WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1467/20**
Applicant: **Craig Wilson**
Respondent: **Ausgrid Management Pty Ltd**
Date of Determination: **16 June 2020**
Citation: **[2020] NSWWCC 202**

The Commission determines:

1. The applicant suffered an injury to his cervical spine in the course of his employment with the respondent by way of an aggravation to underlying degenerative changes, with a deemed date of injury of 28 October 2016.

2. The applicant's employment was the main contributing factor to the injury referred to in (1) above, the effects of which remain ongoing.

3. At the deemed date of injury, the applicant's pre-injury average weekly earnings (PIAWE) were $1,371.50.

4. As a result of the injury referred to in (1) above, the applicant was totally incapacitated for employment between 30 May 2017 and 26 April 2019.

5. Pursuant to section 37 of the *Workers Compensation Act 1987* the respondent is to pay the applicant weekly compensation for the period referred to in (4) above at the rate of $1,097.20 per week.

6. The cervical fusion surgery proposed by Dr Singh is reasonably necessary as a result of the injury referred to in (1) above.

7. The respondent is to pay the costs of and incidental to the surgery referred to in (6) above and is to pay the applicant's reasonably necessary medical expenses, in accordance with section 60 of the *Workers Compensation Act 1987*.

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.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Craig Wilson (the applicant) commenced work with Ausgrid Management Pty Ltd (the respondent) as a storeman and field worker on 10 January 2000. He received and stored stock both manually and with the use of a forklift. He states the work was heavy and repetitive.

2. Over time, the applicant says he began to develop aches and pains in his back and left shoulder. On 14 October 2016, his duties changed when he was trained in sedentary computer-based work. During the first week in this new role, the applicant's neck symptoms got worse and spread into his left arm and shoulder.

3. On 23 October 2016, the applicant's condition deteriorated to the point his wife took him to the emergency department at Wyong Hospital. Shortly after, he was certified unfit for work and completed a workers' compensation claim form on 22 December 2016. At that time, the applicant attributed his injury to prolonged sitting at a computer. He has not worked since.

4. On 30 May 2017, the respondent issued a section 74 notice denying liability on the basis the applicant had fully recovered from the effects of his injury. That decision was confirmed in a section 78 notice dated 13 March 2020.

5. The applicant brings a claim for weekly compensation for the period 30 May 2017 to 26 April 2019 at an agreed rate of $1,097.20 per week and for section 60 expenses, including the cost of a proposed two-level cervical spine decompression and fusion.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:

    (a) Whether the effects of the applicant's injury have passed;

    (b) If the injury is ongoing, whether it gives rise to the need for a reasonably necessary two-level cervical spine fusion; and

    (c) If the injury is ongoing, whether it gave rise to incapacity, and to what extent.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a hearing on 26 May 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.

8. At the hearing, Mr P Perry instructed by Ms B El Masri appeared for the applicant and Mr D Saul instructed by Ms L Beattie appeared for the respondent.

EVIDENCE

Documentary evidence

9. 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;

(b) Reply and attached documents;

(c) The applicant's Application to Admit Late Documents (AALD) dated 15 April 2020; and

(d) Report of Dr Harrington dated 14 April 2020, tendered without objection by the respondent and marked Exhibit 1.

Oral evidence

10. There was no evidence called at the hearing.

FINDINGS AND REASONS

Whether the effects of the injury are ongoing

11. The applicant bears the onus of providing his cervical spine symptoms continue to be caused by the workplace injury. In determining the cause of an injury, the Commission must apply a common-sense test of causation. In the workers compensation context, that test was set out in the oft quoted passage of Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*).

12. The respondent does not dispute there was an injurious event, however, it characterises it as a transient aggravation of an underlying condition, the effects of which have passed.

13. The applicant's case, as set out by independent medical examiner (IME) Dr New, is that heavy work over many years rendered his cervical spine pathology symptomatic by way of radiculopathy which worsened in late 2016, when a change of roles at work brought about increased symptomology. In his supplementary report dated 28 March 2019, Dr New says:

> "In my report of 27 July 2018, it was my opinion that the patient's condition was caused by the general nature and conditions of the scope of his duties of his employment in both phases. I would confirm that it is the nature and conditions of his employment performed over 18 years, as well as the change in his duties in September 2016, which have caused degeneration in his neck, despite him being asymptomatic prior to going off work following his initial report of pain."

