WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1230/20**
Applicant: **Darren Knight**
Respondent: **X-Rail Specialists Australia Pty Ltd**
Date of Direction: **26 May 2020**
Citation: **[2020] NSWWCC 172**

The Commission determines:

Finding

1. The applicant has 20% whole person impairment resulting from injury on 15 August 2013.

Order

2. The respondent pays the applicant compensation pursuant to s 66 of the *Workers Compensation Act 1987* in the sum of $31,762.50 which includes a 5% uplift pursuant to s 66(2A).

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Darren Knight (the applicant) was employed by X-Rail Specialists Australia Pty Ltd (the respondent) and sustained a compensable injury to the lumbar spine on 15 August 2013.

2. The applicant commenced proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The body parts for assessment were the lumbar spine and the skin.

3. The matter was listed for telephone conference on 20 May 2020 when Ms Jackson appeared for the applicant and Ms Casey appeared for the respondent. The parties then agreed that the permanent impairment be determined consistent with the decision of the President of the Workers Compensation Commission (Commission) in *Etherton v ISS Properties Services Pty Ltd*[1] (*Etherton*).

4. By letter dated 3 December 2013, the insurer issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying liability to pay weekly compensation on the basis that the worker had fully recovered from injury and was not incapacitated for work.

5. By notice dated 20 November 2019 pursuant to s 78 of the 1998 Act, the respondent repeated the denial of liability although it accepted there was an injury by way of aggravation of a pre-existing condition of the lumbar spine consistent with the agreement in the Certificate of Determination dated 2 July 2019.

6. On 26 September 2018 the applicant underwent surgery by way of L5/S1 posterior lumbar interbody fusion (the surgery).

7. The respondent asserts that the injury has self-limiting effects and that there was no permanent impairment that results from injury. It submitted that the applicant recovered from the injury within a short period and the need for the surgery did not result from the accepted work injury.

8. The documentation admitted into evidence without objection was:

    (a) Application to Resolve a Dispute and attachments (Application);

    (b) Reply and attachments (Reply); and

    (c) Application to Admit Late Documents filed by the respondent.

9. There was no application by either party to adduce any further evidence. The parties made brief oral submissions.

EVIDENCE

Applicant's evidence

10. The applicant provided a statement dated 13 August 2018[2]. The applicant worked for the respondent since February 2011 in duties requiring a significant amount of heavy lifting and suffered injury on 15 August 2013 towards the end of the day whilst welding and packing gear into the truck when he felt immediate pain in his low back.

[1] [2019] NSWWCCPD 53.
[2] Application, p 5.

11. The applicant attended his general practitioner, Dr Bui, on 19 August 2013. Further consultations with Dr Bui included a referral for a CT scan of the lumbar spine. Various pain-relieving medication were prescribed by the general practitioner.

12. The applicant undertook a pre-employment medical for the Ahrens Trucking Group (Ahrens) in March 2014. He said that he was not receiving any money at the time as the insurer had denied the claim for compensation and he needed to provide support for his family. Despite the pain in his lower back he advised the doctor that he believed he could work as a truck driver and believed that the work would not aggravate the pain in his lower back.

13. The applicant commenced employment with Ahrens in April 2014 on a full-time basis working four to five days per week. He ceased that employment in February 2015 stating that he found it difficult to work due to the pain in his lower back. He has been unemployed since that time.

14. The applicant attended Dr Tait, Neurosurgeon, on various occasions in 2015 and 2016 complaining of back pain radiating down his legs. Dr Tait then recommended a lumbosacral fusion.

15. The applicant provided a further statement dated 11 April 2019.[3] He stated that he also worked for the Tritton Copper Mine around September 2013 as a casual for approximately two to three weeks. The work at the mine involved pushing buttons whilst at a control panel which controlled levers to operate chemicals, pumps and water flow.

16. The applicant underwent surgery at the Nepean Hospital performed by Dr Tait in September 2018. The surgery significantly improved his lower back and right leg pain.

17. A further statement from the applicant dated 4 January 2020 noted that he continued to experience pain in the lower back with some radiation of symptoms and was taking various pain medications.

Dr Matthew Tait

18. Dr Tait initially examined the applicant on 1 September 2015[4] noting a history at work in 2013 which involved onset of sudden pain in the lower back extending down both legs. The doctor noted ongoing radiculopathy and requested an MRI scan and a bone scan with SPECT.

19. On 10 November 2015, Dr Tait opined that the MRI scan confirmed the presence of bilateral L5 pars defect with no obvious spinal compression.[5] In January 2016, Dr Tait noted severe low back pain severely impacting the quality of life. At the time, he felt that the unstable L5/S1 segment was the source of the applicant's severe pain and recommended a posterior lumbar interbody fusion and an epidural injection in the meantime. In March 2016, Dr Tait noted that the applicant had a good response from the epidural injection which only lasted for four weeks.

