

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3715/20
Applicant: Kelly Hunter
Respondent: Bowral Management Company Pty Ltd
Date of Determination: 10 September 2020
Citation: [2020] NSWCC 314

The Commission determines:

1. Award for the respondent in respect of the claim for injury to the low back on 13 July 2015 as a result of the applicant being grabbed by a patient while the applicant was attempting to perform pressure area care on the patient.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Kelly Hunter (Ms Hunter/the applicant) commenced employment in March 2013 as an Endorsed Enrolled Nurse at the Southern Highlands Private Hospital, a private hospital operated by Bowral Management Co Pty Ltd (the respondent). During the course of a night shift on 13 July 2015, she suffered the onset of low back symptoms.
2. Ms Hunter consulted her general practitioner and was off work until September 2015. At that time the workers compensation insurer notified Ms Hunter that her claim had not been accepted. Ms Hunter then returned to work carrying out normal duties with the assistance of pain medication.
3. Complaining of increasing symptoms in the low back, Ms Hunter went off work and was referred to a neurosurgeon, Dr Abraszko, who recommended conservative treatment. Ms Hunter continued to experience symptoms in the low back and Dr Abraszko considered L5/S1 anterior discectomy and interbody fusion.
4. In May 2019, Ms Hunter was referred by her legal advisors to a neurosurgeon and pain management specialist, Dr Michael Davies, for the purposes of obtaining a medicolegal report. In the light of that report Ms Hunter's legal representatives requested a review of the insurer's decision to decline the claim.
5. The insurer maintained its denial of the claim, disputing that Ms Hunter had suffered an injury in the course of employment or that employment was a substantial contributing factor.
6. Ms Hunter's legal representatives then filed an Application to Resolve a Dispute (the Application) in the Commission alleging lumbar spine injury by way of aggravation, acceleration or exacerbation or deterioration of a disease, deemed have occurred on 13 July 2015. The cause of the aggravation injury was alleged: "the applicant suffered injury to her lumbar spine while attempting to perform Pressure Area Care on a patient. The patient became aggressive and grabbed the applicant."
7. Either in the alternative or in addition, a claim was made in respect of personal injury occurring on 13 July 2015.
8. The applicant sought weekly payments from 27 May 2018 and reimbursement of treatment expenses. The respondent by its Reply maintained denial of the claim.
9. At the telephone conference the applicant abandoned the aggravation claim with its deemed date of injury and relied solely on a personal injury (that is an injury within section 4(a) of the *Workers Compensation Act 1987* (the 1987 Act)) occurring on 13 July 2015.

ISSUES FOR DETERMINATION

10. The parties agree that the following issues remain in dispute:
 - (a) Did the applicant suffer injury to the lumbar spine in the course of her employment on 13 July 2015 while attempting to perform pressure area care on a patient who became aggressive and grabbed the applicant?
 - (b) If injury in the manner described was established:
 - (i) did the applicant suffer incapacity as a result of that injury?

- (ii) did the medical treatment provided to the applicant constitute reasonably necessary treatment resulting from the injury?

PROCEDURE BEFORE THE COMMISSION

11. 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.
12. At the hearing the Application was formally amended to delete the allegation of aggravation injury deemed have occurred on 13 July 2015. The date of commencement of the claim for weekly payments was amended to 28 September 2018.

EVIDENCE

Documentary evidence

13. The following documents were in evidence before Commission and taken into account in making this determination:
- (a) Application and attached documents;
 - (b) Reply and attached documents, and
 - (c) Reports of Dr Paul Hitchen dated 6 August 2015 and 1 September 2015, Return to Work Plan dated 31 August 2015 and Notification of Injury form dated 14 July 2015 together with the applicant's bank statements attached to Application to Admit Late Documents by the respondent.

