

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2304/20
Applicant: Victoria Kirkman
Respondent: Westpac Banking Corporation
Date of Determination: 5 August 2020
Citation: [2020] NSWCC 266

The Commission determines:

1. The applicant suffered injury to her right wrist arising out of or in the course of her employment with the respondent over the period from October 2016 to 1 April 2018.
2. The injury is the aggravation, acceleration, exacerbation or deterioration of a disease.
3. The applicant's employment with the respondent was the main contributing factor to the aggravation, acceleration exacerbation or deterioration of a disease.
4. The surgery proposed by Dr Meads in his report dated 5 June 2018 is reasonably necessary as a result of the injury deemed to have been suffered by the applicant on 1 April 2018.
5. The respondent is to pay the costs of and incidental to such surgery.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Victoria Kirkman (the applicant/Mrs Kirkman) seeks compensation pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) for the cost of surgery to her right wrist as a result of injury on 1 April 2018 arising out of or in the course of her employment with Westpac Banking Corporation (the respondent).
2. Mrs Kirkman commenced working for the respondent in 1998. At that time she had no hand or upper limb problems, although she had a ganglion excised from the back of her right wrist in the mid nineteen seventies.
3. The applicant originally worked as a teller for the first 10 years of her employment at the respondent's Forster branch. This work required regular repetitive use of both hands, generally counting money and some computer work. During this time Mrs Kirkman had no symptoms in either upper limb.
4. The applicant then became a personal banker, which required her to work in an office and continuously on a computer, four days a week. She used the computer mouse with her right hand. The applicant is right hand dominant.
5. In about April 2018 the applicant reported pain in her right wrist. This had gradually developed over an 18 month period up until that time.
6. As a result of her symptoms, the respondent readjusted her workstation; however her right wrist condition continued at work.
7. The applicant has had no time off work and continues to work four days a week.
8. The applicant says that the pain in her right wrist occurs while she is using the mouse at work.
9. The foregoing summary of the applicant's evidence is taken from her statement dated 23 April 2020¹.
10. The applicant consulted her general practitioner, Dr R Worley, who referred her to Dr Bryce Meads, hand surgeon. Mrs Kirkman first saw Dr Meads on 22 August 20, who arranged for nerve conduction studies to be performed. When these were received, Dr Meads then ordered an MRI scan of the right wrist. On receipt of the scan, the doctor prescribed conservative management of the applicant's right wrist condition and reviewed her in three months.
11. Dr Meads continued to treat the applicant until June 2019, when, as she was still experiencing ongoing pain on the ulnar side of her right wrist, recommended surgery. A surgery request was made to the respondent, which arranged for the applicant to be examined by independent medical examiner Dr Stephen Potter, rheumatologist, on 23 July 2019. On 4 September 2019, the respondent issued to the applicant a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998*² declining liability for the applicant's claim.

¹ Application to Resolve a Dispute (the Application) p 14 (noting that page references in this Statement of Reasons are to those in the Commission's electronic records).

² Reply p 2.

12. The applicant was examined by independent medical examiner Dr T Best on 23 January 2020 who produced a report dated 30 January 2020³, and a request for review of the respondent's declinature of liability was made on 27 February 2020. On 27 March 2020 in a further s 78 notice⁴, the respondent affirmed its decision to decline liability for the applicant's claim.

ISSUES FOR DETERMINATION

13. At the commencement of the arbitration hearing counsel for the applicant sought leave to amend the Application to delete from the Injury Description therein under "Injury Details – 1/04/2018" the words "repetitive injury to right wrist" and insert instead "A disease injury and/or aggravation of a disease over the period October 2016 to 1 April 2018." The respondent did not object to this amendment and leave was granted.
14. The parties agree that the following issues remain in dispute:
- (a) Did the applicant sustain injury to her right wrist in the form of a disease and/or aggravation of a disease over the period from October 2016 to 1 April 2018?
 - (b) Was the applicant's employment the main contributing factor to contracting the disease?
 - (c) Was the applicant's employment the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease?
 - (d) Is the surgery proposed By Dr Bryce Meads reasonably necessary as a result of the injury sustained by the applicant.

PROCEDURE BEFORE THE COMMISSION

15. The parties attended a conciliation conference/arbitration hearing conducted by way of telephone conference on 22 July 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.
16. Mr J Hallion of counsel appeared for the applicant briefed by Mr M Bechelli. The applicant attended. Mr J Dodd of counsel appeared for the respondent briefed by Mr C Tonkin.

EVIDENCE

Documentary evidence

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

³ Application p 3.

⁴ Application p 8.

