

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4812/19
Applicant: Clifford Thomas Corton
Respondent: Nariment Pty Limited t/as The Oakes Bakery
Date of Determination: 6 January 2020
Citation: [2020] NSWCC 3

The Commission determines:

1. The applicant suffered a consequential condition by way of substantial weight gain as a result of an accepted injury to his thoracic spine which took place in the course of his employment with the respondent on 6 January 2006.
2. The lap sleeve gastrectomy and bariatric surgery proposed by Dr C Jameson is reasonably necessary as a consequence of the consequential condition referred to in (1) above.
3. The respondent is to pay the costs of and incidental to the surgery referred to in (2) above.
4. The Form 7 Application for Assessment by an Approved Medical Specialist bearing matter number 4814/19 is dismissed.

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.

A MacLeod

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



STATEMENT OF REASONS

BACKGROUND

1. These proceedings are an amalgam of two claims. The first is for future bariatric lap band surgery, which is opposed. The second is an application for assessment by an Approved Medical Specialist (AMS) to determine whether the applicant's level of whole person impairment is greater than 20%.
2. There is no issue the applicant suffered a serious injury to his thoracic spine while working for the respondent. Likewise, it is agreed that if the applicant is successful in his claim for the cost of the future surgery, the section 39 application in proceedings number 4814/19 will be dismissed, as the degree of whole person impairment arising from the applicant's injury will not yet be fully ascertainable.
3. The applicant claims the surgery is reasonably necessary as a result of massive weight gain which he says was consequential upon his back injury as it led to severe pain and lack of activity on his part.
4. The respondent opposes the surgery on two bases. Firstly, it denies the applicant's weight gain is consequent upon his work injury, and secondly it says the surgery is not reasonably necessary in any event.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Is the applicant's weight gain consequent upon his accepted work injury of 6 January 2006?
 - (b) Is the proposed surgery reasonably necessary?
6. I note the claim for future hiatus hernia repair surgery was discontinued at the hearing.
7. As noted, it is agreed if the applicant is unsuccessful on the surgery claim, the matter will be remitted to the Registrar for referral to an AMS to determine whether the applicant's level of whole person impairment is greater than 20%.

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a hearing on 11 December 2019. 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.
9. At the hearing, Mr J Callaway of counsel appeared for the applicant and Mr F Doak of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

10. The following documents were in evidence and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents;
 - (c) the applicant's Application to Admit Late Documents (AALD) dated 1 November 2019;
 - (d) applicant's second AALD dated 26 November 2019 and attached documents, and
 - (e) two radiological reports dated 10 January 2006 and 1 December 2011 respectively, admitted without objection and collectively marked Exhibit 1.

Oral evidence

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

FINDINGS AND REASONS

Issue 1 – is the applicant's weight gain a consequence of his work injury?

12. There is no doubt the applicant has gained a large amount of weight since his injury. The parties disagree as to the precise amount of weight gained, however, it appears at least to be in the vicinity of 90 kg.
13. The respondent submitted that contrary to the applicant's assertions, his weight at the date of injury was significantly greater than the 100-110 kg stated by him. Mr Doak submitted the clinical picture demonstrates the applicant was much heavier than he has indicated at the date of injury, and as a result his condition with regards to weight gain is one related to pre-morbid obesity rather than being consequent upon the back injury.
14. I do not accept that submission. Even on the respondent's best case, the applicant has gained between 80-90 kg since the injury. The clinical records reveal that from time to time the applicant has been weighed by his treating general practitioner (GP) Dr McCroary. From approximately 2008 to 2018, the records reveal the applicant's weight has increased from approximately 155 kg to greater than 240 kg.
15. I note the applicant's evidence that since his injury he had led an increasingly sedentary life-style. I accept, applying a common-sense approach to the question of consequential weight gain as required by the decision in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*), that the reduction in the applicant's activity since his back injury has led to his weight gain.
16. In so deciding, I have noted the line of authority which clearly establishes the applicant bears the onus of proving a consequential condition and must therefore show his weight gain has resulted from the accepted thoracic spine injury (see *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWCCPD 8 (*Kumar*), *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWCCPD 23 (*Brennan*) and *Moon v Conmah Pty Ltd* [2009] NSWCCPD 134 (*Moon*). In my view, the lay and medical evidence clearly demonstrates the applicant's weight gain to be a consequential condition.

17. In making that finding, I have also had regard to the views of Dr Vickery, Psychiatrist Independent Medical Examiner (IME) for the respondent. Dr Vickery noted the history of weight gain over the period of time both before and after the injury at issue. Mr Doak submitted that in light of Dr Vickery's findings, the applicant's history of an active pre-injury lifestyle should be approached with caution.
18. Whilst I accept the applicant had issues with his weight before the injury and had consulted his GP regarding weight loss measures before 2006, the irrefutable evidence is since the workplace injury, the applicant's weight has risen enormously. That increase corresponds with lack of activity on his part since the January 2006 injury.
19. On balance, the medical evidence supports the proposition that the applicant's weight gain is consequential upon the back injury. The applicant's GP Dr McCroary alludes to the potential link between post-injury sedentary lifestyle and weight gain, admitting it is a possibility.
20. The applicant's treating pain specialist, Dr Wallace goes further. In his February 2018 report found at page 37 of the Reply, Dr Wallace notes:

“Since his injury in 2006 Clifford has gained weight from approximately 100 kilograms to whatever he weighs now, I would estimate 180 kilograms. I think this is a very large factor in his pain and I think Clifford will be unable to achieve significant pain reduction and significant functional improvement without a major decrease in his weight.

