

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5494/19
Applicant: LINDA LOUISE ALLAN
Respondent: STATE OF NEW SOUTH WALES
Date of Determination: 20 DECEMBER 2019
Citation: [2019] NSWCC 416

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist to determine the extent of the applicant's whole person impairment, if any, which results from injury to her cervical spine and right shoulder which occurred on 6 May 2015 and 21 August 2015.
2. The Registrar is requested to place before the Approved Medical Specialist a copy of the Application, the Reply, the Application to Admit Late Decision and a copy of these Reasons for Decision.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Linda Louise Allan (the applicant) is a 42 year old lady who was employed by the State of New South Wales (the respondent) as a cleaner at Maitland Hospital.
2. The applicant commenced employment in 2012 and stopped work on 31 August 2016.
3. The applicant relies upon two specific injuries. The first occurred on 6 May 2015 when she was cleaning vents using a long handled duster and alleges injury to her right shoulder, neck and scarring; alternatively, a consequential condition to her cervical spine.
4. The second injury occurred on 21 August 2015 when the applicant was pushing a food trolley and picking up stores in the kitchen area of the hospital.
5. In both instances the applicant relies upon sections 4(b)(i) and 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act).

ISSUES FOR DETERMINATION

6. The respondent concedes that the applicant sustained injury to her right shoulder but disputes any cervical spine injury or consequential condition of the applicant's cervical spine. The issues resolve to whether the applicant suffered any injury to her cervical spine or alternatively any consequential condition in respect of her cervical spine.
7. As I understood the applicant's submission, it was suggested that the cervical spine injury was a section 4(b)(ii) injury on 6 May 2015 which was again aggravated along with her right shoulder on 21 August 2015, alternatively a consequential condition.

PROCEDURE BEFORE THE COMMISSION

8. The matter came for conciliation and arbitration hearing in Newcastle on 11 December 2019. Mr P Williams of Counsel instructed by Mr J Bartley appeared for and with the applicant. Mr H Halligan of Counsel appeared for the respondent.
9. The matter was subject to a conciliation process and unfortunately could not be resolved. I am satisfied that the parties to the dispute understood the nature of the allegations and significance of the evidence before the Commission. I am satisfied that despite conciliation between the parties and having used my best endeavours, the parties were unable to resolve their differences. The matter therefore proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute dated 17 October 2019 and attachments (Application);

- (b) Reply registered 12 November 2019 and attachments (Reply);
- (c) Application to Admit Late Documents dated 26 November 2019 attaching MRI report of Dr Smith and x-ray report of Dr Walker (AALD).

Oral evidence

- 11. No oral evidence was given.

THE APPLICANT'S SUBMISSIONS

- 12. There is no contest in relation to the right shoulder and the critical issue is whether the applicant suffered a cervical spine condition.
- 13. A lot of confusion arises principally from the fact that the applicant is not a clear historian and her problems with articulation were noted by both Dr AG Hopcroft and Dr C Harrington. Additionally, the focus of her treatment was on her right shoulder and it is understandable that the injury to her neck was overlooked as a secondary factor.
- 14. The applicant received some physiotherapy for her neck. Her history is that since the first injury on 6 May 2015 she suffered neuropathic symptoms in her right hand. These symptoms were largely unexplained until the applicant saw Dr Hopcroft. She sustained no pre-existing symptoms or impairment. The applicant states that in late 2015 her treating doctors raised the prospect of restricted movement on the right hand side of her neck and she was receiving physiotherapy, including for the neck.
- 15. The applicant states that since the injury she suffered pain in her neck on the right side. She says that she developed onset of pain and restricted movement in her neck but because of the relative severity of her right shoulder symptoms, treatment concentrated on her shoulder. The applicant states that she complained of her neck pain to physiotherapist Ms Trescott and was given a collar on her neck and treatment with a traction machine.
- 16. The applicant's third statement of 13 September 2019 explains her efforts to retrieve all of Ms Trescott records and sets out the fact that the records she did recover were incomplete. She has continually explained her neck pain. Her evidence is unchallenged as a matter of the weight to be given to it regarding the onset of her symptoms.
- 17. Over time after the incidents the applicant experienced the onset of tingling in her right hand. This led to the referral to Dr Katekar for nerve conduction studies which found problems with the median nerve of her right wrist. Dr Amir referred the applicant to Dr Osborne but he could not find a solution. Dr Katekar's nerve conduction studies provided no real answers. Dr Osborne noted radiation of pain in the arm and in February 2016 thought the applicant had capsulitis. By May 2016 Dr Osborne noted the applicant's condition had worsened despite treatment and Dr Osborne organised capsular release. By January 2017 Dr Osborne could still not determine the underlying problem and referred the applicant to Dr S Tame, a pain specialist.
- 18. Because of the swelling in the applicant's right hand, the applicant was referred to Dr P Coleman for vascular opinion on 11 April 2016. Dr Coleman noted right arm fatigue and swelling in the right hand.
- 19. Dr Tame in March 2017 noted intermittent forearm, wrist and hand pain and suggested that the applicant's symptoms were neuropathic in nature. Dr Tame did not suggest any non-organic reasons for her pain. Dr Coleman had eliminated vascular reasons, yet the applicant continued to suffer symptoms in her right hand.

