from time to time, requiring treatment.
25. I accept that submission, however, the finding in support of it does not preclude the applicant having suffered a lumbar spine injury in the assault at issue. Moreover, I reject the respondent's submission that the applicant's history is unreliable as she has failed to disclose the pre-existing back problems. An examination of the medical evidence reveals the applicant disclosed that pre-existing problem to Dr Teychanne and to Dr Whitaker, among others. In my view, there can be no adverse finding made owing to the absence of IME Dr Wong omitting any reference to her prior back complaint in circumstances where the applicant has volunteered that condition to the respondent's own doctors.
26. As established by cases such as *Zickar MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 (*Zickar*), an applicant is able to rely on *injury simpliciter* despite the existence of a pre-existing disease. In *Zickar*, a worker suffered brain damage due to the rupture, at work, of a congenital aneurysm. The congenital condition could be characterised as a disease, however, that would not have satisfied the requirements of clause (b) of the definition in section 4 of the 1987 Act (as it then was). The worker succeeded in the High Court on the basis that the rupture itself could be described as an injury simpliciter. The presence of the disease did not preclude reliance upon an injurious event as a personal injury. In other words, the terms "personal injury" and "disease" are not mutually exclusive categories. A sudden identifiable physiological change to the body brought about by an internal or external event can be a personal injury and the fact there are changes connected to an underlying disease process does not prevent the injury being a personal injury (see Toohey, McHugh and Gummow JJ in *Zickar* agreeing with a passage from *Accident Compensation Commission v McIntosh* [1991] 2VR 253.)

27. In this matter, notwithstanding the presence of pre-existing problems of the applicant's back, I have no difficulty in finding that the serious assault which she suffered at the hands of her assailant on 19 February 2013 caused an injury to her lumbar spine by way of an aggravation to the underlying lumbar spine condition. Such an aggravation would, in my view, satisfy the requirements of section 4(b)(ii) of the 1987 Act, in that the assault was plainly a workplace incident and as such the applicant's employment with the respondent was the main contributing factor to the aggravation which took place in the assault.
28. For reasons which I have already set out, I find the effect of the aggravation caused by the assault to the applicant's lumbar spine is ongoing. The extent to which there should be any deduction for the pre-existing condition in the applicant's lumbar spine is a matter for an AMS rather than an arbitrator.
29. In finding in favour of the applicant on the issue of injury, I have considered the report of Dr Breit, IME for the respondent. Dr Breit has provided two reports, in August 2017 and August 2019 respectively. I do not prefer Dr Breit's opinion for the following reasons.
30. At page 15 of the Reply, Dr Breit was specifically asked whether there was any relationship between the applicant's lumbar spine and the incident on 19 February 2013. In answer to that query, he replied "this lady was assaulted saying the assailant was on her feet and hitting her around the upper body which would not have resulted in an injury to the lumbar spine, she did not fall and again there is no evidence of organic pathology."
31. Dr Breit's view does not take into account the applicant's version of the assault both in her statement and as provided to Dr Whitaker, rheumatologist IME for the respondent in his report dated 22 October 2014. The applicant's version of events provided to Dr Whitaker and contained in her statements is not contested. As Mr Stanton noted, it is open to a tribunal of fact to take a history provided to medical practitioners as evidence of the fact in issue.
32. In this matter, it is apparent the assault was protracted and serious. I accept that it involved the applicant making a number of sudden movements in adopting variable stances and postures to avoid the blows being inflicted on her by her assailant. As already noted, I accept Mr Stanton's submission of the circumstances of the assault can be broadly categorised as consistent with the applicant having suffered a lumbar spine injury, and I accept that this is in fact what happened.
33. Dr Breit also refers to the report of Dr Mellick, IME for the respondent who according to Dr Breit had indicated the applicant did not suffer any impairment. Nevertheless, at page 54 of the Reply, Dr Mellick's report notes the applicant has ongoing incapacity and was fit for "current restricted duties." Although such a finding by a doctor is not automatically suggestive of the presence of permanent impairment, it is suggestive of ongoing difficulties caused by her injuries. The fact that Dr Breit has selectively quoted Dr Mellick and ignored the fact the applicant was, on Dr Mellick's own view, suffering from ongoing incapacity does not persuade me that Dr Breit's opinion should be followed.
34. I accept Mr Parker's submissions that there are difficulties with Dr Wong's report owing to him having an incomplete history regarding the applicant's pre-existing lumbar spine problems. Having found, however, the applicant has suffered an injury to her lumbar spine notwithstanding the presence of the pre-existing problems, in my view it is a matter for an AMS to determine the weight to be given to Dr Wong's assessment of whole person impairment. It may well be that an AMS gives less weight to Dr Wong's assessment owing to the absence of reference to the pre-existing problems. I do not, however, consider Dr Wong failing to take that problem into account as being fatal to the applicant's case that she suffered an injury to her lumbar spine in the assault. Rather, as already noted, the applicant made comparatively contemporaneous and consistent complaints regarding the onset of lumbar spine symptoms after the assault and was forthcoming with the history of prior lumbar spine problems to the respondent's own doctors.

35. For reasons which I have advised, I therefore find the applicant suffered an injury to her lumbar spine in the assault at issue and accordingly that injury will be remitted along with the accepted injuries to the Registrar for placement into the pending list for a referral to an Approve Medical Specialist to assess the level of whole person impairment arising from it.

CONSEQUENTIAL CONDITIONING

36. As I have found the applicant suffered an injury to her lumbar spine in the assault, it is not necessary for me to determine whether she suffered a consequential condition.

SUMMARY

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