

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3200/20
Applicant: Kulwinder Kaur
Respondent: Challenger Hospitality Pty Ltd
Date of Determination: 7 September 2020
Citation: [2020] NSWCC 304

The Commission determines:

1. Leave is granted to amend the name of the respondent to Challenger Hospitality Pty Ltd.
2. The applicant suffered an injury to her lumbar spine and right lower extremity (hip) as a result of the nature and conditions of her employment with the respondent with a deemed date of injury of 30 April 2018.
3. The injuries referred to in (2) above are remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to determine the degree of permanent impairment arising from the following:
 - Date of injury: 30 April 2018 (deemed)
 - Body systems referred: Lumbar spine, right lower extremity
 - Method of assessment: Whole person impairment.
4. The documents to be referred to the AMS to assist with their determination are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) Application to Resolve a Dispute and attachments;
 - (c) Reply and attachments; and
 - (d) Applicant's Application to admit late documents dated 12 August 2020.
5. Award for the respondent on the claim for cervical spine injury.

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.

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



STATEMENT OF REASONS

BACKGROUND

1. The applicant commenced employment with the respondent as a commercial cleaner in October 2017. In the course of her employment, she worked cleaning hotels including lifting and carrying vacuum cleaners across various floors and carrying out the normal duties associated with that role. There is no issue those duties were occasionally heavy and often repetitive and physical in nature.
2. The applicant alleges that as a result of the nature and conditions of her employment, she sustained injury to her lumbar spine, right lower extremity and cervical spine. She brings a claim for permanent impairment compensation with respect to those body parts, with a deemed date of injury of 30 April 2018.
3. On 28 April 2020, the respondent issued s 78 notice in which it accepted liability in relation to the lumbar spine injury but denied the claims with respect to the cervical spine and right lower extremity. In so doing, the respondent alleged that the applicant did not suffer an injury in or arising out of her employment (s4 of the *Workers Compensation Act 1987* (the 1987 Act)) and that if she did so, her employment was not a substantial contributing factor to those injuries (s 9A of the 1987 Act).

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain to be determined:
 - (a) Whether the applicant suffered a workplace injury to her right lower extremity; and
 - (b) Whether the applicant suffered a workplace injury to her cervical spine.

PROCEDURE BEFORE THE COMMISSION

5. The matter was listed for conciliation/arbitration hearing before me on 13 August 2020. On that occasion, the parties used their best endeavours to attempt to resolve the matter, however, they were unable to do so. Accordingly, the matter proceeded to arbitration hearing.
6. At the hearing, Mr B Loukas of counsel instructed by Ms N Pawlikowski appeared with the assistance of an interpreter for the applicant and Mr S Harris, solicitor, instructed by Mr G Foster appeared for the respondent.

EVIDENCE

Documentary evidence

7. The documents in evidence before the Commission consisted of the following:
 - (a) Application to Resolve a Dispute (the Application) and attachments;
 - (b) Reply and attachments; and
 - (c) The applicant's Application to Admit Late Documents (AALD) dated 12 August 2020 and attachments.
8. I note the respondent filed an AALD on 29 July 2020, however, that document was objected to and not pressed at the hearing. Accordingly, it was not entered into evidence nor taken into consideration.

Oral evidence

9. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Injury and contributing factor

10. "Injury" is defined in s 4 of the 1987 Act as follows:

"In this Act: injury means

- (a) Personal injury arising out of or in the course of employment,
- (b) Includes a "disease injury", which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
 - (ii) The aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease..."

11. The applicant's case in relation to both her right lower extremity and cervical spine was presented on the basis that her employment with the respondent was the main contributing factor to an aggravation to underlying conditions in both body parts. She contended that despite the presence of pre-existing conditions in both body parts, she had previously been able to continue with employment over many years.
12. As noted in cases such as *Castro v State Transit Authority (NSW)* [2000] NSWCC 12, what is required to constitute "injury" is a "sudden or identifiable pathological change." As such, a temporary physiological change in the body's functioning, without pathological change, does not constitute injury.
13. Nevertheless, an applicant is able to rely on injury despite the existence of a pre-existing disease, as is specifically noted in s 4(b) of the 1987 Act, and which was explained in *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 (*Zickar*). In that case, the worker suffered brain damage due to a rupture, at work, of a congenital aneurysm. Even though the congenital condition could be characterised as a non-work-related disease, the worker succeeded in the High Court on the basis that the rupture itself could be described as an injury.
14. Notwithstanding the respondent's contention in the s 78 notice that employment was not a substantial contributing factor to any injury, the applicant having framed her case as an aggravation of a pre-existing disease process means she must demonstrate her employment was the *main* contributing factor to any aggravation or exacerbation of that disease.
15. In *Kelly v Western Institute NSW TAFE Commission* [2010] NSWCCPD 71 (*Kelly*) at [66], Deputy President Roche said:

"An aggravation or exacerbation of a disease occurs where the experience of the disease by the patient is increased or intensified by an increase or intensifying of the symptoms (*Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626)."

16. The question of “main contributing factor” in claims involving a disease process was also considered by Arbitrator Harris in *Ariton Mitic v Rail Corporation of NSW* (Matter number 8497/13, 8 April 2014). In considering the terms of s 4(b)(ii), the Arbitrator said:

“The opening words of the amended s 4(b)(ii) relate to the aggravation, acceleration, exacerbation or deterioration ‘in the course of employment of any disease’. In my view, those opening words therefore direct attention to the work-related component of the ‘aggravation, acceleration, exacerbation or deterioration’. The following words of cause (ii) then state ‘but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease’. The concluding words of cause (ii) requires an examination of whether the employment was the main contributing factor ‘to the aggravation, acceleration, exacerbation or deterioration of that disease’ and not to the overall pathology or the overall disease process...

In my view, the amendment to s 4(b)(ii) does not require the applicant to establish that the employment must be the main contributing factor to the overall disease process or pathology,... but simply that the employment must be the main contributing factor to the injury, that is, to the aggravation, acceleration, exacerbation or deterioration of such disease.”

17. Arbitrator Rimmer adopted this approach in *Mylonas v The Star Pty Ltd* [2014] NSWCC 174 at [151]-[166], as did Arbitrator Edwards in *Egan v Woolworths Limited* [2014] NSWCC 281 at [60]-[82].
18. In *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 (*Semlitch*), the High Court found that an exacerbation of a disease takes place where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual injured and the effect of the disease process upon them, rather than being concerned with the underlying mechanism (per Kitto J). In the same matter, Windeyer J said (at 637) that the question posed by an aggravation is “whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient”, and as such “the answer depends upon whether for the sufferer the consequences of [their] affliction have become more serious”.
19. The Commission and its predecessor the Compensation Court of New South Wales has consistently adopted the reasoning in *Semlitch*. For example, in *Cant v Catholic Schools Office* [2000] NSWCC 37, Burke CCJ said:
- “The thrust of these comments is that irrespective of whether the pathology has been accelerated there is a relevant aggravation or exacerbation of the disease if the symptoms and restrictions emanating from it have increased and become more serious to the injured worker.” (at [17]).
20. It can therefore be said that the proper test is whether the aggravation has impacted the individual concerned. It is not necessary for the particular disease process to be made worse (see for example *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond* [2006] NSWCCPD 132).

Injury to the right lower extremity

21. For the following reasons, I am satisfied the applicant suffered a work-related aggravation to the underlying disease process in her right lower extremity (hip) and as such sustained an injury to that body part.

22. The applicant completed an injury report form shortly after the incident. In that form, the applicant complained of right lower extremity and back problems having taken place on the deemed date of injury. Those complaints were corroborated by her supervisor, to whom the applicant reported her problems on the date of injury. The applicant presented to her general practitioner the day after the deemed date of injury. An entry by her general practitioner on that date states:

“Actions:

Diagnostic imaging requested: CT–pelvis, spine–lumbar,

RT hip–lower back pain ++

RT hip pain ++

Very painful and difficult to move

RT hip dysplasia”.

23. From that date, the applicant continued to consult her general practitioner in relation to low back and right hip issues. She did so over the course of a number of visits throughout 2018. On 18 October 2018, she was diagnosed with a labral tear in her right hip, while radiological investigations conducted in the latter part of that year also confirmed the right hip dysplasia.

