

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3850/19
Applicant: Michelle Hastie
First Respondent: KD Products & Services Pty Ltd
Second Respondent: Workers Compensation Nominal Insurer
Date of Determination: 23 October 2019
Citation: [2019] NSWCC 347

The Commission determines:

1. The matter is remitted to the Registrar, insofar as it relates to the applicant's claim for compensation under s 66, so that the Registrar can refer the following medical disputes to an Approved Medical Specialist (AMS) to assess:
 - (a) the degree of permanent impairment of the applicant as a result of the injury she suffered to her nervous system on 29 April 2016;
 - (b) whether any proportion of the applicant's permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion;
 - (c) whether the applicant's impairment is permanent, and
 - (d) whether the degree of permanent impairment of the applicant is fully ascertainable.
2. The determination by the Commission of the applicant's disputed claims for weekly payments of compensation, compensation for the costs of medical treatment and compensation for permanent impairment is deferred pending the outcome of the assessment by the AMS of the medical disputes listed in order 1.
3. The AMS is to be provided with:
 - (a) the documents attached to the Application to Resolve a Dispute other than the report of Dr Robert Gertler dated 3 July 2017;
 - (b) the documents attached to the Reply of the second respondent;
 - (c) the DVD on which is recorded surveillance of the applicant shot on 18 and 21 October 2016, and
 - (d) Pages 452-457 of DSM IV.
4. Within 48 hours of the date of these orders the second respondent is to file with the Commission a copy of the document listed at order 3(d) and is to enquire with the Commission whether the registry has the DVD listed in 3(c) and in the event that it does not is to file a duplicate of the DVD within a further 48 hours.

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

Marshal Douglas
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 MARSHAL DOUGLAS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the **Registrar**



STATEMENT OF REASONS

BACKGROUND

1. Michelle Hastie commenced employment as a food preparation assistant with KD Products & Services Pty Ltd (KD Products) in February 2016. KD Products ran a cafe trading under the name Bay Organics.
2. Ms Hastie claims that on 26 April 2016 while working for KD Products she suffered an electric shock. She says this occurred when she was plugging a sandwich toaster into a power board. She says this shock resulted in her suffering injury. She claims that she has an incapacity for work as a result of that injury and that she has incurred cost in receiving medical treatment. She also claims to have a permanent impairment from her injury.
3. At the time Ms Hastie says she suffered her injury, KD Products was not maintaining a policy of insurance under the *Workers Compensation Act 1987* (the 1987 Act). On 27 September 2016 Ms Hastie's solicitors posted to the Nominal Insurer an "uninsured liabilities worker claim form" that Ms Hastie had signed on 21 September 2016. By doing so, Ms Hastie made a claim under Division 6 of Part 4 of the 1987 Act against the Nominal insurer.
4. On 21 November 2016, Icare Workers Insurance wrote to Ms Hastie notifying her under s 74 of the *WorkPlace Injury Management & Workers Compensation Act 1998* (the 1998 Act), as then enacted, that it disputed liability to pay weekly payments of compensation to Ms Hastie and to pay her compensation for medical expenses. I understand that Icare Workers Insurance is a business name of Insurance & Care NSW, which, in accordance with s 154C(1) of the 1987 Act, acts for the Nominal Insurer.
5. On 19 July 2017, Ms Hastie's solicitors again wrote to the Nominal Insurer, advising it that Ms Hastie was making a claim for compensation for permanent impairment that Ms Hastie claimed resulted from her alleged injury. By letter dated 1 November 2017, Icare wrote to Ms Hastie, care of her solicitors, notifying her under s 74 of the 1998 Act that it disputed liability to pay Ms Hastie compensation under s 66 of the 1987 Act for permanent impairment. It also advised Ms Hastie that it continued to dispute liability with respect to her claims for weekly payments of compensation and compensation for medical expenses. The basis upon which Icare disputed liability for Ms Hastie's claim for compensation was advised by Icare in its letter of 1 November 2017, to be, in substance, that Ms Hastie did not suffer an injury arising out of or in the course of her employment or, if she did, her employment was not an essential contributing factor to her injury.
6. On 1 August 2019 the Commission registered an Application to Resolve a Dispute (ARD) that Ms Hastie had filed and by which she sought determination of her disputed claims for compensation. In accordance with s 142B(1) of the 1987 Act, Ms Hastie named both KD Products and the Nominal Insurer as respondents to the ARD.

PROCEDURE BEFORE THE COMMISSION

7. The Commission conducted a conciliation conference on 3 October 2019, at which Ms Hastie was present, accompanied by her husband. She was represented by Mr Bill Lucas of Counsel, on instruction from Ms Madeline Smith. Dean Payton participated for part of the conciliation conference. Mr Payton advised that he was a shareholder and director of KD Products at the time Ms Hastie claims to have suffered her injury. The Nominal Insurer was represented by Mr Paul Stockley of Counsel.