14. That report is broadly consistent with the findings of the cervical spine CT scan taken on 10 January 2017, which relevantly found:

> "At C6/7, there is a disc bulge centrally indenting the thecal sac. There are neurocentral joint degenerative changes bilaterally associated with slight but not significant foraminal narrowing most marked on the left."

15. Support for a finding of radiculopathy is also found in the report of Dr Vasili, treating orthopaedic surgeon who noted in February 2017:

> "After working with Ausgrid for the last 17 years as a labourer, Craig recently accepted voluntary redundancy which involved participation in a career transitioning programme. After two weeks of computer work, he experienced neck pain which necessitated presentation to hospital.
>
> Craig now describes constant neck discomfort radiating to the back of the head, and along the posterior aspect of the left arm as far as the elbow, with paraesthesia affecting within the ulnar two digits of the left hand. Craig also described neck stiffness and clicking, with discomfort upon turning to the left and looking down.

> The physiotherapy has not provided significant benefit. Craig is on no regular medications, and he denies a significant past medical history."

16. The applicant underwent a CT guided nerve block injection, as reported at page 77 of the Application with minimal improvement in his neck and left arm symptoms. In my opinion, that report is significant as it demonstrates the presence of left arm symptoms consistent with radiculopathy, which Dr New indicates is in turn suggestive of cervical spine problems necessitating the proposed surgery.

17. Dr Harrington, the respondent's IME originally only had a history of the applicant's symptoms arising due to computer work, however, in later reports he obtained the relevant history of prolonged heavy, manual work. He consistently says the applicant is an honest historian.

18. In his report dated 14 April 2020 (Exhibit 1), Dr Harrington also notes at page 3 the presence of ongoing left arm symptoms. Mr Perry submitted such an observation is consistent with radiculopathy, as is treating neurosurgeon Dr Singh's recommendation at page 69 of the Application that surgery will alleviate neck and arm symptoms.

19. Mr Perry also relied on entries in the general practitioner clinical records, such as that found on 21 September 2017 recording chronic pain, stiffness in the neck and "radicular pain". He submitted that was suggestive of long-standing radiculopathy, rather than a transient aggravation, the effects of which had passed.

20. At page 7 of Exhibit 1, Dr Harrington provided the following response to this question:

> "*6. Do you consider the section 60 expenses claimed, for both past and future medical treatment, to be reasonable and necessary and as a result of employment?*
>
> His treatment has consisted of physical therapy and injections. I believe there is an argument for the onset of symptoms being related to 15 years of work in the depot, rather than the onset of symptoms he experienced using a computer in 2016.
>
> Be that as it may, Mr Wilson has not worked for Ausgrid for several years. In my opinion the work-related aggravation has now ceased. This is based on the lack of frank injury to indicate significant work-related condition." (original emphasis)

I reject that opinion. The bare opinion that the effects of an aggravation have passed because a worker ceases employment is one frequently seen in this jurisdiction. Absent a substantive explanation, it is a mere *ipse dixit* statement and no more. The uncontroversial facts in this matter are that the applicant worked for 16 years in a job entailing repetitive, heavy employment. Nothing in Dr Harrington's opinion explains why the effects of such prolonged heavy work would have passed because the applicant moved to a sedentary role and then ceased employment. Absent such an explanation, I reject Dr Harrington's opinion.

21. Mr Saul submitted, and I accept, that it is not enough for the nature and conditions of the applicant's employment to be capable of causing an injury, it must be shown that those nature and conditions in fact caused it (see *Mannie v Bauer Media Pty Ltd* [2016] NSWWCCPD 47 at [86] and [87]). It is not enough for an injured worker to submit, absent any other explanation, that the work they carried out, must be the cause of an injury or condition.

22. Nevertheless, in my opinion, the preponderance of the medical evidence establishes on the balance of probabilities, the applicant's employment was the major contributing factor to the aggravation of his cervical spine pathology, and that the effects of the aggravation are ongoing.

23. That finding is supported by the opinions of all doctors save Dr Harrington, whose opinion I have rejected for the reasons set out at [20] above.

24. In terms of the presence of radiculopathy, the following opinions are noteworthy. Dr Singh, treating neurosurgeon who proposes to carry out the cervical fusion, noted in his report dated 4 July 2019 found at page 62 of the Application:

> "The reasoning for surgical decompression is that there is a clinical diagnosis of radiculopathy at C6/7 based upon the history, and the clinical examination which reveals weakness of the involved muscles and sensory changes in the respective dermatomes. He has failed conservative treatment and has a significant disc bulge compressing the neurological elements."