20. Dr Tait provided a more comprehensive report dated 18 April 2016.[6] The doctor noted the history in 2013 which was associated with back pain and bilateral leg pain. He opined that the direct cause of the applicant's condition was this injury and expressed disagreement with Dr Casikar's opinion that the applicant had recovered from the effects of the injury.

21. In September 2017, Dr Tait noted that the insurer had declined to pay for surgery and that the applicant had been placed on a public waiting list for surgery at Nepean Hospital. He opined that the applicant had aggravated the L5/S1 spondylosis arisen at the work injury.

[3] Application, p 9
[4] Application, p 50
[5] Application, p 51
[6] Application, p 54

22. Dr Tait performed a L5/S1 posterior lumbar interbody fusion on 26 September 2018.

Dr Bui

23. The applicant attended Dr Bui on 19 August 2019 when the doctor recorded a history of low back pain after lifting heavy equipment at work on 15 August 2013.[7] On 6 September 2013, Dr Bui noted the pain was not better and there was radiating pain to the right heel.

24. Subsequent attendances in September and October 2013 reported ongoing complaints of lower back pain.[8] The applicant was certified unfit for work at the time. On 4 November 2013, Dr Bui noted that the back pain persisted and he prescribed Panadeine Forte and Naproxen and certified the applicant unfit for work.[9] On 18 November 2013, Dr Bui noted the applicant had seen Dr Casikar the previous week and the back pain was getting worse and continued to prescribe Panadeine Forte. On 10 December 2013, the applicant advised the doctor that the back pain persisted and wished to seek another specialist opinion.

25. On 13 March 2014 Dr Bui noted the back pain had settled. On 3 February 2015, Dr Bui recorded that the applicant was recently shovelling mud at home and complained of lower back pain radiating to the left leg.[10] Various consultations in 2015 recorded that the applicant continued to be off work complaining of low back pain.

26. Dr Bui provided a report dated 24 July 2015.[11] The doctor noted the attendance at the surgery on 19 August 2013 following a history of lifting heavy items at work on 15 August 2013 with no neurological involvement at that time. Subsequent attendances including a presentation on 6 September 2013 when the applicant complained of pain radiating down to the right heel. Dr Bui noted that he attended Dr Casikar who advised the applicant to resume his duties. The applicant subsequently presented to Dr Bui one-week later stating he could not return to work and would be seeking a second opinion.

27. Dr Bui noted the applicant was doing a pre-employment medical for Ahrens on 13 March 2014 and denied any back pain at the time and on 3 February 2015, presented with low back pain after shovelling mud in his garden at home. Dr Bui opined that the applicant first presented with back pain following the reported work injury with the respondent and the injury was the main contributing factor to these symptoms of back pain. He noted the pars defect shown in the CT scan report can cause frequent back pain.

28. A WorkCover certificate dated 10 December 2013 certified the applicant unfit for work from 23 November 2013 to 24 December 2013 and opined that the applicant would be fit for duties from 25 December 2013.[12]

Qualified Opinions

29. Dr Graeme Doig provided a report dated 29 May 2019.[13] The doctor noted that there was an absence of low back problems prior to the incident on 15 August 2013 and opined that the applicant suffered intervertebral disc injury at L5/S1 with probable aggravation of pre-existing spondylosis at L5.[14]

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[7] Application, p 69
[8] Application, p 70
[9] Application, p 71
[10] Application, p 73
[11] Application, p 43
[12] Late Application, p 8
[13] Application, p 28
[14] Application, p 39

30. The doctor noted a fine lumbosacral scar following surgery and assessed the applicant at 22% whole person impairment (WPI) based on the applicant having a fusion falling in the lumbar category IV together with an additional 2% of the activities of daily living totalling 22%. The doctor deducted 10% pursuant to s 323 due to the pre-existing spondylosis and assessed the applicant at 20% WPI.

Dr Peter Bentivoglio

31. In a report dated 15 July 2016, Dr Peter Bentivoglio, Neurosurgeon, noted a work history of injury in August 2013 and again in December 2014 with Ahrens. The doctor diagnosed the applicant with mechanical back pain secondary to spondylitic spondylolisthesis at L5/S1 and recommended a spinal fusion. The doctor noted the applicant has an inherent weakness in the back which required surgical treatment and opined the applicant's ability to work was affected by the injuries.

32. In a further report dated 4 August 2016, Dr Bentivoglio noted the spondylitic spondylolisthesis was pre-existing but that the work injuries, referring to the incidents in 2013 and 2014, were the main contributing factor to the current symptoms.

