

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3316/20
Applicant: JUDITH PALASTY
Respondent: KINCARE HEALTH SERVICES PTY LIMITED

Date of Determination: 31 August 2020
Citation: [2020] NSWCC 293

The Commission determines:

1. The applicant suffered injury to the cervical spine in the course of employment with the respondent on 12 March 2019 (deemed) in the form of the aggravation, acceleration, exacerbation or deterioration of pre-existing degenerative change; the employment was the main contributing factor to the injury.
2. The need for the applicant's C4-C7 anterior cervical decompression and fusion surgery proposed by Dr Bhisam Singh results from the work injury.
3. The proposed surgery is reasonably necessary.
4. The respondent is to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses for the injury including the above surgery proposed by Dr Singh and associated costs.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Ms Palasty (applicant) is a 65-year-old former part-time home care worker for Kincare Health Services (respondent) working three days per week from approximately 2016. Her duties included cleaning houses, shopping and bathing clients.
2. Ms Palasty made a claim for s 60 of the *Workers Compensation Act 1987* medical expenses for C4-C7 anterior cervical decompression and fusion surgery as proposed by Dr Bhisham Singh. The respondent insurer denied the claim in a Notice issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) dated 11 February 2020. This Application to Resolve a Dispute (Application) is for section 60 of the *Workers Compensation Act 1987* (1987 Act) is in respect of s 60 expenses, including the proposed surgery.

ISSUES FOR DETERMINATION

3. There is no dispute as to injury to the right arm. The following issues remain in dispute:
 - (a) Did Ms Palasty suffer injury of the aggravation, acceleration, exacerbation or deterioration of a pre-existing degenerative condition of the cervical spine in the course of her employment with the respondent (deemed date of injury 12 March 2019)?
 - (b) If so, was the employment the main contributing factor to the injury?
 - (c) If so, does the need for the cervical spine fusion surgery proposed by Dr Bhisham Singh result from the work injury?
 - (d) If so, is the proposed surgery reasonably necessary?

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a conciliation conference and arbitration hearing on 4 August 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.

EVIDENCE

Oral evidence

5. There was no oral evidence adduced.

Documentary evidence

6. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) Application with annexed documents, and
 - (b) Reply with annexed documents.

SUBMISSIONS

7. The representatives made oral submissions at the arbitration hearing. I have taken the submissions into account, and they are referred to in the discussion below.

Evidence

Ms Palasty statement 22 April 2020

8. On or around 28 November 2018, Ms Palasty noticed the development of pain in the neck, right shoulder, and right elbow. She had approximately one week off work, but then worked on because of financial obligations until Christmas time when she had more time off. She attempted to return to work around February 2019 but found the pain too intense to be able to continue. She saw her doctor, Dr Siddiqui, because of the pain in her neck, right shoulder, and elbow. There was pain radiating down her right arm which was like pins and needles. She was sent for imaging and was prescribed pain medication. There was a cortisone injection at the right shoulder and intensive physiotherapy. However, the pain has not resolved and the pins and needles in the right arm continue. She has difficulty holding things in her right hand due to loss of power and function.

Allcare Carnes Hill Medical Centre - clinical notes

9. There is reference to pain in the right arm at the shoulder and elbow in these notes from 27 November 2018, as well as mention of the cortisone injection for right shoulder bursitis. The notes also record the heavy nature of the work for the respondent. There is no report of the neck in the notes, with the last entry being 25 June 2019.

Dr Calvache-Rubio

10. The report of 25 March 2019 takes the history of neck and right arm symptoms associated with the work for the respondent. Dr Calvache-Rubio notes the symptoms, "Neck pain and stiffness, radiating to R) arm. R) shoulder pain, restriction of movement, R) elbow pain, clicking, R) arm weakness, trouble sleeping due to pain, worried, depressed, anxious."
11. The opinion is that, "Ms Judith K Palasty has suffered a Neck/Shoulder/Elbow injury with a diagnosis of Cervical Spine Radiculopathy (NDI: 60%); R) Shoulder Strain (SPADI: 83%) Bursitis (US); R) Elbow Strain. Intrasubstance tear common extensor tendon (US)."
12. There is also an "Injury Questionnaire" completed for Dr Calvache-Rubio by Ms Palasty on 25 March 2019 in which she records neck pain as well as right arm pain.