- (c) Application to Admit Late Documents (AALD) lodged by the respondent dated 9 June 2020 with the following attachments:
 - (i) letter of instructions dated 18 July 2019 from the respondent to Dr Stephen Potter;
 - (ii) attachments to report of Dr Stephen Potter dated 23 July 2018;
- (d) Application to Admit Late Documents lodged by the applicant dated 11 June 2020 with the s 78 notice dated 4 September 2019 attached, and
- (e) Application to Admit Late Documents lodged by the respondent dated 3 July 2020 with the following attachments:
 - (i) Tuncurry Medical Centre – clinical records at 4 June 2020, and
 - (ii) Dr Bryce Meads – clinical records.

Oral evidence

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

Submissions

19. The submissions of the parties were recorded and are available on the Transcript (T), a copy of which is available on request. I will not repeat them in full. In summary they are as follows.

Applicant

- 20. The applicant opened her submissions with reference to the medical treatment proposed by Dr Meads, noting the fact that it is not a requirement for doctors to use the language of the 1987 Act for their opinions to be accepted. Their role is to provide factual evidence upon which the legal implications are a matter for the Commission. In this regard, the applicant submits that Dr Best is considering the surgery proposed; there is no other suggestion that there might be some other surgery that would be referred to.
- 21. The applicant then submits that Dr Potter, a rheumatologist, does not, and cannot dispute the surgery proposed. He is not an orthopaedic or hand surgeon; his speciality is non-surgical treatment. Therefore if the Commission accepts that the applicant's injury is causally related to her employment, there is no issue on the need for surgery.
- 22. The applicant submits that the critical issue in the case is that Dr Potter does not accept the mechanism of injury relied upon could result in a personal injury. That seems to be more a philosophical stance than one to which the Commission could have regard when the issues in the case are examined.
- 23. The applicant submits that in the jurisdiction of the Commission, repetitive strain injuries are regularly brought before it, and the biomechanics of such injuries are regularly accepted as being responsible for injury.
- 24. The applicant submits that in this case the evidence suggests gradual onset of injury over 18 months brought on by use of a computer mouse, which resulted in attendance on a doctor. That is the only history that is reported.

25. The applicant discounts the rather unhelpful comment of Dr Best that complaints similar to those brought on in the applicant's workplace do not arise in the domestic context, submitting that a person sitting at a desk for eight hours a day using a mouse is wholly consistent with repetitive exercise which would result in aggravation of a condition. There is not much that can be identified in the domestic context which would have a person sitting in the one spot using a mouse for that period of time, which is the mechanism of injury identified by the worker in this case. An expert biomechanical opinion is not required to show that the repetitive use of a mouse over a period of time can result in symptoms and aggravation of a condition, if there is a condition to be aggravated. This is a matter of common experience.
26. The Commission should therefore reject the suggestion that, in terms of biomechanics, the evidence in the case is insufficient to support the opinions of Dr Meads and Dr Best. Once this suggestion is rejected, one is left with the opinion of Dr Potter whose position is that the applicant's condition is idiopathic in nature, and that the applicant has experienced a spontaneous onset of symptoms.
27. In seeking to support the submission that Dr Potter does not accept injury is caused by repetitive actions, the applicant seeks guidance as to what the doctor means by his reference to a pain syndrome. The applicant refers to evidence given by Dr Potter in two Presidential decisions of the Commission to illustrate his opinion on what is a pain syndrome, namely:

*Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan*⁵
*HPM Industries Pty Limited v Awad*⁶.
28. The applicant submits that, based on the evidence given by Dr Potter in those two cases, he regards a pain syndrome, often called a regional pain disorder, as "...one of the functional somatic syndromes and requires careful management with reassurance and support, exercise therapy, pain management, usually maintaining normal activities."⁷
29. What Dr Potter is saying in this case, according to the applicant and having regard to the evidence he gave in *Brennan* and *Awad*, is that the applicant has a genuine reaction in response to pain, that it appears to be a functional somatic response but not in response to work-related pain. The applicant also refers to the number of articles that Dr Potter has attached to his report which, according to the doctor, support his opinion.
30. The applicant submits that Dr Potter accepts the applicant's underlying pathology, accepts that she has pain and that she is genuine, but then for reasons that are not apparent, says that it is all functional and somatic. This is because Dr Potter does not accept that the history given by the applicant of an 18 month that the use of a mouse, four days a week over an eight hour day could have resulted in the development of, or aggravation of, a disease.
31. The applicant submits that Dr Potter has a 'philosophical position' on matters such as those in the present case, whereby he treats the repetitive use type injury as being a wholly somatic or functional condition, a position not generally accepted by the Commission. The applicant further submits that if the applicant were suffering from a somatic or functional condition, one would expect evidence that she was suffering from some sort of psychiatric or psychological condition.
32. In the final analysis, the applicant submits that Dr Potter's opinion is unhelpful because he does not accept that repetitive use of the right wrist is capable of causing pathology in the wrist.

