WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2421/20**
Applicant: **Rahulkumar Gandhi**
Respondent: **Coles Supermarkets Australia Pty Ltd**
Date of Determination: **10 August 2020**
Citation: **[2020] NSWWCC 268**

The Commission finds:

1. The proposed surgical treatment is reasonably necessary.

The Commission orders:

1. The respondent will pay for the cost of and incidental to an L5/S1 anterior lumbar interbody fusion (Stage 1) and an L5/S1 Pedicle screw fixation and decompression (Stage 2).

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. Rahulkumar Gandhi, the applicant, brings an action against Coles Supermarkets Australia Pty Ltd, the respondent, for a declaration pursuant to s 60(5) of the *Workers Compensation Act 1987* (the 1987 Act) that the proposed surgery is reasonably necessary.

2. Section 78 notices were issued on 4 September 2019 and 3 March 2020 denying liability.

3. The Application to Resolve a Dispute (ARD) and Reply were duly lodged and served.

ISSUE FOR DETERMINATION

4. The parties agree that the following issue remains in dispute:

    (a) Is the proposed surgery reasonably necessary?

PROCEDURE BEFORE THE COMMISSION

5. The matter was heard by way of teleconference conciliation and arbitration on 6 July 2020. The applicant was represented by Mr Ross Stanton of counsel, instructed by Ms Marina Azer. The respondent was represented by Mr Tony Baker of counsel, instructed by Mr Glen Dolan. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

6. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) ARD and attached documents,
    (b) Application to Admit Late Documents and attached documents,
    (c) Reply and attached documents.

Oral Evidence

7. No application was made with regard to oral evidence.

FINDINGS AND REASONS

Evidence

Mr Gandhi's statement

8. It is common ground that Mr Gandhi was born in 1976 and came to Australia from the UK where he had been working as a filler for a supermarket chain in the UK.

9. When he came to Australia, he first worked for the respondent in Victoria, working in stores in Malbern and Tarneit. He was transferred to New South Wales in September 2017 where he worked at the Stanhope Gardens store and then on 12 March 2018 was transferred to the Rouse Hill store where he has worked since.

10. He was allocated to the dairy department and duties were described in his statement at [9] – [11]:

> "9. My duties as a night filler and team member involving moving items of stock from the storeroom to the sales floor for shelving and stocking. I was required to lift, carry and push boxes. The duties involved repetitive bending, twisting, lifting and carrying as well as pushing and pulling. Whilst performing these duties, I experienced mild low back pain. The back pain was not debilitating and did not stop me from working. I did not actively seek any treatment for these symptoms.
>
> 10. When I was transferred to the Rouse Hill store on 12 March 2018, I was allocated to the dairy department. My daily duties in the dairy department involved unloading deliveries, which weighed up to 1000kg from the loading dock to the back room, with the use of a manual pallet jack. I was then required to transport those pallets to a freezer room where I was required to split frozen goods from the pallet to a cage. I completed approximately 3 pallets per shift. This involved bending, twisting, squatting and lifting of weights ranging between 1-12kgs.
>
> 11. The cages would weigh up to 30kg-110kg. I was required to manually push and pull those cages to the floor for stocking duties. I was required to push and pull approximately 7 cages per shift and occasionally more. Stocking duties involved lifting a crate which held approximately 12 litres of milk. I would lift the crate against the fridge and hold it up with my body weight while I restocked the fridge. Replenishing the milk fridges required 60-75 milk crates. I did not receive any assistance with replenishing. When adequate staff was available, usually each team member, such as myself, is only required to replenish approximately 20 crates of milk.
>
> 12. My duties in the dairy department were very strenuous and more physically demanding than my previous duties with Coles. I became very conscious of uncomfortable low back pain immediately after the allocated to the dairy department in March 2018. My lower back continued to deteriorate, and I became more conscious of increasing low back pain over the following weeks and months. Persevered with employment, as I am the only income earner in the family."

11. He said that by August 2018, his low back pain became intolerable, as he was by then working without the assistance of 2-3 others who were on leave and his workload consequently increased.

12. He kept working as he is the only income earner in the family, his wife being disabled and his son at that stage was not working. He is aged 18.

13. Mr Gandhi complained about his back problems to employees of the respondent "Alex" and "Chris" but received no effective response.

14. On 7 August 2018, he attended his GP, Dr Vidya Shetty at Parramatta Park View Medical Centre for the first time. He said:[1]

> "… To the best of my recollection, this was the first doctor I saw upon moving to NSW. I told the doctor that I have experienced low back pain over the last several months. To the best of my recollection, I told the doctor that my job his physical a job. To the best of my recollection, I also told the doctor that when I push my wife's wheelchair, I experienced a flair low back pain."

[1] ARD page 2.

15. Mr Gandhi took some days off between 22 August and 24 August and he was subsequently placed on light duties from 27 August 2018, which duties he continues to perform at 16 hours per week, ordering stock and not lifting items heavier than 5 kg.

16. Dr Shetty referred Mr Gandhi to a Neurosurgeon, Dr Prashanth Rao whom Mr Gandhi saw on 24 September 2018. Dr Shetty then referred Mr Gandhi to Dr Sana Asim at "Main Street Family Medical Centre" in Blacktown, as Dr Shetty did not do workers compensation matters.

