

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2037/20
Applicant: Jocelyn Lesley Perry
Respondent: State of New South Wales (Central Coast Local Health District)
Date of Determination: 16 June 2020
Citation: [2020] NSWCC 201

The Commission determines:

1. An award for the respondent for the injury claimed by the applicant to the cervical spine.
2. The applicant sustained an injury to her lumbar spine and thoracic spine in the course of her employment with the respondent by way of a disease injury as provided by section 4 (b)(i) of the *Workers Compensation Act 1987* (the 1987 Act), with a deemed date of injury of 9 November 2011.
3. The assessment of impairment for the injury to the lumbar spine can be aggregated with the assessment of impairment for the injury to the thoracic spine.

The Commission orders:

1. This matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) as follows:

Date of injury: 9 November 2011 (deemed)

Body Parts: Lumbar spine; thoracic spine; upper digestive tract (consequential condition); lower digestive tract (consequential condition)

Method of Assessment: Whole Person Impairment

2. The following documents are to be forwarded to the AMS:
 - (a) Application to Resolve a Dispute with attachments;
 - (b) Reply with attachments;
 - (c) This Certificate of Determination and Statement of Reasons.
3. It is recommended that the assessment by the AMS should involve a face to face, physical examination of the applicant.

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

John Isaksen
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 ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Jocelyn Lesley Perry, commenced employment as an enrolled nurse with the respondent, Central Coast Local Health District, in 1990.
2. The applicant claims a lump sum payment for 36% permanent impairment which results from injury to the lumbar spine, thoracic spine, and cervical spine, and a consequential condition affecting her upper and lower digestive tracts by way of a disease injury with a deemed date of injury of 9 November 2011, being the date when the applicant last worked for the respondent. The applicant claims that the repetitive bending, lifting and twisting in undertaking her duties as a nurse has been the cause of these injuries.
3. The respondent admits that the applicant sustained an injury to her lumbar spine on 11 June 2009 when she bent backwards to avoid being assaulted by a patient but disputes that the applicant has sustained injury to her lumbar spine by way of a disease injury.
4. The respondent admits that the applicant sustained an injury to her thoracic spine by way of a disease injury, but this is a separate and discrete injury compared to her lumbar spine injury, and the assessments of permanent impairment for those injuries cannot be aggregated.
5. The respondent disputes that the applicant sustained an injury to her cervical spine in the course of her employment with the respondent.
6. The respondent admits that the applicant has a consequential condition affecting her upper and lower digestive tracts due to the medication she has been taking for the injury to her lumbar spine.
7. The respondent relies upon assessments of 7% permanent impairment of the lumbar spine which results from the injury on 11 June 2009; 5% permanent impairment of the thoracic spine which results from the nature and conditions of the applicant's employment; and 1% permanent impairment of the upper digestive tract and 1% permanent impairment of the lower digestive tract as a consequence of the injury to the applicant's lumbar spine.

ISSUES FOR DETERMINATION

8. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant sustained an injury to her cervical spine in the course of her employment with the respondent;
 - (b) whether the applicant sustained an injury to her lumbar spine by way of a disease injury (section 4 (b)(i) or (ii) of the *Workers Compensation Act 1987* (the 1987 Act));
 - (c) whether an assessment of any impairment for any injury to the lumbar spine can be aggregated with the assessment of any impairment for the injury to the thoracic spine and/or any injury to the cervical spine.

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conference and hearing on 11 June 2020. 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.
10. Mr Willoughby appeared for the applicant. Mr Morgan appeared for the respondent, instructed by Ms Markley.
11. The hearing was conducted by telephone in accordance with the protocols set out by the Commission as a result of the coronavirus pandemic.

EVIDENCE

Documentary evidence

12. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD)a and attached documents;
 - (b) Reply and attached documents.

Oral evidence

13. There was no application to cross-examine the applicant or to adduce oral evidence.

FINDINGS AND REASONS

Whether the applicant sustained an injury to her cervical spine in the course of her employment with the respondent

14. The applicant has provided statements dated 8 December 2011, 30 January 2017, 5 July 2018 and 9 August 2019.
15. The applicant's first statement is not signed and was prepared by a licensed private investigator, but the applicant has placed that statement into evidence and has not disputed its contents. The statement addresses the injury she sustained on 11 June 2009 and her subsequent medical treatment and activities at work with the respondent until December 2011.
16. The applicant states that between 2010 and November 2011 she had a lot of time off work due to her back pain. She states that she tore her right Achilles tendon in January 2011, and had a week off work, and that upon returning to work she suffered a further injury to her leg and had more time off work. She states that on 9 November 2011 her general practitioner, Dr Daly, gave her a Workcover certificate and that she had not returned to work since then. There is no mention in that statement of any symptoms in the applicant's neck.
17. There is no mention of any problems with the neck in a second statement made by the applicant on 30 January 2017.

