

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 290/20  
**Applicant:** Julie Al Titi  
**Respondent:** State of New South Wales (Sydney Local Health District)  
**Date of Determination:** 27 March 2020  
**Citation:** [2020] NSWCC 93

The Commission determines:

1. The applicant suffered an injury to her right upper extremity (shoulder) in the course of her employment with the respondent on 29 December 2014.
2. The applicant suffered an injury to her cervical spine in the course of her employment with the respondent on 13 April 2016.
3. Award for the respondent.

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

Cameron Burge  
**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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Lucy Golic  
Dispute Services Officer

As delegate of the Registrar



## STATEMENT OF REASONS

### BACKGROUND

1. Julie Al Titi (the applicant) was injured in the course of her employment with Sydney Local Health District (the respondent) on 29 December 2014. There is no issue that she suffered an injury to her right shoulder on that date, however, the respondent disputes a claimed injury to the cervical spine.
2. The applicant claims her cervical spine was also injured in the incident on 29 December 2014, or alternatively in an incident which took place on 13 April 2016 or alternatively as a result of the nature and conditions of her employment.
3. The manner in which the applicant suffered her alleged injuries is important for several reasons. On her own case, if the alleged right upper extremity and cervical spine impairments cannot be aggregated, then the applicant's claim will fail as none of the allegedly impaired body parts satisfies the requirements of the threshold for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

### ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
  - (a) Whether the applicant suffered an injury to her cervical spine at all, and
  - (b) If the answer to (a) above is in the affirmative, did that injury arise from the same injurious event as her right upper extremity impairment?

### PROCEDURE BEFORE THE COMMISSION

5. The parties attended a hearing on 9 March 2020. Despite the best endeavours of the parties and me, the matter was unable to resolve and accordingly proceeded to an arbitration hearing. 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.
6. At the hearing, Mr P Stockley of counsel appeared for the applicant and Mr F Doak of counsel appeared for the respondent.

### EVIDENCE

#### Documentary evidence

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

#### Oral Evidence

8. There was no oral evidence called at the hearing.

## FINDINGS AND REASONS

### The alleged cervical spine injury

9. Both Dr Endrey-Walder, independent medical examiner (IME) and treating surgeon Dr Pope provide support for a finding of the applicant having injured her cervical spine.

10. In his report to the applicant's general practitioner dated 1 March 2017, Dr Pope noted:

“She was diagnosed with a rotator cuff tear and was treated with physiotherapy and improved. She aggravated her injury working full-time with a new incident in late 2015 doing the same activities. She describes neck pain in the cervicothoracic junction to the interscapular zone, daily, mechanical and not-mechanical, radiation to the previously injured shoulder not past the elbow. Symptoms are worse with activity and improved with rest. There has been no upper limb pain pins and needles, numbness or weakness. ...

My opinion is that [the applicant] has two work related injuries. Rotator cuff on the right and the other a neck injury with three levels of disc herniation.”

11. In his report dated 16 November 2017, Dr Endrey-Walder commented on the opinion of Dr Pope regarding the applicant having suffered a cervical spine injury and said at page 36 of the Application:

“As to whether there is contribution to the right shoulder pain by radicular or referred pain from the neck is difficult to say, but I found no overwhelming clinical evidence today of active radiculopathy emanating from the cervical spine.

I believe that it is more likely that the majority of this lady's symptoms, mostly activity related, relate to rotator cuff pathology with some contribution by referred pain from soft tissue injury to the neck.”

12. On balance, I find these opinions persuasive. They accord with the applicant's own evidence of a cervical spine which was asymptomatic before the alleged injury (see paragraph 4 of the applicant's statement). The opinions of Dr Endrey-Walder and Dr Pope are also consistent with the radiological evidence found from page 42 of the Application which demonstrates nerve root impingement at C4/5 and C5/6.

13. In making this finding, I reject the opinion of Dr Machart, IME for the respondent, whose basis for finding no neck injury is the absence of pain on the part of the applicant in and around 2014. That opinion does not, in my view, adequately explain the onset of neck symptoms and pathology which is demonstrated in or about 2016 and recorded in the MRI from that time.