8. Mr Payton was not legally represented. Because of that, that part of the conciliation conference in which he participated was recorded.
9. The conciliation conference did not result in a resolution of Ms Hastie's claim although it did result in clarification of the issues the Commission presently needs to determine.
10. The matter proceeded immediately to an arbitration. Mr Payton remained only for a very brief time at the arbitration and left before submissions were made by counsel for Ms Hastie and counsel for the Nominal Insurer.

ISSUES FOR DETERMINATION

11. The parties agreed that the issue the Commission presently needs to determine is whether Ms Hastie suffered an injury on 29 April 2016 arising out of or in the course of her employment with KD Products. The parties also agreed that that issue required the Commission to make findings with respect to two matters, being whether Ms Hastie received an electric shock on 29 April 2016 and, if so, whether that shock resulted in her suffering injury to her nervous system.¹
12. I note that the s 9A issue that Icare raised in its letter of 1 November 2017, was not pressed at the arbitration as an issue that the Commission needed to determine.
13. Ms Hastie and the Nominal Insurer also acknowledged at the arbitration hearing that, were I to find that Ms Hastie suffered an injury arising out of and in the course of her employment, the best way for the Commission to proceed is to defer determining any other issue relating to Ms Hastie's entitlement to weekly payments of compensation and compensation for the cost of treatment until an Approved Medical Specialist (AMS) had assessed various medical disputes relating to her claim for compensation for permanent impairment. In other words, all Ms Hastie's claims for compensation ought to be determined together after an AMS had assessed Ms Hastie's permanent impairment.
14. This acknowledgement by the parties is soundly based.
15. In the event that I find Ms Hastie has suffered an injury, it then falls on the Commission to determine her claims for compensation. As will become apparent from the discussion below, there is controversy in this case regarding the validity of the symptoms that Ms Hastie says she suffers from her claimed injury. The Commission will need to make findings regarding that in order to determine Ms Hastie's disputed claims for weekly payments of compensation and compensation for medical expenses. An AMS will also need to make findings relating to that, in all likelihood, so as to assess Ms Hastie's permanent impairment from her injury. That assessment by an AMS must occur prior to the Commission determining Ms Hastie's disputed claim for compensation for permanent impairment. So as to minimise the potential of the Commission's findings conflicting with those the AMS may make relating to Ms Hastie's symptoms, it is best that the Commission determine all of Ms Hastie's claims after an AMS has assessed her permanent impairment. Moreover, the AMS's reasons for the assessment the AMS makes of Ms Hastie's permanent impairment is likely to be germane to the remaining factual controversies the Commission will need to determine with respect to Ms Hastie's claims for weekly payments of compensation and medical expenses.
16. Given that, in the event that I find Ms Hastie has suffered an injury I will defer determining Ms Hastie's claims for weekly payments of compensation and compensation for medical expenses until after an AMS assesses her permanent impairment. In other words, the Commission will make determinations with respect to all her entitlements at the one time.²

¹ Transcript 4.22-29; 6.13-18

² See generally *Jaffarie v Quality Castings Pty Ltd* [2014] NSWCCPD 79 at [265]-[269]

EVIDENCE

17. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents other than the report of Dr Robert Gertler dated 3 July 2017;
 - (b) Nominal Insurer's Reply and attached documents;
 - (c) Pages 452-457 of the fourth edition of Diagnostic and Statistical Manual of Mental Disorders, and
 - (d) DVD on which is recorded surveillance of the applicant shot on 18 and 21 October 2016.
18. Documents (c) and (d) above were tendered by the Nominal Insurer at the arbitration and were received into evidence with the consent of Ms Hastie.
19. No witness was called to give oral evidence.
20. For completeness I note that a staff member from the venue at which the arbitration was held had advised the Commission, prior to the arbitration, that there was a screen at the venue equipped with the facility to be connected to a laptop by means of a HDMI cable, such that if a DVD was played on the laptop it could thereby be viewed on the screen at the arbitration. Following the Commission receiving that advice, a member of staff of the Commission informed the parties, at my request, that if any of them intended to apply to have a DVD received into evidence that party must attend the arbitration with a laptop and a HDMI cord so that the DVD could be viewed at the arbitration. Despite that request, neither party brought any equipment to the arbitration such that the DVD could be viewed at the arbitration.
21. Also for completeness I note that the solicitors for the Nominal Insurer had lodged a duplicate of the DVD listed at [17d] with the Commission before the arbitration. A duplicate had also previously been provided to the solicitors for Ms Hastie. Prior to the arbitration, the Commission's registry posted me the duplicate of the DVD that the Nominal Insurer's solicitors had lodged at the Commission. It arrived cracked and accordingly could not be viewed. At the arbitration, Mr Stockley handed me a further duplicate of the DVD to substitute for the cracked DVD that I had received from the Commission in the post.
22. As indicated above, Mr Lucas did not object to the Commission receiving the DVD into evidence, but the DVD could not be viewed at the arbitration. Both Mr Lucas and Mr Stockley agreed to my viewing the DVD after the arbitration, which would therefore occur without their having the opportunity to address me on the evidence.
23. I have now viewed the evidence. Given the unusual circumstances just recounted relating to the admission of this item into evidence, I consider it appropriate that I set out now my brief summary of the evidence based on what I viewed:
 - The DVD contained two recordings totalling approximately 28 and a half minutes that were shot on 18 October and 21 October 2016;
18 October 2016 recording
 - The recording done on 18 October 2016 commenced at 8.46 am;