Oral evidence

14. No application was made to introduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

Issue 1 – injury occurring while attending to post-operative patient

15. It is common ground that Ms Hunter suffered the onset of low back pain during the course of her night shift at the Southern Highlands Private Hospital on 13 July 2015. While seated at a desk Ms Hunter complained of back pain to a co-worker, Kirsty Ferris.
16. The respondent disputes that the onset of symptoms results from the incident described in the Application; while Ms Hunter was attempting to apply pressure area care to a post-operative patient.
17. The applicant acknowledges that she submitted a claim form to the respondent on 14 July 2015 describing the injury as "lower back – Repetitive Strain Injury". In that claim form Ms Hunter asserted: "I was sitting in Nurse's Station on stool (no back) doing paperwork when my back started to ache." She stated that at the time of the injury she was in the "nurse's station sitting on stool doing paperwork started to feel pain in lower back." She was "unsure" of the time of injury.

18. Ms Hunter consulted her general practitioner, Dr Wijesurendere, on 14 July 2015. Dr Wijesurendere recorded:

“severe back pain – works in Bowral Private Hospital – was doing a night shift – was sitting and doing paperwork and got a severe back pain – taken voltaren

she is a nurse – lifting, rolling the patients all the time – never had back injuries – and this is the first time she is getting this severe back pain –? from repeatative [sic] sprain.”

19. Referral letters dated 30 July 2015 and 6 August 2015 by Dr Wijesurendere were in evidence. In both letters Dr Wijesurendere records “Kelly is having severe back pains and I think it’s work-related as she started getting pain while working and 14/07/15 she had severe back pain while sitting and doing some paperwork at a workplace.”
20. Ms Hunter was examined by an orthopaedic surgeon, Dr Paul Hitchen, at the request of the insurer. Dr Hitchen reported the following history of injury:

“Ms Hunter describes spontaneous onset of lower back pain at about 4 AM when performing her night shift. She was sitting at the nurse’s station on a stool writing notes. After being on the stool for about 30 minutes, she developed lower back pain. She told a co-worker, and then got up to walk around. She found a physiotherapy treatment table and went and lay down on that for a while without any improvement. Around that time, she noted episodes of pain shooting down the anterior aspect of the left thigh. At about 6 AM she took some Panadeine and was able to complete her shift. She then drove home. When she got home she rang the Nursing Unit Manager and advised her of her pain. She was advised thereafter to proceed with the workers compensation claim.”

Dr Hitchen further noted:

“When asked specifically what she felt the cause of her pain was as it came on when sitting on a stool she felt overall it was perhaps the months of work leading up to it wherein she was undertaking nursing duties involving rolling heavy patients in bed, for example, performing pressure area care. She did advise however that there was no specific single episode.”

21. In a subsequent report dated 1 September 2015 Dr Hitchen said:

“I would confirm the contents of my previous report. In particular I was very specific about questioning Ms Hunter about the perceived mechanism of injury, and I refer you to the first paragraph under ‘History’ of my report from 6 August 2015. Further, as per paragraph 3, page 2 of my previous report Ms Hunter advised me she felt that perhaps duties of work in the months leading up to the alleged date of injury for example rolling heavy patients in bed was the cause but she was unable to identify any single specific episode.”

22. In a statement dated 18 January 2020, Ms Hunter described attending to the care of a patient to perform pressure area care at about 4 AM on 13 July 2015. She said that this involved rolling and repositioning the patient to mitigate the risk of developing bedsores. She noted that the patient had recently undergone hip surgery and was suffering from dementia. The patient weighed more than 100 kg and she was using a ‘slide sheet’ to assist with moving the patient. She said:

“Whilst performing routine pressure area care, the patient began to display signs of post-operative delirium, including becoming aggressive and agitated with the various lines attached to her.

It is not uncommon for dementia patients who have just undergone surgery to experience 'postop delirium' and aggression.

The patient attempted to remove her urinary catheter and cannula.

In response to this, I tried to reassure and calm the patient to mitigate any risk of the patient injuring herself and causing damage to her post-operative hip.

As I proceeded to calm the patient, she grabbed me with both arms forcefully and pulled me towards her.