14. Instead, I prefer the opinions of Dr Pope and Dr Endrey-Walder who take into account the presence of neck symptoms and deal with them from a diagnostic point of view.

15. Accordingly, I find that the applicant suffered an injury to her cervical spine, and that this injury arose as a result of the incident on 13 April 2016. On that occasion, according to the applicant:

“On the 13 April 2016 I suffered a further aggravation to my shoulder and neck when I was in the course of my cleaning duties and was lifting a large bin lid to place garbage in.”

16. Although the applicant describes the incident of 13 April 2016 causing a “further aggravation” to her shoulder and neck, it is apparent that she made no complaints of neck problems before that incident, and that they were present from that time. On 10 June 2016, she attended Dr Pope's offices at which time he recommended conservative treatment with regards to her neck symptoms and prescribed her with Lyrica, together with recommending physiotherapy sessions.
17. For the above reasons, I find the applicant suffered an injury to her cervical spine in the course of her employment with the respondent on 13 April 2016, to which her employment was a substantial contributing factor.

### **Aggregation of the alleged injuries**

18. In my opinion, the applicant has not discharged the onus of proof in establishing that both her right shoulder and cervical spine symptoms arose from the same injury and/or the same pathology.
19. The applicant's case is pleaded in the alternative as a frank injury to her neck and shoulder on 29 December 2014, an aggravation at work on 13 April 2016 or as having been caused by the nature and conditions of her employment.
20. As indicated above, I have found the applicant suffered an injury to right upper extremity (shoulder) on 29 December 2014. Her version of that incident, which is uncontested, is found at paragraphs 11-15 of her statement.
21. That evidence is supported by contemporaneous medical evidence that the applicant suffered right shoulder pathological changes after the frank incident on 29 December 2014. I therefore find the incident on that date was the cause of her right shoulder injuries, rather than them being caused by the nature and conditions of her employment.
22. It is common ground that the applicant did not complain of neck problems until 2016. The circumstances giving rise to her neck problems are set out in her statement at paragraph 17, and the treatment which was provided to her after April 2016 is set out at paragraphs 17-25 of that document.
23. Mr Stockley quite appropriately conceded in his submissions that the first time the applicant complained of neck symptoms was after the incident in April 2016.
24. I accept, in light of the applicant's own evidence and the contemporaneous medical material, that she suffered an injury to her right shoulder on 29 December 2014.
25. I do not, however, accept the applicant suffered her neck injury in the same incident. Rather, for the reasons already advanced, I find based on her evidence and the contemporaneous medical material that the applicant suffered her cervical spine injury on 13 April 2016, in the manner described in her statement.
26. As Mr Doak noted and Mr Stockley appropriately conceded, there is no suggestion in the pleadings that the applicant's neck problems were caused by an aggravation of a disease process in her cervical spine. The matter is pleaded on the bases previously set out at paragraph 19 of these reasons.

27. On the balance of probabilities, I am of the view the applicant has not satisfied the test which would enable aggregation of her alleged impairments, as set out in the decision of Roche DP in *Department of Juvenile Justice v Edmed* [2008] NSWCCPD 6. The decision stands for the proposition that impairments resulting from the same injury (meaning pathology) are to be assessed together. Similarly, Arbitrator Snell (as he then was) in *Stagg v Department of Education and Communities* [2014] NSWCC 441 at [32] noted:

“It is not possible to aggregate assessments that do not result from the same incident and which do not result from the same pathology.”

28. In this matter, the applicant's own IME indicates that her shoulder symptoms are at best only contributed to in a minor manner by neck pathology. He rules out any radicular symptoms in the applicant's right upper extremity. Likewise, her first complaint of neck symptoms is after the incident in April 2016.
29. In this matter, having found the applicant suffered her cervical spine injury in a separate incident to the injury to her right shoulder, and the cervical spine injury involves separate and different pathology to that caused in the right shoulder injury, it is not in my view appropriate for the two injuries to be assessed together, and there will therefore be an award for the respondent.