- It showed Ms Hastie assisting her husband and another person to dump large items of garbage into a large “wheelie” bin. Ms Hastie held the lid of that bin open for long periods of time and pressed the garbage down into the bin. She did so with no apparent restriction or problem;
- It showed Ms Hastie securing a tarpaulin like cover of a tray of a utility vehicle by looping bungie straps of the cover onto the fastening points on the vehicle. Again, the DVD showed her experiencing no problem in doing this;
- It showed her hopping into the cabin of the utility vehicle and lifting herself up to do so without any apparent difficulty;
- It showed her at approximately 8.55 am walking away from the utility with a limp after she had disembarked from it. She was talking to her husband whilst walking. She was then seen placing a hat on her head and looking at her reflection in a car window and laughing;
- It showed her speaking with her husband and another person.

21 October 2019 recording

- The recording shot on 21 October 2016 commenced at 8.38 am and showed Ms Hastie walking along a pathway hand in hand with her husband, again limping;
- It showed her slowly getting into the passenger side of a utility vehicle;
- At 8.51 am it showed her sitting on sand on a beach and then walking away from the beach hand in hand with her husband along sand. She again seemed to be walking with a slight limp;
- It showed her getting into the passenger seat of a utility;
- At around 9.49 am, it showed her sitting at an outside table at a cafe chatting with her husband. It showed her smiling and talking to a third person who briefly approached the table. It showed her drinking coffee;
- It showed that as she left the cafe she took the hand of her husband and then continued walking hand in hand with him. She again walked with a slight limp;
- It showed her getting into a car with no difficulty;
- At 10.25 am, it showed her walking by herself, with a slight limp and holding a purse in one of her hands. She entered what seemed to be a pet shop;
- It then showed her exiting the shop carrying a large paper bag of dog food that I would estimate weighed between 10 and 20 kilograms. Again, she walked with a limp;
- It showed her entering the passenger side of a vehicle without assistance or difficulty.

FINDINGS AND REASONS

Did Ms Hastie receive an electric shock

24. There is no controversy that around midday on 29 April 2016, following a customer of KD Products placing an order that included a toasted sandwich, Ms Hastie plugged the power cord of a sandwich press into a power board and as she did so the supply of power to KD Products' store ceased.
25. Mr Payton signed a statement on 1 November 2016 that is in evidence. In it he said that he was present and nearby to Ms Hastie when the power went out. He said he enquired of Ms Hastie, "are you alright?", to which she responded along the lines, "I broke the shop". Mr Payton then inspected the power board at the front of KD Product's store and noticed the circuit breaker switch in the off position. He switched that back on but that did not result in a restoration of power. He then reset the button on the power board into which Ms Hastie had plugged the cord, but power still did not return. He then turned all switches off at the power board and called an electrician, who quickly attended. The electrician went to another power board and reset a trip switch which resulted in power returning to the store.
26. During this period, Mr Payton observed that Ms Hastie had placed her hand in a bowl of ice water, and kept it there for 15 minutes.³ He again asked Ms Hastie, "are you alright?", to which she replied, "I'll be fine". He asked her, "did you receive a shock?", to which she replied "no". He asked her if she wanted him to call her husband to pick her up. Her response was "no".⁴ He asked her if she wanted him to call her an ambulance, to which her response was again "no". He asked her, "do you want me to take you to hospital?". She again responded in the negative.⁵ Mr Payton said that after the power was returned to the store Ms Hastie continued with her work.
27. Kylie Sbrugnera has signed a statement relating to this matter, which she did on 1 November 2016. She described herself in it as the manager for KD Products. She was working on 29 April 2016. Her evidence regarding the power to the store ceasing upon Ms Hastie plugging a cord into a power board accords with Mr Payton's evidence. She said that following the power outage, and whilst Mr Payton was endeavouring to restore power, Ms Hastie and the rest of the staff stood around and chatted about the power outage. She said that she saw Ms Hastie running one of her hands under a tap in the kitchen. She also saw Ms Hastie shaking one of her hands, possibly the right one, as if Ms Hastie was experiencing some discomfort.
28. Ms Sbrugnera recounted that after power was restored, KD Products continued trade as normal. She said that Ms Hastie was very quiet but worked as normal. Ms Sbrugnera enquired of Ms Hastie as to whether Ms Hastie would like her to call her husband, to which Ms Hastie replied, "no I'm fine". Ms Sbrugnera said she did not notice anything different about Ms Hastie's movements during the remainder of the time that Ms Hastie worked that afternoon, which was to 3.00 pm when Mr Hastie picked her up "as normal".
29. Ms Sbrugnera stated that that evening she sent Ms Hastie a text "to check and see how she was". Ms Hastie responded the following morning with a text that read as follows:

