WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **111/20**
Applicant: **Mirmujahed Ali**
Respondent: **Linksmart Pty Limited**
Date of Determination: **31 March 2020**
Citation: **[2020] NSWWCC 100**

The Commission determines:

1. The applicant has sustained a consequential condition to his upper digestive tract as a result of injury to his left index finger on 5 August 2018 in the course of his employment with the respondent.

2. The applicant has sustained some symptoms of chronic regional pain syndrome as a result of injury to his left index finger on 5 August 2018 in the course of his employment with the respondent.

3. Award for the respondent in relation to the allegation of the development of a consequential cervical spine condition as a result of the injury to his left index finger on 5 August 2018 in the course of his employment with the respondent.

4. Pursuant to section 66(1) of the *Workers Compensation Act 1987* the applicant is not entitled to have his permanent impairment claim in relation to the left upper extremity/ chronic regional pain syndrome, scarring, and upper digestive tract referred to an Approved Medical Specialist for assessment.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Mirmujahed Ali was employed as a machine operator for Link Smart Pty Ltd, the respondent, as a machine operator. On 5 August 2018 he was using a dicing machine and suffered an amputation of the tip of his left index finger. On 6 August 2018 he underwent surgery at Auburn Hospital. In these proceedings Mr Ali seeks lump sum compensation in relation to the left index finger and the consequential surgical scarring. He also claims as a consequence of his left index finger injury he has sustained conditions in his cervical spine, chronic regional pain syndrome and upper gastrointestinal tract.

2. Leave was granted to the respondent under section 298(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to dispute these alleged consequential conditions.

PROCEDURE BEFORE THE COMMISSION

3. 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.

4. At the conciliation conference/arbitration hearing on 3 March 2020 Mr Ali was present and represented by Mr Bill Carney, counsel, instructed by Mr Kris Narsimulu. The respondent was represented by Mr Fraser Doak, counsel.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute (the ARD) and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents dated 26 February 2020; and

    (d) Application to Admit Late Documents dated 2 March 2020.

Oral Evidence

6. There was no oral evidence. Both counsel made oral submissions which were sound recorded. A copy of the recording is available to the parties. A written transcript (T) has been made available from the sound recording.

FINDINGS AND REASONS

Mr Ali's statement

7. Mr Ali's statement is extremely brief and provides no assistance to determine if there is a causal connection between the alleged consequential conditions and the injury to the left index finger. He does say he has pain and restriction of movement in his cervical spine, but it would have been helpful if he gave an account about how such symptoms came on. Mr Ali mentions he was prescribed Cephalexiam, Oxycodone and Paracetamol by his surgeon, Dr Kubistky. Mr Ali describes the procedure as a surgical wash out, debridement and terminalisation of the left index. Mr Ali does not refer to any gastrointestinal symptoms or of chronic regional pain syndrome symptoms.

8. It is necessary to examine closely the treating and medico-legal reports in order to determine the issues in dispute.

Auburn Hospital records

9. It is recorded that Mr Ali sliced the tip off of his distal phalanx of his left index finger. He was taken to theatre and underwent a terminalisation of the distal index finger. His admission was uncomplicated. He was discharged with supportive bandages and his left hand elevated in a gallows sling. His pain was controlled with Oxycodone and Paracetamol and he was given Cephalexin.

General practitioner's records

10. Dr Azhar Khan examined Mr Ali on 23 August 2018 and recorded that he is right hand dominant. At that time his left arm was in a sling. It was noted that Mr Ali had not returned to the Hospital for his follow-up appointment but had seen a doctor in Auburn who gave him a prescription for antibiotics and pain relief.

11. Thereafter Mr Ali saw Dr Ijaz Khan at the same practice on 29 October, 12 November, 26 November and 17 December 2018. The records from these consultations are brief and only refer to letters being issued about the left finger, excepting on 12 November which also refers to the cervical spine. On 12 January 2019 Mr Ali saw Dr Tran and the note just refers to the left finger and on 18 February 2019 he saw Dr Ijaz Khan and there is reference to the left index, middle and ring fingers. These notes are so brief that little can be gleaned from them.

