

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1221/20
Applicant: ALI BARKAT
Respondent: FIRST CHOICE TILING
Date of Determination: 13 May 2020
Citation: [2020] NSWCC 150

The Commission determines:

1. The claim for section 66 of the *Workers Compensation Act 1987* lump sum compensation is remitted to the Registrar for placement on the medical assessment pending list for referral to an Approved Medical Specialist for injury on 18 December 2018 to assess whole person impairment as follows:
 - (a) Cervical spine;
 - (b) Lumbar spine;
 - (c) Right upper extremity;
 - (d) Scarring (TEMSKI).
2. The documents annexed to the Application to Resolve a Dispute and the Reply are before the Approved Medical Specialist; there are no additional documents.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Barkat (applicant) was born in Pakistan in 1973. From 2003 to 2012, he was a government employee working in the role of administrative assistant. He arrived in Australia as an asylum seeker in 2012 and as a “boat person” was kept in captivity for two years. He then held a temporary protection visa until mid-2018 when his visa restrictions were lifted, and he was able to seek employment. He began with the respondent on 9 July 2018 full-time as a labourer. On 18 December 2018, Mr Barkat was cleaning balconies when the ladder on which he was working slipped and he fell approximately three metres, landing on the ladder and the tiled floor, suffering multiple fractures.
2. This Application to Resolve a Dispute (Application) is in respect of a claim pursuant to section 66 of the *Workers Compensation Act 1987* (1987 Act) lump sum compensation for injuries to the right arm, cervical spine, lumbar spine, and scarring in the fall on 18 December 2018. The insurer accepted liability for the injury to the right arm, but denied liability for claims of injury to the cervical spine and lumbar spine in a notice dated 30 January 2020 issued under s 78 of the *Workers Compensation and Work Injury Management Act 1998* (1998 Act).

ISSUES FOR DETERMINATION

3. The following issues remain in dispute:
 - (a) Did Mr Barkat suffer injury to the cervical spine; and the lumbar spine, in the fall on 18 December 2018 (s 4(a) 1987 Act)?
 - (b) If so, was the employment a substantial contributing factor to those injuries (s 9A 1987 Act)?
 - (a) Should the claims for lump sum compensation for the cervical spine and lumbar spine be remitted to the Registrar for referral to an Approved Medical Specialist (s 66 of the 1987 Act)?

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a conciliation conference and arbitration hearing on 20 April 2020. 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

Oral evidence

5. There was no oral evidence adduced.

Documentary evidence

6. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) Application to Resolve a Dispute with annexed documents;
 - (b) Reply with annexed documents.

SUBMISSIONS

7. The representatives made oral submissions at the arbitration hearing. As they were recorded they will not be repeated here, but I have taken them into account, and they are referred to in the discussion below.

Did Mr Barkat suffer injury to the cervical spine and the lumbar spine as a result of the fall on 18 December 2018?

Evidence

8. Mr Barkat says in his statement that he fell from a ladder onto his right side onto the ladder and the tiled ground. Mr Barkat says he felt severe pain, particularly in the right arm but also in the neck and back. He suffered substantial injuries in the fall, which is not surprising given the distance he fell to the ground. He says he had substantial bruising to his body. The traumatic injuries were summarised by Dr Endrey-Walder in his report of 28 November 2019 as: comminuted segmental fracture of the right humerus with marked displacement; fracture right scapula; fracture of the right 7th and 8th ribs, right-sided apical (trace) pneumothorax; fracture right distal radius.
9. Mr Barkat remained in St George Hospital from admission immediately after the fall until his discharge on 31 December 2018. The arm was surgically treated on 27 December 2018 by Dr Adie and the arm put in a cast. He says he was experiencing stabbing headaches and pain in the back and neck, with a burning sensation over both feet. He states that he told staff at the hospital about the pain and he was given medication for it. He was discharged to physiotherapy and his general practitioner and was prescribed analgesia for the pain.
10. The St George Hospital progress notes for the period of admission record, "States some neck pain", but it is not clear when that note was made and there follows mention of a CT scan report of "no cervical fractures". The hospital notes for 24 December 2018, prior to the surgery on the right arm fractures, record headaches with "stabbing pain" and, "Has had neck pain and back pain for the past day or so, with a burning sensation all over both feet". There is also a note regarding examination of the neck, "Generalised neck tenderness, but has good ROM and neck feels supple". The notes have mention of the neck on an entry for 25 December 2018, "No significant C-spine pain. CT C spine no obvious fracture. Normal range neck movements with no pain".
11. General practitioner Dr Oreb completed a medical certificate on 21 January 2019 at the first consultation after the discharge from hospital in which the injuries were noted. These included the back and neck, and there is a note for referral for an MRI for the lumbar, thoracic and cervical spine. Further certificates on 8 March and 5 April 2019 also include the back and neck among the injuries noted.
12. In his report of 3 June 2019 Dr Oreb referred to the consultation on 21 January 2019, three weeks after discharge from hospital. He lists complaints of pain at that time in the neck; back; right shoulder; right elbow; right wrist; and chest. Dr Oreb says that Mr Barkat suffered injury to the neck and back in the fall, as well as the other injuries to the right arm, ribs and lung (pneumothorax).