Dr Soo, orthopaedic surgeon

13. In the report of 9 May 2019, Dr Soo takes a history consistent with Ms Palasty's statement. He notes the symptoms in the right arm and neck and restrictions in the neck on examination, including "marked tenderness". In the report of 4 July 2019 Dr Soo expresses the opinion that the right arm issues were emanating from the neck, in part indicated because there was zero response to a cortisone injection in the shoulder, and also because of the nature of the right arm symptoms. Dr Soo felt that the referral to Dr Singh was a positive step in addressing the neck issues.

Dr Singh

14. In his report of 25 June 2019, Dr Singh records the stiffness and pain in the neck, the symptoms down the arm to the hand, and the discussion about neck surgery. In the report of 28 June 2019 Dr Singh refers to injury to the cervical spine with symptoms of pain with radiation to the arms on both sides with right sided weakness. He refers to the imaging showing disc bulges with deformation of the spinal cord at C5/6.

Dr Lim

15. In the report of 25 November 2019, Dr Lim notes Ms Palasty's consultation of 25 March 2019 for injury to the "Neck/Shoulder/Elbow". He also notes Ms Palasty's report of injury from the heavy work. Dr Lim says "it would be reasonable to conclude that the mechanism of injury was the direct result of performing those specified tasks." He also says the work was the main contributing factor to the injury. He goes on to give the diagnosis of, "Cervical Spine Stenosis aggravated."
16. Dr Lim discusses Dr Minter's opinion and disagrees with his belief that the degeneration in the cervical spine is not work related.

Dr Gehr

17. In his comprehensive report of 19 March 2020, Dr Gehr takes the history of the onset of symptoms and treatment. He notes the various reports and the absence of any prior medical history regarding the cervical spine.
18. Dr Gehr concludes that the neck symptoms arose from the employment and the work was the main contributing factor to the development of symptoms from the aggravation of the degenerative changes. He says, "Whatever degenerative changes, age-related, they would most likely have remained asymptomatic for a longer period if it had not been for the nature of her employment."
19. Dr Gehr says the surgery proposed by Dr Singh is "reasonable and necessary as it will alleviate the consequences of injury."

Dr Minter

20. There are three reports of Dr Minter in the materials the first of which is 8 November 2019 takes the history emphasising unrelated depression and also records that Ms Palasty lives alone, which is incorrect. Dr Minter says Ms Palasty "began to develop non-specific right arm and upper limb discomfort, this occurring over a period of at least 6 months and perhaps longer. There is no specific history of injury."
21. Dr Minter says that when "asked to isolate the area of maximum discomfort she was unable to do so." He reports "gross pain-related behaviour." He saw nothing in Ms Palasty's presentation related to the work, and she described no injury. He was unable to make a diagnosis to explain the presentation. He said, "I do not believe that "cervical spondylosis and spinal cord CSF effacement is related to the workplace." He said the employment was not the main contributing factor to the current symptoms. He saw the work as low impact and put the complaints down to abnormal pain behaviour coupled with a history of depression. He saw no indication for surgery. He also says that, "Perhaps she is not suited to this type of work." He saw any changes as age-related. He recommended that Ms Palasty see a neurosurgeon before any surgery.
22. Dr Minter said there is pre-existing pathology but it appears to be an "incidental finding" as she has no clinical features of cervical myelopathy. He saw the proposed surgery as unnecessary in the clinical sense as well as being unrelated to work.
23. In the supplementary report of 29 November 2019, Dr Minter says he reported that Ms Palasty lived alone because that was the history she gave him. He reiterates that Ms Palasty at no point recalled any injury. He also reiterated that Ms Palasty was vague in her identification of the site of maximum pain. Dr Minter disagreed with Dr Lim on the aggravation of the degenerative changes. He said,

"I was concerned that Dr Lim feels that the degenerative change in her neck has been somehow aggravated by the performance of her duties. Even if one were to assume that this was the case, and I do not agree that this is the case, such aggravation cannot be regarded as longstanding."

24. Dr Minter also noted that Dr Lim agreed with him that, "Perhaps she is not suited to this type of work." He said, "You will note that since she has stopped her duties her symptoms have not improved in any way. Thus, if there has been aggravating effect from her workplace, there should have been some amelioration since discontinuing work."
25. Dr Minter's second supplementary report of 14 April 2020 focussed on reviewing the report of Dr Gehr, in which he referred to the difference in his own findings on examination of illness behaviour and "that there was no evidence that she had had an injury at any time." Dr Minter expresses interest in the fact that contrary to his own findings, Dr Gehr found no pain behaviour. Dr Minter was concerned that there are discrepancies in the date of injury noted by Dr Gehr and Dr Lim, in which Dr Gehr referred to developing pain from 28 November 2018 and also that cervical spine pain and anterior shoulder pain was developing in February 2019.