18. In her third statement dated 5 July 2018, the applicant states:

“Between the injury to my back in 2009 and when I last worked in about September 2011 I did a lot of heavy work and as a consequence of my lower back injury I would alter my posture and the way I lifted putting additional strain on my upper back and neck.

Following the development of chronic symptoms in my upper back in around 2012, I reformulated my posture to protect both my upper and lower back. I understand from medical advice that I have since received that in doing so I have overloaded my neck in an unnatural way and caused similar symptoms of pain and discomfort to develop in my neck over time.

I must admit that I noticed the symptoms in my neck some years ago but they were always quite manageable and I just got on with it because they always somewhat paled in comparison to the symptoms in my upper and lower back. However, in recent years the symptoms in my neck are causing me almost as much difficulty as those symptoms in my upper and lower back.”

19. In her fourth statement dated 9 August 2019, the applicant states that it was in early 2011 that she first noticed pain in her upper back and neck. She states that the pain in her neck became severe in mid to late 2017.
20. A report from Dr Daly to QBE/TMF dated 23 November 2011, which is some two weeks after the applicant ceases employment due to ongoing upper and lower back pain, makes no reference to any symptoms or problems that the applicant was having with her neck.
21. The Workcover certificate referred to by the applicant in her first statement is not in evidence but a certificate dated 9 December 2011 refers to MRI findings of pathology in the lower thoracic and lower lumbar spine. There is no reference to any injury or symptoms to the cervical spine.
22. The applicant was referred to A/Prof Papantoniou, orthopaedic surgeon. In his first report dated 25 January 2012, A/Prof Papantoniou records the applicant presenting with bilateral lower back pain and bilateral sciatica, and also pain between the scapula. There is no mention of any symptoms complained of by the applicant in the neck.
23. There are 29 reports from A/Prof Papantoniou in evidence which span a period of treatment of the applicant from January 2012 and June 2016, but I could not locate any reference in those reports to complaints of, or treatment for, neck symptoms.
24. There is a report from Andrew Alexander, physiotherapist, dated 15 June 2012, which records that the applicant was referred for management of her lumbar spine. There is no reference to any neck symptoms in that report.
25. There is a report from Dr Russo, specialist pain medicine physician, dated 15 October 2012, which records the applicant sustaining a work related injury in 2009 when she bent backwards and experienced a sudden onset of acute low back pain. There are no complaints recorded in regard to the applicant's neck.
26. The applicant was referred to another consultant in pain medicine, Dr Prickett. In his first report dated 14 August 2013, Dr Prickett records the applicant having primary mechanical back pain and secondary protective muscle spasming up her thoracic spine and some pain radiating into the legs. There is no reference to any complaints of pain or symptoms in the applicant's neck.

27. The applicant was examined by Prof Ghabrial at the request of her solicitors on 29 July 2015 and in the report of the same date there is no reference to any injury to the neck or complaints of symptoms in the neck.
28. The first reference to any problems that the applicant was having with her neck in any medical report is found in the second report of Prof Ghabrial dated 5 April 2017 wherein he writes: "She continued with symptoms in her neck, upper and lower back with pain in the lower back radiating to the left leg." He opines that the applicant sustained injuries to her upper and lower back in the incident on 11 June 2009 and that she "developed as well neck symptoms which continued to deteriorate over the years."
29. Prof Ghabrial notes that the applicant has had no investigations regarding her neck but believes from his clinical assessment that the applicant has cervical spondylosis. He opines that the applicant's employment is considered to be the main contributing factor to her present clinical features, disabilities and impairments. He assesses 5% permanent impairment of the cervical spine.
30. In his third report dated 9 January 2019, Prof Ghabrial opines:

"... I believe that the major part of her problem is related to the nature and conditions of her employment over a period of 10 years, being involved in heavy activities, leading to the development of degenerative changes in her neck, upper back and lower back with, what appears to be, right arm radiculopathy associated with the neck and left S1 radiculopathy associated with her lower back."
31. Dr Breit, whom the applicant saw at the request of the respondent, writes in a report dated 1 November 2017 that he was told by the applicant that she had neck symptoms for the past three to five years. Dr Breit opines:

"She had however been working as an enrolled nurse for 19 years and that certainly has played a role in the origin of both the thoracic and lumbar spondylosis but not the neck. Nothing in the literature shows that loading from lifting and carrying has any effect on cervical degeneration. It is purely constitutional."
32. Mr Willoughby for the applicant makes a submission often made in this jurisdiction that the lack of reference in the medical evidence to any problems with the applicant's neck was due to her main concern being for the condition and treatment of her lumbar and thoracic spine. Mr Willoughby submits that the opinion of Prof Ghabrial should be preferred over that of Dr Breit because Prof Ghabrial has been provided with all the available evidence relevant to the condition of the applicant's neck, including a MRI scan performed in February 2018.
33. Mr Willoughby confirmed during the hearing that the applicant was not claiming that she had developed a neck condition as a consequence of the injury she sustained to her lumbar spine and thoracic spine, but that she had sustained a disease injury to her neck in the course of her employment due to the physical work she undertook as an enrolled nurse.
34. I acknowledge that the work which the applicant was required to undertake as an enrolled nurse, which included repetitive bending and lifting, was capable of causing an injury to the applicant's neck. That repetitive bending and lifting could cause stress and strain upon not only the applicant's upper and lower back but also her neck.
35. The difficulty for the applicant, however, is that there is no evidence from the medical records made available in this dispute of any complaints of neck pain or the need for treatment for pain or symptoms in the neck for at least five years after the applicant ceased employment with the respondent. Even the first record of neck symptoms in April 2017 by Prof Ghabrial notes there had been no investigations of the applicant's neck and it was Prof Ghabrial's clinical assessment that the applicant had cervical spondylosis and that the applicant's employment had been the main contributing factor to her clinical features.

36. There are no clinical notes or medical report from the applicant's general practitioner, Dr Daly, who treated the applicant until at least 2016, which can provide evidence of any complaints of neck pain. There is no reference to any neck problems in the reports of A/Prof Papantoniou who treated the applicant over four years from soon after the applicant ceased her work for the respondent. There is also no reference from two specialists in pain medicine of any complaints of neck pain or symptoms. I would agree with a submission made by Mr Morgan that one would expect a pain specialist to have a record of neck pain if that was a source of concern to the applicant.
37. I acknowledge the submission made by Mr Willoughby that for some years the applicant was focused on the pain and difficulties that she was having with her lower and upper back. However, there is not even a passing reference to any problems with the applicant's neck in the medical evidence until the applicant sees Prof Ghabrial on a second occasion in April 2017.
38. Given that I am required to make a determination on an injury that is claimed to have occurred almost nine years ago, I prefer to rely upon the medical reports and records made in the few years immediately following the applicant's cessation of work with the respondent as opposed to the applicant's own evidence that is provided some six years later, and the opinion of Prof Ghabrial, who in any event does not record any problems that the applicant was having with her neck when he initially saw her in 2015. The medical evidence for almost six years following the applicant's cessation of employment with the respondent, which contains no reference at all to any injury, symptoms or pain in the applicant's neck, means that I cannot be satisfied that the applicant did sustain an injury to her cervical spine in the course of her employment with the respondent.
39. I also consider that the applicant's own evidence on this issue is unreliable. In her statement dated 5 July 2018, the applicant states that the pain and discomfort developed in her neck in around 2012 after she had "reformulated" her posture to protect her upper and lower back. This would have been after the applicant had ceased working for the respondent in November 2011. That might well be consistent with a claim for a consequential condition affecting the cervical spine, but that is not the claim that has been brought by the applicant in this dispute.
40. In her final statement dated 9 August 2019, the applicant states that it was during early 2011 that she began to notice pain in her upper back and neck following heavy work which she undertook in the stroke ward. That is consistent with work activities being a potential cause of injury to the neck but inconsistent with her own previous statement made in July 2018.
41. This inconsistency in the applicant's own evidence adds to my opinion that it is the contemporaneous medical evidence which is the best guide to determining whether or not the applicant did sustain an injury to her cervical spine in the course of employment with the respondent. For the reasons I have already given, I am not satisfied that the applicant did sustain an injury to her cervical spine in the course of her employment with the respondent.
42. There will be an award for the respondent on the claim made by the applicant of an injury to the cervical spine.