17. Mr Gandhi outlined the treatment he had undertaken since seeking assistance. He has undergone TENS treatment, the first being on 22 August 2018. He said he underwent a further four treatments but did not feel that they gave him any longstanding relief.

18. He has been prescribed anti-inflammatory analgesia such as Mobic.

19. In September 2018, he was referred to physiotherapy which was not successful, as it tended to flare up his symptoms. He was advised to ceased physiotherapy but was referred to sports physiotherapy and hydrotherapy.

20. Mr Gandhi said that his physiotherapist also asked him to perform home based exercises which Mr Gandhi did not find reduces his pain levels.

21. On 20 June 2019, Mr Gandhi underwent a steroid injection in his back with Dr Rao. This produced temporary relief but after three or four days his symptoms returned to the same pain levels. He has been taking over the counter analgesics such as Nurofen and has been prescribed Celebrex and Targin to manage his pain. Sports physiotherapy commenced around January 2020 but has not been effective. Mr Gandhi said it caused his back pain to flare up and create heightened discomfort.

22. Mr Gandhi noted the advice of Dr Rao that surgery would give him the best chance of returning to pre-injury hours and improving his quality of life.

Clinical notes of Dr Shetty

23. The first entry relating to the subject injury was on 7 August 2018[2]:

> "Since 8 months chronic back pain lumbosacral area – pushes wheel chair around for wife, exam ts spine nontender movement full nil sciatica."

24. Dr Shetty organised a CT scan that was taken on 9 August 2018 and reported on by Radiologist, Dr S Kariappa[3].

25. Dr Kariappa reported:

> "At L5/S1: There is an anterolisthesis of L5 with respect to S1 secondary to bilateral pars defects. Disc material and posterolateral osteophytosis are causing some neural exit foraminal narrowing bilaterally. Vertebral body heights are preserved.
>
> View of the soft tissues is within normal limits."

26. On 16 August 2018, Dr Shetty again noted that Mr Gandhi suffered "only" lumbosacral back symptoms whilst pushing the wheelchair. Dr Shetty noted that there were no sciatic symptoms and no neurological deficits.

[2] ARD page 118.
[3] ARD pages 6 - 7

27. On 22 August 2018, Mr Gandhi was seen at the same practice by Dr Anoma Bandara. Dr Bandara recorded:

> "Lower back pain 6-7 months
> Not radiating…
> Lifting heavy things at work….
> Neurological examine NAD."

28. On 23 August 2018, the practice nurse at Dr Shetty's practice recorded that she had administered a second TENS treatment. A third TENS treatment was recorded for 26 August 2018 and Dr Shetty on the same date noted:

> "back pain 40% better, taking analgesia. Discussed physio F/U for back strengthening exercise."

29. On 2 September 2018, a fifth TENS treatment was applied, after which Mr Gandhi saw Dr Shetty again. Dr Shetty recorded:

> "TENS rx done feels 50% better. Physio session tomorrow."

30. On 16 September 2018, Dr Shetty recorded:

> "Back pain not getting better. Seeing physio minimal change."

31. Dr Shetty issued three medical certificates, which were not in the WorkCover form, for three dates, 26 August 2018, 2 September 2018 and 16 September 2018.

Dr Sana Asim

32. Dr Shetty had been at the Parramatta Park View Medical Centre and Dr Asim was at a Blacktown Medical Centre called "Main Street Family Medical Centre".

33. Dr Asim supplied a medical report on 26 November 2019 to Mr Gandhi's solicitors.[4] Dr Asim said that she was first consulted by Mr Gandhi on 14 March 2019. She noted that Mr Gandhi had been given cortisone injections, twice-weekly physiotherapy sessions, strong opioid analgesia such as Targin, restricted duties at work and restricted hours. She said that nonetheless (as I understood her) Mr Gandhi's lower back pain was nonetheless "deteriorating fast."

34. Dr Asim said that to Mr Gandhi's condition was not improving with conservative management, and that he was unilaterally increasing his intake of the Targin. Physiotherapy was failing as most of the exercises Mr Gandhi was trying to do were aggravating his pain as a result of which Dr Asim had ceased physiotherapy.

35. Dr Asim endorsed the proposed surgery in view of the failure of the other treatment options that had been tried.

Section 78 notice

36. A s 78 notice issued on 4 September 2019 declining liability on the basis that the proposed surgery was not reasonably necessary, The insurer relied on the advice of Dr Vidyasagar Casikar dated 16 April 2019.[5]

[4] ARD page 83.
[5] ARD page 262.

Dr Renata Abraszko

37. After that refusal, a medico-legal opinion was retained from Dr Renata Abraszko on 1 February 2020. Dr Abraszko confirmed that Mr Gandhi has an L5/S1 spondylolisthesis with pars defects. Mr Gandhi's work with Coles was a significant contributing factor to the injury Dr Abraszko said as it aggravated his pre-existing condition which had been completely asymptomatic prior to Mr Gandhi's work with Coles. Dr Abraszko noted that Mr Gandhi had undergone conservative management, physiotherapy and TENS with no improvement saying that he had already exhausted any other treatment option.