I think weight loss is the most important factor in allowing Clifford to increase his physical function, to reduce his pain and to maximise his chances of ever being able to achieve a return to work.”

That opinion is reinforced by Dr Wallace's report dated 12 June 2009, in which Dr Wallace says:

“I am confident that his pain is at very least exacerbated and most likely caused by his excess weight at 233 kilograms. If his weight was to be reduced by 100 kilograms, I imagine his pain would be far better, if not completely gone.”

21. I place a high degree of weight on Dr Wallace's opinion, coming as it does from a treating specialist providing contemporaneous reports to the applicant's GP.
22. The respondent relied on Dr Vickery's comment that it is difficult to determine the extent of the applicant's physical problems given his inability to undergo MRI scans owing to his large size. I note; however, the applicant underwent such a scan on 28 February 2007, which confirms he was not too large for an MRI scan at that stage, namely 13 months post-injury.
23. In this matter, the preponderance of the medical and lay evidence supports the applicant's weight gain being consequential upon his injury. I prefer the evidence of the applicant and Drs McCroary, McKechnie and Wallace. Their views accord with IME Dr Endrey-Walder who also says the applicant's obesity contributes to his pain. In my opinion, Dr Vickery does not provide compelling reasons in the face of overwhelming treating doctor opinions, sufficient to overturn those views. Accordingly, I am of the view the applicant has discharged the onus of proof on the balance of probabilities that his weight gain is consequential to his back injury.

Is the proposed surgery reasonably necessary?

24. I note the opinion of Dr Zarrouk, bariatric surgeon who refused to undertake surgery similar to that proposed by Dr Jameson, as her view was the applicant needed to lose weight to 190 kg before she would consider sleeve gastrectomy and gastric bypass.

25. Mr Doak relied upon this opinion as evidence that the proposed operation is not appropriate nor reasonably necessary.
26. In my view, the applicant has overcome this difficulty by provision of the report of Dr Jameson, who has indicated she will carry out the surgery at the applicant's current weight.
27. Both parties accept the applicant bears the onus of proving that the proposed surgery is reasonably necessary. The relevant test for establishing reasonable necessity is set out in the decision of Roach DP in *Diab v NRMA Limited* [2014] NSWCCPD 72. In that matter, the Deputy President sided with approval the test articulated by his Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233. Thus, the treatment will be considered reasonably necessary if it is preferable that the worker should have the treatment than it be forborne.
28. In *Rose v Health Commission (NSW)* [1986] 2 NSWCCR 2 (*Rose*), Burke J listed a number of factors to take into account when determining whether proposed treatment is reasonably necessary. Dealing with each of those indicia in turn:
- (a) *Appropriateness of the particular treatment;***
29. There appears little medical evidence to contradict the proposition that the proposed surgery is appropriate as a mechanism for generating weight loss and in turn reducing the level of the applicant's pain. Although Dr Zarrouk indicated the applicant needed to lose weight before the surgery could be performed, Dr Jameson who is the specialist intending to carry out the procedure plainly believes that is not the case. Given Dr Jameson is a treating surgeon who is prepared to take on the liability associated with carrying out the procedure, I place a high degree of weight on her opinion and prefer it to that of Dr Zarrouk.
- (b) *The availability of alternative treatment and its potential effectiveness***
30. The clinical records and medical reports in this matter are replete with evidence that conservative measures aimed at the applicant losing weight have been unsuccessful. Accordingly, I find alternative treatments to the gastric sleeve surgery are of limited if any potential effectiveness for him.
- (c) *The cost of the treatment***
31. Mr Doak quite appropriately conceded the cost of the treatment in this matter is not prohibitive and accordingly, I find the applicant has satisfied the onus of proving that the treatment is not cost prohibitive.
- (d) *The actual or potential effectiveness of the treatment***
32. Although certain clinicians indicate the applicant will need to undergo lifestyle changes in order to maximise weight loss, there is a clear picture within the medical evidence in this case that the proposed surgery is an effective means of weight loss. The preponderance of the medical evidence also indicates the applicant will greatly benefit from the weight loss brought about by the proposed surgery in that it is more likely than not to lead to a significant reduction in his pain.
- (e) *The acceptance by medical experts of the treatment as being appropriate and likely to be effective***

33. The applicant's treating pain specialist Dr Wallace, Dr Zarrouk and Dr Jameson are all of the view the surgery will be effective. Although Dr Zarrouk indicates the applicant should lose weight before undergoing the surgery, she does not state the procedure itself will be ineffective once it has been undertaken. Moreover, Dr Jameson's view is the procedure will be effective, and that view accords with the applicant's GP Dr McCroary and the treating pain specialist Dr Wallace. Those views are also consistent with those of Dr Endrey-Walder, and I prefer them to that of Dr Vickery.
34. Accordingly, I find the preponderance of the medical evidence supports a finding the proposed surgery is reasonably necessary, and order the respondent to pay the costs of and associated with it.

SUMMARY

35. In my view the evidence overwhelmingly discloses the applicant's weight loss is consequent upon his accepted thoracic spine injury. Medical evidence also discloses it is more likely than not he will derive benefit by way of reduction in pain if he were to lose weight. He has tried other modalities and now seeks a proven method for weight loss which, if implemented, is more likely than not to provide him with relief.
36. Accordingly, I find the applicant should not be denied the opportunity of proposed surgery, which is reasonably necessary as a result of the consequential weight gain arising from the thoracic spine injury suffered on 6 January 2006.