

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1764/20
Applicant: Nellinda Fay Breed
Respondent: State of New South Wales
Date of Determination: 6 July 2020
Citation: [2020] NSWCC 223

The Commission determines:

1. The applicant suffered an injury in the course of her employment on 10 August 2016 by way of an aggravation of pre-existing degenerative changes to her cervical spine.
2. As a result of the injury referred to in paragraph 1 above, the applicant required surgery by way of anterior C5/6 and C6/7 discectomy and fusion at the hands of Dr McDowell on 26 July 2017.
3. The surgery referred to in paragraph 2 above was reasonably necessary as a result of the injury referred to in paragraph 1 above.
4. The matter is remitted to the Registrar for placement into the pending list for referral to an Approved Medical Specialist for determination of the permanent impairment arising from the following:
 - Date of injury: 10 August 2016.
 - Body systems referred: Cervical spine.
 - Method of assessment: Whole person impairment.
5. The documents to be referred to the Approved Medical Specialist to assist with their determination are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) Amended Application to Resolve a Dispute filed under cover of Application to Admit Late Documents dated 30 April 2020;
 - (c) Reply filed as Application to Admit Late Documents dated 22 April 2020; and
 - (d) Bundle of reports of Dr Panjratn, admitted by the respondent without objection and collectively marked Exhibit 1.

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.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. For 31 years, Ms Nellinda Fay Breed (the applicant) worked for the State of New South Wales (the respondent) in the linen service at Wagga Wagga Base Hospital as a laundry assistant. Her duties were repetitive, heavy and required a deal of overhead lifting.
2. On 10 August 2016, the applicant was lifting a heavy bag of linen when she felt a sharp pain radiating down her right arm from her elbow. She could not move the fingers on her right hand and there was numbness down her right arm. She eventually came under the care of neurosurgeon Dr Ow-Yang in November 2016, who diagnosed her as suffering C5/6 and C6/7 foraminal stenosis with compression of the C6 and C7 nerves. She was also diagnosed with a right shoulder rotator cuff tear.
3. Dr Ow-Yang requested approval for a C5/6–C6/7 interbody fusion on 3 November 2016. On 5 January 2017, the respondent issued a section 74 notice denying the proposed surgery was reasonably necessary, as there were pre-existing degenerative changes in the applicant's neck and the surgery would not afford the applicant relief from the effects of any workplace injury.
4. On 6 June 2017, the respondent issued a further section 74 notice declining liability on the basis the applicant had “recovered from the effects of the injury that you sustained to your cervical spine and that any work-related aggravation has ceased.” That notice was based on the reports of Dr Cochrane, neurosurgeon, Independent Medical Examiner (IME) who considered that although the applicant likely sustained a work-related aggravation, the effects of the aggravation had ceased and her ongoing problems related to either soft tissue injury to her right shoulder or pre-existing degenerative changes to the cervical spine.
5. The applicant eventually had the proposed surgery at the hands of Dr McDowell through the public health system on 27 July 2017. She states she had improved movement and less pain, however, the referred pain and pins and needles in the right arm persisted.
6. On Easter Saturday 2018, the applicant had a non-work-related stroke which has, among other things, left her with reduced movement in her right arm. The applicant brings these proceedings seeking permanent impairment compensation in relation to her cervical spine. The respondent opposes the claim on the basis that the effect of the aggravation had passed by June 2017 and therefore the work injury is not responsible for the surgery which has given rise to the permanent impairment.

ISSUES

7. The parties agree the only matter as an issue are whether the injury by way of aggravation gave rise to the need for surgery, or whether the effects of the applicant's injury to the cervical spine had passed by June 2017.

PROCEDURE BEFORE THE COMMISSION

8. The parties were unable to resolve their differences despite best endeavours, and the matter proceeded to conciliation/arbitration hearing before me on 9 June 2020. On that occasion, Mr T Abbott, solicitor appeared for the applicant and Mr P Barnes of counsel instructed by Mr D Russell appeared for the respondent.

EVIDENCE

Documentary evidence

9. The following documents were in evidence before the Commission and taken into consideration:
 - (a) Amended Application to Resolve a Dispute and attached documents (the Application);
 - (b) Reply and attachments filed as the respondent's Application to Admit Late Documents on 22 April 2020; and
 - (c) A bundle of reports of Dr Panjratn, 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

Whether the injury on 10 August 2016 gave rise to the need for the surgery on 27 July 2017 and any consequential permanent impairment

11. Dr Cochrane, IME for the respondent, provided a number of reports. He accepted there had been a work-related aggravation of pre-existing cervical spondylosis. In his report dated 9 December 2016 found at page 38 of the Reply, he said "the diagnosis of right C7 radiculopathy at least, as an aggravation of pre-existing degenerative condition could reasonably be related to the reported injury." He confirms that diagnosis at pages 39 and 40 of the Reply.
12. As to whether the effects of the aggravation will likely be permanent, Dr Cochrane said:

"I am very guarded in this. There seems to be a significant amount of disability and restriction, more diffusely in the right upper limb that I could explain on the basis of isolated C6 and C7 radiculopathy.