24. On 11 May 2018, the applicant was referred to the Concord Hospital Neurosurgery clinic in relation to her lower back and right leg symptoms. Meanwhile, on 26 July 2018, her treating orthopaedic surgeon Dr Diwan provided a report to her general practitioner in which he referred to pathological problems in the applicant’s right hip.

25. The applicant’s independent medical examiner, Dr Lai, in his report dated 29 October 2019 referred to the MRI of the applicant’s right hip taken in July 2018. That scan showed a labral tear with a paralabral cyst together with degenerative changes.

26. The applicant’s treating neurosurgeon, Associate Prof Steel, provided a report to her treating general practitioner on 23 January 2020 in which he again referred to degenerative right hip osteoarthritis together with bone marrow oedema. In fairness to Associate Prof Steel, his observation of the applicant’s right hip was based on an MRI performed on 15 November 2019, some 18 months after the injury in issue.

27. What is apparent, is that as early as 2 May 2018, the applicant had a CT scan of her right hip. In my opinion, that is strongly indicative of the applicant complaining of problems in that region at that time, and given the nature and conditions of her employment, with her having suffered a work-related aggravation to previously asymptomatic changes in that body system.

28. As Mr Loukas noted, there is no issue the applicant suffered pre-existing degenerative changes in her right hip (and indeed in her cervical spine). The documentation and evidence reveal the applicant making contemporaneous complaints to her medical practitioners surrounding her right hip from the time she ceased working with the respondent.

29. The respondent’s IME, Dr Breit, provided a report dated 8 April 2020 at [194] of the Reply. In the report, Dr Breit said:

“There is nothing to indicate that the right hip was injured, the changes are constitutional and on the basis of today’s assessment one cannot indicate any impairment of the hip whether there is any deduction. There is evidence of pre-existing disease in the hip and in the lower back.”

30. With respect, that opinion is of no benefit to the respondent. The fact of pre-existing degenerative change in the applicant’s right hip is not in issue. The question is whether the nature and conditions of her employment with the respondent have caused *an aggravation or exacerbation* of that underlying condition. Dr Breit’s report does not address this question. In light of contemporaneous complaint and the findings on radiological examination as recent

as May 2018 which demonstrated symptomatic pathological change in the applicant's right hip over a background of her being able to carry out often heavy work without complaint regarding that body system, I have no difficulty in finding on the balance of probabilities that she suffered a work-related aggravation of her underlying degenerative condition owing to the nature and conditions of her employment with the respondent. That work was, on her own uncontested evidence, periodically heavy and physically demanding.

Injury to the cervical spine

31. The applicant's alleged injury to the cervical spine has a markedly different clinical background to that of her right hip and lumbar spine.
32. When the applicant presented to her general practitioner following the injury at issue, she made no specific mention of any symptoms in her cervical spine. Indeed, when her general practitioner referred the applicant to Concord Hospital on 11 May 2018, he noted a history of cervical spine issues between 2014 and 2018.
33. The applicant submitted that her presentation to treating orthopaedic surgeon Dr Diwan on 13 June 2018 complaining of cervicothoracic pain was evidence of complaint consistent with an aggravation to her neck condition due to the nature and conditions of her employment. I note, however, that whilst Dr Diwan listed cervicothoracic pain as a presenting complaint, he took the following history regarding the cervical symptoms:

"Kulwinder, who is now 46 years old has had symptoms for quite some time, dating back to 2011. She has been working as a room attendant for quite some time and the heavy nature of her work has led to repeated small injuries causing her on-going symptoms. Six weeks ago, she developed a significant amount of right-sided leg pain for which she has come in today.

She has complained of right groin pain dating back to her initial injuries.

She rates her symptoms at 3/10 in the lower back and states there is disturbance of sleep. There is a lot of limitation of numerous activities. Medically she is fine."
(my emphasis)
34. Dr Diwan then referred to the investigations which have been carried out and diagnosed right-sided hip dysplasia, early degeneration of the lumbar spine with disc herniation on the left side and "cervical spondylosis for further evaluation." Dr Diwan does not specifically indicate the applicant's cervical spine symptoms and pathology are linked to her employment.
35. Mr Loukas submitted the reason for fewer complaints surrounding the applicant's neck post-accident was that her lumbar spine and groin were the primary cause of her difficulties in the immediate aftermath.
36. On balance, I do not accept that submission. As Mr Harris noted, the applicant had longstanding symptoms in her neck, which required radiological investigation more than a decade earlier and from time to time up to the point of alleged injury, and indeed after. It is one thing for an applicant to suffer from symptoms, it is quite another for her to prove causation. Neither Dr Millard, Dr Steel nor Dr Waller attribute any cervical spine symptoms to the nature and conditions of the applicant's employment, to the extent they mention those symptoms at all.
37. There is no issue the applicant had neck problems in 2004 and from time to time thereafter. Whilst there is a referral to some pre-existing neck problems and radiological investigation by Dr Diwan, he at no time makes any statement to the effect those symptoms relate to any work injury.