38. Dr Abraszko thought that the proposed surgery was reasonably necessary saying[6]:

> "Lumbar fusion L5/S1 is an appropriate and effective treatment for this condition. It is a beneficial treatment for his condition, since it may allow him to return to a full-time permanently modified duties.
>
> This treatment (lumbar fusion) is accepted by the medical profession. The recommended surgery is the direct result of his workplace injury."

39. Dr Abraszko took a history that Mr Gandhi lived in a unit with his son. The history she recorded was:[7]

> "In August 2018, during his employment with Coles, Mr Gandhi was directed to load and unload deliveries. These deliveries weighed up to 1000kg. He had to use a manual pallet jack. He was required to transfer those pallets to a freezer room, where he had to split frozen goods from the pallet to a cage which required bending twisting and squatting. The lifting of weights was ranging between 1 kg and 12 kg. The cages would weigh up to 110kg. He was required manually to push and pull those cages to the floor of the stock duties, which involved lifting a crate with 12 – 18 litres of milk. He would then lift the crate against the fridge and hold it up with the body weight, while he restocked the fridge."

40. Dr Abraszko recorded that Mr Gandhi experienced "a sudden and severe low back pain" whilst he was doing extra duties because other staff members were on leave at the time of his injury. Dr Abraszko noted the x-ray findings of 6 October 2018 that Mr Gandhi had bilateral L5 pars defect and that there was approximately 5 mm anterolisthesis of L5/S1 on extension, but only 2.7mm of anterolisthesis with flexion. Her diagnosis was that Mr Gandhi injured his L5-S1 disc as a result of the subject injury.

41. Dr Abraszko thought that Mr Gandhi's prognosis was guarded and that he would always have a degree of back pain, even with the surgery. She thought that the pre-existing L5 bilateral pars defect contributed to the need for lumbar fusion. She thought that the spondylolisthesis was not significant and that but for the work-related injury there would not be a need to undergo surgery.

42. A further s 78 notice issued on 3 March 2020 acknowledging the report of Dr Abraszko and other material but simply confirmed the original decision.

Dr Rao

43. Mr Gandhi was referred to Dr Rao, Neurosurgeon. Dr Rao reported to Dr Shetty on 24 September 2019 noting that he had been reviewed on 20 September 2018[8].

[6] ARD page 15.
[7] ARD page 13
[8] ARD page 18.

44. The history taken by Dr Rao noted that Mr Gandhi had been on light duties for the past four weeks because of lower back pain. He noted that the job involved a lot of heavy lifting and that the pain started six months earlier whilst he was lifting heavy stock. He would still go to work wearing a belt/lumbar corset Dr Rao noted.

45. He recorded that Mr Gandhi's pain got worse in the last one to two months. He noted that Mr Gandhi had trialled medication, physiotherapy and bed rest all of which had given short term relief. The CAT scan organised by Dr Shetty was viewed and Dr Rao said:

> "CT scan currently organised by you reveals bilateral L5 pars defect with grade 1 spondylolisthesis at L5/S1 with loss of height at the L5/S1 with disc with moderate foraminal compression at both L5 foramina."

46. Dr Rao sent Mr Gandhi for an x-ray which was taken on 8 October 2018[9]. The findings of the radiologist, Dr Babak Sanadgol were:

> "There is bilateral L5 pars defects noted. There is approximately 5mm anterolisthesis of L5/S1 noted with extension. With flexion there is only 2 .7mm of anterolisthesis of L5/S1. Vertebral body heights are preserved."

47. On 19 October 2018, Dr Rao reported to Dr Shetty. Dr Rao noted[10]:

> "…..the MRI scan of the lumbar spine revealed significant disc degeneration at L5/S1 with grade 1 anterolisthesis and ongoing pars defects. On the flexion extension x-ray there is signification [sic] dynamic instability at that level."

48. Dr Rao reported that he had discussed the options available for treatment noting at this point that the symptomatology was "significant" and that Mr Gandhi constantly wore a brace.

49. Dr Rao recommended surgical options. Dr Rao said that the procedure risks and expectations were detailed and that Mr Gandhi was planning to discuss that option with his family and apply for workers compensation. Dr Rao noted that Mr Gandhi had "multiple questions which were all answered to his satisfaction."

50. Dr Rao noted that Mr Gandhi had several issues with his wife's medical care which he had been "quiet [sic] busy with".

51. Dr Rao supplied a series of reports on 19 October 2018. He reported that Mr Gandhi's symptomatology was significant and that he was wearing a brace constantly. At that stage he thought that surgical options were the best.

52. Dr Rao reported again to Dr Shetty on 19 March 2019[11]. Surgery was discussed and Mr Gandhi was put onto to Targin medication as the Nurofen he had been taking was not enough for his ongoing pain. The type of surgery was discussed. Dr Rao indicated that Mr Gandhi should "give serious consideration to surgery".

53. Dr Rao recommended an interior lumbar interbody fusion followed by a minimal invasive percutaneous pedical screw fixation. Dr Rao said[12]:

> "I believe he will have a significant chance of improvement of the back pain."

54. Dr Rao again reported that Mr Gandhi had several "insightful questions".

[9] ARD page 8.
[10] ARD page 20.
[11] ARD page 22.
[12] ARD page 22.