Although I would usually expect such a work-related aggravation to be temporary, some four months has elapsed now since the injury without any seeming response or recovery and I would be worried that there may be indefinite symptoms."
13. In his supplementary report dated 30 January 2017, Dr Cochrane somewhat resiled from this position, saying in reference to his earlier report "I conceded there was a *possibility* that there had been a work-related aggravation." (my emphasis). In my view, Dr Cochrane's opinion in the earlier report is stronger than the suggestion of a mere possibility, as he actually stated the diagnosis of work-related aggravation could be reasonably made.
14. Dr Cochrane said in his supplementary report that he would have expected the effects of the aggravation to have ended within six months of the date of injury.
15. I reject that view. The broad statement that the effects of a workplace aggravation have ceased within a certain timeframe is one commonly seen in this jurisdiction. Without a convincing explanation as to why the effects of any given aggravation have ceased, a mere assertion that the effects have passed is no way a persuasive statement. Dr Cochrane provides no explanation as to why, in his opinion, the effects of the aggravation would have ceased within six months of August 2016.

16. Dr Panjratán, orthopaedic IME for the respondent also opined the applicant's pathology in the cervical spine was pre-existing and "precipitated by the incident." He then said in a supplementary report that he agreed with Dr Cochrane as to the effects of the aggravation having passed. As with Dr Cochrane, he made that assertion without saying why it is so.
17. In a later report of 24 February 2020, which was part of Exhibit 1, Dr Panjratán recanted his earlier view and said the applicant still suffered from an injury, the proper diagnosis for which is the anterior cervical fusion at C5/6 and C6/7. When specifically asked whether employment was a substantial contributing factor to the applicant's injury or whether the injury would have happened at about the same time in any event, Dr Panjratán replied "employment was a substantial contributing factor for both the shoulder and the neck."
18. Accordingly, Dr Panjratán was stating as at February 2020:
 - (a) The applicant still suffered from an injury;
 - (b) The injury is to the cervical spine;
 - (c) The applicant's employment with the respondent relevantly caused the injury at issue.
19. Dr Panjratán's conclusion in February 2020 report is supported by the applicant's own statement that her symptoms did not cease before the surgery. In turn, that statement is supported by entries in the clinical notes of the applicant's general practitioner Dr Vargas, which refer to ongoing problems with the cervical spine up to the time of surgery.
20. In a further report dated 10 March 2020, Dr Panjratán recanted his February 2020 opinion and said the February report was "a mistake". He then said he agreed, as he had in his original report, with Dr Cochrane that the effects of any aggravation had passed. Again, he did not provide any reason as to why that is so.
21. It is unclear to me how Dr Panjratán can adequately explain his February 2020 report as "a mistake" when he went into such detail surrounding not only causation, but the ongoing effect of the injury and the nature of it. The "mistake" was not simply a typographical or small error in one sentence or paragraph. Rather, the February 2020 report went into considerable detail as to the nature and effect of the applicant's alleged injury together with its duration. Given his February 2020 report determined the injury to be the cervical fusion, I am at a loss to explain how Dr Panjratán could then state in a report in March 2020 that the effects of a procedure as serious as a cervical spine fusion had passed.
22. It follows that Dr Panjratán's views are not persuasive. I am unable to accept them as he has altered his opinion without an adequate explanation as to why. Moreover, even if I disregard the contents of his report on February 2020, the difficulty with both of his other reports is, as with Dr Cochrane, a lack of explanation for the bold assertion that the effects of the accepted aggravation to the cervical spine would have passed by mid-2017 when the surgery was undertaken.
23. Dr Ow-Yang, treating neurosurgeon who first sought approval for the surgery did not provide a comment on Dr Cochrane's opinion. He expressly refused to do so. Nevertheless, the fact he sought approval for the surgery from the respondent's insurer is, in my opinion, indicative of him forming a view that the need for surgery was occasioned by the injury at issue. Otherwise, he presumably would not have requested the workers compensation insurer to pay for it.