12. However, there is more detail in the medical certificates issued by Dr Khan. On 29 October 2018 there is reference to the left index fingertip being sensitive. The skin flap was dark and discoloured and still viable. Medications had ceased three days prior. The doctor recommended an orthopaedic and hand therapy follow up. It is noted "digit splint dispensed with usual advice- 2x splints and associated consumbles [sic]".

13. In the certificate dated 12 November 2018 Dr Ijaz Khan records that the flap had improved since the last review. Reference is made to the cervicothoracic spine with "discomfort on palpation over the left levator scap & cervicothoracic spine midline to T10 with some release in levator scap muscle stretches". There was no sign of radiculopathy. Dr Khan opined that it is "likely to be sling induced mechanical cervicothoracic discomfort with levator scap symptoms". The doctor recommended physiotherapy for the cervicothoracic discomfort. Analgesia was to be as required[1].

[11] ARD p58.

14. In the certificate dated 17 December 2018[2], Dr Khan has added a diagnosis of:

> "2. left middle finger concurrent reflex sympathetic germinal matrix stunning with discontinuous left middle finger nail plate
> 3. Left ring finger concurrent reflex sympathetic germinal matrix stunning with discontinuous left ring finger nail plate
> 4. Mechanical neck pain"

15. Dr Khan on this certificate refers to a case conference with Mr Ali and Melissa from Balance Rehab where he refers to an orthopaedic review being approved and rehab was requested to assist with the future orthopaedic management of upper limb index, middle and ring fingers, and cervical spine.

16. In the certificate dated 18 February 2019 there is a reference to neck discomfort and to reflex concurrent sympathetic germinal matrix stunning with discontinuous left middle and ring finger nail plates[3].

17. In the certificate of 4 March 2019, it is noted that Mr Ali reported disturbed sleep and inability to sleep due to neck and headache. There is also reference to ongoing cervical spine mechanical discomfort. Similar comments are made about the fingers as noted previously.

18. Dr Ijaz Khan has provided the insurer with a report dated 22 October 2019[4]. He diagnoses Mr Ali suffers from an adjustment disorder with mixed symptoms of anxiety, depressed mood and poor sleep. The doctor repeats the diagnoses listed above.

Rehabilitation reports

19. Balance Rehab reported to the insurer on 27 November 2018[5]. Their history is that Mr Ali took pain medication during the initial phase and wore a sling on his left arm initially. It is noted:

> "Mr Ali also reported back pain symptoms which started in July 2018 due to bending constantly at work which then subsided following the use of Voltaren gel and hot water. He mentioned the back pain returned following his left index finger injury.
>
> Mr Ali advised overall his left index finger is improving and he continued to wear a splint and bandage on his finger. He also mentioned he continues to have his wound dressings changed every 2 weeks. Mr Ali confirmed he was certified with nil capacity following the injury and had not yet returned to work."

20. The symptoms Mr Ali complained of to Balance Rehab are reported to include shooting pain and hypersensitivity in his left index finger as well as pain in his mid-back region. It is noted that Dr Khan advised the diagnosis for the back was mechanical back pain due to wearing of the sling. The cervical spine is not mentioned in this report.

21. Dynamic Rehab provided a report dated 10 March 2019 noting that Mr Ali had improved, and they sought to provide more occupational therapy. The report does not deal with any CRPS condition or the cervical spine.

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[2] ARD p71.
[3] ARD p82.
[4] Reply p7.
[5] Reply p10.

Dr Herald

22. Dr Herald is the treating orthopaedic surgeon of Mr Ali. On 21 January 2019, he reported to Dr Khan.[6] He refers to Mr Ali having neck pain. On examination Dr Herald found "In regard to his neck however he has tenderness over his cervical spine and a positive Spurling's test". The doctor did not discuss the cause of the neck pain. Dr Herald refers to Mr Ali having stiffness of the joints in the left index finger and some features of chronic regional pain syndrome affecting the hand itself. On the referral Dr Herald wrote "?whiplash type injury."[7]

23. On 13 February 2019, an x-ray and MRI of the cervical spine was performed at the request of Dr Herald. The clinical detail on the report is "?Whiplash type injury"[8]. No particular pathology was identified.