55. Dr Rao stated on a number of occasions that if Mr Gandhi underwent the recommended surgery he would be able to return to normalcy and full duties within weeks.[13]

56. On 19 March 2019, Dr Rao recorded that the Nurofen was not enough to stop the ongoing pain in his lower back and a script was taken out for Targin. Dr Rao said that he advised Mr Gandhi that it was unlikely that the spondylolisthesis and dynamic instability would improve over time and that consideration should be given to surgery.

57. On 7 May 2019, Dr Rao reported to Dr Asim.

58. On this occasion, Dr Rao noted that the insurer favoured conservative management with physiotherapy. Dr Rao said:

> "I do believe the symptomatology is dynamic and will not be helpful ongoing".

59. At that stage, cortisone injections for diagnostic and therapeutic purposes were also discussed.

60. On 20 June 2019, Dr Rao administered bilateral facet joint and pars injections at L5/S1[14].

61. As noted on 20 June 2019, cortisone injections were performed at Norwest Private Hospital the results of which, as already indicated, were not helpful after about three to four days.

62. On 5 July 2019, Dr Rao reported to Dr Asim that Mr Gandhi was unlikely to improve with "pure conservative management including injections." Dr Rao said:[15]

> "I believe surgical fixation of the problem is the last resort and will potentially give [Mr Gandhi] the best chance of recovery of his back pain and return to full-time work."

Dr Casikar

63. As indicated the insurer relied upon the opinions of Dr Casikar. On 16 April 2019[16] Dr Casikar agreed with the diagnosis that Mr Gandhi has a congenital spondylolisthesis bilateral pars defects at L5 and that his work with the respondent had aggravated that condition. He noted that although Mr Gandhi was carrying that pre-existing condition prior to the injury, he had no symptoms. Dr Casikar said[17]:

> "Though there has not been a single episode of injury, the nature of his employment with Coles Supermarkets has produced an aggravation of his pre-existing degenerative disease. In my opinion, the contribution from the nature of his employment is very significant."

64. Dr Casikar however did not support the surgery. He said[18]:

> "The 360-degree spinal fusion suggested by Dr Rao is certainly not necessary as a result of the injury. Such extensive spinal fusion on a young man will certainly have a very poor outcome, as far as his work capacity is concerned. I believe non-surgical management of his back has a much better outcome. I am surprised that Dr Rao has not tried the standard management of back pain in a young man, particularly when there is no verifiable neurological problem. I find it very difficult to accept Dr Rao's suggestion of a 360-degree fusion when other methods of treatment are available.

[13] ARD pages 28, 74 and 76.
[14] ARD page 26.
[15] ARD page 28
[16] Reply page 1.
[17] Reply page 5.
[18] Reply page 6.

> If Mr Gandhi were to go through the spinal fusion, it would be very unrealistic to expect him to get back to the workforce."

65. Dr Casikar thought the aggravation would cease when the employment conditions were changed and that a Work Capacity Assessment and vocational redirection was required.

66. Dr Casikar reported on 25 February 2020 again. On this occasion he again acknowledged that the condition was pre-existing, being the degenerative disease of the lumbar spine and the congenital pars defect and spondylolisthesis.[19] However on this occasion he contradicted his earlier report and said "His employment with Coles has not been the main contributing factor". He explained his opinion by saying that it was reasonable to accept that initially there was an aggravation but that he had recovered in about six weeks. Dr Casikar thought that the continued complaints of pain over more than a year and three months suggested that "there are pain focussed issues".

67. Dr Casikar repeated that Mr Gandhi was a "pain focussed personality" and that he had "significant pain focus issues" elsewhere in his report. This aspect of Dr Casikar's assessment was not present in his first report. He said[20]:

> "The main barrier to his recovery is his degenerative disease of the lumbar spine, and more importantly, his pain focused issues. There are significant emotional factors, probably related to his domestic circumstances. This is my clinical impression. He needs to see a specialist for this and a Pain Specialist."

68. The comment regarding the emotional factor of Mr Gandhi's pain focus was made after Dr Casikar had noted[21]:

> "Mr Gandhi also seems to have significant domestic issues. He is trying to cope with his wife who is severely disabled. I believe his main problem is a pain focused personality. He needs to see a Pain Specialist. I find it extremely difficult to support a 360 degree fusion on Mr Gandhi at this stage."

69. Dr Casikar said that it was extremely difficult to support a 360° fusion on a young male because the outcome was likely to be poor and there was a very slim chance of Mr Gandhi getting back to any kind of employment. Employers would be very reluctant to take on a person who has already had a spinal fusion, he thought. He said that merely because Mr Gandhi complained of back pain a 360° fusion was not necessarily needed.

70. Dr Rao wrote a report that was curiously dated "17 September 2019 Amended 11 February 2020."[22] Dr Rao disagreed with Dr Casikar's view, saying that the pars defect was not congenital. He referred to various papers he had written which he said confirmed that a pars defect is not a congenital effect. Dr Rao also referred to articles which he said supported his opinion that outcomes of anterior lumber interbody fusion in general "and in spondylolisthesis" had statistically significant improvement. In this cohort of anterior lumbar fusion, Dr Rao said, he was not sure as to the accuracy of Dr Casikar's prediction of a long recovery process. Dr Rao asked rhetorically:

> "I know that at 40 years with pars defect and symptomatology, why would a fusion not be performed. It is ridiculous to say that after 13 months of conservative treatment, suggesting further conservative management and is not sure to what benefit to the patient. The Spondylolisthesis and the Pars defects are not going to get better with time only worse. This is a waste of

[19] Reply page 9.
[20] Reply page 11.
[21] Reply page 9.
[22] ARD page 33.

taxpayers money, the patient's disability to follow this path. I have presented his case to Macquarie complex spine meeting and there was overwhelming support for surgical management and also that Pars defect was not congenital in nature." (As written).