20. Consistent with the applicant's history, significantly a record of treatment of physiotherapist Ms Trescott is dated 24 October 2015. Ms Trescott on that occasion noted stiffness of the applicant's cervical and upper thoracic spine.
21. Dr Hopcroft in his first report obtains an extensive four page history. Importantly, the existence of paraesthesia of the *dorsum* of the applicant's right hand, in Dr Hopcroft's opinion, precludes a diagnosis of carpal tunnel syndrome and is suggestive of cervical radiculopathy. Dr Hopcroft noted the applicant to be an enormously difficult historian and thought that she either sustained a primary cervical disorder or the symptoms followed postural changes during surgery.
22. The applicant's symptoms were present in October 2015, before her first surgery in November 2015. Therefore, the postural changes theory during surgery cannot be sustained. That leaves the existence of spurring in the applicant's upper cervical spine on the right side, with the two injuries causing an aggravation of underlying cervical problems.
23. In his report of April 2019 Dr Hopcroft had the benefit of the report of Ms Trescott concerning 24 October 2015 consultation. He firmed in his opinion, noting stiffness in the applicant's neck in the very early stages and made the point that it is not uncommon in his experience for (in this case) the right shoulder problems to take "centre stage". Dr Hopcroft makes the point that Dr Harrington failed to analyse the fact that paraesthesia on the dorsum of the applicant's hand can only be explained by cervical neuropathy.
24. Dr Harrington on 21 April 2016 took no history of the applicant suffering any symptoms in her hand nor any radiculopathy. Yet only 11 days earlier the applicant had seen Dr Coleman for a vascular opinion concerning these same symptoms. Dr Harrington does not explore any symptoms other than shoulder symptoms.
25. By report 6 August 2018 Dr Harrington notes that the applicant had developed some restriction of neck movement. Dr Harrington says there are no radicular symptoms, but clearly there were. Dr Harrington comments that the applicant has some tingling but does not attempt to comment on whether that might be associated with the neck rather than the shoulder. Dr Harrington does not believe the neck is related to her work, but does not explain why. He incorrectly says that there has been no treatment for the neck and he fails to take into account when the symptoms came on.
26. The reports of Dr Hopcroft have been available to the respondent since 11 April 2019. There is no further report from Dr Harrington addressing Dr Hopcroft's medical opinion. Dr Harrington does not address the existence of Ms Trescott's earlier treatment of the applicant's neck, nor the applicant's complaints concerning the onset of her symptoms.

THE RESPONDENT'S SUBMISSIONS

27. The fact that Dr Harrington has not responded to Dr Hopcroft's comment is of no moment because Dr Harrington in his report of 6 August 2018 says that he does not believe there has been any injury to the cervical spine.
28. When consideration is given to the original Workcover certificates and documents, Dr Amir makes reference to the right shoulder injury alone. Not once does Dr Amir mention any reference to the neck or radiculopathy and this is the same in Dr Osborne's reports. Dr Osborne makes no reference to tingling and relates only to the complaint of right shoulder pain. Dr Osborne as treating orthopaedic surgeon would not have overlooked a complaint of neck pain.