⁵ [2016] NSWCCPD 23 (*Brennan*).

⁶ [2006] NSWCCPD 60 (*Awad*) at [34] and [37].

⁷ *Brennan* at [149].

33. The applicant deals with the pathology revealed on the MRI scan of the right wrist which she submits ultimately takes Dr Meads to the point of recommending surgery, after taking a cautious approach by initially prescribing conservative treatment. Over the course of his treatment of the applicant, Dr Meads developed a number of differential diagnoses, finally concluding that when conservative treatment did not alleviate the applicant's condition, surgery was the way to address the problem.
34. The applicant submits that causation of her injury is satisfied, noting that other than Dr Potter's philosophical position that the type of condition of which she complains is not caused by overuse, there is no other evidence to dispute injury.
35. The applicant also notes that both Dr Meads and Dr Best identify a discrepancy between the right and left hand grip, as opposed to Dr Potter's finding of no grip strength deficit.
36. The applicant refers to the findings revealed on the MRI scan, and notes that when Dr Meads reviews her in October 2018, six months after onset of symptoms, the condition was deteriorating with continuation of work. This is consistent with an injury and deterioration over time.
37. The applicant submits that, taking a commonsense approach to the issue of causation of her injury, it is established on the evidence. The applicant's employment with the respondent was the main contributing factor to the aggravation of the condition in her wrist as diagnosed by Dr Meads. Dr Potter is if no assistance on the question of the reasonable necessity of surgery as a result of injury and does not accept that overuse is responsible for the type of injury of which the applicant complains.

Respondent

38. The respondent notes that, apart from accepting provisional liability which an employer is obliged to do under the legislation, it disputes that the applicant suffered injury arising out of or in the course of her employment, and that this denial of liability dated from the first s 78 notice dated 4 September 2019 and was replicated in the s 78 notice dated 27 March 2020.
39. In respect of the applicant's submissions in respect of Dr Potter and his 'philosophical approach' to injury such as that complained of by the applicant, the respondent submits that Dr Potter in his report dated 23 July 2019⁸ does not refer to a functional somatic syndrome as he does in the two cases relied upon by the applicant. That was not his diagnosis of the applicant in this case. Dr Potter accepts that the applicant has regional pain in her right arm and that the results of the nerve conduction test is normal and the MRI scan is slightly abnormal. He says that, as far as treatment is concerned, surgery is a matter between the applicant and her treating doctors. Dr Potter does not base his opinion on a view that there can be no injury arising out of repetitive strain. What he does say is that he finds no evidence of physical trauma and no evidence of workplace injury. This finding, according to the respondent, is based on the applicant's history and what he has read from the medical reports which he lists under the heading "**ENCLOSURES**" in his report, including the reports of Dr Meads.
40. The respondent submits that the attempt to impute into Dr Potter some philosophical stance, together with the question as to whether a person can have a repetitive strain injury at all, or that everybody who complains of such matters needs psychological assessment, should be put aside. The question for determination is whether the applicant has established on the evidence that she sustained injury arising out of or in the course of her employment, which was the main contributing factor to such injury.

⁸ Reply p 51.