SUBMISSIONS

Mr Baker

71. Mr Baker submitted that I would have reservations regarding the history given by Mr Gandhi in his statement. He referred to Mr Gandhi's assertion that it was only after he started working at the Rouse Hill store that he experienced a flare up of his back pain whilst pushing his wife's wheelchair, whereas the first contemporaneous note from Dr Shetty of 7 August 2019 revealed that the only complaint was that pushing his wife's wheelchair had caused his back symptoms. Similarly, on his second visit on 16 August 2018, Mr Gandhi also mentioned only the wheelchair as causing his back pain. No mention of any work involvement was made until 22 August 2019.

72. I understood Mr Baker to submit that accordingly the date of injury was 7 August 2019. The need for surgery thus arose from the wheelchair pushing, and that I would have some doubt as to the bona fides of the later allegation that the source of the back symptoms was the work being done for the respondent. I was referred to the medical certificates issued by Dr Shetty on 26 August 2019, 2 September 2019, and 16 September 2019, all of which were ordinary certificates, and not issued on WorkCover forms.

73. Mr Baker also said that it was significant that Dr Shetty did not refer Mr Gandhi to Dr Rao until 16 September 2018, which was the fourth time Mr Gandhi had been seen regarding his back.

74. Mr Baker submitted that Dr Rao was not given the history of Mr Gandhi's difficulties in pushing his wife's wheelchair. Mr Baker referred to the investigations and submitted that there was no material suggesting that Mr Gandhi had suffered a recent trauma. The investigations indicated that the pathology was old.

75. Mr Baker submitted that the pathology revealed by the imaging did not demonstrate any neurological involvement, and that the nature of the injury was the aggravation of a pre-existing condition. He submitted that Dr Rao's interpretation of the flexion extension x-ray was incorrect. There was no significant dynamic instability, it having measured 5mm on extension but only 2.7 mm on flexion. There was no suggestion that there had been recent trauma, and the imaging showed only pre-existing pathology.

76. Mr Baker referred to the paper written by Dr Rao and others which was attached to his report of "amended 11 February 2020."[23] He submitted that the conclusions drawn were unreliable due to the small sample subject. He referred to some reviews which were attached to the article which suggested that the "interesting and ambitious study is hampered primarily by small sample size" and that "one of the drawbacks of the study is that given the division of 125 patients into 6 subsets, there is likely insufficient power to draw any definitive conclusions by pathological subset…"[24].

77. Mr Baker submitted that I would prefer the first opinion of Dr Casikar, who recorded a history that at the time of the date of injury on 7 August 2018, Mr Gandhi had been suffering back pain "on and off" for six to eight months. Mr Baker submitted that, like Dr Rao, Dr Casikar was not given the history of Mr Gandhi's difficulties in pushing his wife's wheelchair.

[23] ARD pages 35 – 51.
[24] ARD page 51.

Dr Casikar did not think that the flexion extension study showed any excessive movement beyond the normal range, and he recommended some reorganisation of Mr Gandhi's workplace together with a regular supervised gym program. Mr Baker submitted that I would prefer Dr Casikar's opinion that there was no indication for a major 360 – degree fusion in the face of a normal neurological examination and a grade 1 congenital spondylolisthesis.

78. Mr Baker also referred me to Dr Casikar's second report of 25 February 2020 which also did not support the proposed surgery. Dr Casikar's recommendation was that Mr Gandhi be referred for treatment with a Pain Specialist due to the emotional factors and the degenerative state of his lumbar spine. Mr Baker referred to papers mentioned by Dr Casikar that demonstrated that, contrary to the paper referred to by Dr Rao, the outcome of spinal fusion in a workers compensation setting tended to be extremely poor.

79. Mr Baker submitted that Dr Abraszko's evidence was unreliable because her diagnosis of an injury to the L5 – S1 disc was incorrect. He submitted that the anterolisthesis was pre-existing, and minimal in view of the extension and flexion x-ray results of 6 August 2018. Mr Baker further submitted that I would have some doubt about Dr Abraszko's evidence because she was not told about Mr Gandhi's disabled wife, and that he had always had symptomatology in the low back.

80. Mr Baker also submitted that there was a significant inconsistency between the prognosis given by Dr Abraszko and that of Dr Rao. Dr Rao suggested that Mr Gandhi would be back to normal as a result of the surgery, and would be able to work his pre-injury duties within weeks of the surgery without any need for further medication. Dr Abraszko however thought that he would always have a degree of back pain, regardless of the surgery.

Mr Stanton

81. Mr Stanton referred to the medical treatment Mr Gandhi has undergone. Mr Gandhi had undergone injections on 20 June 2019, and Mr Stanton submitted these included the pars defect as well as the facet joints themselves.