"Thank you cherub. Was spacey like a space cadet and felt like I had been plugged into jumper leads though okay. Bit heavy in the body this morn and spacey and preparing for the mother ship to land or e.t. Apparently, we don't get to choose when and where we receive our energy upgrades. Go figure... May you have a beautiful weekend. Signing off, yomo unplugged".⁶

³ Reply page 33 at [16] and page 171

⁴ Reply page 33 [16]

⁵ Reply page 171

⁶ Reply page 129

30. There is also in evidence a statement signed by Natalie Gaul dated 16 November 2016. She was a casual employee of KD Products and was working on 29 April 2016. She observed Ms Hastie reaching down to plug in the cord, although she says she did not pay close attention to what Ms Hastie was doing. She recalled the power in the store going off. She said she did not notice any spark or bang. She said that she recalled that Ms Hastie passed wind and was squatting at one point, although her impression was that Ms Hastie seemed “coherent and composed”. She said that the staff in the shop were standing together waiting for the power to be fixed and they were all “having a joke together about Ms Hastie breaking the shop”. She said that she did not notice Ms Hastie’s “presentation or movements to indicate that she was in any difficulty as the shift continued”. She said that that evening she sent Ms Hastie a message on Facebook asking how she was, to which Ms Hastie responded that “she felt like her whole system had had a ‘reboot’ or ‘buzz’”.
31. Ms Hastie in an unsigned statement she provided to “investigator B.Huston” on 24 November 2016 said that when she plugged the power cord into the power board she felt an electric shock go through her hand up her right arm and saw a flash of light coming from the plug holes of the power board. She recalled someone helping her place her hand under water and said she felt a sensation like an electric shock running up her right arm and also the same sensation in her left arm and across the top of her shoulders and her head. She said that she had trouble breathing and felt a tightness in her chest. She recalls asking for ice and felt as though she wanted to cry but thought that if she did that she would probably pass out. She said that she had no feelings in her hands or arms. She said she tried to continue to work but found it very hard. She said she cannot remember how she responded when asked by Mr Payton “are you okay”.
32. She said that her husband picked her up as usual from KD Products’ store. She said that whilst being driven home her head was pounding and she had feeling of her being singed inside and could “smell something like burning”. She said that she slept for most of the next three days and could only get up from her bed to go to the toilet and clean her teeth.
33. Ms Hastie’s husband, namely Gary Hastie, signed a statement on 12 July 2019 that is in evidence, in which, except for one point which is of no significance, he endorsed the contents of an unsigned statement that he provided on 24 November 2016 to “investigator B.Huston”. In his unsigned statement he said that following his taking Ms Hastie home on 29 April 2016 Ms Hastie spent the majority of the next three days asleep. He said that he had to help her to and from the bathroom.
34. Mr Stockley put to me that I ought not to place any weight on Ms Hastie’s unsigned statement, because it is unsigned. However, her evidence within her unsigned statement with respect to what occurred on 29 April 2016 when she plugged the power cord of the sandwich press into the power board accords with the evidence of the other witnesses, and there is no reason not to accept it with respect to this matter.
35. I am satisfied based upon the evidence above that when Ms Hastie plugged the power cord into the power board she did receive an electric shock. She described feeling a shock. She very shortly thereafter placed her right hand into ice water for a period of up to 15 minutes. She was seen shaking her right hand as though she was experiencing discomfort. The fact that she placed her hand in water for 15 minutes is consistent with her feeling as though she had experienced an electric shock, and supports her evidence in her unsigned statement to that effect. The fact that she was seen shaking her right hand in apparent distress supports her evidence that she received an electric shock. Those about her were sufficiently concerned at the time about her welfare to ask her if she was okay and, indeed, Mr Payton was so concerned that he enquired as to whether he ought to call an ambulance for her or call her husband in to collect her and take her home. Ms Sbrugnera and Ms Gaul hours later enquired further about her welfare through social media. The concern of others about her welfare is also consistent with Ms Hastie have received an electric shock, and supports her

evidence that she received an electric shock. In my view, the enquiries of Mr Payton and others would not have been made unless they were concerned that Ms Hastie had sustained an electric shock.