Discussion

Did Ms Palasty suffer injury of the aggravation, acceleration, exacerbation or deterioration of a degenerative condition of the cervical spine in the course of her employment with the respondent (deemed date of injury 12 March 2019)?

26. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452, the Court said, "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. ... What is required is a commonsense evaluation of the causal chain." As has since been indicated by the High Court the "commonsense" concept does not operate at large. All the evidence must be considered, with the onus of proof on the applicant throughout.¹
27. The respondent submits that the circumstances of Ms Palasty's work do not support injury to the neck. Dr Minter notes there was no specific event of injury and Dr Gehr notes Ms Palasty was only casual. It is submitted the activities in the work were varied and not repetitive and could be done as she wanted and this work was unlikely to aggravate the degenerative changes in the neck.
28. Ms Palasty outlines her work in her statement. She notes the cleaning and bathing of clients as well as shopping. In my view this qualifies as heavy work, in particular the cleaning and bathing. It was three days per week from 2016 as noted by Dr Minter, but he does not go on to say that this is the reason there was no aggravation. When Ms Palasty returned to work after Christmas 2018 she was unable to cope, which reflects the physical demands of the duties.
29. The respondent submits that the clinical notes contradict Ms Palasty's statement that she had neck symptoms from 28 November 2018. The notes only refer to the right arm issues, and there is no mention of neck investigations at that time. The first mention of neck pain was in early March 2018 when Ms Palasty attended a new general practitioner.
30. A significant issue here is the role of the right shoulder injury which in my view has clouded the symptoms emanating from the neck for two or three months. Ms Palasty was conscious of pain in the neck and arm, but the focus of treatment was on the shoulder with the pathology in the neck being picked up later in the April 2019 MRI after it was raised with Dr Calvache-Rubio who records the symptoms in his report of 25 March 2019 and relates these symptoms in the neck to the duties he understood were being performed in the

¹ *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506; *Flounders v Millar* [2007] NSWCA 238

employment. He notes the symptoms in the arm and neck which are complicated because as it turned out there was injury to both the neck and the shoulder, “Neck pain and stiffness, radiating to R) arm. R) shoulder pain, restriction of movement, R) elbow pain, clicking, R) arm weakness ...”. Ms Palasty could not be expected to identify the source of the symptoms given the overlap in pain stemming from the shoulder and the neck that was later clarified. In these circumstances that the neck was not specifically referred to in the medical notes and reports until March 2019 is not inconsistent with their being injury to the neck.

31. Dr Gehr is clear in his opinion as to the work with the respondent as the cause of the neck symptoms, and Dr Soo is of the opinion that the arm symptoms are related to the neck problem, not to the shoulder. Dr Lim is also of the opinion that the work is the cause of the neck symptoms.
32. Dr Minitier is of limited assistance because his opinion emphasises the absence of an incident of injury; perceived illness behaviour; and the history of depression. These factors do not work against Ms Palasty’s claim. There is no evidence that the history of depression has any bearing on the symptoms, and Dr Minitier is not a psychiatrist. The clinical notes about a mental health plan do not negate injury or the need for surgery. Any such conclusion is not based on evidence, and is speculative. The respondent’s submission is not accepted. The claimed injury is the aggravation of degenerative change in the neck by the work duties, not of a specific incident of injury.
33. No other practitioner found “gross pain-related behaviour”, with Dr Gehr reporting no evidence of this feature on examination. The absence of a specific incident of injury is not relevant to the aggravation of degenerative changes due to the work over a period of time, and in Dr Minitier’s report these repeated comments serve to distract from the issue in dispute. I do not see the cervical pathology as “incidental findings” but as explaining the symptoms arising from the aggravation of previously asymptomatic degenerative change. This is supported by the evidence of the onset of symptoms from November 2018.
34. I prefer Dr Gehr’s report together with the opinions of Dr Soo and Dr Lim on causation. They are consistent with the evidence of Ms Palasty which I accept on the history of the development of symptoms in the neck even though she was initially unable to discern the separate sources of pain from the shoulder and the neck. This became apparent with the MRI of the neck in April 2019. The neck symptoms developed by the end of November 2018, and despite a period of rest, they continued, preventing a return to work.
35. Dr Gehr records pain in the cervical spine, as well as the right shoulder and elbow from 28 November 2018. Dr Gehr also says the cervical and anterior shoulder pain “developed in February 2019”. I don’t see this as a contradiction, as submitted for the respondent, but a reference to progression of the symptoms in February 2019. Dr Gehr goes on to note that Ms Palasty reported “persisting cervical spine pain from the time of onset from November 2018”.
36. For these reasons I find that Ms Palasty suffered injury in the form of the aggravation acceleration, exacerbation, or deterioration of degenerative changes in her cervical spine in the course of employment with the respondent, with the deemed date of injury 12 March 2019.