82. Mr Stanton submitted, as I understood him, that the wheelchair argument by Mr Baker was something of a red herring. The wheelchair in the domestic environment was electric, and it was only when Mr Gandhi had to take his wife anywhere that he had to push the wheelchair. The evidence showed that this was an infrequent activity whereas the employment activity was strenuous indeed. I would accept Mr Gandhi's evidence that the work he was required to do at the time that his symptoms became serious was intensive and repetitive. There was no evidence to contradict Mr Gandhi's assertion that he was doing the work of three people at the time because the store was shorthanded. Mr Stanton submitted that I would accept that it was the extra work Mr Gandhi was required to do that caused him to see Dr Shetty, and that the history regarding the occasional flareup of low back pain whilst pushing the wheelchair was no more than an incidental background matter.

83. Mr Stanton conceded that the report of Dr Abraszko was not perfect, but could be accepted as being within a fair climate. Mr Stanton referred to Mr Gandhi's description of his pain as becoming "intolerable" by August 2018 following the weeks and months he was allocated to the dairy department in March 2018. That Dr Abraszko mistook the history as indicating that the pain was sudden and severe in August 2018 was not inconsistent in the context of the histories given over all. It was neither here nor there, I understood Mr Stanton to say, that Mr Gandhi had been experiencing some symptoms prior to August 2018, as he had been able to work notwithstanding them.

84. The history taken by Dr Casikar, who took a history of six to eight months back pain which was manageable until around 7 August 2018 when it became intense, supported this approach.

85. Mr Stanton submitted that the relevant question was whether the need for surgery resulted from the injury. The nature of the injury Dr Rao determined was the pars defect and spondylolisthesis. Mr Stanton submitted that the object of the surgery was to stabilise the spondylolisthesis and dynamic instability caused thereby. There was no suggestion in the evidence, Mr Stanton submitted, that the surgery was inappropriate to address these two difficulties.

86. Mr Gandhi, who was only 43, had a highly functional back notwithstanding his congenital pathology, but the work he described had caused it to become intolerable and to collapse through overwork, Mr Stanton asserted. Although Mr Gandhi expressed the hope that he could return to his pre-injury duties, and although Dr Rao was somewhat enthusiastic in his prognosis to the same effect, Mr Stanton submitted that Dr Abraszko certainly was sanguine about the prognosis when she stated that Mr Gandhi would always have a degree of back pain, even with the surgery.

87. Mr Stanton submitted that the usual modalities of treatment had already been attempted. Mr Gandhi outlined them in his statement and they consisted of painkillers, light duties, the referral to Dr Rao for management, Tens treatment, anti-inflammatory medication, physiotherapy, sports exercise and steroid injections. Notwithstanding this treatment the evidence showed that Mr Gandhi was continuing to deteriorate. The evidence from the general practitioners, who had the day-to-day management of Mr Gandhi's case only strengthened the argument for surgery.

88. Mr Stanton submitted that the report of Dr Asim was a good commentary and encapsulated, perhaps more clearly than others, the history that led to this application. Mr Stanton conceded that Dr Rao was somewhat optimistic in his prognostication but submitted that I would be satisfied nonetheless that the proposed surgery would alleviate his symptoms.

89. Mr Stanton submitted that the diagnosis was that Mr Gandhi had aggravated his underlying constitutional pathology, and that the aggravation will not cease. With the exception of Dr Casikar the other medical practitioners were all of the view that the proposed surgery would improve Mr Gandhi's situation and at least make it better than it was. Dr Casikar's opinion could be dismissed because the Conservative management which he espoused had been tried already, as had been most fully described by Dr Asim.

Mr Baker in response

90. Mr Baker replied that there was no argument that Mr Gandhi was his wife's carer, on his own evidence, working in that capacity four hours per day on weekdays. The report of the GP Dr Assem had to be viewed in the light of the date upon which it was written, 26 November 2019 bearing in mind that Mr Gandhi first consulted Dr Asim on 14 March 2019.

91. Mr Baker submitted that the report of Dr Abraszko could not be seen as supporting Mr Gandhi, as her opinion was based upon an assumption that he had suffered a fracture injury on 22 August 2018. It could not be assumed, had Dr Abraszko taken the correct history, that she would have supported the proposed surgery because of a minor constitutional spondylolisthesis.

92. Mr Baker emphasised that Mr Gandhi was only 43 years old. He submitted that the surgery could not be undone and it was not reasonably necessary to remove a disc that was still patent. Mr Baker submitted that there was no evidence of a disc prolapse and that I would accept Dr Casikar's opinion that there was no neurological involvement.

93. Accordingly, Mr Baker submitted the course suggested by Dr Casikar of ongoing exercise, sports physio, and referral to a pain specialist were still alternative treatments that were open to Mr Gandhi, and which had not proven unsuccessful. Mr Baker relied on Dr Casikar's observation that there were involved in Mr Gandhi's case emotional factors which in turn raised the suggestion that there was a psychological aspect of the case which had not been fully addressed.

Discussion

94. Section 60 of the 1987 Act provides relevantly:

> "(1) If, as a result of an injury received by a worker, it is reasonably necessary that-
>
> (a) any medical or related treatment (other than domestic assistance) be given….
>
> (5) The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute may be referred by the Registrar for assessment by an approved medical specialist under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act."