36. Accordingly, I find that Ms Hastie did receive an electric shock when she plugged the power cord of the sandwich press into the power board.

Did Ms Hastie suffer an injury to her nervous system?

37. For Ms Hastie to have suffered an injury from the electric shock she received on 29 April 2016 there must have been, as a consequence of that shock, a physiological change or disturbance from her normal state.⁷ In other words, for her to have suffered an injury there must have been more than the onset of physical or mental dysfunction; more than the onset of discomfort. There must have been a definite or distinct physiological change. That is to say, it is necessary that there was an underlying physiological consequence from the electrical shock she received for her to have suffered an injury within the meaning of s 4 of the 1987 Act.⁸
38. Ms Hastie has relied on the opinion of consultant neurologist Dr Paul Teychenne as set out in reports Dr Teychenne posted to Ms Hastie's solicitors on 5 April 2017 and 14 February 2018. Dr Teychenne examined Ms Hastie on 5 April 2017. The Nominal Insurer has relied on an opinion of neurologist Dr Dudley O'Sullivan as expressed in a report of 27 September 2017 addressed to a case manager of Icare. Dr O'Sullivan examined Ms Hastie on 27 September 2017. Dr Teychenne's second report of 14 February 2018 is, in the main, a response to Dr O'Sullivan's report.
39. Dr Teychenne diagnosed Ms Hastie as having "an electrocution injury resulting in both acute and delayed neurological manifestations of damage to the spinal cord, brain stem, cerebrum and cerebellum". Dr Teychenne made it clear in both his reports that his diagnosis was based on a history he obtained, which he sets out at length in his reports, particularly his first report, as well as his examination of Ms Hastie on 5 April 2017 and his review of material that was provided to him. Although he does not in either of his reports discretely list the material he reviewed, it is apparent from his reports that the material he reviewed included reports from Ms Hastie's treating neurologist, Dr Brew, a referral from her general practitioner Dr Ramanathan to Dr Brew, the clinical notes of the Gosford and Wyong Hospitals and other ancillary documents such as Ms Hastie's solicitors' letter of 27 September 2016 by which they submitted Ms Hastie's claim to the Nominal Insurer and Icare's letter of 21 November 2016 to Ms Hastie in which Icare notified Ms Hastie that it denied liability with respect to her claims for compensation. Dr Teychenne indicates in his report of 5 April 2017 that he was aware that Icare had arranged for an investigator to observe Ms Hastie's level of activity for the period from 4 October 2016 to 21 October 2016. He does not expressly indicate in either of his reports, nor is it apparent or implicit from what he has stated in his reports, that he viewed the footage shot of Ms Hastie whilst she was under surveillance on 18 and 29 October 2019 that is recorded on the DVD that is in evidence.
40. As just mentioned, Dr Teychenne when formulating his opinion relied on a history he obtained, which included the history relating to Ms Hastie's development of symptoms following Ms Hastie receiving the electric shock. As also mentioned, Dr Teychenne recounted that history at length and in my view, rather than trying to summarise it, it is appropriate to repeat it here, verbatim, up to the point of December 2016, as contained in his report of 5 April 2017.

⁷ *Military Rehabilitation & Compensation Commission v May* (2016) HCA19 (*May's case*) per French CJ Kiefel, Nettle & Gordon JJ at [45]-[48] and per Gageler at [75]-[80]; applied in *Ky v Blue Leaf Group Pty Ltd* [2016] NSWCCPD 55 (*Ky's case*)

⁸ *May's case* at [78]-[79] and *Ky's case*

“For the first three days, it was difficult to determine if there was any neurologic deficit as she slept most of the time. On the fourth day, she noted constant burning and tingling as well as numbness within the left and right fourth and fifth fingers extending up the medial left and right arm across the anterior axilla into the left and right suprascapular region and then into the left and right paracervical region. She still at that stage could use her arms. However, she was unable to abduct either arm past 90° and four days after the electrocution, the weakness progressed and now she cannot lift or hold objects. She was weak in flexing the fingers to grasp the handle of a cup and lift the cup up. The first day she could not walk, with the pain in the feet. A week after the injury, she noted the constant burning pain within the left and right fifth finger extending up the medial aspect of the either and right arm to the left and right axilla. She noted constant numbness in the left and right fifth finger.