25. For his part, treating general practitioner Dr Lim records in his report dated 21 March 2019 that the applicant was continuing to suffer "persistent neck pain with left arm radiation." He diagnosed cervical spine strain at C6/7 disc bulge affecting the thecal sac.

26. As already noted, Dr Vasili, treating orthopaedic surgeon also described symptoms consistent with radiculopathy in his report dated 13 February 2017.

27. Dr New, IME indicated that the applicant's symptoms as at July 2018 included "dysaesthesia only into his left arm. He describes the pain as an aching quality with pins and needles, exacerbated by changing positions, coughing, sneezing, prolonged sitting and recurrent lifting." Dr New described the pathology as "left sided radiculopathy in his upper limb" which is consistent with the C6 and C7 nerve root distribution. He attributed the mechanism of injury to the two phases of the applicant's employment, rather than simply the two weeks sitting at a computer.

28. In his report dated 2 December 2019, Dr New noted the type of cervical surgery proposed by Dr Singh is usually based on arm radicular pain rather than neck pain. He said the main indicator for surgery is "true radiculopathy". Dr New then stated "It would be my opinion that if the patient continues to have radicular pain in the C6 and C7 nerve root distribution then that would be an indication for the patient's surgery to proceed." Implicit in Dr New stating surgery would be indicated if the applicant "continues" to have radicular pain is a finding by the doctor that there was radicular pain to begin with. As noted, the applicant's evidence is his left arm radicular symptoms persist.

29. In his second statement dated 5 February 2019, the applicant states that he continues to have pain in his left shoulder together with "a constant dull ache which travels the length of my left arm. I also have days where I experienced numbness from the top of my left arm down to my fingertips." That evidence is uncontested, and in my view supports a finding of ongoing radicular pain brought about by the nature and conditions of the applicant's employment.

30. In the above reasons, I find that the effects of the aggravation of the applicant's degenerative condition in his cervical spine are ongoing.

Whether the effects of the aggravation give rise to the need for reasonably necessary cervical spine fusion

31. The question of whether the cervical fusion is reasonably necessary largely turns on whether the applicant suffers from radiculopathy.

32. For the following reasons, I find the applicant's symptoms are consistent with, and indeed are as a result of radiculopathy.

33. It is trite to say that the applicant bears the onus of demonstrating any proposed treatment is reasonably necessary. The relevant test for establishing reasonable necessity is set out in the decision of Deputy President Roche in *Diab v NRMA Limited* [2014] NSWWCCPD 72 (Diab). In that matter, the Deputy President cited with approval the test articulated by his Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233 (Bartolo). Thus, treatment will be considered reasonably necessary if the Commission finds that it is preferable that the worker should have the treatment than it be forborne.

34. There are other considerations which are also relevant to deciding whether treatment is reasonably necessary. These include, but are not limited to, the appropriateness of the treatment, the availability of alternative treatment and the potential effectiveness of the alternative, the cost of the proposed treatment, the actual potential effectiveness of the proposed treatment and the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

35. Taking into account the various indicia as set out in the decision of Deputy President Roche in Diab as applying the principles set out in the decision of his Honour Judge Burke in Bartolo I am satisfied on the balance of probabilities that the treatment is reasonably necessary. As was noted in *Diab*, the word "reasonably" in section 60 operates to qualify the word "necessary", such that an injured worker does not need to prove the treatment is either absolutely necessary or the only available treatment modality.

36. As already noted, IME Dr New's opinion is if the applicant suffers from radiculopathy, then the proposed surgery will be beneficial. For his part, treating surgeon Dr Singh reports the benefits of the proposed surgery are the alleviation of both arm and neck symptoms. Although Dr Harrington *prima facie* says there are no signs of radiculopathy, he then goes on to set out symptoms which are consistent with it.

37. In Exhibit 1, Dr Harrington records the applicant having noticed reduced muscle bulk in his left forearm compared to the other side, muscle wasting and reduction of tone, reduced biceps jerk when compared to the right side and altered sensation in his whole arm which runs from the wrist all the way up to his neck and trapezius. Dr Harrington states there is a lack of radiculopathy "apart from a reduced biceps jerk on that left side – which may be subjective." In my view, Dr Harrington's opinion is to an extent contradictory on the question of whether radiculopathy is present and is not sufficient to overcome the balance of the medical evidence regarding the presence of radiculopathy, which has been referred to at [24] to [28] above.