41. The respondent notes that the only evidence from the applicant in respect of the 'nature and conditions' of her employment appears in her statement dated 23 April 2020 at [5]-[6] where she states that after a period of 10 years when she worked for the respondent as a teller, she became a personal banker which required her to work in an office on a computer for four days a week, using the computer with her right hand. That is the full extent of what is alleged in respect of her employment duties. The respondent submits that there is nothing in this evidence to suggest, as did the applicant in submissions, that she is sitting at her desk eight hours a day using a mouse. Presumably, according to the respondent, the applicant is using a keyboard, may use a headset, uses a telephone, talks to people in person, shuffles papers, opens and closes files and has coffee breaks. The applicant in doing this work is not doing what she refers to in [5] of her statement, that is repetitive use of both hands including money counting and computer work.
42. The respondent submits that there is a paucity of evidence from the applicant as to what are her duties said to give rise to the injury complained of. This lack of evidence would not allow the Commission to infer from common experience that the biomechanics of the applicant's work would give rise to injury. The respondent submits that, although reliance can be placed on histories given by workers recorded in medical reports, this does not assist the applicant in this case.
43. The respondent submits that the history of the applicant's employment duties obtained by Dr Meads and recorded in his first report dated 22 August 2018⁹ does not reveal that the applicant was using a mouse repetitively for eight hours a day as submitted by her.
44. The respondent submits that the applicant, having regard to her age (62 years), would have problems that cause pain, but that does not mean that she has suffered an injury at work if she experiences pain while at work. The most that can be gleaned from the history recorded by Dr Meads is that the applicant's pain in her right arm and wrist is aggravated by using a computer mouse for 5 or 10 minutes. The evidence to support the applicant's repetitive strain injury case put forward is just not made out.
45. The respondent examines the history of work injury taken by Dr Best in his report dated 30 January 2020, noting in particular "...Ms Kirkman reports that this pain has been brought on by the use of the 'mouse' at work" is recorded. The respondent submits that this is the full extent of the history in this doctor's report, and that it is brief because "...that's all the applicant has got."¹⁰ There is no detailed history of the applicant's duties recorded by Dr Best. When the doctor suggests at the end of his report under the heading "OPINION" that Ms Kirkman has moderate ulna abutment syndrome related to mild positive ulna variance of the right wrist, the most he can say is that "[C]linically this is related to work and more specifically to the use of the computer 'mouse.'" The respondent submits that this just means that when the applicant uses the mouse, she gets pain. That is consistent with the history provided. It does not answer the question as to why the use of the mouse has caused this.
46. The respondent submits that what Dr Best says cannot be persuasive evidence that, as a result of the nature and conditions of her employment, the applicant suffered an aggravation of an injury to which the work was the main contributing factor.
47. The respondent submits that there is no doubt that the applicant has an underlying condition, and that this is understandable given her age. Dr Potter in his report accepts that the applicant has pain in her arm, that she has got abnormal MRI scan and an abnormal nerve conduction test result, and that her treatment is a matter between her and her surgeon. However Dr Potter does not find any evidence of physical trauma. The fact that the applicant says that she uses her mouse for 5 or 10 minutes, and that when she does this her wrist hurts, does not mean that she has suffered an injury.

⁹ AALD 03.07.20 p 51.

¹⁰ T p 23.10.

48. The respondent submits that the paucity in the applicant's statement evidence is reflected in the histories obtained by Dr Meads, Dr Best and Dr Potter. The respondent also highlights Dr Best's note of some inconsistency in the history provided by the applicant to him that she reports no symptoms or functional disability outside work when carrying out wrist activities of a similar nature. The respondent submits that this comment does not make sense other than the applicant trying to attribute to the respondent responsibility for an underlying condition which is not aggravated by work. It submits that the evidence that the applicant's undoubted underlying condition has been aggravated by work, and that work was the main contributing factor to the aggravation of the condition, is simply lacking.
49. The respondent submits that the applicant has therefore failed to show that the need for surgery to address her underlying condition is reasonably necessary as a result of injury. At most the respondent submits that "...a passing event that's causing [the applicant's] symptomatology for some period, as a result of that underlying condition"¹¹ does not constitute an injury.
50. In terms of what the High Court of Australia found in *Federal Broom Co Pty Ltd v Semlitch*¹², where it was stated that that the worsening of symptoms of an underlying disorder can constitute an aggravation of a disease, the respondent submits that the occurrence of symptoms of an underlying condition in this case does not constitute an injury.
51. The respondent submits that even if it is accepted that the applicant suffered some symptoms, that does not lead to a finding that the surgery sought by her is reasonably necessary as a result of injury.

Applicant in response

52. The applicant draws attention to the attachments to Dr Potter's report dealing with regional pain syndrome¹³, noting that the thrust of the articles is that such syndrome is not a work-related condition, and that is the basis of the opinion of Dr Potter expressed in his report. It is a pattern of pain unrelated to physical injury. The respondent has adopted the position of Dr Potter that the mechanism of injury put forward by the applicant cannot cause physical injury, and that the applicant's response to the 'injury' is not one based on pathology.
53. The applicant puts the case in its starkest term which is, whether the opinion of Dr Potter can be accepted, based as it is in his philosophical position inconsistent with the acceptance of overuse injuries. The applicant submits that there is no suggestion of anything else that has been responsible for the development of and onset of her pain, other than the use of the mouse.
54. The applicant also points out that Dr Potter in his report says that although he obtained no history of work injury, work aggravation or work duties "...that could have or did do any objective trauma or aggravation of same in musculoskeletal terms"¹⁴, he does not say what history he is relying upon. The applicant says that it appears that Dr Potter is relying on Dr Worley's referral to Dr Meads (dated 11 July 2018¹⁵), where Dr Worley refers to the applicant's ongoing right wrist pain which began with "constant use of computer mouse at work." The applicant submits that this would be sufficient to inform Dr Meads as a hand surgeon and is evidence of such use by the applicant. The applicant submits that it is a matter of common experience that when one sits down to use a computer, the use of a mouse is part of that activity. The evidence of the use of a computer mouse is not challenged.