Was the employment the main contributing factor to the injury?

37. The employment is required to be the main contributing factor to the aggravation of the pre-existing condition, not to the condition itself. There are no other aggravating factors apparent on the evidence. I have found that the work was of a nature consistent with the findings of the preferred medical opinion. There were no symptoms before their onset at work. I find that the employment was the main contributing factor to the aggravation of the pre-existing cervical spine condition.

Does the need for the cervical spine fusion surgery proposed by Dr Bisham Singh result from the work injury?

38. Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 (*Murphy*), noted the established authority² that there may be multiple causes of an injury, and also emphasised that the test with medical expenses is whether the injury was a “material contribution” to the need for the claimed treatment, in order for it to be accepted as a result of the injury.
39. Given the findings on injury and main contributing factor, it tends to follow that the work has brought on the contemplation of surgery by Ms Palasty’s treating specialist, Dr Singh. Dr Gehr is of the opinion that the degenerative change would have remained asymptomatic “for longer” in the absence of the aggravation at work. It seems clear to me on all the evidence that the work is a material contribution to the need for cervical surgery.
40. For the above reasons I find that the need for the cervical spine surgery results from the injury of 12 March 2019 (deemed).

Is the proposed surgery reasonably necessary?

41. I also prefer Dr Singh and Dr Gehr on this issue to the opinion of Dr Minter, whose opinion on the proposed surgery was affected by his strong opinion of pain behaviour and the history of depression, an opinion that does not appear anywhere else. He finds a lack of neurological issues on examination but does allow that if there were cervical myelopathy or pending myelopathy present then surgery might be indicated. Dr Singh outlines the history of Ms Palasty dropping things and of the referred symptoms in the arms from the neck. This is consistent with Ms Palasty’s statement of having difficulty holding items in her hand. Dr Gehr is of the view that the proposed surgery would address the symptoms caused by the work aggravation. Dr Gehr does say he would recommend a second opinion before surgery, but this is something to be considered by the treating surgeon and Ms Palasty. It is not a basis on which to deny Ms Palasty the costs of surgery aimed at alleviating her symptoms.
42. In terms of the relevant authorities³ the proposed treatment is appropriate, as it is directed at the source of local pain and referred symptoms in the right arm since November 2018. No alternatives are apparent, apart from Dr Minter’s option of doing nothing because there was no injury. Dr Singh describes the unpleasant symptoms as treating surgeon and outlines the elements of the proposed surgery.
43. The procedure is one well known and accepted by the medical profession, and its cost does not outweigh the potential benefits. As to effectiveness, the objective is to reduce pain, and increase efficient use of the arm. It is surgery that, in terms of *Rose*, should not be forborne by Ms Palasty and is reasonably necessary.

SUMMARY

44. Ms Palasty suffered injury to her cervical spine in the course of her employment with the respondent in the form of the aggravation, acceleration, exacerbation, or deterioration of degenerative change (deemed date of injury 12 March 2019). The employment is the main contributing factor to the aggravation.
45. The need for the surgery proposed by Dr Singh results from the work injury.

² See *Comcare v Martin* [2016] HCA 43

³ *Rose v Health Commission (NSW)* [1986] NSWCC 2 (*Rose*); *Diab v NRMA Ltd* [2014] NSWCCPD 72; and *Pelama Pty Ltd v Blake* [1988] NSWCC 6.

46. The surgery proposed by Dr Singh is reasonably necessary.
47. Ms Palasty is entitled to s 60 of the 1987 Act expenses for the injury, including those associated with the surgery proposed by Dr Singh.