24. Dr Herald reported to Dr Khan on 4 March 2019[9] noting that Mr Ali continued to have pain in his neck, head and left hand. He recorded that Endep did not seem to help Mr Ali so he prescribed Lyrica. He stated that Mr Ali seemed very depressed. Dr Herald concluded that Mr Ali does not have any organic causes for his pain based upon the MRI scans, presumably he is referring to the MRI of the cervical spine. Dr Herald wrote a referral to a pain specialist dated 4 March 2019 in which he refers to Mr Ali having neurogenic pain to his head, neck and left hand[10].

Dr Teychenne

25. Dr Teychenne is a consultant neurologist. He has provided medico-legal reports to Mr Ali's solicitors dated 4 June 2019[11] and 4 August 2019. Dr Teychenne seems to use the term left second finger and left index finger interchangeably. This is evident from his history in his first report because he refers to Mr Ali losing the terminal phalanx of the left second finger and at hospital having a terminalisation of the left index finger.

26. Dr Teychenne adds that subsequent to the injury Mr Ali developed features consistent with Complex Regional Pain Syndrome. He refers to stiffness and swelling to the fingers, marked allodynia when touching the left second finger over the dorsal aspect of the finger and hypersensitivity over the stump. Dr Teychenne said he noted Mr Ali had smooth skin over the second to fourth fingers and the left second and third fingers were cold to touch. He said there was red discolouration of the palm and fingers of the left hand.

27. In relation to the cervical spine, Dr Teychenne took the history that Mr Ali noted pain over the left paracervical region and that he had this pain for five months. This would date to about January 2019. The doctor states that Mr Ali said he related this pain to wearing a sling to support the left hand. Mr Ali said the pain was a stabbing pain at the intensity of 8.5-10/10 and a 30 degree decrease in the rotation of his head to the left. He said Mr Ali stated that the pain would extend from the right paracervical region into the left and right occiput and that the pain was heavy over the back of the head.

28. Dr Teychenne also took a history of lumbar pain if he stood for 20 minutes and this was noticed after he had started work in April 2018. He also had pain in both feet. Dr Teychenne also took a history that if Mr Ali walks for eight to ten minutes he has a stabbing pain over the central vertebral column of T10 to T12.

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[6] ARD p111.
[7] ARD p201.
[8] ARD p107.
[9] ARD p 209.
[10] ARD p106.
[11] ARD p12.

29. Dr Teychenne found that Mr Ali "was slow in left finger dexterity testing associated with CRPS. He was slow in left finger tap associated with CRPS. He was slow in left rapid alternating movements and left grip count secondary to CRPS".

30. In his second report Dr Teychenne summarises the various reports sent to him. Dr Teychenne says he also reviewed Mr Ali's statement. He then essentially repeats the contents of his first report.

31. Dr Teychenne refers to the State Insurance Regulatory Authority 4th Edition 1st April 2016. This is a reference to the NSW Compensation Guidelines for the Evaluation of Permanent Impairment. Those Guidelines at page 80 state that for Complex Regional Pain Syndrome Type 1 (CRPS1) not only does the diagnosis have to be confirmed by the criteria in Table 17.1 on page 81, the diagnosis has to be present for at least one year and verified by more than one examining physician and other possible diagnoses have to be excluded. Dr Teychenne does not address these requirements and that may be due to the fact that in his separate report assessing the permanent impairment Dr Teychenne says he considered that Mr Ali has Complex Regional Pain Syndrome Type 2 (CRPS2). He says this is related to an injury to the left index finger digital nerve which he suspects was amputated along with the amputation of the distal portion of the left index finger terminal phalanx.

32. He lists the following signs:

- Hyperaesthesiae and allodynia.
- He had temperature asymmetry and skin colour changes.
- He had sweating decrease with dry skin. He also had swelling (oedema).
- He had decreased range of motion in the left index finger and trophic changes with decreased hair growth over the proximal aspect and dorsal aspect of the left 2nd finger.