¹¹ T p 28.10.

¹² (1964) 110 CLR 626 (*Federal Broom Co v Semlitch*).

¹³ AALD 9 June 2020 p 78.

¹⁴ Reply p 52.

¹⁵ AALD 9 June 2020 p 12.

FINDINGS AND REASONS

Injury

55. The applicant says in her statement dated 23 April 2020 that when she became a personal banker employed by the respondent after a period of 10 years working as a teller, she worked in an office, and the work required her to work continuously on a computer four days per week. She used the computer mouse with her (dominant) right hand.
56. The applicant reported pain in her right wrist in about April 2018. It had gradually developed over a period of 18 months prior to that time. It was reported to the respondent, but despite readjustment of her workstation by the respondent, the wrist condition continued at work. The applicant has had no time off work and continues to work four days a week. She says that the pain occurs whilst she is using the mouse at work.
57. The applicant's statement is brief. However it is possible to track her treatment and subsequent progress from the evidence of the treating and qualified doctors whose reports are in evidence
58. The applicant consulted her general practitioners, Dr Ray Worley and Dr George Castillo. It appears that Mrs Kirkman consulted Dr Worley first. He referred her to see hand surgery specialist, Dr Bruce Meads on 11 July 2018¹⁶. In the referral note of that day, Dr Worley thanked Dr Meads for seeing Mrs Kirkman "...for opinion and management regarding ongoing pain right wrist began with constant use of computer mouse at work. Changes to workstation and physiotherapy have not resulted in improvements."
59. Dr Meads reported to Dr Worley on 22 August 2018¹⁷. The history he recorded is as follows:
- "Thank you for referring Vicki who is a 60 year old right hand dominant bank officer who is currently on leave. She presents with pain in her right arm and wrist. She has found this to be present for about twelve months. It has been aggravated by using a mouse. It is present over the dorsal aspect of her wrist extending up her forearm over the extensor aspect. She has had some pain occasionally at night. She indicates that it takes five to ten minutes of mouse work before the pain starts. She denies an [sic] numbness or tingling. She does not take any pain relief. She has had previous ganglion excised and she has been attending physiotherapy with Reyne Black. He has been concentrating on exercises for her neck. She has had an x-ray and an ultrasound."
60. In his summary Dr Meads notes that Mrs Kirkman has diffuse pain in her right arm, has some symptoms and also an ultrasound consistent with possible carpal tunnel syndrome. He recommends nerve conduction studies to confirm this. Those studies were subject to insurance company approval.
61. There is an undated handwritten report of Dr Meads in evidence, responding to an enquiry from the respondent in respect of the applicant's workers compensation claim¹⁸. Dr Meads confirms a diagnosis of:
- "Ulna sided wrist pain – ulna abutment
Possible carpal tunnel syndrome."

¹⁶ AALD 03.07.20 p 42.

¹⁷ AALD 03.07.20 p 51.

¹⁸ AALD 03.07.20 p 52.

62. In respect of treatment Dr Meads advises physiotherapy and referral for nerve conduction studies, and notes that it is too early to indicate a timeframe to return to pre-injury capacity.
63. Nerve conduction studies were carried out on 30 September 2018. The conclusion in the report on those studies is as follows:

“The neurophysiological study is consistent with bilateral ulnar dysfunction at the level of the elbows on both sides, graded mild in severity. Clinical correlation is advised.”¹⁹

64. Dr Meads reported to Dr Castillo on 8 October 2018, having seen the applicant with the nerve conduction studies²⁰. In view of Mrs Kirkman’s ongoing symptoms he recommended an MRI scan, which he said would show up a dorsal occult wrist ganglion. He said:

“[H]owever, as she has ulnar nerve impairment and ulnar positive variance, I am uncertain as to whether these are causing her pain.”

The MRI was performed on 16 October 2018. The result suggested an ulnar impingement syndrome²¹.