38. Treating surgeon Dr Singh states in his report of 23 January 2020 that the applicant's arm symptoms are radicular in nature and consistent with "radicular pain and paraesthesia in the left C7 and to some extent the C6-7 distributions. In my opinion his significant symptoms are secondary to the pathology in the cervical spine."

39. On balance, I am satisfied the preponderance of the medical evidence establishes the presence of radiculopathy and that the surgery proposed by Dr Singh is reasonably necessary.

40. Having regard to the long course of conservative treatment undertaken by the applicant to little or no effect, and also the cost of the alleged treatment and its known effect in terms of benefiting the effects of radiculopathy which I have found the applicant experiences, I am satisfied as indicated that the proposed operation is reasonably necessary.

41. Having found for the reasons set out above that the applicant continues to suffer from radiculopathy as a result of the workplace injury at issue, it follows I am satisfied the precondition for the surgery to be appropriate as set out by Dr New is satisfied. In so finding, I have taken into account Dr Harrington's opinion that there were no radicular signs, however, as noted at [37] above, having discounted the presence of radiculopathy, Dr Harrington then set out a number of signs which are actually consistent with it.

42. The combination of the views of Dr Singh, Dr Vasili and Dr New together with the findings of the CT scan at C6/7 in my view establishes the presence of radiculopathy, for which the proposed surgery is universally regarded by the experts in the matter as appropriate.

43. For these reasons, I find the presence of radiculopathy as a result of the workplace injury is ongoing, and that the proposed surgery is reasonably necessary as a result of that injury.

Incapacity

44. Having found that the effect of the injury is ongoing and causative of the applicant's symptoms, I have little difficulty in accepting that he was totally incapacitated for the period claimed. In so finding, I have taken into account the medical certificates which indicate lack of capacity, together with the report of Dr Harrington himself, the IME for the respondent. In his latest report (Exhibit 1) Dr Harrington said:

> "He is not fit for pre-injury duties. Mr Wilson is a 53-year-old man with neck pain who has not worked for several years and we know that the prospects of retraining and obtaining meaningful work will be difficult."

45. While Dr Harrington said that theoretically the applicant would be fit for supervisory work which is light in nature for two days per week at the limited lifting capacity of 5 kg, on balance, I prefer the views of the applicant's treating practitioners who all indicate he was totally incapacitated for employment during the period claimed.

46. Dr New, IME for the applicant, agreed there were radicular symptoms at the time of his initial report in July 2018. Regarding capacity, Dr New said "it would be very difficult for him to have a favourable consideration for employment with ongoing neck and left arm pain (radiculopathy and possible left sided rotator cuff pathology)." In my view, that statement supports a finding of total incapacity at that time, and given my finding there is ongoing radiculopathy, is consistent with that total incapacity being present for the entirety of the period claimed.

47. Mr Saul noted, and I accept, that under the post-2012 statutory regime, the only relevant matter for determination is the applicant's capacity to work. When one examines the medical evidence in this matter, I find there is a consistency across the treating practitioners which supports a finding of total incapacity for the period claimed. Dr Lim, treating GP noted in his report dated 21 March 2019 "He has failed to demonstrate any work capacity, since returning to light work in an office caused a deterioration of his condition."

48. For his part, Dr Singh does not specifically comment on capacity, however, he recommends a multi-level fusion and refers to the applicant's significant neck and arm pain. He opined in his October 2018 report that the proposed surgery "will allow him to return to the work force as he is keen to do so." Implicit in that comment is an opinion that at the time Dr Singh wrote his report, the applicant was not capable of returning to the work force. That finding is reinforced by Dr Singh's report of 4 July 2019, in which he states the applicant is "unable to work."

49. On balance, I find the medical evidence supports a finding the applicant was totally incapacitated for employment for the period claimed.

50. The period claimed falls within the second entitlement period under section 37 of the 1987 Act. As the applicant has not returned to work, the relevant rate of compensation is set out at section 37(3), namely 80% of the applicant's pre-injury average weekly earnings, which in this matter is agreed. 80% of the agreed figure is $1.097.20. That figure having been agreed, I therefore order the respondent to pay the applicant weekly compensation for the period 30 May 2017 to 26 April 2019 pursuant to section 37 of the 1987 Act at the rate of $1,097.20 per week.

SUMMARY

51. For the reasons advanced, the Commissioner makes the order set out on page 1 of the Certificate of Determination.