33. Dr Teychenne assesses 4% whole person impairment (WPI) under Table 17-1 and then under the various tables in chapter 16 of AMA 5 Guides that deal with the upper extremity he assesses 4%WPI. He only gives 4%WPI in his total column. I queried whether this was correct, however Mr Ali's counsel confirmed that a total of 4%WPI was claimed for the left upper extremity/CRPS.

34. In his second report Dr Teychenne states that he considers the injury arose out of or in the course of employment and that the employment was a substantial contributing factor to his injuries. However, he does not give any reasoning as to why the cervical spine was injured, except to note Mr Ali related it to using a sling for the left-hand injury.

35. In a further report dated 4 August 2019 Dr Teychenne amends his permanent impairment assessment report to add 1%WPI for scarring making the total he assessed at 19%WPI[12].

36. He also issued a report dated 2 September 2019 in which he repeats the history taken from Mr Ali and he adds "He didn't specifically complain of neck pain at that time but at the time of my examination I noted that a medical certificate dated the 29Th October 2018 had indicated a mechanical neck pain." Dr Teychenne noted the request for an x-ray of the cervical spine had query whiplash injury and he says, "I presume that this was sought [sic] to have occurred at the time that he lacerated the left 2nd finger". Dr Teychenne states:

> "I found evidence consistent with a C7 radiculopathy and I noted rotation of his neck and head to the right caused pain over the left paracervical region. He had asymmetric loss of range of motion. He had two potential causes for the neck pain,

[12] Application to Admit Late Documents dated 26/2/2020 pp1-3

one is consequential to the amputation injury on the 5th August 2018 that is whether he sustained a jerking whiplash type injury at the time of the amputation. The other potential possibility is that his neck pain and evidence of a left C7 radiculopathy is derived from the nature and condition of his employment that is the heavy lifting.[13]"

Dr Berry

37. Dr Berry is a general surgeon who has been engaged by Mr Ali's solicitors and he has provided two medico-legal reports dated 11 September 2019. He has a history that Mr Ali left Auburn Hospital with a feeling of pain in the neck and down his left arm and a degree of back pain. Mr Ali informed the doctor that he has to keep his left index finger in a splint.

38. In terms of the gastro-intestinal system, Dr Berry states that Mr Ali began to develop a feeling of fullness in the upper abdomen approximately a month after his injury. He then developed constipation and if he ate anything spicy he would vomit. His constipation has eased with the use of Metamucil. Mr Ali told Dr Berry that he avoids pain medications as much as possible.

39. Dr Berry noted there were no special investigations of Mr Ali's gastrointestinal system.

40. Dr Berry opines that Mr Ali has had gastric upset as a result of medication intake which involved the use of Endone and Oxycontin. He said his medications have resulted in gastric irritation. The doctor also refers to significant epigastric tenderness on palpation of the abdomen. In his separate permanent impairment report Dr Berry assesses Mr Ali to have 2%WPI for upper digestive tract impairment due to symptoms of reflux, bloating and occasional vomiting and the clinically defined epigastric tenderness[14].

Dr Rimmer

41. Dr Stephen Rimmer is an orthopaedic surgeon who has provided medico-legal reports for the respondent dated 7 November 2019[15] and 2 March 2020[16]. In his first report Dr Rimmer notes Mr Ali was referred to Dr Herald in relation to cervical and lumbar pain. Dr Rimmer says when he asked Mr Ali specifically about the development of symptoms at these sites he was extremely vague, and that Dr Rimmer could not establish a relationship with that of his left index finger injury.

42. Dr Rimmer stated that Mr Ali was not taking any form of oral analgesics or anti-inflammatories.

43. Dr Rimmer's examination revealed the left index finger was non-tender to firm palpation and that he had pain free range of motion in the joints of that finger. He said examination of the hand and wrist were unremarkable. In relation to the cervical spine examination, Dr Rimmer said it was normal. Dr Rimmer found no injury to the cervical spine and quoted Dr Herald's comment about the MRI scan not revealing any pathology.