65. Dr Meads reported to Dr Castillo on 30 October 2018 with the benefit of the MRI scan result. His assessment was that the applicant probably had early cubital tunnel syndrome, and also ulnar positive abutment with oedema within the proximal volar ulnar aspect. He recommended trying conservative management first with splinting and then start range of motion with frequent breaks for work. He said at that stage that the applicant should wear her splints initially and see what the pain is like as she returns to work, and added “[T]he characteristics of the pain are important as to work out whether it is truly cubital tunnel versus ulnar abutment or both.”
66. When Dr Meads reviewed the applicant in January 2019²² he noted some improvement in symptoms on the ulnar side of the right wrist. Occasional niggling pain on the ulnar side was noted but not as severe. It was aggravated by using the mouse, but Mrs Kirkman had avoided heavy lifting and locking her wrist when gripping objects. The ulnar nerve symptoms were noted to have also settled down. The applicant was happy with her current level of symptoms and thought that they were manageable. Dr Meads did not make any further arrangements to see the applicant but offered follow up should symptoms recur.
67. It appears that symptoms did recur. Dr Worley referred the applicant back to see Dr Meads on 22 May 2019 “...for opinion and management regarding ongoing pain in right wrist which does not appear to have improved over time.”²³
68. Dr Meads saw Mrs Kirkman again on 5 June 2019 and reported to Dr Castillo on that day²⁴. He noted ongoing pain on the ulnar side of the right wrist, aggravated with activity. He carried out an examination and noted that the MRI scan demonstrated increased signal within the lunate and a thin TFCC with ulnar positive variance. He recommended an arthroscopy and debridement of the right wrist plus ulnar shortening osteotomy. He thought that such surgery had an 85% chance of improving pain on the ulnar side of the wrist. The risks, benefits and potential complications of surgery were discussed and the applicant indicated happiness to proceed with surgery once surgical approval was forthcoming. Dr Meads sought approval for surgery from the respondent on 12 June 2019²⁵.

¹⁹ AALD 03.07.20 p 56.

²⁰ AALD 03.07.20 p 57.

²¹ AALD 03.07.20 p 58.

²² AALD 03.07.20 p 60.

²³ AALD 03.07.20 p 61.

²⁴ AALD 03.07.20 p 63.

²⁵ AALD 03.07.20 p 65.

69. The respondent arranged for the applicant to be assessed by Dr Stephen Potter, rheumatologist, on 23 July 2019 and his report of that date is in evidence. It appears from the list of enclosures listed by Dr Potter in his report that he had access to all of the reports and referrals of Dr Worley, Dr Castillo and Dr Meads abovementioned. He had also seen WorkCover certificates. He notes that the MRI scan of the right wrist as being slightly abnormal.
70. Dr Potter says in the report that he had chosen to put in all the relevant medical factors but came to the conclusion that although the applicant was genuine in every respect, he had no evidence that the workplace at Westpac at Forster had caused, initiated or aggravated any musculoskeletal pathology. He said that he was mindful of nerve tests showing a defect in the elbows and could not see that as being work related. He was also mindful of the minor pathology and could not see that as being work related. He said that he obtained no history of work injury, work aggravation or work duties that could have or did do any objective trauma or aggravation of same in musculoskeletal terms. He found the applicant fit to work her normal hours and normal duties.
71. Dr Potter said that after he examined the applicant, he was left with residual symptoms in the right wrist and right forearm but no striking motor, swelling or sensation change to define an abnormality. His diagnosis was regional pain right arm with abnormal MRI scan and unusual nerve conduction tests. He said:

“The diagnosis of best fit, therefore, remains local regional pain involving the right wrist and right forearm with unusual nerve conduction study findings, not clinically relevant and mildly abnormal MR scan but no evidence of any physical injury in that context.”

Dr Potter said that he had no evidence that the nature of duties described was ever the main contributing factor to the symptoms so given in the right wrist and forearm. He attached to his report articles from medical journals addressing regional pain disorders, ulnar sided pain and ulnar impaction.

72. Dr Best, orthopaedic surgeon, examined the applicant at the request of her solicitors on 23 January 2020 and produced a report dated 30 January 2020. He recorded a history of the injury consistent with what Mrs Kirkman said in her statement dated 23 April 2020 and went on to note that she is able to carry out kitchen work at home and is able to cook regularly without right wrist symptoms. She is able to lift pots and pans with the right hand as well as food containers without symptoms. Dr Best noted the readjustment of the applicant's workstation for her to continue with her work with less aggravation to her condition. Mrs Kirkman reported to Dr Best that her right wrist condition continued while at work, that she had no further time off work and continued to work four days a week. Dr Best also referred to the nerve conduction studies carried out on 27 September 2018, to the report of the x-ray dated 25 July 2018 and the MRI report dated 16 October 2018. After giving the results of his examination of the applicant he expressed the following opinion:

“I suggest that Ms Kirkman has moderate ulna abutment syndrome related to mild positive ulna variance of the right wrist. Clinically this is related to work and more specifically to the use of the computer 'mouse'. This is consistent with the history provided. I agree that the surgical treatment suggested by Dr Mead is fair and reasonable in relation to the work injury. I note however, that there is some inconsistency in the history provided today, in that Ms Kirkman reports no symptoms or functional disability outside of work when carrying out wrist activities of a similar nature.”