Dr Casikar

33. Dr Casikar provided a report dated 12 November 2013.[15] The doctor recorded a history of no prior back pain, noted limited straight leg raising and diagnosed mechanical back pain. He stated that if the applicant's account was accepted then he believed that he had recovered from the effects of the workplace injury and was fit to resume his pre-injury duties. The doctor noted the applicant's account was inconsistent with a factual report. He opined that if injury was confirmed then employment was the main contributing factor to the back pain, but the applicant had now "fully recovered".

34. Dr Casikar provided a further report dated 19 March 2019.[16] He then noted various inconsistencies by the applicant but accepted that the proposed surgery was reasonably necessary and opined that the need for surgery was mainly due to the congenital lumbar spinal condition, but symptoms commonly arise when doing manual labour. The doctor otherwise stated that the contribution for unemployment was difficult to justify because of "notable inconsistencies".[17]

Dr Smith

35. Dr Anthony Smith, Orthopaedic Surgeon, provided a report dated 12 April 2019.[18] After noting the history and other medical reports, Dr Smith opined that the applicant has a congenital abnormality with a bilateral pars defect and spondylolisthesis at L5/S1.

36. Dr Smith opined that the initial aggravation lasted for a number of days, weeks or "three months at the most".[19] The doctor noted the applicant's symptoms were coming from the degenerative processes at L5/S1 and probably at L4/5.

37. Dr Smith provided a further report dated 22 October 2019.[20] The doctor opined that the applicant had a 20% WPI under DRE lumbar category IV with no allowance for the activities of daily living. The doctor opined that there was no relationship between the impairment and the work injury on 15 August 2013 noting that the applicant had recovered by March 2014 when he applied for work with Ahrens.

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[15] Reply, p 86
[16] Reply, p 100
[17] Reply, p 102
[18] Reply, p 104
[19] Reply, p 108
[20] Reply, p 111

Other document

38. A pre-employment health assessment was completed by the applicant on 18 March 2014. The examining doctor recorded that the applicant was healthy.[21]

SUBMISSIONS

39. At the telephone conference the legal practitioners were invited to make submissions.

40. The applicant referred to the consent orders that indicated that there was an award for the respondent in relation to the allegation of injury in the employment with Ahrens and that the present respondent had admitted injury.

41. The respondent accepted that the applicant had a 20% WPI and that the issues were limited to whether the impairment resulted from injury and whether the applicant had recovered from surgery. It relied on the opinions expressed by Dr Casikar and Dr Smith and submitted that the WorkCover certificate issued in late 2013 and the pre-employment health assessment undertaken in March 2014 with Ahrens were consistent with its position.

42. The respondent otherwise submitted that, despite the admission of injury, there was no inconsistency with the proposition that the effects of the injury had settled and that the surgery was not related to injury. It confirmed that it relied upon the notices issued by it pursuant to ss 74 and 78 of the 1998 Act.

REASONS

43. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[22] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[23]

44. Given the parties' agreement and the admission of injury, the essential issue is whether the injury "results in a degree of permanent impairment" within the meaning of s 66 of the 1987 Act.

45. In *Secretary, Department of Education v Johnson*[24] the Court of Appeal confirmed that common law principles of tort are to be applied in the field of workers compensation.[25] Emmett JA stated:[26]

> "In common law contexts, an injury or incapacity may be attributable, in the legal sense, to more than one cause operating concurrently. There is no difference between the legal view of causation in tort and causation in the field of workers compensation, subject to the qualification that, in a claim for workers compensation, it is unnecessary to prove that the incapacity was the natural and probable consequence of the injury. That is to say, the question of foreseeability does not arise. It is sufficient that the incapacity results from the injury by a chain of legal causation unbroken by a *novus actus interveniens*."

[21] Late Application, p 6
[22] The 4th edition guidelines are issued pursuant to s 376 of the 1998 Act
[23] Clause 1.1 of the fourth edition guidelines.
[24] [2019] NSWCA 321
[25] (*Johnson*), Emmett AJA at [53]-[55], Macfarlan JA agreeing at [1]
[26] *Johnson* at [53]

46. The consistent history recorded in a variety of medical reports, which I accept, is that the applicant was asymptomatic prior to injury. The applicant then suffered low back pain which was, after a short period, associated with a degree of radiating right leg pain.

47. The applicant attended his general practitioner over a number of months complaining of back pain. Indeed, he consulted his general practitioner both shortly before and shortly after seeing Dr Casikar in late 2013. Dr Casikar, without any explanation, then concluded that the applicant had recovered from the effects of the injury when the contemporary complaints to the general practitioner were to the contrary. In these circumstances I do not accept Dr Casikar's initial opinion that the applicant had recovered in the three months following the injury.

48. The applicant was assessed in March 2014 as fit for employment with Ahrens. His explanation that he was in trouble financially at that time and had to provide for his family is logical and consistent with the fact that the respondent had declined liability following the report provided by Dr Casikar. However, this explanation must be contrasted with the fact that the applicant successfully underwent a pre-employment physical in March 2014 and did not again complain of back pain to the general practitioner until early 2015.