She stated that the pain and burning in the left and right fifth finger extending up the arms was getting worse; she could not sleep with the pain. The pain was totally debilitating. By the fifth day after the electrocution, her husband had to feed and wash her. She could not bathe, she could not eat; she had to be fed. She was weaker in both arms and hands. By the fourth day, she had jerking in the arms and writhing movements of the arm. She had difficulty walking; her legs were wobbly. On standing up, the legs were wobbling and flexing down. She could not stand up by herself. She needed her husband to hold her up.

She had an intense burning pain and tingling as well as numbness within the left foot extending to the left fourth and fifth toes up the dorsolateral aspect of the left foot into the lateral aspect of the left leg up to the left buttock and into the lower lumbar spine. She was crying with the pain, which she rated at 10/10. At that stage, she went to the local GP. She needed a wheelchair to go to the GP.

She was transferred to Wyong Hospital. They were unable to determine the problem and referred her to the psychologist. The psychologist assessed her and indicated that her condition was not psychosomatic. At that time, her speech and memory were normal. It was at that time that she wrote the description of the accident.

Two weeks after the electrocution, she began to slowly deteriorate. She did not have any energy to get out of the bed. Her husband needed to bathe her. She could not stand, her fingers were flexing in, her arms were flexing up. She was flexed over 25° at the lumbar spine. Her torso was deviated 25° to the right. Her legs were flexed at the knees. She had a wide-based gait to help her balance. She had burning pain within the fourth and fifth fingers extending up the medial arms and burning pain in the left foot extending from the fourth and fifth toes up the lateral aspect of the left leg into the left buttock. She stated that the burning pain within the left and right arm and left foot was becoming worse.

Three weeks after the electrocution, she noted continual pain within the throat. She described the pain as a pulling, stretching, burning pain over the anterior neck extending into the throat. She noted numbness and pain over the base of the tongue. She stated that she could not get her tongue to work. She felt like her tongue was twisted. She had a metallic taste in the mouth. A day after the electrocution, she developed a deep cough. She was persistently coughing. Bouts of coughing would last up to five minutes. Nothing would come up and then the coughing would settle.

She had insomnia due to the pain. She had fatigue. She stated that she did not have any energy. When she was able to sleep, she slept a lot. She was exhausted. At the time of the electric shock, the electric shock shot up the right arm into the back of the neck into the left and right occiput, into the left and right parietal region and over the head to behind the eyes as well as into the throat and then into the left and right upper anterior chest. The electric shock also extended down the central vertebral column from the cervical spine down into the lower lumbar spine across into the left buttock and went down the posterolateral aspect of the left leg into the left foot.

She had a marked disturbance in eyesight. According to her husband she virtually had total loss of eyesight. She was totally blurred. She lost the ability to see colours. She lost her sense of smell and taste. She slept for three days. She was up and about for about half an hour, but mainly she slept. She was apparently speaking normally for the first two weeks but she had difficulty identifying certain objects.

Two weeks after the electrocution, she developed a slow scanning speech. I listened to her speech as recorded prior to the electrocution and this was quite clear and precise. Subsequent to the electrocution, she had slow scanning speech which was difficult to follow and understand and she had an accent in the slow scanning speech. A month after the electrocution she started to formulate words and express herself, but then around 12 December 2016 or 15 December 2016 she had a total loss of memory. She lost memory of her past. She did not know where she was. She did not know who her husband and children were. She lost her ability to fluently communicate and she would say "You are husband".

She could not name people. She did not know who she was. She did not know who her husband was. She did not know what had happened. She could not work out why she was in so much pain.

She could not formulate words. Her brain was jumbled. She would look at a cup, but she could not find the words to say what the cup was. Her husband indicated that she lost all her past memories in December 2016. She did not know what marriage meant. She did not know what her husband meant. She still does not understand the concepts of marriage or the concept of a husband. Her emotional appreciation appeared to be intact. She could tell when people had a good heart.

Ten days after the electrocution, a neighbour found her wandering around. She did not know who she was, or where she was. She was like this for about three hours. Subsequently, she would have one of these episodes weekly. In between the episodes, she knew where she lived. She was orientated, but with an episode she would become disorientated. She would not know who she was and she did not know where she lived. She did not know who her husband was or who the animals were. The episode could last about two hours. Her husband subsequently would need to slowly remind her and he stated that the memory would slowly come back.