73. The applicant reported to Dr Best that her right wrist pain was continuing while she was using the computer mouse at work and becoming more persistent during her work periods. Depending on results of treatment, Dr Best said that the applicant should be able to return to her normal work with proper management and care in respect of her workstation. The prognosis was guarded.

74. The applicant submits that Dr Potter in giving his opinion on the causation of the applicant's right wrist condition, is proceeding from a 'philosophical' position, in that he does not accept that injury can be caused by repetitive actions, commonly called repetitive strain injuries. An excerpt from *Brennan* is set out at [28] above. At [37] in *Awad* Acting Deputy President Deborah Moore referred, inter alia, to the evidence of Dr Potter in that case in the following terms:

"Both Doctors Hassall and Potter pointed out that a 'condition' variously described as 'chronic pain syndrome' or 'regional pain syndrome' was not an injury per se. As Doctor Potter put it in his report dated 6 December 2002 'the patient has a pattern of pain, not injury.'"

75. I was not greatly assisted by the voluminous articles attached to Dr Potter's report, nor was I taken in detail to parts of those articles. Nevertheless, an article by Alexander Y Shin & Ors headed "Ulnar-Sided Wrist Pain", being an Instructional Course Lecture, American Academy of Orthopaedic Surgeons published in *The Journal of Bone & Joint Surgery*, Volume 86-A Number 7, July 2004 contained the following comments:

"Ulnar-sided wrist pain can be divided into three categories: acute traumatic injuries, chronic overuse injuries, and chronic degenerative problems."

and

"Chronic overuse injuries may have a more indolent presentation. Patients with chronic repetitive ulna loading, such as mechanics and plumbers, may present with vague ulnar-sided pain without a history of specific injury."²⁶

76. These comments would tend to support a finding that a chronic overuse injury can occur with chronic repetitive ulna loading. If one accepts the applicant's evidence in this case, and no doctor suggests that she was not genuine in her presentation, the repetitive use of the computer mouse by the applicant over a four day working week could suggest at least aggravation of the existing condition from which the applicant suffers and which is acknowledged by the respondent.

77. Regional pain syndrome is also discussed in an article by Geoffrey O Littlejohn published in *Medicine Today* 2011; 12(6): 72-80²⁷. The conclusion in that article is that regional pain syndrome is a pain disorder that is well-characterised and has high impact.

"Early diagnosis is aided by anticipation of pain sensitisation in high-risk situations, such as work-related injuries or traffic accidents, where safety net deliberations and disputes are common, and in psychologically vulnerable persons. Patient outcomes are significantly improved when the disorder is recognised early and treated as a disorder of pain sensitisation rather than one of peripheral nociception."²⁸

²⁶ AALD 09.06.20 p 53.

²⁷ AALD 09.06.20 p 78.

²⁸ AALD 09.06.20 p 83.