38. Likewise, the general practitioner referrals all refer to the applicant's back pain, and some to her right lower extremity. None refer to her cervical spine. The same can be said in relation to the applicant's certificates of incapacity presented by her general practitioner until over 18 months post alleged injury.
39. Whilst IME Dr Lai attributes the applicant's cervical spine symptoms to her employment, she does not record a history of any pre-existing problems in the cervical spine. To the contrary, the history recorded by Dr Lai is that the applicant began to experience pain in her lower neck some months after she commenced employment with the respondent. That history is contrary to the contemporaneous medical evidence which demonstrates periodic symptoms in the applicant's cervical spine for more than a decade. In my view, little weight can be placed on Dr Lai's opinion regarding the cervical spine in circumstances where she does not have the benefit of an accurate pre-injury baseline of the cervical spine symptoms by which to reference the applicant's current difficulties. This is reinforced by the fact Dr Lai had access to a number of radiological investigations, however, the earliest of them dated from 2 May 2018. In other words, she did not have access to any of the earlier records relating to neck problems.
40. The applicant bears the onus of proving on the balance of probabilities that she suffered an injury as alleged. In my view, the applicant has not demonstrated on a common-sense basis a causal link between her cervical spine symptoms and the nature and conditions of her employment. Given the applicant's case is pleaded as an aggravation of a disease process, in order to establish the presence of a workplace injury she must demonstrate her employment was the main contributing factor to her cervical spine aggravation. In my view, she has not done so. Although the applicant's general practitioner provides an opinion to the effect that her cervical spine symptoms were "masked" by her lumbar and right hip problems, in my view that is not borne out by the evidence.
41. The applicant's submissions also referred to the operation of s 16 of the 1987 Act, and submitted the respondent was the last employer whose employment was a substantial contributing factor to the aggravation. I reject that submission, as I do not believe the evidence establishes on the balance of probabilities that the employment with the respondent was such a factor. For the reasons already stated, in my view the evidence establishes the presence of clearly symptomatic pre-existing pathology in the applicant's neck and does not establish her employment with the respondent was a substantial contributing factor to any cervical spine aggravation.
42. None of the applicant's treating specialists ascribe the aggravation of her neck condition to her employment with the respondent. An applicant must discharge their onus. Those surgeons include orthopaedic and neurosurgeons. Likewise, the clinical material makes no mention of neck problems relatable to the applicant's employment.
43. To the contrary, when one examines the referrals by her GP, the history disclosed is of cervical disc prolapse in 2014 (Reply 373). All of Dr Milad's WorkCover Medical Certificates refer only to the lower back and right leg issues. Dr Preston, treating rheumatologist at the pain clinic records only complaints relating to the applicant's lumbar spine and leg. There is also no mention of any cervical issues in the patient induction form of Associate Professor Steel nor by Dr Waller. Although the latter is a hip and leg specialist, the absence of complaint or referral for cervical issues to all of these specialists in my view supports a finding that there was no work-related aggravation to the applicant's cervical spine.
44. Although there is one referral for a scan of the cervical spine in June 2018 and a report from Dr Diwan referring to cervical spondylosis, nothing in that report links any neck problems to the applicant's employment. Absent such a link being established against a background of longstanding cervical spine issues, in my view the preponderance of the medical evidence does not support the applicant's claim and she has not discharged the onus of proof in relation to the alleged workplace cervical spine aggravation.

45. Accordingly, there will be an award for the respondent on the claim for cervical spine injury.

SUMMARY

46. For the above reasons, the Commission will make the findings and orders set out at page 1 of the Certificate of Determination.