95. Mr Baker's submissions were directed at a hypothesis that the need for surgery resulted from an unrelated injury, namely Mr Gandhi's degenerative condition being made symptomatic when he was pushing his wife's wheelchair.

96. The caution that must be applied to the use of clinical notes is well recognised. In *Winter v New South Wales Police Force* [2010] NSWWCCPD 121 DP Roche said at [183]:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34]–[36])."
>
> 37.The authorities (including *Mason*) do not preclude the use of such evidence in the fact finding process, nor do they provide that such evidence should not be relied on, in the absence of evidence from the author of the clinical notes. The authorities require the use of caution by a fact finder, including having regard to the circumstances in which such notes are brought into existence."

97. There was no challenge to Mr Gandhi's description of the nature of the work he was required to do as a night filler, which was repetitive and involved considerable bending and twisting in the process of lifting and carrying the dairy produce. Neither was there any challenge to his evidence that in the months leading up to August 2018 Mr Gandhi's workload increased as 2 - 3 fellow workers were on leave.

98. Although there was no mention the work contribution to the onset of his back symptoms in Dr Shetty's notes on both 7 August 2018 and 16 August 2018, Dr Bandara noted a complaint on 22 August 2018. Mr Gandhi said in his statement that he did mention to Dr Shetty that his job was a physical job, as well as the requirement that he push his wife's wheelchair.

99. I note also that Dr Shetty referred Mr Gandhi to Dr Asim because Dr Shetty did not do workers compensation matters. It is apparent from the entry in Dr Shetty's note of 16 August 2018 once the CT results were at hand that she may not have regarded Mr Gandhi's complaint is being significant, as she used the expression "only lumbosacral back pain."

100. Another reason to exercise caution is that although the three certificates Dr Shetty issued were not in the approved WorkCover form, they nonetheless certified that Mr Gandhi was only fit for light duties. It follows that Dr Shetty regarded Mr Gandhi's back complaints as sufficiently serious to warrant an alteration to his capacity at work.

101. I accordingly approach Mr Baker's submission with some care, and am not satisfied that it would be safe to rely on Dr Shetty's notes to discredit Mr Gandhi's evidence.

102. Mr Baker also submitted that the expert evidence upon which Mr Gandhi relied was deficient. In the case of Dr Abraszko, he argued that the assumption on which she based her opinion - that Mr Gandhi experienced a sudden and severe low back pain – was incorrect. However Dr Abraszko also noted that Mr Gandhi started to experience pain in the lower back whilst performing his employment duties, and I accordingly accept that the history she obtained was within a fair climate.

103. Mr Baker also argued that Dr Abraszko's opinion had little weight because she failed to take a history regarding Mr Gandhi's disabled wife, noting only that he lived in the unit with his son. The inference I was accordingly asked to draw was that Mr Gandhi may have deliberately omitted the existence of his wife so that he did not have to mention that he had to push her wheelchair.

104. I do not agree, with respect. The failure by Dr Abraszko to record that aspect of the history is not of any moment, as her opinion was based on the assumption that it was Mr Gandhi's employment duties that had caused him to suffer such pain that he needed to cease work. This assumption was common ground, and, as already indicated, I do not regard the wheelchair history as being as significant as the respondent contended.

105. I also accept that the flexion extension x-ray, although showing only 2.7mm on flexion nonetheless demonstrated a dynamic instability. Whether it was significant or not is by the way. The pathology found on imaging was not the subject of any controversy and it was common ground in the medical evidence that Mr Gandhi has pathology in his lumbosacral spine in the form of an anterolisthesis (or spondylolisthesis) and pars defect. Dr Abraszko was criticised for diagnosing an injury to the L5/S1 disc as a result of the subject injury, but I accept on the evidence that the work Mr Gandhi was doing did indeed injure that disc by aggravating the underlying constitutional pathology. In this regard I accept the opinion of Dr Casikar that the nature of Mr Gandhi's employment produced an aggravation of pre-existing degenerative disease. I also accept the opinion of Dr Casikar that the contribution from the nature of his employment was "very significant," as he described it in his first report of 16 April 2019.

106. I have some difficulty in accepting Dr Casikar's altered opinion in his second report of 25 February 2020 that Mr Gandhi's employment was not the main contributing factor. Firstly, injury has not been raised by the respondent as a defence, and secondly Dr Casikar made no attempt to explain the inconsistency. Although he said that the aggravation would have ceased by about six weeks, Dr Casikar's opinion of 16 April 2019 was written some eight months after the injury.

107. Dr Casikar did not take a history in his first report of Mr Gandhi's domestic situation, and once he had been given the circumstances of Mrs Gandhi's condition, he then identified "significant emotional factors" in Mr Gandhi's presentation and concluded that this had made Mr Gandhi a pain focused personality. I found Dr Casikar's logic somewhat difficult to follow.

108. Counsel referred me to the well- known case of *Diab v NRMA Ltd*[25] in which DP Roche from [88] set out the following principles applicable to the question of whether a proposed treatment was reasonably necessary:

> "88. In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> (a) the appropriateness of the particular treatment;
>
> (b) the availability of alternative treatment, and its potential effectiveness;
>
> (c) the cost of the treatment;
>
> (d) the actual or potential effectiveness of the treatment, and
>
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
>
> 89. With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts."