13. MRI results from 18 March 2019 are noted by Dr Oreb for the cervical spine a normal study with no fracture, disc protrusion or neural compression; for the lumbar spine no acute fracture, disc protrusion or neural compression; and an intact thoracic spine with normal cord signal.
14. Dr Oreb's diagnosis includes, apart from the fractures, "Post traumatic mechanical derangement of the cervical spine, thoraco lumbar spine ...".
15. Rohan Laurendet, physiotherapist, in a report dated 1 March 2019 reports to Dr Oreb on physiotherapy treatment for the "multiple right-sided fractures" suffered in the fall. The symptoms at that time are reported and concentrate on the issues with the right arm and fractured ribs. He was waking through the night and was unable to do anything with his right arm. There was some improvement as a result of treatment by that stage after nine physiotherapy sessions. There is no mention of the back or neck in that report.
16. Later, in the report of 16 August 2019, the physiotherapist records the history that Mr Barkat "continually reports severe pain in the right wrist, shoulder and lower back, and states that he has difficulty sleeping at night due to pain." There is no mention of the neck.
17. The body diagram in the physiotherapy notes from 17 January 2019 is marked by the physiotherapist to show the areas on the right side of the body injured in the fall, but there are ticks at the rear of the neck and the left rib cage area.
18. Dr Endrey-Walder in his report of 28 November 2019 took the history of the fall and the traumatic injuries. He notes that Dr Oreb recorded in the clinical notes on 11 February 2019 Mr Barkat's complaints of neck and back pain. He notes the normal MRI studies of these areas of March 2019 that were ordered as a result of the complaints of pain.
19. Dr Endrey-Walder records the symptoms as reported by Mr Barkat at that time of constant pain on the right side of the neck with a pulling sensation and pain when turning his head; and soreness and stiffness in the lower back with difficulty sometimes in straightening his back, and pain in the bottom of his feet.
20. Dr Endrey-Walder noted on examination of the lower back, "both visible and palpable muscle spasm on both sides of the lumbar spine." He also noted much restricted hyperextension and pain in the attempt. His opinion is that Mr Barkat "suffered multiple fractures and soft tissue injuries in the accident described." He goes on to opine, "The extent of the damage is not surprising given that he fell from the height of about three metres onto the ladder and the tiled ground." The restrictions due to the injuries are also noted in relation to future work capacity, "ongoing difficulties as it relates to his dominant upper limb, the neck and especially lower back pain ...".
21. Dr Wallace for the respondent in his report of 28 January 2020 takes a similar history to that of Dr Endrey-Walder of the fall and its aftermath. He notes the current symptoms as including aching pain from L1 to L5 radiating to the lower limbs to the feet and to the sole of the left foot with paraesthesia; no leg weakness, but intermittent stiffness at the lower spine. He notes the normal MRI study of the cervical spine, and of the lumbar spine evidence of pars defects at L5, but no evidence of disc protrusion.
22. Dr Wallace gives his opinion under "Causation",

"There is no objective medical evidence that he suffered any work-related injuries at his cervical spine or lumbar spine as a result of the work incident on 18 December 2018. He complains of no current symptoms at his cervical spine.

He has no evidence of ongoing disability at his lumbar spine on clinical examination at the time of review on 21 January 2020."

23. Dr Wallace says,

“He did not complain of any lumbar spinal symptoms at the time of his admission to St George Hospital in December 2018 or on multiple consultations with his Orthopaedic Surgeon, Dr Adie in the period December 2018 to July 2019.