As a result of being pulled with such force, I immediately felt a popping sensation in my lower back. I experienced intense pain across my lower back and had assumed I had pulled a muscle. The pain across my lower back was intense at this stage but I assumed it would resolve quickly."

23. Ms Hunter said she completed care of the patient and went to the treatment room to sit and complete her notes for the night. She said that another worker, Kirsty Ferris, was in the treatment room completing her notes. After sitting for some time, Ms Hunter said that she was continually experiencing intense pain in her lower back and she complained to Ms Ferris of back pain saying that she felt unwell and that her back hurt. She did not think that she had told Ms Ferris the cause of her pain.
24. Ms Hunter said that, acting in accordance with Ms Ferris's advice she had gone to physiotherapy room to lie down and elevate her legs which assisted in stretching her back. After half an hour she returned to the treatment room to write up notes and complete her rounds. She said that she noted a shooting pain down the left leg when she got off the physiotherapy table.
25. She then described the symptoms she experienced travelling home where she told her partner that she had vomited on the way home and was in a lot of pain from her back. She said that she had told her partner that she had been "trying to calm a post-operative dementia patient down, she pulled me and I felt a pop in my lower back".
26. Ms Hunter said that she did not think too much of the incident as she assumed that her back pain would recover with rest. She reported it to the Nurse Unit Manager, Yvonne McIntosh, by phone, telling Ms McIntosh that she had vomited on the way home and that her back was sore. She said that she had not told Ms McIntosh of the incident involving the patient.
27. Ms McIntosh advised Ms Hunter to fill in the respondent's online digital incident report with respect to her low back pain. Ms Hunter said that she had returned to the workplace and completed the form using a computer in the office. She said that she had not reported the actual circumstances of the injury as she felt "there would be negative implications for doing so". She said that she would not have completed the formal report because she felt "that would have been the best way to avoid causing confrontation in the hospital." She explained:

"I did not inform Yvonne [McIntosh] however of the incident with the patient as I felt intimidated and feared the repercussions. I have witnessed other co-workers be treated differently and have shifts cut after their reported injuries and I did not want to experience the same things. I also did not want to jeopardise my employment.

I was also not aware of the severity of my injury and assumed by pain would subside quickly with rest."

28. Ms Hunter said that she had chosen to report incorrect circumstances of injury because she thought that this would be “the only way to avoid any conflict and avoid causing issues in the workplace.” She said that there had been a previous incident whereby a patient had escaped from his room and physically assaulted two members of staff who suffered severe injuries and she felt that the hospital “wanted everything to run smoothly” and she did not wish to be “the person to cause waves and put the hospital in the spotlight.”
29. Ms Hunter confirmed that she had completed the Worker’s Injury Claim Form in the office at work, noting that she had asserted that she had suffered a “lower back - repetitive strain injury” (original emphasis) and noted the circumstances of injury as recorded above. She said:
- “I withheld from reporting the real circumstances of my injury as I was worried that I would be reprimanded for doing so. The culture in my workplace the time of my injury did not support or encourage complaints or work injuries and therefore I chose to keep quiet about the incident with the patient.”
30. Ms Hunter said that she had spoken to other members of staff about reporting incidents and that “everyone was frightened to put in a ‘risk man’ and report injuries.” She said that she felt that she would not be “judged or bullied for being injured at work” if she didn’t “point the finger at a specific event or cause”.
31. Ms Hunter reiterated that she felt that her employment might be jeopardised as a “junior nurse”. She said that she also had not understood the extent of her injury until she had undergone radiological testing. She said that she had not understood the importance of correctly reporting the circumstances of the injury and the incident with the patient. Ms Hunter said that she had assumed that if the incident had occurred at work that would be considered the compensable work injury.
32. Ms Hunter detailed her consultation with Dr Wijesurendere on 14 July 2015. She said that she had told Dr Wijesurendere that she had developed lower back pain while sitting down to complete nursing paperwork but she also told him that she had been required to regularly perform pressure area care on patients. She said “Despite being provided with the incorrect history of injury, Dr Wijesurendere advised my injury was work-related.”
33. Ms Hunter said:
- “I did not report the correct history of my lower back injury to Dr Wijesurendere during the consultation on about 14 July 2015 as I did not want to change the history I’d already provided to my employer.
- I knew that if I told Dr Wijesurendere the correct history and he would include that in his reports and there would be a possibility the hospital would find out.
- Also, as Dr Wijesurendere had confirmed my injury was work-related, I did not feel it was an issue that the history relating to the injury was not entirely correct.”
34. Ms Hunter acknowledged that she had told Dr Hitchen that she had experienced the onset of lower back pain while completing notes in the nurse’s station at about 4 AM for the same reasons that she had provided the incorrect history on the claim form and to Dr Wijesurendere. Ms Hunter said:
- “I was still working at the time did not want to appear to seem to be ‘dishonest’ by changing my story. I was still afraid of jeopardising my employment and hoped it would be okay.