During the episodes, she could have synchronous tremoring in the arms. Her legs were wobbly and she would look scared and confused. She appeared to be terrified during the episodes. The description of the episode suggested complex partial seizure activity with some secondary generalisation. Her husband stated when she lost her memory in December 2016 she was unable to understand the concept of marriage or the concept of a husband. After an episode, her memory would slowly come back. She could have synchronous tremoring in the arms and wobbly legs during the episode. She looked as though she was confused and terrified during the episode. The episodes of synchronous tremor during the episodes of confusion and appearing to be terrified stopped after three months. He said she would still appear scared and she still had wobbly legs.

Her husband stated she would have a scared and glazed look and this could occur up to three times a week. Since January 2017, she has known who her husband was, but she does not have any concept what a husband and a wife is. After losing memory in December 2016, she was unable to formulate words. Her brain was jumbled. She would look at a cup, but she could not find the words to say what it was. She was weaker on the legs when standing up. She was slow when walking. She had to push up to stand up. She was deviated 20° to the left at the junction of the lumbar and thoracic spine.”⁹

41. Dr Teychenne in his report of 5 April 2017 also noted that Ms Hastie’s solicitors in their letter of 27 September 2016, by which they submitted Ms Hastie’s claim to the Nominal Insurer, had advised that Ms Hastie could not write or sign her signature but had instead had to make a mark on the claim form with considerable pain and distress that caused Ms Hastie to break down.¹⁰
42. As said, it is apparent that Dr Teychenne had a copy of Icare’s letter of 21 November 2016, in which the author of that letter, Mr Carson, provided his summary of what the surveillance of Ms Hastie on 18 and 21 October 2016, as recorded on the DVD, revealed. However, Dr Teychenne does not indicate that he himself viewed the recordings of the surveillance or even the pictures taken from the recording and makes no comment at all regarding Mr Carson’s summary.
43. The functioning of Ms Hastie as at 18 and 21 October 2016, as revealed by the surveillance of her on those days that has been recorded on the DVD, and which I have summarised much earlier, was completely at odds with the history that Dr Teychenne obtained regarding the symptoms that Ms Hastie had developed to that point. Her functioning as revealed on the recordings on the DVD was far superior to that described by Dr Teychenne and was far superior to that which Ms Hastie obviously exhibited when attending her solicitors’ office on 21 September 2016 to sign the claim form.
44. Dr Teychenne has assumed, when formulating his opinion, that the history he obtained with respect to the development of symptoms by Ms Hastie is correct. In my view, having regard to how Ms Hastie was able to function in October 2016, as revealed by what was recorded on the DVD, the history Dr Teychenne obtained regarding the symptoms that Ms Hastie allegedly developed does not reflect what the situation actually was. In other words, the history Dr Teychenne obtained on this matter is simply incorrect. His opinion therefore with respect to Ms Hastie’s injury is based on an assumption relating to Ms Hastie’s development of symptoms that, up to October 2016, simply does not correlate, in my view, with what Ms Hastie’s actual symptoms and functioning was. Given the lack of correlation between the facts Dr Teychenne has assumed with respect to Ms Hastie’s symptoms and functioning as at October 2016 and what was in fact the case, Dr Teychenne’s diagnosis of Ms Hastie’s injury must, in my view, be given little weight.¹¹ Rather than how Dr Teychenne describes Ms Hastie’s symptoms, at the point to which they had developed by October 2016, the case was in fact that Ms Hastie was able to assist others to dump large pieces of rubbish, she was able to carry and walk with weight, she was to converse and laugh, and she was able to walk although with a limp.
45. Simply stated, the discrepancy between the capacity and functioning Ms Hastie actually had in October 2016, as distinct from that which Dr Teychenne assumed she had, based upon the history he obtained regarding the development of symptoms, is such that little weight can be afforded his opinion with respect to his diagnosis of the nature of the injury Ms Hastie suffered from the electric shock she received on 29 April 2016.

⁹ ARD pp81-83

¹⁰ ARD p87. The letter is in evidence at ARD p 37. That reveals she signed the claim form on 21 September 2016.