There is no objective medical evidence that Mr Barkat has suffered any lumbar spinal injury as a result of the index work incident.”

24. Dr Wallace also says the employment with the respondent is not a substantial contributing factor to “any current cervical spinal or lumbar spinal conditions.”

Discussion

25. The respondent refers to *North Coast Area Health Service v Felstead* [2011] NSWCCPD 51 as authority for establishing injury, and submits the applicant in this matter has failed to discharge the onus because there is no evidence of pathological change to satisfy this and related authorities.

26. Roche DP said in *Felstead* [at 81],

“It follows that the description of a personal injury as “a sudden identifiable pathological change” is consistent with the authorities. It suggests no more than that, to qualify as a personal injury, there must be some sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state. Such a change or disturbance may be as simple as a bruise or a soft tissue strain.”

27. Roche DP continued [at 82],

“If an event occurs, such as the rupture of an artery, that will normally qualify as a personal injury even though it is the end result of a disease process. However, if the pathological change is not identifiable or ascertainable, it will obviously be difficult, if not impossible, to establish that the worker has received a personal injury. The reference to identifiable/ascertainable is merely a legal frame of reference to give contextual meaning and sense to “personal injury”.”

28. The respondent also relies on *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 on the necessity for sufficient evidence that there has been a physiological change as a result of the employment to establish injury. Mr May’s problem was dizziness, allegedly as a result of vaccination. This is considerably different to the frank injury suffered by Mr Barkat, and much more difficult to make a connection.

29. The respondent relies in this regard on Dr Wallace, who says there is no “objective evidence” of injury to the neck and back in the fall. By this it seems he means the imaging studies, but the authorities do not suggest that imaging studies are conclusive in establishing injury. Dr Wallace does take a history from Mr Barkat of symptoms and also notes tenderness in the neck and restrictions and tenderness in the back on examination. He does also note that Mr Barkat was able to bend down and pick up his sock at the end of the examination.

30. Dr Wallace says,

“He did not complain of any lumbar spinal symptoms at the time of his admission to St George Hospital in December 2018 or on multiple consultations with his Orthopaedic Surgeon, Dr Adie in the period December 2018 to July 2019.”

31. In fact, the evidence is that there were complaints at hospital of pain in the neck and back at least by 24 December 2018 when a note referred to neck and back symptoms having been present for a day or two.
32. In my view both Dr Oreb and Dr Endrey-Walder find a sudden identifiable change in the back and neck as soft tissue injuries as a result of the fall. Because there was nothing apparent in the imaging studies does not mean there is no personal injury in those body parts. The change in pathology is identified by specific complaints of pain and clinical identification of soft tissue injuries by the medical practitioners.
33. Mr Barkat says he felt pain in his neck and back after the fall. There is a record of pain complaints in relation to the neck in the St George Hospital notes and also imaging, and complaints about both the neck and back as early as a day or two before the record on 24 December 2018.
34. Dr Oreb took the history of neck and back pain at the first consultation on 21 January 2019, after Mr Barkat's discharge from hospital. Dr Oreb was of the opinion there was injury notwithstanding the normal imaging studies.
35. Dr Endrey-Walder found restrictions in range of motion at the neck as well as tenderness, and restrictions and muscle spasm on examination of the lumbar spine.
36. The respondent submits that Dr Endrey-Walder did not give an opinion as to causation, but taking his report as a whole it is quite clear he considers the fall to be the cause of the back and neck symptoms. He reports the history of the various injuries arising in the fall and includes the back and neck.
37. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 the Court said,

“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. ... What is required is a commonsense evaluation of the causal chain.”
38. It has been indicated by the High Court since then that the “commonsense” concept does not operate at large. All the evidence must be considered, with the onus of proof on the applicant throughout.¹
39. That Dr Endrey-Walder does not explicitly state that the fall was the cause of the problems with the neck and back does not dispose of the claim. In *State Transit Authority of New South Wales v El-Achi* [2015] NSWCCPD 71 Roche DP said [at 72],

“That a doctor does not address the ultimate legal question to be decided is not fatal (*Guthrie v Spence* [2009] NSWCA 369; 78 NSWLR 225 at [194] to [199] and [203]). In the Commission, an Arbitrator must determine, having regard to *the whole of the evidence*, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.”
40. This is more apparent in a case such as this with a clear incident of injury in a serious fall. The whole context of Dr Endrey-Walder's report is of the injuries suffered in that incident. When the report overall is taken into account, there is no doubt Dr Endrey-Walder's opinion is that the symptoms at the neck and back arose in the fall. There is no other causative element realistically available on a common sense view of the evidence.