While I did not report the specific incident with the dementia patient on 13 July 2015 to Dr Hitchen, I did disclose to him that I was required to reposition heavy patients in bed to perform pressure area care as part of my employment with Southern Highlands Private Hospital.”

35. Ms Hunter noted receipt of the dispute notice from the insurer declining liability. She said that the respondent informed her that the hospital was not obliged to provide her with suitable duties and she had returned to normal duties working with pain. She said:

“I did not inform QBE, the doctors or Southern Highlands Private Hospital of the correct version of events after received the liability notice as I did not know the correct history of my frank injury could alter the doctor’s opinion on causation.

Prior to instructing RMB lawyers in or about November 2018, I did not understand that the necessary link between my employment and injury, to be able to prove I sustained a ‘work-related injury’ was missing.

I did not know that reporting the correct history may have resulted in an alternative outcome.

I assumed that the process was complete because QBE obtained Dr Hitchen’s medical report and that outcome was final. I accepted that there was nothing further that could be done for my injury through workers compensation.

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It was not until after I instructed RMB lawyers in or about November 2018 that I understood and appreciated the entitlements to dispute the insurer’s initial liability decision.”

36. A statement by Kirsty Ferris dated 5 February 2020 was in evidence. Ms Ferris was the Clinical Specialist Nurse on duty with Ms Hunter on 13 July 2015. Ms Ferris confirmed that she was present in the treatment room completing notes when she noticed that Ms Hunter appeared to be in discomfort. She recalled that Ms Hunter said “I don’t feel well, my back is sore.” Ms Hunter did not disclose the cause of the onset of pain. Ms Ferris took over Ms Hunter’s duties while Ms Hunter rested on the physiotherapy table.
37. Ms Ferris said that “at some point after her incident” Ms Hunter had mentioned a problem with a patient with dementia and the onset of back pain while trying to calm the patient down. Ms Ferris also said that another member of staff had told her that she was “experiencing difficulties” at work since reporting an incident and “did not feel supported by management”.
38. Ms Ferris said that she was aware that co-workers were hesitant to report injuries or incidents in the workplace at the respondent “due to the fear of jeopardising employment”. She said this fear had arisen “due to the way in which other staff members had been treated by management at Southern Highlands Private Hospital.”
39. A statement by Ms Hunter’s partner, Virginia Reko, dated 7 February 2020 was in evidence. Ms Reko recalled that Ms Hunter had returned from her night shift with the respondent complaining of pain and having been ill on the way home. She said that Ms Hunter had told her “I had to calm a patient down. She was trying to remove her lines” and “she grabbed me and I felt a pop in my lower back.”