49. The fact that the applicant did not have symptoms in early 2014 does not equate with the fact that there had been a complete recovery from the injury. Indeed, the acceptance by the respondent that the injury had aggravated the applicant's degenerative condition, made during the course of previous proceedings in the Commission, indicates that there was an aggravation to the degenerative process. That conclusion is otherwise consistent with some aspects of both Dr Casikar's subsequent opinion and an opinion arising from Dr Smith.

50. Dr Casikar noted in his second report that the surgery was mainly from the congenital condition but that the "contribution from this employment is very difficult to justify because of multiple inconsistencies"[27]. Without identifying the multiple inconsistencies, the doctor has recognised some contribution for the need for surgery from employment.

51. Dr Smith observed:[28]

> "Once the degenerative disease process is rendered symptomatic for the first time, he will be likely to render it symptomatic from time to time thereafter with various activities on his part. Aggravations will cause low back pain and/or leg pain and or altered sensation in the lower limbs from time to time."

52. The recognition by Dr Smith that the initial injury meant that the applicant was more likely to be rendered symptomatic from time to time falls within the first and/or second categories discussed by Malcolm CJ in *State Government Insurance Commission v Oakley*.[29] Despite Dr Smith's opinion that the applicant had "recovered", his opinion supports the applicant's case that he had become more vulnerable to further exacerbations.[30]

53. The applicant otherwise relied on opinions from Dr Tait, the treating Neurosurgeon, Dr Doig, Dr Bentivoglio and Dr Bui that the effects of the injury produced ongoing consequences. Whilst the applicant may have had a form of recovery by early 2014, I am satisfied that the condition had been initially rendered symptomatic and thereafter he was more susceptible to further insult.

54. The applicant's case is otherwise strengthened by the respondent's admission of injury and the Consent Orders, in which the respondent was a party, that there was no injury with Ahrens.

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[27] Reply, p 102
[28] Reply, p 109
[29] (1990) 10 MVR 570. See also *Johnson* at [126]
[30] *Johnson* at [125]

55. In these circumstances I am satisfied that the applicant has discharged the onus of proving that the work injury aggravated the degenerative process in the low back resulting in the applicant becoming vulnerable to further exacerbations. As a result of the ongoing condition caused by the work injury, the applicant underwent the surgery performed by Dr Tait. It is the surgery which is the basis for the permanent impairment.

56. I am satisfied that the injury has resulted in a degree of permanent impairment.

Assessment

57. The lumbar fusion means that the applicant is assessed at 20% as the nature of the surgery is classified as being DRE category IV.[31]

58. Dr Doig assessed the applicant at 2% for the effects on the activities of daily living (ADL). Dr Smith said no allowance should be made because the applicant was "better than he makes out"[32].

59. The applicant is regularly attending his general practitioner and is prescribed Targin to sleep and Panadol and Nurofen for pain. The clinical records of the general practitioner are consistent with this history.[33]

60. In these circumstances I accept the applicant's version of ongoing symptoms and reject Dr Smith's opinion on this issue. I accept Dr Doig's assessment on ADLs.

61. Dr Doig did not provide a separate WPI assessment of the surgical scar and has included that assessment as part of the lumbar spine. Accordingly, there is no assessment made with respect to the skin and I determine that assessment at 0%.

62. The applicant has a 22% WPI resulting from injury less the s 323 deduction.

Section 323

63. Section 323 relevantly provides:

> "(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality."

64. A statutory deduction of one-tenth is prescribed by s 323(2) which relevantly provides:

> "(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.
>
> (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter."

[31] AMA 5, Table 15-3
[32] Reply, p 116
[33] Application, p 99

65. Section 323(3) of the 1998 Act provides meaning to the reference in s 323(2) of “available evidence”. Dr Smith and Dr Casikar did not provide a s 323 deduction as they were of the opinion that the injury did not contribute to impairment. I have provided reasons for rejecting the opinion expressed by the doctors.

66. The applicant has a pre-existing congenital condition and the surgery was performed in part because of the spondylitic spondylolisthesis at L5/S1. For that reason, I find that the pre-existing condition contributed to impairment.

67. I apply the statutory one-tenth deduction in accordance with s 323(2) based on the opinion expressed by Dr Doig. I have rejected portions of the opinion expressed by Dr Casikar and Dr Smith that the work provided no contribution to the need for surgery and the impairment. In the absence of acceptable contrary opinion on contribution from the pre-existing condition, I adopt and apply Dr Doig’s assessment. I apply the one-tenth due to s 323(2) because the assessment is difficult to determine based on the absence of competing evidence.

68. The applicant has a 20% WPI as a result of injury after the s 323 deduction.

CONCLUSION

69. The findings and orders are set out in the Certificate of Determination.