29. Dr Hopcroft's opinion relies upon the fact that Ms Trescott questioned at an earlier stage of potential neck problems. Ms Trescott's material, however, contains several Physiotherapy Management Plans¹, none of which make reference to any neck or arm pain nor any mention of radiculopathy.
30. Regarding Dr Katekar, his nerve conduction studies showed mild median nerve damage at the right wrist but no evidence of any nerve lesion at the right shoulder or upper arm. If he thought that the applicant's hand pain had a genesis in the cervical spine, he would have said so.
31. Dr Hopcroft gets his clue by referring to Ms Trescott's treatment. This treatment to the neck is absent from all of Ms Trescott's reports except for one.
32. Whilst Dr Tame notes that the applicant had some numbness in her right arm he adds that this "took some time to recover" suggesting a recovery of any arm pain. The radiology reports the subject of the AALD showed degenerative changes and spurring, but no disc protrusion at any level of the cervical spine.
33. It is inconceivable that all of the medical practitioners who have examined the applicant in the three years prior to Dr Hopcroft did not address the neck, if indeed the neck was producing pain or other symptoms. The applicant has not discharged the onus of proof.

APPLICANT'S SUBMISSIONS IN REPLY

34. By February 2016 Dr Amir was perplexed and wondered whether the applicant had suffered nerve damage as a complication of surgery. Dr Tame, despite the studies by Dr Katekar, suggests neuropathic damage. Dr Hopcroft's opinion regarding the right hand (dorsum) complaints is not contradicted and both Dr Hopcroft and Dr Harrington agreed that there has been aggravation. The doctors just express different views as to how it occurred.

FINDINGS AND REASONS

35. The applicant's statements to the effect that she experienced right sided neck pain and tingling in the dorsum of her right hand after her incidents of injury need to be considered in the light of a number of background matters. First, the primary injuries suffered by the applicant were to her right shoulder and human experience suggests that it is not uncommon for treatment providers (and workers) to be focussing on the body part with the most pain and discomfort. Second, the applicant's problems with articulation have been identified by both Dr Hopcroft and Dr Harrington. The applicant can, therefore, be forgiven for not always providing a comprehensive history of all of her ailments. Third, it is clear that at least by 24 October 2015 Ms Trescott was treating the applicant in relation to her cervical spine. So much so is evidenced by Ms Trescott's entry in her clinical notes.
36. I accept that because the applicant first underwent surgery in November 2015, the "postural changes" theory identified in Dr Hopcroft's report cannot be sustained. The account by the applicant of paraesthesia in the dorsum of the applicant's right hand is also significant in my view. This is because Dr Hopcroft after taking an extensive history and closely questioning the applicant, concludes that this complaint is indicative of cervical spine radiculopathy. Dr Harrington on the other hand does not appear to specifically address this symptom and indeed, as the applicant submits, does not address any symptoms other than right shoulder symptoms. Importantly, Dr Harrington was not asked to address the significance of the complaint made to Ms Trescott on 24 October 2015. In the result, I prefer Dr Hopcroft's opinion in this regard.

¹ Application pp 23-27

37. The absence of specific complaint of neck pain or cervical radiculopathy to Dr Amir and Dr Osborne, does not to my mind dispose of the matter because on the applicant's evidence and supported by Ms Trescott's note, such complaints were in fact made. I accept the applicant's explanation concerning a cervical collar and traction machine being administered by Ms Trescott.
38. Having regard to the foregoing I am comfortably satisfied in making a finding that the applicant in the course of her employment on 6 May 2015 and on 21 August 2015 suffered an aggravation, acceleration, exacerbation or deterioration of her underlying cervical spine disease in terms of section 4(b)(ii) of the 1987 Act as well as frank injury to her right shoulder in terms of section 4(a) 1987 Act.

ORDERS

39. The matter is remitted to the Registrar for referral to an Approved Medical Specialist to determine the extent of the applicant's whole person impairment, if any, which results from injury to her cervical spine and right shoulder which occurred on 6 May 2015 and 21 August 2015.
40. The Registrar is requested to place before the Approved Medical Specialist a copy of the Application, the Reply, the AALD and a copy of these Reasons for Decision.