40. Ms Reko said that Ms Hunter was worried about reporting the incident and jeopardising her employment. Ms Reko said that Ms Hunter had spoken in the past about colleagues being treated unfairly or differently for “speaking out about issues”. She confirmed that Ms Hunter had put in a “risk man” form although Ms Hunter feared doing so, saying “everyone’s scared to put in a risk man”.
41. The evidence does not assist in establishing whether the “risk man” form is a risk management document used by the respondent or whether it is in fact the applicant’s workers compensation claim form.
42. In her initial report to the general practitioner dated 18 April 2018, the treating neurosurgeon, Dr Abraszko, noted the history of the onset of pain when “the patient grabbed her and pulled her very strongly.” That appears to be the first occasion on which Ms Hunter provided her treating practitioners with the history of the frank injury. Dr Abraszko’s subsequent reports do not assist with causation.
43. Ms Hunter was examined by Dr Michael Davies at the request of her legal advisors in May 2019. Dr Davies was also provided with a history of:
- “attending to a post-operative patient who had dementia and was trying to pull out all her leads following hip surgery. As Ms Hunter was attending to her, the patient grabbed onto her and pulled her forcefully. She felt a popping sensation in her lower back and had acute onset of low back pain.”
44. In a further report dated 26 June 2020 Dr Davies was asked:
- “In your opinion, considering the two alternative versions of the circumstances of injury, is Ms Hunter’s lumbar injuries as diagnosed by you or likely to have occurred whilst:
- a) being forcibly grabbed and pulled by the patient; or
 - b) while sitting doing paperwork.”.
- Dr Davies replied:
- “Her injury is more likely to have occurred while she was being forcefully grabbed and pulled by the patient. That was my opinion at the time I saw her in May 2019 and my opinion has not changed.”
45. Dr Davies said he did not believe that Ms Hunter’s condition was precipitated by sitting at work doing paperwork. He felt that “the sitting she undertook whilst doing paperwork exacerbated the pain that had been precipitated by the incident with the patient.”
46. Counsel for the applicant submitted that the evidence established on the balance of probabilities that Ms Hunter had suffered an injury to her low back when attending to the post-operative patient rather than simply experiencing the onset of back pain while seated in the treatment room completing her notes. Counsel submitted that Ms Hunter had provided a credible explanation for describing a different scenario and this explanation was corroborated by Ms Ferris and Ms Reko.
47. Counsel for the respondent submitted that the explanation provided by Ms Hunter did not satisfactorily explain why she had described the onset of pain as occurring while seated writing up her notes in her claim form, to her general practitioner and to Dr Hitchen.

48. There is no dispute that Ms Hunter suffered the onset of back pain in the course of her night shift in the early hours of 13 July 2015. She submitted a workers compensation claim form which described the onset of pain as having occurred while she was seated writing up her notes. She provided some detail of the seat as having “no back”.
49. Ms Hunter repeated that version when she consulted her general practitioner the following day and again when she was assessed by Dr Hitchen.
50. It is difficult to reconcile Ms Hunter’s explanation that she feared the repercussions of reporting the incident involving the patient with dementia. Although Ms Hunter and Ms Ferris both state that there was reluctance to report incidents, the clear and undisputed evidence is that the Nurse Unit Manager, Yvonne McIntosh, asked Ms Hunter to complete a workplace injury form (“risk man”) and provided access to a computer in the workplace to do that.
51. Ms Hunter said: “Given the fact Yvonne [McIntosh] did request a formal report, I chose to report incorrect circumstances of injury because as a junior nurse I thought this was the only way to avoid any conflict and avoid causing issues in the workplace.”
52. I have difficulty in accepting that the Nurse Unit Manager would encourage Ms Hunter to lodge a report of her injury when Ms Hunter did not wish to do so, if the respondent had a negative attitude to such reporting.
53. It is difficult to see how an injury caused by the actions of a post-operative patient who was trying to remove her urinary catheter and her cannula could reflect poorly upon the respondent. Ms Hunter advanced an alternative theory, “rolling heavy patients in bed” as the cause, without disclosing the event which she felt was the actual cause.
54. Counsel for the respondent noted that the evidence raised three possible scenarios connecting the onset of low back pain to employment. The applicant had first described the onset of pain as having occurred while seated in the treatment room. The general practitioner had suggested the possible involvement of the duties performed by Ms Hunter in the care of patients – “she is a nurse – lifting, rolling the patients all the time”. This second scenario had been suggested by Ms Hunter to Dr Hitchen; “Ms Hunter advised me she felt that perhaps duties of work in the months leading up to the alleged date of injury for example rolling heavy patients in bed was the cause but she was unable to identify any single specific episode.” The third scenario was that advanced by the applicant in the current proceedings.
55. Although Dr Davies described the third scenario as more likely than the first, that opinion is expressed as to the probability of the damage to the lumbar spine occurring in the manner described rather than providing assistance as to the likelihood of what actually occurred.
56. I accept that Dr Davies’ opinion simply represents a choice between the two alternatives which he was presented with and does not take into account other possible causes such as the work tasks performed or actions entirely unrelated to the workplace. I do not think Dr Davies’ opinion in this regard assists in determining what occurred to bring about the onset of Ms Hunter’s low back symptoms.
57. Ms Hunter’s case was specifically limited to an allegation of injury caused by the specific incident involving actions of the post-operative patient and taking hold of Ms Hunter and pulling her. That case has to be established on the balance of probabilities. Dixon J in *Briginshaw v Briginshaw*¹ described the test as requiring “reasonable satisfaction” that the event to be proved had in fact occurred.