¹¹ See *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA58 (*Paric’s case*) at [9]

46. As mentioned Dr O'Sullivan examined Ms Hastie on 27 September 2017. The history he recorded in his report regarding the electric shock accords generally with that which I have found above actually occurred. I observe in his report that the history he obtained included Ms Hastie touching two prongs of the plug of the cord simultaneously. Mr Stockley submitted that the evidence does not establish that this occurred and, given that, I ought not to place any weight on Dr O'Sullivan's opinion in so far as he expresses a view that Ms Hastie suffered a physical injury from her plugging the cord into a power board.
47. As to whether Ms Hastie touched two prongs or not cannot be known from the evidence. But that is irrelevant, in my view, given I have found she received an electric shock on 29 April 2016. What is key to Dr O'Sullivan formulating his opinion with respect to whether Ms Hastie suffered injury is that Ms Hastie received an electric shock. If it be the case that Ms Hastie did not touch two prongs, the facts that Dr O'Sullivan has assumed, with respect to the electric shock Ms Hastie received, are still such that I can give weight to his opinion. That is, the correlation between the facts Dr O'Sullivan has assumed and what occurred with respect to the electric shock Ms Hastie received is sufficient such that what Dr O'Sullivan assumed provided a fair climate for his opinion.¹²
48. Dr O'Sullivan recounted in his report of 27 September 2017 the development of Ms Hastie's symptoms which, although very much briefer than that which Dr Teychenne recounted in his reports with respect to this, is generally consistent with what Dr Teychenne recorded regarding this. Dr O'Sullivan also noted the reports on the video surveillance of Ms Hastie on 18 October 2016 and 21 October 2016. It is not apparent that he actually viewed the recording, but rather it seems he just relied on the reports of it. What Dr O'Sullivan said in his report about the DVD accords broadly with the impression I formed when I viewed the DVD.
49. Dr O'Sullivan conducted an examination of Ms Hastie. Dr O'Sullivan stated that he could "find no evidence of any underlying organic neurological disease". He noted that Ms Hastie presented for examination seated in a wheelchair wearing shades over her eyes because she complained of intense photophobia. He noted that Ms Hastie had "completely lost her memory". He described Ms Hastie's presentation as being "most unusual".
50. Dr O'Sullivan considered that the incident on 29 April 2016 was not a substantial contributing factor or the main contributing factor "to her present ongoing symptoms". He considered, based on Ms Hastie's presentation, that there was no evidence that she had suffered any damage to her "cerebrum, cerebella, brain stem or spinal cord" as a result of the electric shock Ms Hastie received. In reference to Dr Teychenne's opinion there was a "transmission of current through the peripheral nerves into the spinal cord, down the spinal cord, into the brain stem and into the cerebrum", Dr O'Sullivan stated that based on the description of the "electrical shock the injury was very minimal indeed".
51. On my reading of Dr O'Sullivan's report, he is of the view that the electric shock that Ms Hastie received did result in a transmission of current into the peripheral nerves but it was not such that she suffered any organic damage to her spinal cord, brain stem or cerebrum. Dr O'Sullivan is of the view however that Ms Hastie did suffer an injury from the event, and this is because that is what he says. He says however, that the injury was "minimal".
52. Mr Stockley put to me that Dr O'Sullivan when using the term "injury" was not expressing the view that Ms Hastie suffered an injury within the meaning of that word within s 4 of the 1987 Act. I do not accept that that is the case. To my mind, Dr O'Sullivan distinguishes between the event, that is the electric shock, and the consequence of that event, that is the injury that occurred to Ms Hastie from the event. Given Dr O'Sullivan is a medical practitioner, and indeed practising in the speciality of neurology, it seems to me that in the

¹² Paric's case at [9]

context in which he uses the word “injury” he is denoting that Ms Hastie did suffer a physiological disturbance by virtue of the current passing along the periphery nerve. He is of the view however, that the disturbance, that is the injury, was minimal and that the symptoms and condition with which Ms Hastie presented at the time of his examination of her do not stem from that minimal injury. He speculates that Ms Hastie’s current conditioning is “functional” and not due to anything organic, and could be possibly explained as due to a “conversion disorder”.

53. In any event, I accept Dr O’Sullivan’s opinion. It is to be afforded far more weight than the opinion of Dr Teychenne, given that Dr O’Sullivan formulated his opinion by reference to a more accurate history that included consideration of what the actual symptoms and functioning of Ms Hastie was as at September and October 2016 as revealed by the reports to which he had regard relating to the surveillance of Ms Hastie . It is based upon his findings from examination and also an assumption with respect to what occurred when Ms Hastie received an electric shock that sufficiently correlates with what in fact occurred.
54. In the circumstances, I am satisfied that Ms Hastie has suffered an injury to her nervous system. It is neither necessary nor desirable at this stage to make any specific findings regarding the exact pathology that constitutes injury.¹³ There is great controversy regarding the extent to which Ms Hastie’s current presentation and symptoms result from that injury, but for reasons explained much earlier, that controversy is to be determined when her claims for compensation as determined following an AMS assessing her permanent impairment from that injury.

¹³ See *Inghams Enterprises Pty Ltd v Belokoski* [2017] NSWCCPD 15 at [222]-[224]