78. Dr Potter diagnoses the applicant as suffering from regional right arm pain, and in this sense and having regard to the articles which he attached to his report, he may be suggesting that Mrs Kirkman is suffering from a regional pain syndrome rather than an injury per se. However, his essential finding is that there was no evidence that the nature of the applicant's duties was ever the main contributing factor to the applicant's symptoms in the right wrist and forearm. For the reasons outlined hereunder I do not agree with him on this point. The doctor *may* be suggesting that an injury cannot arise from repetitive strain, but I do not think so. He is simply looking at the facts of this case. Further, I do not think that Dr Potter, in giving his opinion, is proceeding from any 'philosophical' position as submitted by the applicant.
79. It is significant that Dr Potter could not define from the non-work related factors any relevant causation of the pathology. That would still allow for a finding that the applicant's symptoms were idiopathic, that is, of spontaneous origin from an unknown cause. However I think that there is sufficient evidence to displace such a finding.
80. There is no suggestion that the applicant is suffering from a functional condition or is psychologically vulnerable, which may be relevant to a diagnosis of regional pain syndrome.
81. The applicant presented her case on the basis of an aggravation of a disease injury over the period from October 2016 to 1 April 2018 (s 4(b)(ii) of the 1987 Act). She did not rely on s 4(b)(i) of that Act, that is the contraction of a disease in the course of her employment. Dr Meads assessed the applicant as having early cubital tunnel syndrome and also ulnar positive abutment with oedema within the proximal volar ulnar aspect. He tried conservative management which did not succeed in relieving the applicant's symptoms. With this lack of success he recommended surgery which was accepted by the applicant. Dr Meads says that the surgery has an 85% chance of improving the pain on the ulnar side of the wrist. He was clearly referring to the pain of which the applicant had complained from when she first saw the doctor in August 2018.
82. Dr Best suggests that the applicant has a moderate ulna abutment syndrome related to mild positive ulna variance of the right wrist, clinically related to work and more specifically to the use of the computer mouse. That was consistent with the history provided to him. He endorsed the surgery proposed by Dr Meads as fair and reasonable in relation to the work injury. Notwithstanding Dr Best's reservation about the applicant's presentation, in that she experienced no symptoms or functional disability outside work, I accept his opinion. The applicant has only ever stated that the symptoms in her right wrist occurred as a result of the specific task of using the computer mouse at work, as a personal banker, four days a week. There is no other cause of the symptoms relied upon by the applicant
83. The respondent presented its case at hearing on the basis that there was simply insufficient evidence put forward as to the nature and extent of the applicant's duties as a personal banker, particularly in respect of the use of the computer mouse. I do not agree. The applicant says in her statement that she was required to work continuously on a computer four days a week using the computer mouse with her right hand. She did not say that when she uses her mouse for 5 or 10 minutes her wrist hurts (see [47] above). What the applicant did say to Dr Meads and is recorded in his report dated 22 August 2018 is that it takes 5 or 10 minutes of mouse work before the pain starts.
84. When the applicant's admittedly brief evidence is taken along with the histories of the onset of symptoms she provided to all of the doctors she saw, and having regard to Dr Meads' findings and opinion in particular, there is sufficient evidence on the balance of probabilities to ground a finding that the applicant sustained injury in the form of aggravation, acceleration, exacerbation or deterioration of a disease. The disease is the undisputed pre-existing condition from which the applicant suffered as diagnosed by Dr Meads.

85. This finding is consistent with what the High Court stated in *Federal Broom Co v Semlitch* that a worsening of symptoms of an underlying disorder will be an aggravation, acceleration, exacerbation or deterioration of the disorder, although it is only temporary and even though there is no worsening of the disorder in a medical sense²⁹.
86. I also find that, consistent with the applicant's evidence that she only experiences symptoms when she uses the computer mouse at work, that her employment with the respondent is the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease from which the applicant suffers.

Surgery

87. The applicant submits that Dr Potter, as a rheumatologist, is not qualified to comment upon the reasonable necessity for the surgery proposed by Dr Meads. Dr Potter says that whether the applicant undergoes this surgery is a personal choice between her and her treating surgeon, but that he has no evidence that the need for surgery has come as a consequence of any physical injury.
88. I accept that both Dr Meads and Dr Best, as orthopaedic surgeons, are better qualified to give opinions on the reasonable necessity for surgery.
89. In *Diab v NRMA Ltd*³⁰ Roche DP set out at [88] the relevant matters in the context of s 60 of the 1987 Act, according to the criteria of reasonableness. They include, but are not necessarily limited to:
- (a) the appropriateness of the particular treatment;
 - (b) the availability of alternative treatment, and its potential effectiveness;
 - (c) the cost of the treatment;
 - (d) the actual or potential effectiveness of the treatment, and
 - (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective."
90. In my view both Dr Meads and Dr Best address items (a), (b), (d) and (e) above. No issue was raised by the respondent in respect of the cost of the surgery proposed by Dr Meads.
91. I find that the surgery proposed by Dr Meads in his report dated 5 June 2020 is reasonably necessary as a result of injury sustained by the applicant deemed to have occurred on 1 April 2018.

SUMMARY

92. The applicant sustained injury to her right wrist arising out of or in the course of her employment with the respondent from October 2016 to 1 April 2018.
93. The injury is the aggravation, acceleration, exacerbation or deterioration of a disease.

²⁹ See Kitto J at [7].

³⁰ [2014] NSWCCPD 72.

94. The applicant's employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease.
95. The surgery proposed by Dr Meads in his report dated 5 June 2020 is reasonably necessary as a result of the injury deemed to have been suffered by the applicant on 1 April 2018.
96. The respondent is to pay the costs of and incidental to such surgery.