109. As to the appropriateness of the recommended treatment, I was not assisted by the reference by Dr Casikar to articles as to the effectiveness of spinal fusion surgery in workers compensation cases. Each case must be considered on its merits, and whilst there may be unsuccessful surgical treatment of this nature, I am not convinced that such outcomes are limited to the workers compensation sphere.

110. Equally, the paper relied on by Dr Rao has the shortcomings that were quite properly included by Dr Rao in the extract he provided.

111. I am satisfied that the recommended surgical procedure of an L5/S1 anterior interbody fusion with pedicle screw fixation and decompression is appropriate to a person with an intractable lumbosacral problem. It has been recommended by Dr Abraszko and by Dr Rao. Indeed, not even Dr Casikar argued against that proposition. His argument was that such a procedure within the workers compensation setting was statistically unlikely to produce a good outcome, and that the nature of the pathology in Mr Gandhi's case did not lend itself to this major surgery.

112. The alternative treatment available to a person suffering an intractable back condition and its effectiveness has been well described within the evidence. Mr Gandhi has undergone cortisone injections, physiotherapy, opioid analgesia, and sports physiotherapy. In his report of 16 April 2019 Dr Casikar recommended a supervised gym program and home-based exercises, and Dr Rao himself supported a further trial of conservative management by physiotherapy on 7 May 2019.[26]

[25] [2014] NSWWCCPD 72 (*Diab*).
[26] ARD page 24.

113. A convenient summary of alternative treatments was given by Dr Asim on 26 November 2019, some four months following the initial request for surgery by Dr Rao. She noted that the alternative treatments mentioned above did not result in any improvement in Mr Gandhi's condition, and in fact that he was deteriorating. I regard Dr Asim's report as having considerable weight, as she was Mr Gandhi's GP from 14 March 2019 and was familiar with his continuing circumstances.

114. No submissions were made as to the cost of the proposed treatment.

115. In considering the effectiveness of the treatment, varying opinions were given. Dr Casikar was extremely pessimistic as to whether there would be a successful outcome, and indeed expressed the view that it was inappropriate in a person as young as Mr Gandhi, who is only in his early 40s. Dr Rao, on the other hand, expressed the view that, as I understood him, a person as young as Mr Gandhi stood a better chance of having a successful outcome. Dr Casikar's pessimism was accordingly matched by Dr Rao's optimism.

116. It must be borne in mind that Dr Rao has an interest in supporting his application, and I was not assisted by his enthusiastic advocacy. His comments in his report of "17 September 2019 Amended 11 February 2020" that he had presented Mr Gandhi's case to a meeting of experts, that taxpayers money was being wasted, and that further conservative management was a "ridiculous" proposition, did not engender a feeling that his opinion was objective or dispassionate. I would also observe that his prognosis following surgery for Mr Gandhi of a return to normalcy and full duties was also somewhat hopeful.

117. Dr Abraszko's opinion I found to be the soundest when she said that the surgery may allow Mr Gandhi to return to full-time permanently modified duties and that, even with the surgery, the prognosis was guarded. She observed that Mr Gandhi would always have a degree of back pain.

118. On one view, Mr Gandhi has already achieved a level of stability within Dr Abraszko's prognosis without any surgery. He is working on modified duties and he certainly continues to have back pain. The question, as discussed by DP Roche regarding the effectiveness of the proposed treatment, especially concerning surgery, must take into account the possibility that there may be a poor outcome. Such an outcome does not necessarily mean that the treatment was not reasonably necessary and a decision as to its effectiveness is accordingly not determinative. Each case must turn on its own facts.

119. Dr Abraszko stated that the proposed treatment is accepted within the medical profession, and Dr Rao's articles certainly show that acceptance. The criticisms contained in the material that Dr Rao supplied did not suggest that the surgery was not accepted by experts. Dr Casikar also appeared to accept that spinal fusion is an appropriate form of treatment, but that it was not appropriate in workers compensation cases, a proposition I have already dealt with.

120. This has not been an easy case to determine, and I think the answer lies in the dicta of Burke CCJ in *Rose v Health Commission (NSW)*[27] as cited by DP Roche in *Diab* at [76]:

> "3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
>
> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker."

[27] [1986] NSW CC 2; (1986) 2 NSW CCR 32.

121. Mr Gandhi has taken advice as to the wisdom of adopting a recommendation as to treatment which by its very nature carries with it significant risk. It also carries with it a period of extreme pain and discomfort when recovering from what is in the final analysis a serious surgical intervention. He believes that his situation will be alleviated by it, and the evidence although made somewhat equivocal by the matters to which I have referred, does not suggest that there will be an unsuccessful outcome. There is accordingly a possibility that his back condition will be alleviated.

122. Accordingly, on balance, I find the proposed surgery to be reasonably necessary and the respondent will accordingly pay for the cost of and incidental to the recommendation contained in the report of Dr Rao dated 8 July 2019, that is to say and L5/S1 anterior lumbar interbody fusion (Stage 1) and an L5/S1 Pedicle screw fixation and decompression (Stage 2).