24. Dr Endrey-Walder, IME for the applicant, provided a number of reports. In his final report dated 21 November 2019, Dr Endrey-Walder in my view persuasively dealt with Dr Cochrane's argument regarding the cessation of any aggravation as follows:

"In my report of 13 February 2018, I acknowledge the opinion extracted from Dr Cochrane's report [indicating the applicant's ongoing symptoms are related to either pre-existing changes to the neck or shoulder injury rather than the accepted aggravation of the cervical spine], noting that this report was written prior to the surgery on this lady's cervical spine, and that given this report was formulated prior to your client's two level fusion in the neck, I wonder on what basis the doctor formulated his notion that 'this work-related aggravation should likely have ceased'.

The nature of the pathology of radiculopathy is that there is compression (impingement) of a particular nerve root as it comes through the neural exit foramen and of the vertebral column.

Spondylosis of the spine can and often does cause stricturing of the neural exit foramen, and then the subsequent associated pressure causes neurological symptoms further distally along the limb...

If this lady suffered a work injury, which I believe she did, such an injury causing the radiculopathy would not have settled were it not for the surgical release of the nerve.

Hence, it is not correct to suggest that the work injury has settled down when it had, indeed, given rise to the necessity of the surgical intervention."

25. In my opinion, the overwhelming preponderance of the medical evidence including both IME and treating doctors, supports a finding that the effects of the work-related aggravation had not ceased at the time of surgery and that it was the basis for the need for the surgery. As already noted, there is no issue the applicant's employment was the main contributing factor to the aggravation itself. The relevant issue has always been the duration of the effects of that aggravation. The applicant's own uncontested evidence of ongoing cervical spine symptoms also supports the finding that the effects of the aggravation have not ceased.
26. In making this finding, I note the applicant had no cervical spine symptoms before the incident on 10 August 2016. The doctors all agree that some aggravation took place. The real issue is whether the effect of that aggravation had ceased by mid-2017. For the reasons set out above, I am comfortably satisfied on the balance of probabilities that the effects of the injury had not ceased and that the aggravation was the reason for the surgery ultimately carried out by Dr McDowell.

Reasonable necessity for surgery

27. Dr Cochrane did not agree the surgery was reasonably necessary. He said as much in his first report. I reject that view, as it is based on the opinion that the effect of the aggravation had ceased, which view I have rejected for the above reasons. Dr Cochrane also stated the surgery was not reasonably necessary as the applicant's symptoms would not "be adequately treated" by the surgery.

28. With respect to Dr Cochrane, that opinion does not address the basis of the need for the surgery as set out by Dr Ow-Yang, namely, to halt the progression of further cervical spine symptoms in the applicant.
29. The applicant bears the honours of proving that the treatment was reasonably necessary. The relevant test for establishing reasonable necessity was set out in the decision of Deputy President Roche in *Diab v NRMA Ltd* [2014] NSWCCPD 72. In that matter, the Deputy President cited with approval the test articulated by His Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233. Thus, treatment will be considered reasonably necessary if the Commission finds that it is preferable that the worker should have the treatment than it be forborne.
30. Whilst the applicant has had the surgery and is not claiming the cost of it, I consider it appropriate for abundant clarity to address the question of whether the surgery was reasonably necessary, as that surgery plainly has an effect on the degree of the applicant's whole person impairment. As noted in *Diab*, there are a number of considerations which are relevant to deciding whether treatment is reasonably necessary. They include, but are not limited to, the appropriateness of the treatment, the availability of alternative treatment and the potential effectiveness of the alternative, the cost of the proposed treatment, the actual potential effectiveness of the proposed treatment and the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
31. It is important in this matter to have regard to the treating surgeon's view that the need for surgery arose in order to halt the progression of cervical spine symptoms. I am persuaded by that opinion, noting it arises from a treating surgeon who was prepared to undertake the surgery and the risks associated with it. Dr Cochrane's statement that the applicant was not likely to receive adequate treatment of symptoms from the surgery is made without reasonable explanation. For treatment to be reasonably necessary, it does not need to propose a complete cure. Rather, a cessation of the progression in symptoms can be, and in my view in this matter is, sufficient basis for finding the treatment is reasonably necessary.
32. Moreover, I note the applicant had undergone conservative treatment for many months after her injury which had proven unsuccessful. There is no suggestion the cost of the surgery which was carried out was prohibitive, happening as it did in the public hospital system. Likewise, a cervical discectomy and fusion is, whilst very serious surgery, an accepted form of treatment for radiculopathy, and taking into account the views of Dr Ow-Yang, Dr Endrey-Walder and also treating orthopaedic surgeon, Dr Howard, I am satisfied on the balance of probabilities that the surgery was reasonably necessary.

SUMMARY

33. For the above reasons, I find the effect of the applicant's injury is ongoing and relevantly caused the need for the cervical fusion surgery. Accordingly, the matter will be remitted to the Registrar for referral to an Approved Medical Specialist to determine the degree of permanent impairment arising from the injury which took place on 10 August 2016.