44. Dr Rimmer provided his second report to the insurer after reviewing the material in the ARD and Reply. He answered a series of questions posed to him. He advised that he did not consider that Mr Ali had suffered a consequential condition in his cervical spine because Mr Ali was extremely vague as to the causes and also because on examination the cervical spine was normal.

[13] Application to admit late documents dated 26/2/2020 p5.
[14] ARD p24.
[15] Reply p1.
[16] Application to admit late documents dated 2/3/2020 p1.

45. He also did not find injury to the left middle or ring fingers and said Mr Ali did not complain of symptoms in these digits. In relation to CRPS, Dr Rimmer said Mr Ali did not meet the criteria for such a diagnosis as there was no hypersensitivity, no discolouration and no sweating.

46. Ironically, Dr Rimmer, while offering no opinion regarding Dr Teychenne's assessment, found a higher impairment in relation to the left index finger under Tables 16-2 and 16-3, being 5%WPI.

Legal principles

47. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[17] wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):

> "Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

48. His Honour said at 463–464:

> "The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus*. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

49. Deputy President Roche in *Kumar v Royal Comfort Bedding Pty Ltd* [18]is authority for the proposition that *Kooragang* is the test to determine if a consequential condition arises from a work injury.

[17] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*
[18] [2012] NSWWCCPD 8

Chronic regional pain syndrome

50. Mr Ali's counsel acknowledged the lack of detail in Mr Ali's statement. In relation to the CRPS he relies on Dr Teychenne's opinion and submits that the doctor reported on the CRPS in quite a detailed fashion. Counsel drew attention to the findings of stiffness, allodynia, hypersensitivity, discolouration and coldness in the second and third fingers. Mr Ali's counsel also referred to findings of Dr Khan, such as that in the middle and ring fingers there was the presence of concurrent reflex sympathetic germinal matrix. Counsel also drew attention to, and relied on, Dr Herald's finding of left finger stiffness and hypersensitivity and altered sensation in the rest of the fingers of the left hand and the reference to some features of chronic regional pain syndrome. Counsel submitted that this was at a time of four months post injury.

51. The respondent submitted that Dr Rimmer's opinion should be preferred because he found no signs of CRPS. The respondent was also critical about the lack of detail in Mr Ali's statement.

52. The condition of CRPS can wax and wane and therefore the absence of symptoms when Dr Rimmer examined Mr Ali does not necessarily mean that he did not develop some symptoms of the condition as a result of the left index injury. Whether he has sufficient signs now present to meet the requirements in AMA 5 and the 4th Edition of the NSW Compensation Guidelines for the Evaluation of Permanent Impairment is a matter for an Approved Medical Specialist (AMS) to determine. I consider it relevant that the treating specialist, Dr Herald, noted some features of the condition and I find that is sufficient for an Arbitrator to make a referral of the condition to an AMS, particularly when coupled with the findings of Dr Teychenne. It also should be borne in mind that both Drs Teychenne and Herald examined Mr Ali some months before Dr Rimmer and that could account for the difference in presentations.

Cervical spine

53. In relation to the cervical spine Mr Ali's counsel confirmed at the outset of the arbitration hearing that his client was making the claim on the basis it was a consequential condition as a result of the injury to the left index finger. However, even though counsel referred to Mr Ali's statement, it does not refer to anything more than he had an injury to his cervical spine. Counsel relied on the reference in Dr Teychenne's report that Mr Ali believed the cervical pain came on due to him having his left arm in a sling. Counsel also notes that Dr Khan in the medical certificate dated 12 November 2018 states cervicothoracic mechanical pain secondary to sling usage.

54. However, as submitted by the respondent, Dr Teychenne does not actually opine that this was the cause of the cervical symptoms. Dr Teychenne in his last report clearly identifies two causes, neither of which is the case being put forward by Mr Ali in these proceedings. Dr Teychenne refers to the nature and conditions of his work or to an injury to the cervical spine at the time of the injury to the left index finger. In relation to the latter he relies on the notation in Dr Herald's referral to the radiologist "?whiplash type injury."