¹ [1938] HCA 34; 60 CLR 336 (at [361] – [362])

58. McDougall J (McColl and Bell JJA concurring) said in *Nguyen v Cosmopolitan Homes*²:

“55 The position may be summarised as follows:

- (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
- (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
- (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
- (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.”

59. I have real difficulty in accepting the explanation offered by Ms Hunter as to why she gave an incorrect description of the causes of the onset of low back pain. The explanation that she feared the repercussions of reporting an incident is outweighed by the clear fact that the Nurse Unit Manager actively encouraged her to put in a report and by the fact that Ms Hunter related her actions in rolling heavy patients to Dr Hitchen in a situation where Dr Hitchen's report was likely to become available to the respondent.

60. I have difficulty accepting that Ms Hunter would not inform her general practitioner, Dr Wijesurendere, of the mechanism of injury, particularly as the general practitioner appears to have raised the issue of performance of work duties and a resulting repetitive strain in the course of the consultation on 14 July 2015.

61. In a document dated 19 March 2019 Dr Wijesurendere noted that the history he obtained was “severe back pain while doing paperwork in the hospital”. The first note of report of the incident involving the patient appears to be in the report of Dr Abraszko in April 2018, almost three years after the incident.

62. The statements of Ms Ferris and Ms Reko are made more than four years after the date of injury. The statement of Ms Ferris does not assist Ms Hunter's case. It appears that Ms Ferris is sympathetic to the idea that incidents should not be reported to management but Ms Hunter did not, to Ms Ferris' recollection, mention the incident with the patient. There would have been significant reason for mentioning the actions of the patient in attempting to remove her urinary catheter and cannula and it would seem natural for Ms Hunter to have then recounted what had occurred. It is difficult to see why reluctance to report that incident to management would have made Ms Hunter reluctant to tell Ms Ferris what occurred.

63. I consider that the evidence of the account given in the workers compensation claim form, to Dr Wijesurendere and to Dr Hitchen outweighs history provided to Dr Abraszko and the statements of Ms Hunter and of Ms Reko, the latter being made more than four years after the event and apparently reliant on memory alone.

² [2008] NSWCA 246.

64. I could not be reasonably satisfied on the whole of the evidence that Ms Hunter suffered injury to her low back in the early hours of 13 July 2015 because of an incident which occurred when a heavy post-operative patient pulled on Ms Hunter when she was trying to calm the patient while attempting to remove her urinary catheter and cannula.
65. There will be an award for the respondent in respect of that claim.