Whether the applicant sustained an injury to her lumbar spine by way of a disease injury

43. The applicant's first statement dated 8 December 2011 addresses the injury she sustained on 11 June 2009 and her subsequent medical treatment and activities at work with the respondent until December 2011. The applicant states that she had six days off work following the injury to her lower back on 11 June 2009. She states that when she returned to work her back was still sore but she had to work to pay the bills.

44. The applicant also states:

“I consider the specific incidents I have detailed here in my statement together with the general nature and conditions of my duties as a nurse over several years have collectively caused my current back symptoms and conditions. Those duties of heavy lifting of “dead weight” patients and awkwardly handling them has caused an accelerated degeneration of my thoracic and lumbar sacral spine.”

45. In her second statement dated 30 January 2017, the applicant states:

“Between the injury to my back in 2009 and when I last worked in about September 2011 I did a lot of heavy work and as a consequence of my lower back injury I would alter my posture and the way I lifted putting additional strain on my upper back.”

46. A/Prof Papantoniou does not record any cause or reason for the applicant’s complaints of lower back pain when he initially sees her in January 2012. I also could not locate any reference to the applicant’s lower back pain being caused or contributed to by her work in the 29 reports provided by A/Prof Papantoniou to Dr Daly. However, A/Prof Papantoniou has provided a report dated 23 December 2019 wherein he opines:

“I do believe Mrs Perry’s work as an enrolled nurse is the main contributing factor to her lumbar spine pathology and therefore ongoing pain and disability.

Her work as an enrolled nurse necessarily involved repetitive lifting, bending and twisting activities. It also involved heavy lifting of patients. The long-term nature of these duties has resulted in the pathology previously identified on imaging.”

47. Prof Ghabrial in his first two reports identifies the incident on 11 June 2009 as being the cause of the injury to the applicant’s upper and lower back. It is only in his third report, which has already been referred to, that Prof Ghabrial changes his opinion to state that the incident on 11 June 2009 “played a part in her present clinical features” but the major part of her problem is related to the nature and conditions of her employment over a period of 10 years.

48. I have also referred to the opinion of Dr Breit that the applicant working as an enrolled nurse for 19 years has certainly played a role in the origin of both her thoracic and lumbar spondylosis.

49. In a further report dated 15 November 2017, Dr Breit states that the injury to the thoracic spine due to the nature and conditions of the applicant’s employment should be regarded as a separate injury to the lumbar spine sustained on 11 June 2019.

50. That the applicant had an injury to her lower back on 11 June 2019, does not preclude a finding that she also has sustained an injury to her lumbar spine by way of a disease injury if the evidence supports such a finding. It has long been recognised a condition can have multiple causes – see *Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pymont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656.