55. The respondent also relies on Dr Rimmer's opinion that Mr Ali did not have a cervical injury, including a consequential condition. Mr Ali's counsel was critical of Dr Rimmer because he submitted the doctor has based his opinion solely on what Mr Ali told him at the time of his examination, and that he was vague about the cervical spine. Mr Ali's counsel submits that the opinion of Dr Rimmer should not be accepted because he did not comment about the assessment by Dr Teychenne. Given that Dr Teychenne has not opined that the cervical spine symptoms he found were causally related to the index finger injury, I do not accept that Dr Rimmer's failure to consider Dr Teychenne's findings to be significant.

56. Mr Ali's counsel also criticises Dr Rimmer for failing to consider the references to the cervical spine by Dr Herald and Dr Khan. However, Dr Herald does not offer a view on the cause of the cervical complaints. He seems dismissive of the same having considered the MRI scan, he says there is no organic cause for the pain. This finding is consistent with Dr Rimmer's examination of Mr Ali's cervical spine.

57. Even if I were to discount Dr Rimmer's opinion, I am not convinced that Mr Ali has discharged his onus of proving a consequential condition in the cervical spine as a result of the left index finger injury by virtue of wearing a sling on his left arm. There is no expert opinion to support such a thesis. Given Dr Teychenne, a neurologist specialist, puts forward two other explanations for the cervical complaints, I find to be satisfied about the sling thesis a doctor needed to consider all of these possible explanations and advise why the wearing of a sling, as opposed to the other scenarios, caused the cervical spine to become symptomatic. We do not even know from Mr Ali's statement how the cervical pain came on or even how long he wore the sling. He does not mention the sling at all.

58. In Dr Khan's notes there is reference on 23 August 2018 that Mr Ali had his arm in a sling but thereafter there is no further reference to a sling, although his clinical progress notes are very brief. In the progress clinical notes there is reference to a digit splint. It is not until the medical certificate of 29 November 2018 does Dr Khan add to the diagnosis mechanical pain secondary to sling usage in the cervicothoracic region. He does not include this diagnosis on the next certificate and thereafter he diagnoses mechanical neck pain.

59. Dr Teychenne knew that the medical certificate had referred to mechanical neck pain because he refers to the same, and yet in his final conclusion he does not put forward the opinion that the neck pain was caused by the wearing of the sling. I find that I cannot accept Dr Khan's reference to the same without, as I have said, him considering the other theses put forward by Dr Teychenne. Also, in my view, Dr Khan's diagnosis is just a bald assertion as he does not provide details of relevant facts, such as how long the sling was worn.

60. I find that I cannot assess the causal chain as discussed in *Kooragang* on the basis of the evidence before the Commission. Mr Ali has the onus of proof. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [19] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

61. I find on the state of the evidence and the issues with the same, discussed above, applying *Nguyen*, Mr Ali has not discharged his onus of proof. I am not satisfied on the balance of probabilities that he has established that the symptoms he complained of in the cervical spine were caused by the wearing of the sling after the injury to his left index finger on 5 August 2018.

62. I find an award for the respondent in relation to the allegation of a consequential cervical spine condition.

[19] [2008] NSWCA 246

Digestive system

63. Again, there is a shortcoming in Mr Ali's case because his statement lacks any detail regarding gastric symptoms. However, Dr Berry's opinion does provide some details about medication usage and the effect on Mr Ali's upper digestive system. That opinion has not been contradicted by an opinion from the respondent's expert. Even though the evidence is scant, I consider on the balance of probabilities there is sufficient evidence to find that Mr Ali has suffered a consequential condition in his upper digestive tract as a result of medications he took as a result of the left index finger injury on 5 August 2018. Whether or not he has an assessible permanent impairment is a matter for an AMS.

Section 66(1) threshold

64. However, Mr Ali's counsel conceded that if he did not establish a consequential condition was sustained to the cervical spine, then the permanent impairment claims for the left upper extremity/ CRPS, scarring and digestive system only combined to 7%WPI and as the claim does not reach the threshold in section 66(1) of the *Workers Compensation Act 1987* (the 1987 Act) there could be no referral made to an AMS. Therefore, I find that Mr Ali is not entitled to receive compensation under section 66 of the 1987 Act.