¹ *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506; *Flounders v Millar* [2007] NSWCA 238

41. The respondent also submits that there is no mention of the back or neck in Dr Adie's reports or in the first physiotherapist's report of 1 March 2019, and it was not until the 16 August 2019 report the physiotherapist reported lumbar spine complaints (with no mention of the neck). The respondent also points to the allied health recovery requests having no mention of the neck and back.
42. This is not indicative of there being no problems with the back and neck from the time of the fall given the other evidence referred to above. Dr Adie was the treating surgeon for the right arm fractures and the referral for physiotherapy was by the hospital for rehabilitation relating to the fractures. By August 2019 the complaints of back pain were reported by the physiotherapist as "continual".
43. Evidence supporting Mr Barkat's statement regarding injury to the back and neck includes the complaints recorded during the hospital admission before the right arm surgery, and the clear complaints noted by Dr Oreb at the first consultation following discharge from hospital. These complaints resulted in referral for MRI imaging, and injury to the back and neck was also noted by Dr Oreb subsequently. The back pain was noted by the physiotherapist in August 2019, although the focus of that treatment had been on the rehabilitation related to the fractures.
44. There was a delay in the right arm surgery at the hospital after admission and this was the subject of complaints by Mr Barkat because of the extreme pain he was in due to the comprehensive fractures of the right arm. Despite the focus on the right arm pain and the two fractured ribs, the symptoms from the back and neck were significant enough for complaint to be made by Mr Barkat at the hospital even before the right arm surgery.
45. The imaging did not reveal damage at the neck or back, and no "objective evidence" of injury was found by Dr Wallace, but there is evidence of injury to both areas in the contemporaneous records and in Mr Barkat's statement.
46. The sequence disclosing the causative chain is clear in this matter. The distance of the fall must first be acknowledged, as it is by Dr Endrey-Walder, who notes under "Opinion", "multiple fractures and soft-tissue injuries in the accident described." Dr Endrey-Walder makes a comment relevant to causation, "The extent of the damage is not surprising given that he fell from the height of about three metres onto the ladder and the tiled ground." His report clearly includes the back and neck among the injuries from the fall, given his discussion of Dr Oreb's notes and reports and the history he took from Mr Barkat. Dr Oreb diagnosed "Post traumatic mechanical derangement of the cervical spine, thoraco lumbar spine and right elbow". Complaints were made to Dr Oreb at the first consultation and subsequent consultations as recorded in the certificates. The symptoms have continued through to the present.
47. Dr Wallace does not address whether back and neck pain could have been the result of soft tissue injuries in the fall from three metres given the severity and extent of the more obvious fractures. He also seems unaware of the contemporaneous complaints of pain at the neck and back in the hospital notes; nor does he discuss the complaints to Dr Oreb from the first consultation after discharge from hospital. I do not accept the opinion of Dr Wallace on causation in relation to the neck and back for the above reasons.
48. On all the evidence there is a clear chain of causation of injury to the neck and back from the time of the fall on 18 December 2018 and I find Mr Barkat suffered injury to the cervical spine and lumbar spine in the course of his employment with the respondent on that date.

Substantial contributing factor

49. The parties did not seek to make submissions specifically directed at s 9A of the 1987 Act issues. Injury is the central issue of dispute. I note there are no elements in terms of s 9A(2) on the evidence that would relegate the employment to less than a substantial contributing factor to the injuries, given the nature of the incident of injury.

Conclusion

50. I find that Mr Barkat suffered injury to his cervical spine and lumbar spine in the course of his employment with the respondent on 18 December 2018. The employment was a substantial contributing factor to the injuries.

Section 66 of the 1987 Act lump sum compensation

51. It follows that the claims for lump sum compensation for the cervical spine and lumbar spine is to be remitted to the Registrar for referral to an Approved Medical Specialist together with the right upper extremity.

SUMMARY

52. The claims for s 66 of the 1987 Act lump sum compensation are to be remitted to the Registrar for referral to an Approved Medical Specialist.