51. The applicant states that she did a lot of heavy work from the time she returned to work after the incident on 11 June 2009 until she ceased work in November 2011. She states that she had a lot of time off work due to her back pain in this period. The respondent has not provided any evidence to dispute this. Heavy lifting and repetitive bending are common requirements of a nurse. I accept the applicant's evidence in regard to this.
52. I also note although the applicant's first statement in January 2012 was prepared by a licensed private investigator, it is the applicant who volunteers, just two months after she has stopped work, that the duties of heavy lifting of patients and awkwardly handling them has caused an accelerated degeneration of her thoracic and lumbar sacral spine.
53. The criteria of a disease injury is well set out by Burke J in *Perry v Tanine Pty Ltd t/as Ermington Hotel* (1998) 16 NSWCCR 253; [1998] NSWCC 14 (*Perry*), which was in respect of a carpal tunnel injury, but which has a similar application to this injury sustained by the applicant:
- “In general it seems to me that carpal tunnel syndrome is a failure of an area of the body to cope with repeated stress imposed upon it and reacts to that stress by developing swelling, pain and loss of function as a consequence. That seems to me to be classically a disease process. Where work is the source of the relevant stress it connotes to me that the worker has received injury either by the contraction or aggravation of a disease.”
54. I consider that the best medical evidence on the question as to whether the applicant has sustained a disease injury to her lumbar spine is that provided by A/Prof Papantoniou, who has had the benefit of treating the applicant over several years since soon after she ceased work due to her increasing lower back pain. A/Prof Papantoniou does not take a history of what the applicant believes was the cause of her injury when he first sees her. There is no reference in his reports to the incident on 11 June 2009. However, having given proper consideration to the work undertaken by the applicant as a nurse, A/Prof Papantoniou considers her employment has been the main contributing factor to the injury to her lumbar spine. I accept that opinion.
55. In my view, Dr Breit also supports a finding that the applicant has sustained a disease injury to her lumbar spine when he opines the 19 years of work as a nurse “certainly has played a role in the origin of both the thoracic and lumbar spondylosis.” I agree with the submission made by Mr Willoughby that in Dr Breit's further report in November 2017 he was being directed to find only a frank injury to the lumbar spine when he is asked:
- “Could you please revise your assessment of 12% WPI to clearly identify the level of impairment that resulted from the frank injury on 11 June 2009 to the lumbar spine as separate from the level of impairment that resulted from the nature and conditions of a worker's employment to her thoracic spine.”
56. The subsequent answer given by Dr Breit does not detract from his opinion that the work undertaken by the applicant has played a role in the origin of her lumbar spondylosis.
57. When I asked Mr Willoughby as to the appropriate finding of the two alternatives for a disease injury in section 4 (b) of the 1987 Act, he preferred a finding of injury pursuant to section 4 (b)(i) of the 1987 Act, namely that the injury to the lumbar spine is a disease injury where the applicant's employment is the main contributing factor to the contracting of that disease.
58. I consider that the applicant's injury to her lumbar spine can be regarded as a disease injury pursuant to section 4 (b)(i) of the 1987 Act. A/Prof Papantoniou refers to the long term nature of the applicant's duties resulting in the pathology identified on imaging. That imaging is identified by A/Prof Papantoniou in his first report as disc desiccation at the L3/4, L4/5 and L5/S1 levels and a significant disc prolapse at the L5/S1 level. Dr Breit refers to the

applicant's work as being the "origin" of her lumbar spondylosis. A/Prof Ghabrial opines that the heavy work activities which the applicant undertook led to the development of degenerative changes in her lower back.

59. I consider that all those opinions support a finding that the applicant's employment is the main contributing factor to the contracting of a disease injury to the lumbar spine.

Whether the assessment of impairment for the injury to the lumbar spine can be aggregated with the assessment of impairment for injury to the thoracic spine

60. In *Department of Ageing, Disability and Home Care v Findlay* [2011] NSWCCPD 65 (*Findlay*) DP Roche considered the issue as to whether an injury to the cervical spine could be assessed for permanent impairment together with an injury to the lumbar spine, as both conditions resulted from the same injurious incident and said at [55]:

"While the injury to Ms Findlay's cervical spine may well be the same as the injury to the lumbar spine, I prefer to base my decision on the fact that the injuries (whether or not they resulted in the same pathology) have resulted from the same injurious incident, namely, the heavy repetitive duties Ms Findlay performed with the Department since 1997."

61. DP Roche reviewed some previous Court of Appeal decisions and then said at [58]:

"It follows from the above authorities, and from Ms Findlay's evidence, that she developed a slow deterioration of problems in her *back and neck* in performing her work tasks over time, that the aggravation injury to her cervical spine and lumbar spine has resulted from the 'same incident' under s 322 (3) of the 1998 Act, and any impairments resulting from that incident should be assessed together."

62. Consistent with what was stated in *Findlay*, I consider that the injuries that the applicant has sustained to her lumbar and thoracic spine can be regarded as having resulted from the same injurious incident, namely the repetitive lifting and bending and heavy lifting that was undertaken by the applicant in her work as a nurse. Both the applicant's evidence and the opinions of A/Prof Papantoniou, Dr Breit and Prof Ghabrial support such a finding.
63. The AMS will provide one assessment of permanent impairment for the lumbar spine and thoracic spine for a disease injury pursuant to section 4 (b)(i) of the 1987 Act, and which also includes an assessment of permanent impairment of the upper and lower digestive tracts as consequential conditions which result from that disease injury.
64. The deemed date of injury, as nominated by the applicant in the ARD and in the letter of claim for a lump sum payment pursuant to section 66 of the 1987 Act, will be 9 November 2011.
65. I agree with the submission made by Mr Willoughby that the assessment by the Approved Medical Specialist should involve a face to face, physical examination as there is a difference in the assessments made by Prof Ghabrial and Dr Breit in regard to radiculopathy from the lumbar spine injury, which would require an examination of the applicant.